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How to Sanction a Breach of Information Duties of the Consumer Rights Directive?

Leonieke TIGELAAR*

Abstract: Traders must provide information to consumers according to the Consumer Rights Directive in case they conclude a distance contract, an off-premises contract, or a contract in another manner. It is the task of the Member States to sanction breaches of those information duties. This article classifies the information duties on basis of their objective, namely supporting decision-making, enabling storing information, and facilitating the exercise of rights. Subsequently, it addresses the question of how German, English, and Dutch law provide for sanctions in case traders breach those information duties. This article shows that the way breaches are being sanctioned in Germany, England, and the Netherlands, *inter alia* depends on choices that have been made regarding the legal consequences of unfair commercial practices and the enforcement of consumer law. It further shows that the actual use of sanctions depends on the question: ‘who can apply a sanction and what does this actor has to prove?’

Résumé: Selon la directive sur les droits des consommateurs, les commerçants doivent fournir des informations aux consommateurs lorsqu’ils concluent un contrat à distance, un contrat hors établissement ou un contrat d’une autre manière. Les Etats membres ont pour tâche de sanctionner les manquements à ces devoirs d’information. Le présent article classifie les devoirs d’information sur base de leur objectif, à savoir aider à la prise de décision, permettre la conservation des informations et faciliter l’exercice de droits. Ensuite, il pose la question de savoir comment les droits allemand, anglais et néerlandais prévoient des sanctions dans le cas de manquements par les commerçants au devoir d’information. Cet article montre que la manière dont les manquements sont sanctionnés en Allemagne, en Angleterre et aux Pays-Bas dépend entre autres de choix qui ont été faits à propos des conséquences juridiques de pratiques commerciales déloyales et de l’application du droit du consommateur. Il montre en outre que l’usage réel des sanctions dépend de la question: ‘qui peut appliquer une sanction et que doit prouver cet acteur?’

Zusammenfassung: Unternehmer müssen Verbrauchern bei Abschluss eines Fernabsatzvertrages, eines Vertrages außerhalb von Geschäftsräumen oder bei Abschluss eines Vertrages in sonstiger Weise Informationen gemäß der Verbraucherrechterichtlinie zur Verfügung stellen. Es ist die Aufgabe der Mitgliedsstaaten, Verstöße gegen diese Informationspflichten zu ahnden. Der vorliegende Beitrag klassifiziert die Informationspflichten auf der Grundlage ihres Zwecks, nämlich Unterstützung bei der Entscheidungsfindung, Speicherung von Informationen und Erleichterung der Ausübung

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von Rechten. Daran anschließend befasst er sich mit der Frage, welche Sanktionen das deutsche, englische und niederländische Recht für den Fall eines Verstoßes des Unternehmers gegen diese Informationspflichten vorsehen. Der Beitrag zeigt auf, dass die Art und Weise, wie Verstöße in Deutschland, England und den Niederlanden geahndet werden, inter alia von den gesetzgeberischen Entscheidungen in Bezug auf rechtliche Folgen unlauterer Geschäftspraktiken und die Durchsetzung des Verbraucherrechts abhängt. Er zeigt weiter, dass die tatsächliche Sanktionierung von der Frage abhängt: Welcher Akteur kann die Ahndung eines Verstoß bewirken und was muss er dafür beweisen?

Key words: information duties, transparency, right of withdrawal, Consumer Rights Directive, Unfair Commercial Practices Directive, remedies, enforcement, sanctions.

Mots-clés: devoirs d'information, transparence, droit de rétractation, directive sur les droits des consommateurs, directive sur les pratiques commerciales déloyales, recours, application, sanctions.

Schlüsselwörter: Informationspflichten, Transparenz, Widerrufsrecht, Verbraucherrechterichtlinie, Richtlinie über unlautere Geschäftspraktiken, Rechtsmittel, Durchsetzung, Sanktionen.

1. Introduction

1. The Consumer Rights Directive contains long lists of information duties.¹ These duties apply to distance contracts, off-premises contracts and to contracts that have not been concluded in this manner. Compared to other directives providing for information duties, the Consumer Rights Directive has a broad scope. It applies, in principle, to any contract concluded between a trader and a consumer.² Other directives with information duties only apply to specific agreements like package travel contracts, distance marketing of consumer financial services, credit agreements, credit agreements relating to immovable property, and timesharing.³

1 These information duties can be found in Arts 5, 6, 7 and 8 Dir. 2011/83 of 25 October 2011 on consumer rights, <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1544100439050&uri=CELEX:32011L0083>.

2 Art. 3 Dir. 2011/83.

3 Art. 2 Dir. 2015/2302 of 25 November 2015 on package travel and linked travel arrangements <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32015L2302>, arrangements <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32015L2302>, Arts 1 and 2 Dir. 2002/65 of 23 September 2002 concerning the distance marketing of consumer financial services, Art. 2 Dir. 2008/48 of 23 April 2008 on credit agreements, <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1544100902462&uri=CELEX:32008L0048>, Art. 3 Dir. 2014/17 of 4 February 2014 on credit agreements for consumers relating to residential immovable property, <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1544100956299&uri=CELEX:32014L0017> and Art. 1 en 2 Dir. 2008/122 of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1544100994286&uri=CELEX:32008L0122>.

Because of their broad scope, the information duties under the Consumer Rights Directive will be the subject of this contribution.

2. The information duties under the Consumer Rights Directive aim to protect consumers. Member States have to transpose the information duties under the Consumer Rights Directive into their legal system. The European legislator has formulated these information duties in detail, so Member States have little room to implement those duties. They often implement the lists of information duties by ‘copying and pasting’ them into their own legal system. There is a risk that due to their detail the development of information duties as a doctrine stagnates. Therefore, the question is whether and how information duties can be classified.

3. Although the effectiveness of information duties can be questioned, this does not release Member States from their obligation to sanction them.⁴ They must provide penalties that are effective, proportionate and dissuasive. Furthermore, Member States have to ensure that there are adequate and effective means to ensure compliance with this Directive.⁵ The question is what kind of sanctions Member States provide if a trader breaches information duties.⁶

4. Based on this question, this article analyses German, English, and Dutch law because these systems differ from each other in two ways. First, they differ in their attitude towards information duties. Traditionally, English law is quite reluctant to embrace information duties. A duty of disclosure only occurs, by way of exception, within the doctrine of misrepresentation. On the other hand, German and Dutch law have accepted information duties in several doctrines like *Irrtum* and *dwaling*. Secondly, these three legal systems differ as to how they enforce consumer law. Germany enforces consumer law through private law. England has a combination of civil and criminal enforcement. In the Netherlands, the *Autoriteit Consument & Markt* (ACM) enforces consumer law through administrative law.

5. In view of the foregoing the following question will be answered: ‘In which way can the information duties of the Consumer Rights Directive be classified, and do German, English and Dutch law provide for sanctions if businesses breach those information duties?’

4 See for the effectiveness of information obligations: M.Y. SCHAUB, ‘How to Make the Best of Mandatory Information requirements in Consumer Law’, *European Review of Private Law* 2017, p 27.

5 Arts 24 and 23 para. 1 Consumer Rights Directive.

6 M.E. STORME, *Information Requirements and Remedies in the Principles of European Contract Law*, KU Leuven discusses remedies for informational problems under the Principles of European Contract Law.

6. This question will be answered as follows. Section 2 classifies information duties of the Consumer Rights Directive on basis of their objective. The aim of information duties is to protect consumers, but this general objective can be further divided into subgoals, and can be used to classify information duties. Subsequently, section 3 examines which remedies, based on European law, apply in Germany, England and the Netherlands if an information duty under the Consumer Rights Directive has been breached. Section 4 examines which sanctions have been introduced in German, English and Dutch law in response to unfair commercial practices. The Unfair Commercial Practices Directives qualifies a commercial practice as misleading if a business does not properly provide information.⁷ Section 5 focusses on the existing enforcement systems in Germany, England and the Netherlands. It discusses whether and in which way these systems influence the enforcement of especially a breach of an information duty.

2. Information Duties and Their Objective

2.1. *Information Duties Aiming to Support Decision-Making*

7. A lot of the information duties under the Consumer Rights Directive relate to the performances of parties. The trader has to inform the consumer about the main characteristics of the goods or services and the arrangements for performance.⁸ Which information the trader has to provide must be determined by the complexity of the product.⁹ Some products need more explanation than others, for instance digital content. Traders have to inform consumers quite extensively about digital content because of its complexity. Traders do not only have to mention the main characteristics of digital content but also its functionality and interoperability.¹⁰ Functionality refers to how consumers can use digital content. Interoperability includes information about hard- and software with which the digital content is compatible, for instance the operating system, the necessary version, and certain hardware features.¹¹ The Commission has facilitated the provision of information by drafting a model which indicates what kind of information the trader has to provide about digital content.¹² Information has been made easily recognizable by using icons related to provider, functionality, interoperability, price, and contract.¹³

7 Arts 3, 6, and 7 Dir. 2005/29 of 11 May 2005 concerning unfair business-to-consumer commercial practices, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32005L0029>.

8 Art. 5 para. 1, s. a, and d and Art. 6 para. 1, s. a and g Consumer Rights Directive.

9 European Commission, *Guidance document concerning Directive 2011/83 on Consumer Rights*, 2014, p 22.

10 Art. 5 para. 1, s. g and h and Art. 6 para. 1, s. r and s Consumer Rights Directive.

11 Recital 19 Consumer Rights Directive.

12 European Commission, *Guidance document concerning Directive 2011/83*, pp 69-72.

13 European Commission, *Guidance document concerning Directive 2011/83*, pp 69 and 70.

8. Information on the product and price aims to support the process of decision-making.¹⁴ Consumers decide based on this information whether they want to conclude a contract with the trader. Although information about arrangements for payment and delivery seems of less importance, it is conceivable consumers take these arrangements into account in their decision to conclude a contract. Those arrangements are of importance because they enable consumers to perform, namely to pay.¹⁵

9. Other information duties under the Consumer Rights Directive concern personal data. The trader has to provide his identity, address and telephone number to the consumer.¹⁶ The trader can omit these personal data in case it does not concern distance contracts or off-premises contracts and these data are already apparent from the context.¹⁷ For example, a trader does not have to share his address when a consumer comes to his store.¹⁸ The trader has to provide more personal data about himself in case of distance contracts and off-premises contracts.¹⁹ The European Parliament, in particular, has encouraged the extension of this information duty in these cases.²⁰ Personal data of traders is, after all, not immediately known to consumers in case they conclude contracts at a distance or off-premise, while this information is crucial to trace a trader. Information duties concerning personal data also aim to support the decision-making process. The identity of the trader is important to consumers because they can gain more information about their potential counterparty through these personal data. A consumer usually concludes a contract if he trusts the trader will fulfil his promises.²¹

10. The information listed in Articles 5 and 6 of the Consumer Rights Directive must be provided on time, i.e., before the consumer is bound by a contract.²² So a trader must ensure the consumer has received the information before the consumer

14 A. BÖRGER, *Sanktionen für die Verletzung vorvertraglicher Informationspflichten, Eine Untersuchung gemeinschaftsrechtlicher Vorgaben und deren Umsetzung in Deutschland, Frankreich und Großbritannien (diss.)* (München: Sellier European Law Publishers 2010), p 90.

15 A. BÖRGER, *Sanktionen für die Verletzung vorvertraglicher Informationspflichten*, p 94.

16 Art. 5 para. 1, s. b and Art. 6 para. 1, s. b, c, and d Consumer Rights Directive.

17 Art. 5 para. 1 Consumer Rights Directive.

18 European Commission, *Guidance document concerning Directive 2011/83*, p 22 cites this example from European Commission, *Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices*, SEC(2009) 1666, p 50.

19 Compare Art. 6 para. 1, s. b, c and d Consumer Rights Directive with Art. 5 para. 1, s. b Consumer Rights Directive.

20 Amendment 101 of the European Parliament to the proposal for a directive on consumer rights (Pb EU 2012 C 247E/82). Also noticed by M.B.M. LOOS & J.A. LUZAK, 'Ontwikkelingen betreffende het voorstel voor een richtlijn consumentenrechten: De positie van de raad en het Europees parlement', *NTER (Nederlands Tijdschrift voor Europees Recht)* 2011, p 173.

21 A. BÖRGER, *Sanktionen für die Verletzung vorvertraglicher Informationspflichten*, p 88.

22 Art. 5 para. 1 and Art. 6 para. 1 Consumer Rights Directive.

accepts his offer.²³ The duty to provide information before the contract is concluded also aims to support decision-making. It ensures the opportunity for consumers to read and process the information, so they can take this information in consideration.

11. The information listed in Articles 5 and 6 Consumer Rights Directive must also be provided in a clear and comprehensible manner.²⁴ In providing information in this manner the trader should take into account the specific needs of vulnerable consumers.²⁵ Whether a trader has provided information in a clear and comprehensible manner will depend on the circumstances. This transparency requirement aims to guarantee that all the information duties fulfil their objective. Because of that, the objective of transparency requirements depends on the objective of information duties. In case information duties aim to support the decision-making process of consumers, the transparency requirement aims to ensure information is formulated in a way which actually supports this process.

2.2. Information Duties Aiming to Enable Storing Information

12. The trader has to provide information on a durable medium in case of off-premises contracts and distance contracts.²⁶ The definition of ‘durable medium’ consists of four elements.²⁷ (a) Any instrument that enables the consumer or the trader to store information, (b) in a way accessible for future reference, (c) for a period of time adequate for the purposes of the information, and (d) which allows the unchanged reproduction of the information stored. In short, the consumer must be able to store and consult the information, while the trader should not be able to modify the information that she provided. Consumers may have different reasons for wishing to consult this information after the conclusion of the contract. For example, if they have questions about the operation of the device, the commercial guarantee, or the price they have paid at that time.

2.3. Information Aiming to Facilitate the Exercise of Rights

13. Information about personal data of the trader does not only support decision-making. It is also the key for consumers to exercise their rights.²⁸ They need

23 E. HALL, G. HOWELLS & J. WATSON, ‘The Consumer Rights Directive - An Assessment of its Contribution to the Development of European Consumer Contract Law’, *European Review of Contract Law* 2012, p 148.

24 Art. 5 para. 1 and Art. 6 para. 1 Consumer Rights Directive.

25 Recital 34 Consumer Rights Directive.

26 Art. 7 para. 1 and Art. 8 para. 1 Consumer Rights Directive.

27 Art. 2 para. 10 Consumer Rights Directive.

28 H.C. GRIGOLEIT, ‘Die Aufklärungspflichten des *acquis*’, in: H. Eidenmüller, F. Faust, H.C. Grigoleit, N. Jansen, G. Wagner & R. Zimmermann (eds), *Revision des Verbraucher-acquis* (Tübingen: Mohr

to know the identity, address, phone number, and e-mailaddress to approach the trader in case they are not satisfied with the product. One of the rights consumers have in case of distance contracts and off-premises contracts is to withdraw from the contract. Traders have to inform consumers about this right of withdrawal. This information duty is quite extended and consists of different components. The trader has to inform consumers about (a) the existence of the right to withdraw, (b) the conditions under which and the period in which consumers can exercise this right, (c) the costs to return products in case of withdrawal, and (d) any costs for services provided.²⁹ To fulfil this extended information duty, the trader is supported by model instructions on withdrawal listed in Annex I (a) of the Consumer Rights Directive. On the other hand the Consumer Rights Directive also supports consumers with a model withdrawal form that traders have to provide to consumers.³⁰ Information about the right of withdrawal aims to facilitate the actual exercise of this right.³¹ It is one of the instruments to prevent that the right of withdrawal remains unused, which the European Court of Justice wants to avoid.³²

14. The trader is also required, in addition to the information on withdrawal, to provide other legal information concerning the contract. He has to remind the consumer of the existence of the legal guarantee of conformity of the goods.³³ The trader should specify that he is liable for any lack of conformity that becomes apparent within a minimum of two years from the delivery of the goods.³⁴ Furthermore, the trader should provide information about after-sales services, complaint handling policy, and where applicable, commercial guarantees.³⁵ This information is usually only interesting for consumers after the conclusion of the contract.³⁶ In case consumers have a complaint they can easily take action based on this information.

Siebeck 2011), p 237 and A. BÖRGER, *Sanktionen für die Verletzung vorvertraglicher Informationspflichten*, p 88.

29 Art. 6 para. 1 s. h-k Consumer Rights Directive.

30 Art. 6 para 1 s. h and Annex 1(b) Consumer Rights Directive.

31 ECJ 5 July 2012, ECLI:EU:C:https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62011CJ0049, consideration 34.

32 ECJ 13 December 2001, ECLI:EU:C:2001:684, *Heininger/Bayerische Hypo- und Vereinsbank AG*, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61999CJ0481>, consideration 45, ECJ 3 September 2009, ECLI:EU:C:2009:502, *Messner/Firma Krüger*, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62007CJ0489>, consideration 19, and ECJ 15 April 2010, ECLI:EU:C:2010:189, *Heinrich Heine/Verbraucherzentrale Nordrhein-Westfalen*, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62008CJ0511>, consideration 54.

33 Art. 5 para. 1, s. e and, Art. 6 para. 1, s. l Consumer Rights Directive.

34 European Commission, *Guidance document concerning Directive 2011/83*, p 27.

35 Art. 5 para. 1, s. d and e, and Art. 6 para. 1, s. g, m, and t Consumer Rights Directive.

36 A. BÖRGER, *Sanktionen für die Verletzung vorvertraglicher Informationspflichten*, pp 94 and 95.

15. The transparency requirement aims to guarantee that the provided information fulfils its objective.³⁷ Applied to information duties aiming to facilitate the exercise of rights, this means information must be formulated in a manner that supports the actual use of these rights.

16. The table below shows what has been discussed in this section about information duties of the Consumer Rights Directive. It contains a classification of information duties based on their objective.

Table 1. Objectives of information duties

<i>Objective</i>	<i>Information Duties</i>
1. Supporting decision-making	Performance, personal data, providing information on time, clear and comprehensible
2. Storing information	Durable medium, providing information on time
3. Facilitating the exercise of rights	Personal data, right to withdraw, contract, and clear and comprehensible

Source: Author's own design

3. Remedies for Consumers in Case of a Breach

3.1. EU Law

17. The Consumer Rights Directive does not provide sanctions that can be applied for, or imposed in case one of the information duties is breached. It is up to Member States to decide which consequences a breach must have in their national legal systems. They have, so to speak, remedial autonomy.³⁸ Penalties must only be effective, proportionate and dissuasive.³⁹ The Consumer Rights Directive contains some legal consequences, but these only apply in case of a breach of a specific information duty.⁴⁰

³⁷ This is in line with number 10.

³⁸ V. TRSTENJAK & E. BEYSEN, 'European Consumer Protection Law: Curia Semper Dabit Remedium?', *Common Market Law Review* 2011, pp 104-124.

³⁹ Art. 24 para. 1 Consumer Rights Directive. According to F. CAFAGGI & P. IAMICELI, 'The Principles of Effectiveness, Proportionality and Dissuasiveness in the Enforcement of EU Consumer Law: The Impact of a Triad on the Choice of Civil Remedies and Administrative Sanctions', *European Review of Private Law* 2017, p 617 these principles have an impact on three dimensions: (1) on the content of the single remedy, (2) the combination between different remedies within the same enforcement mechanism, (3) the coordination between enforcement mechanisms.

⁴⁰ Several authors have noticed these legal consequences: E. HALL, G. HOWELLS & J. WATSON, *European Review of Contract Law* 2012, p 146 and C. CRAVETTO & B. PASA, 'The "Non-Sense"

18. First, the withdrawal period is extended in case of distance contracts and off-premises contracts, when a trader does not provide the information on this right properly.⁴¹ The Consumer Rights Directive has put an end to the tradition in European consumer law that an extension is linked to all breaches of information duties. In the first proposal for a directive on consumer rights, the European Commission had already stipulated that the withdrawal period was only extended with three months in case a trader had not provided the consumer with the information on withdrawal.⁴² The European Parliament has amended this extended period by proposing to extend this term with twelve months instead of three months in case of a breach.⁴³ This amendment has been included in the final version of the Consumer Rights Directive. The question is why the extension has been limited to a breach of the information duty concerning the right to withdraw. This question has not arisen anywhere during the adoption of the Consumer Rights Directive.⁴⁴

19. Secondly, consumers shall only bear additional charges or costs, if the trader has informed them about those charges and costs.⁴⁵ This legal consequence only applies to distance and off-premises contracts. Thirdly, provided information is part of the distance contract or off-premises contract that parties have concluded.⁴⁶ This provision clarifies the status of provided information, and can be further developed by Member States in their contract law.⁴⁷

20. In case a trader breaches the information duty regarding performance, more specifically concerning the main characteristics of a good, consumers can use

of Precontractual Information Duties in Case of Non-concluded Contracts', *European Review of Private Law* 2011, p 769.

41 Art. 10 para. 1 Consumer Rights Directive.

42 Art. 13 Proposal for a Directive on Consumer Rights (COM (2008) 614 final).

43 European Parliament Amendment 116 to the proposal for a Directive on Consumer Rights (Pb EU 2012 C 247E/87).

44 No reason emerges from the following documents: European Parliament Amendments to the proposal for a Directive on Consumer Rights (Pb EU 2012 C 247E/55), Opinion of the Committee of the Regions on consumer rights (Pb EU 2009 C 200/76), Opinion of the European Economic and Social Committee (Pb EU 2009 C 317/09), Commission Staff Working Document SEC(2008) 2544, SEC (2008) 2545, and Proposal for a Directive on Consumer Rights (COM (2008) 614 final).

45 Art. 6 para. 6 Consumer Rights Directive. S. WEATHERHILL, 'The Consumer Rights Directive: How and why a quest for "coherence" has (largely) failed', *Common Market Law Review* 2012, p 1294 and C. CRAVETTO & B. PASA, *European Review of Private Law* 2011, p 769 qualify this provision as a legal consequence.

46 Art. 6 para. 5 Consumer Rights Directive.

47 A. NORDHAUSEN SCHOLEN, 'Information Requirements', in G. Howells & R. Schulze (eds), *Modernising and Harmonising Consumer Contract Law* (München 2009), pp 223 and 232.

remedies based upon the doctrine of non-conformity.⁴⁸ Provided information about a consumer good is namely of importance to answer the question of whether a good is in conformity with the contract.⁴⁹ Conformity can be presumed if a good complies with the description given by the seller and if it shows the quality and performance which is normal and, thereby taking into account any public statements on the specific characteristics of the goods.⁵⁰

21. In the following subsections I will only discuss national remedies for consumers which are suggested in the law system itself. After all, it is questionable whether remedies in a system apply if they are not recognized in the law system itself. Consequence is that not all possible remedies in each of the systems come up for discussion. The doctrine of will and reliance, avoidance actions, and precontractual liability in tort will be discussed for German law.⁵¹ Under English law will be dealt with avoidance actions and contractual remedies.⁵² For Dutch law, avoidance actions, specific performance of the information duty as such, and a contractual remedy will be discussed.⁵³

48 Arts 2 and 3 Dir. 1999/44 of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31999L0044>.

49 Art. 2 para. 2 Consumer Sales Directive.

50 Art. 2 para. 2 s. a-d Consumer Sales Directive.

51 S. 3.2. Consulted sources: *BT-Drucks* 17/12637. M. TAMM, 'Kapitel 4 Informationspflichten', in T. Brünneke & K. Tonner (eds), *Das neue Schuldrecht* (Baden-Baden: Nomos Verlagsgesellschaft 2014), p 114, M. TAMM, 'Informationspflichten nach dem Umsetzungsgesetz zur Verbraucherrichtlinie, *Verbraucher und Recht* 2014, p 16, C. WENDEHORST, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch: BGB*, s. 312d, 7. AUFLAGE, München: Verlag C.H. Beck 2016, Rn. 19, C. WENDEHORST, 'Das neue Gesetz zur Umsetzung der Verbraucherrichtlinie', *Neue Juristische Wochenschrift* 2015, p 578, SCHIRMBACHER, in: Spindler/Schuster, *Recht der elektronischen Medien* 2015, BGB s. 312d, Rn. 44, C. BIEREKOVEN & A. CRONE, 'Umsetzung der Verbraucherrechtlicherichtlinie Neuerungen im deutschen Schuldrecht – Ein erster Überblick', *MMR* 2013, p 689, A. BÖRGER, *Sanktionen für die Verletzung vorvertraglicher Informationspflichten*, p 131, J. HOFFMAN, 'Spezielle Informationspflichten im BGB und ihre Sanktionierung', *Zeitschrift für Wirtschaftsrecht* 2005, p 836, C. SCHÄFER, 'Kapitel 8. Andere Verbraucherverträge', in: *Haas/Medicus/Rolland/Schäfer/Wendland, Das neue Schuldrecht* (München: Verlag C.H. Beck 2002), s. 8, and T. RIEHM, 'Das Gesetz über Fernabsatzverträge und andere Fragen des Verbraucherrechts', *Jura* 2000, p 510.

52 S. 3.3. Not much attention is paid in English law to the sanctioning of a breach of an information duty. The sources known to me about this are: Explanatory Notes Consumer Rights Act 2015 (c. 15), CTSL, *Consumer Contracts – Off-Premises Sales*, 2018 (<https://www.businesscompanion.info/en/quick-guides/off-premises-sales/consumer-contracts-off-premises-sales>), CTSL, *Consumer Contracts – On-Premises Sales*, 2018 (<https://www.businesscompanion.info/en/quick-guides/on-premises-sales/consumer-contracts-on-premises-sales>), C. TWIGG-FLESNER, *The Europeanisation of Contract Law* (Oxon: Routledge-Cavendish 2013), pp 146 and 147, and A. BÖRGER, *Sanktionen für die Verletzung vorvertraglicher Informationspflichten*, pp 140-143 and 157.

53 S. 3.4. Consulted sources: *Kamerstukken II* 2012/13, 33520, 3, M.Y. SCHAUB, 'Contracteren op afstand met consumenten: dat gaat zomaar niet!', *Tijdschrift voor Procespraktijk* 2014, afl. 2, p 53, L.B.A. TICELAAR, 'Sancties op schending van informatieplichten uit de Richtlijn

3.2. German Law

22. According to German authors, consumers can take recourse to different remedies in case a trader breaches an information duty. Firstly, if a trader does not inform the consumer correctly on the performance of parties, the purchase may be interpreted to the trader's disadvantage.⁵⁴ Decisive for the explanation of this statement, is the impression given to the consumer about the price.⁵⁵

23. Secondly, authors mention remedies like *Irrtum* and *Täuschung* that can apply in case of a breach of an information duty.⁵⁶ However, some authors question the feasibility of such an appeal.⁵⁷ An appeal to *Irrtum* is only successful if the misrepresentation that has been arisen relates to a feature that is in society considered as essential.⁵⁸ A consumer can appeal to *Täuschung*, if a trader has created the misrepresentation deliberately.⁵⁹ Both, *Irrtum* and *Täuschung*, require that the breach of the trader has affected the decision-making process of the consumer.⁶⁰ This causal relationship between the breach of the information duty and the conclusion of the contract will often be missing because most provided information is useful, but of minor importance in the decision of the consumer to conclude the contract.⁶¹

24. Finally, authors point to the remedy *culpa in contrahendo*.⁶² Based on this remedy, a consumer may claim damages.⁶³ During the implementation of the Consumer Rights Directive, the Minister emphasized this remedy in case a trader

consumentenrechten', *Tijdschrift voor Consumentenrecht & Handelspraktijken* 2013, p 156, and M.B.M. LOOS & J.A. LUZAK, 'De nieuwe Richtlijn consumentenrechten', *Tijdschrift voor Consumentenrecht & Handelspraktijken* 2011, p 188.

54 M. SCHIRMBACHER, in: Spindler/Schuster, *Recht der elektronischen Medien* 2015, BGB s. 312d, 3. Auflage, München: Verlag C.H. Beck 2015, Rn. 42. German law has a special provision for this (s. 133 BGB).

55 J. HOFFMAN, *Zeitschrift für Wirtschaftsrecht* 2005, p 836.

56 M. TAMM, *Das neue Schuldrecht*, p 114, M. TAMM, *Verbraucher und Recht*, p 16, C. WENDEHORST, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch: BGB*, s. 312d, 7. AUFLAGE, München: Verlag C.H. Beck 2016, Rn. 19, SCHIRMBACHER, in: Spindler/Schuster, *Recht der elektronischen Medien* 2015, BGB s. 312d, Rn. 44 and, A. BÖRGER, *Sanktionen für die Verletzung vorvertraglicher Informationspflichten*, p 131.

57 C. WENDEHORST, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch: BGB* 2016, s. 312d, Rn. 19 and, SCHIRMBACHER, in: Spindler/Schuster, *Recht der elektronischen Medien* 2015, BGB s. 312d, Rn. 44.

58 S. 119 Abs. 2 BGB.

59 S. 123 BGB.

60 S. § 119 Abs. 1 and s. 123 Abs. 1 BGB.

61 SCHIRMBACHER, in: Spindler/Schuster, *Recht der elektronischen Medien* 2015, BGB s. 312d, Rn. 44 and A. BÖRGER, *Sanktionen für die Verletzung vorvertraglicher Informationspflichten*, p 132.

62 M. TAMM, *Das neue Schuldrecht*, p 114, M. TAMM, *Verbraucher und Recht*, p 16 and C. WENDEHORST, *Neue Juristische Wochenschrift* 2015, p 578.

63 S. 280 Abs. 1 BGB, jo. S. 241 Abs. 2 BGB jo. S. 311 Abs. 2 BGB.

breaches one of the information duties.⁶⁴ The difficulty in successfully bringing such a claim is determining damages, and the causal relationship between the breach of an information duty and damages.⁶⁵ The concluded contract between parties can be seen as loss, but this raises questions concerning the relation between *culpa in contrahendo* and the right of withdrawal (*Widerruf*).⁶⁶ A claim based on *culpa in contrahendo* can be problematic because not all information that a trader is obliged to provide does a consumer take into consideration when deciding whether to enter into the contract. Because of this, such a claim will not be successful in case a trader breaches information duties concerning address, delivery costs, payment,- and delivery,-arrangements, and after-services incorrectly.

3.3. *English Law*

25. Before the introduction of the Consumer Contracts Regulations 2013 and the Consumer Rights Act 2015, some authors suggested misrepresentation as a remedy in case of a breach.⁶⁷ But since the introduction of this new legislation, provided information is regarded as a term of the B2C-contract.⁶⁸ Because of this, consumers cannot invoke misrepresentation in case of a breach of an information duty under the Consumer Rights Directive. In case of misrepresentation, it is not allowed that the representation (breach of the information duty) is part of the contract, and that is exactly the case with a term.⁶⁹

26. The Consumer Contracts Regulations 2013 (CCR 2013) stipulate: ‘*Any information that the trader gives the consumer as required by this regulation is to be treated as included as a term of the contract*’.⁷⁰ This provision is the implementation of Article 6 (5) Consumer Rights Directive that provided information is part of the contract.⁷¹ Because of this provision, a consumer can, based on breach of

64 *BT-Drucks* 17/12637, pp 51, 54 and 55.

65 C. WENDEHORST, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*: BGB 2016, s. 312d, Rn. 19, SCHIRMBACHER, in: Spindler/Schuster, *Recht der elektronischen Medien* 2015, BGB s. 312d, Rn. 51 and J. HOFFMAN, *Zeitschrift für Wirtschaftsrecht* 2005, pp 837 and 838.

66 A. BÖRGER, *Sanktionen für die Verletzung vorvertraglicher Informationspflichten*, p 134 and J. HOFFMAN, *Zeitschrift für Wirtschaftsrecht* 2005, pp 836 and 837.

67 C. TWIGG-FLESNER, *The Europeanisation of Contract Law*, pp 146, and 147, and A. BÖRGER, *Sanktionen für die Verletzung vorvertraglicher Informationspflichten*, pp 140-143 and 157.

68 See n. 26.

69 E. MCKENDRICK, *Contract Law Text, Cases and Materials* (Oxford: Oxford University Press 2012), p 578.

70 Reg. 9 (3), Reg. 10 (5) en Reg. 13 (6) Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013 No. 3134). P. GILIKER, ‘The Transposition of the Consumer Rights Directive into UK Law: Implementing a maximum harmonisation directive’, *European Review of Private Law* 2015, pp 20-28 is critical about the way the English legislator has transposed the Consumer Rights Directive.

71 See n. 19.

contract make a claim in case a trader does not comply with the information she has provided. The Chartered Trading Standards Institute highlights this remedy in its guidances.⁷² According to the Consumer Rights Act 2015 consumers have in these cases the right to reject, right to repair or replacement, right to recover or price reduction.⁷³ Which of these remedies applies depends on the type of contract and the type of breach.⁷⁴ This has been clarified in the table below.

Table 2. Remedies According to the Consumer Rights Act 2015

<i>Contract</i>			
<i>Breach</i>	<i>Goods Contracts</i>	<i>Digital Content Contracts</i>	<i>Services Contracts</i>
Information on the main characteristics of the goods, content or services	- <i>Short-term right to reject</i> S. 19 (3) (a) CRA 2015	- <i>Right to repair or replacement</i> S. 42 (2) (a) CRA 2015	- <i>Right to require repeat performance</i> S. 54 (3) (a) CRA 2015
	- <i>Right to repair or replacement</i> S. 19 (3) (b) CRA 2015	- <i>Price reduction</i> S. 42 (2) (b) CRA 2015	- <i>Price reduction</i> S. 54 (3) (b) CRA 2015
	- <i>Price reduction or final right to reject</i> S. 19 (3) (c) CRA 2015		
Other information duties	- <i>Right to recover</i> S. 19 (5) CRA 2015	- <i>Right to recover</i> S. 42 (4) CRA 2015	- <i>Price reduction</i> S. 54 (4) CRA 2015

Source: Author's own design

27. The statutory rights mentioned in Table 2 are restrictive in the sense that they do not apply if the trader does not provide the information at all. The Consumer Contract Regulations 2013 stipulate: *'Every contract to which this Part applies is to be treated as including a term that the trader has complied with the provisions of: (a) regulations 9 to 14, and (b) regulations 16 (these regulations include the reference to the information duties, insertion: LBAT)'*, but the Consumer Rights Act 2015 does not refer to this provision.⁷⁵ The result is that in case traders do not provide the information, consumers should base a claim on the common law or equity.

72 CTSI, *Consumer Contracts – Off-Premises Sales*, and CTSI, *Consumer Contracts – On-Premises Sales*.

73 S. 12 (2) and (5) jo. s. 19, s. 37 (2) and (4) jo. S. 42 and s. 50 (3) and (5) jo. S. 54 CRA 2015

74 S. WHITTAKER, 'Distinctive features of the new consumer contract law', *Law Quarterly Review* 2017 (January), pp 58-67 discusses these remedies.

75 Reg. 18 CCR 2013. Ss 12 (2), 37 (2) en 50 (3) CRA 2015 do not refer to this provision.

28. Remedies that consumers have under the common law and equity in case of breach of contract are damages and specific performance.⁷⁶ Contractual damages aim to put the consumer in the same position as if there had not been a breach.⁷⁷ Damages will only be awarded in case of a breach, damage, and a causal relationship between those two. Due to the last two requirements, it can be questioned to what extent consumers can apply contractual damages in case of a breach of an information duty. ‘Specific performance’ is an equitable remedy. The application of this remedy depends on the court, because it is a direction a court can give, it is not a right consumers have.⁷⁸ On this point common law differs from continental systems in which performance is the main rule.⁷⁹

3.4. Dutch Law

29. According to Dutch authors, consumers have different remedies at their disposal in case a trader breaches one of the information duties. Firstly, authors suggest *dwaling* as a remedy that consumer can use.⁸⁰ The difficulty faced by a consumer is that invoking *dwaling* will only be successful if he has concluded the contract under the influence of the incorrect representation.⁸¹ Such a causal relationship will only be present if a trader has breached an information duty relating to information which is of importance for the consumer when he concludes the contract, such as information regarding performance.

30. Furthermore, the Dutch legislator and a Dutch author point to Article 3:40 (2) Dutch Civil Code (BW). Based on Article 3:40 (2) BW, a contract is void, if it is in conflict with mandatory law. In case the legal provision only serves to protect one of the parties, the contract is voidable. A breach of an information duty is in conflict with Article 6:230l or Article 6:230m BW and these provisions aim to protect one of the parties, namely the consumer. Therefore, a consumer could

76 Explanatory Notes Consumer Rights Act 2015 (c. 15), numbers 208, 209, 272 and 273.

77 Explanatory Notes Consumer Rights Act 2015 (c. 15), numbers 208 and 272.

78 See *Co-operative Insurance Society Ltd v. Argyll Stores (Holdings) Ltd* [1998] A.C. 1. About this court’s discretion: Explanatory Notes Consumer Rights Act 2015 (c. 15), numbers 209 and 273, C. TWIGG-FLESNER, *The Europeanisation of Contract Law*, p 148, and E. MCKENDRICK, *Contract Law Text, Cases and Materials*, p 925.

79 See Lord Hoffmann in *Co-operative Insurance Society Ltd v. Argyll Stores (Holdings) Ltd* [1998] A.C. 1, and C. TWIGG-FLESNER, *The Europeanisation of Contract Law*, p 148.

80 Art. 6:228 BW. M.Y. SCHAUB, *Tijdschrift voor Procespraktijk* 2014, afl. 2, p 53, L.B.A. TIGELAAR, *Tijdschrift voor Consumentenrecht & Handelspraktijken* 2013, p 156, and M.B.M. LOOS & J.A. LUZAK, *Tijdschrift voor Consumentenrecht & Handelspraktijken* 2011, p 188.

81 J. HIJMA, in: Groene Serie, Verbintenissenrecht, Art. 228 Boek 6 BW, Deventer: Kluwer 2015, aant. 4.2 and W.L. Valk, *Burgerlijk Wetboek*, commentaar op artikel 228 Boek 6 BW (Tekst en Commentaar), Deventer: Kluwer 2017, aant. 2b.

rescind the contract because of the breach of an information duty.⁸² Consequence is that the slightest breach in providing information would make the contract infeasible.⁸³ However, Article 3:40 (3) BW states: ‘*the previous paragraph does not apply to legal provisions that do not have the purpose of affecting the validity of the legal transaction*’. This provision makes the application of this remedy in case of a breach of an information duty dependent on its objective. Especially information duties which aim to store information or aim to facilitate the exercise of rights do not meet this requirement. As a result, this remedy does not always apply in case of a breach.

31. Finally, consumers can in case of a breach also claim performance of the information obligation or damages from the trader due to non-performance.⁸⁴ The interest of a consumer in fulfilment of the information duty is small. After all, most information duties aim to support the decision-making process, at a later stage the consumer has nothing more to do with the information.⁸⁵ An action for damages is problematic because it is hard to determine which damage the consumer has suffered and whether this damage has been caused by the breach. Probably due to these reasons, no case law have been occurred.

4. Choices of Member States Regarding the Sanctioning of Unfair Commercial Practices

4.1. EU Law

32. The Unfair Commercial Practices Directive also ensures the provision of correct information to consumers. In short, the Directive forbids the provision of false or misleading information.⁸⁶ It also forbids omitting or hiding material information, and it forbids the provision of material information in an unclear, unintelligible, ambiguous or untimely manner.⁸⁷ Information is material if an average consumer needs it to take an informed transactional decision and thereby causes or if it is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.⁸⁸ Article 7 (4) of the Unfair Commercial Practices Directive lists information that should be regarded as material in case of an invitation to

82 See *Kamerstukken II* 2012/13, 33520, 3, p 11 (MvT), and M.Y. SCHAUB. *Tijdschrift voor Procespraktijk* 2014, pp 53 and 54.

83 Tigelaar, *Tijdschrift voor Consumentenrecht & Handelspraktijken* 2013, p 156.

84 Arts 3:296 and 6:74 BW. See *Kamerstukken II* 2012/13, 33520, 3, p 10 (MvT)

85 Numbers 7-11.

86 Art. 3 para. 1 jo. 6 para. 1 Unfair Commercial Practices Directive.

87 Art. 7 para. 1 and 2 Unfair Commercial Practices Directive.

88 Art. 7 para. 1 Unfair Commercial Practice Directive.

purchase.⁸⁹ This information corresponds with the information duties under the Consumer Rights Directive. Article 7 (4) lit. a, c, and d refers to information regarding performance, lit b relates to personal data, and lit e to the right of withdrawal. Also the European Commission stresses the cohesion between Article 7 (4) Unfair Commercial Practices Directive and the information duties under the Consumer Rights Directive.⁹⁰ Yet, information duties are through another provision, Article 7 (5) even more closely linked to the Unfair Commercial Practices Directive. Under this provision information duties established by EU law should be regarded as material.

33. Under the Unfair Commercial Practices Directive penalties must be effective, proportionate and dissuasive.⁹¹ According to the European Court of Justice it is for Member States to provide for an appropriate system of sanctions with regard to professionals who employ unfair commercial practices.⁹² The Unfair Commercial Practice Directive explicitly states that the Directive is without prejudice to general principles of national contract law and, in particular, to the rules on the validity, formation or effect of a contract.⁹³ It is also without prejudice to individual actions brought by those who have been harmed by an unfair commercial practice.⁹⁴ However, the Directive itself does not confer any individual right upon consumers in the event of an unfair commercial practice.⁹⁵ So the choice is left to Member States to provide a private law remedy to consumers in case of unfair commercial practices, and thereby a breach of an information duty.⁹⁶

34. Under the Unfair Commercial Practices Directive competitors can also play a role in sanctioning unfair commercial practices, and with that in sanctioning a

89 See about the definition of an invitation to purchase: ECJ 12 May 2011, ECLI:EU:C:2011:299, *Ving Sverige*, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62010CJ0122>, consideration 29–32.

90 European Commission, *First report on the application of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market*, COM(2013) 139 FINAL, p 15, and European Commission, *Guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices*, SWD(2016) 163 FINAL, pp 19 and 20.

91 Art. 13 Unfair Commercial Practices Directive.

92 ECJ 16 April 2015, ECLI:EU:C:2015:225, *UPC/Magyarország*, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62013CJ0388>, consideration 58.

93 Art. 3 para. 2 Unfair Commercial Practices Directive.

94 Recital 9 Unfair Commercial Practices Directive.

95 G. BETLEM, ‘Public and Private Transnational Enforcement of EU Consumer Law’, *European Business Law Review* 2007, p 707, and V. MAK, ‘Full Harmonization in European Private Law: A Two-Track Concept’, *European Review of Private Law* 2012, pp 221 and 222.

96 J. Stuyck, E. TERRYIN & T. VAN DYCK, ‘Confidence Through Fairness? The New Directive on Unfair Business to Consumer Commercial Practices in the Internal Market’, *Common Market Law Review* 2006, p 136.

breach of information duties. Competitors can be persons that have a legitimate interest under national law in combating unfair commercial practices.⁹⁷ The preamble states that the Directive directly protects consumer economic interests, but it also indirectly protects legitimate businesses from their competitors who do not play by the rules of this Directive.⁹⁸ Advocate General Trstenjak expresses the protection of competitors in comparison to consumers under the Directive as follows: ‘*However, the economic interests of competitors who act within the law are considered no less worthy of protection, as appears from recital 6 and, particularly, recital 8 in the preamble.*’⁹⁹ Providing a remedy to competitors is an option, it is not a mandatory prescription,¹⁰⁰ but the formulated protection of competitors can be taken in consideration in answering the question whether competitors have a legitimate interest according to national law.

4.2. German Law

35. In Germany, the Unfair Commercial Practices Directive has been implemented in the *Gesetz gegen den unlauteren Wettbewerb* (UWG). The UWG provides no remedy to consumers,¹⁰¹ therefore a consumer cannot use this regulation in case of a breach of an information duty. The *Bundesgerichtshof* has ruled in the *Prüfzeichen*-case that the UWG cannot be considered as a *Schutzgesetz* in terms of section 823 Abs. 2 German Civil Code (BGB).¹⁰² This has made it impossible for a consumer to initiate a claim based on tort against a trader for unfair commercial practices. The German government has submitted in response to the *Prüfzeichen*-case several proposals to extend consumer protection under the UWG.¹⁰³ In

97 Art. 11 para. 1 Unfair Commercial Practices Directive.

98 Recital 6 and 8 Unfair Commercial Practices Directive. Whether this choice still exists in future, is questionable in view of an impact assessment of the European Commission stating that an EU right must be developed that grant consumers individual redress when falling victim of unfair commercial practices (Inception impact assessment: targeted revision of EU consumer law directives, Ref. Ares(2017)3287178, 30 juni 2017, <https://ec.europa.eu/info/sites/info/files/part-2017-279735v1.pdf>).

99 Opinion of A-G TRSTENJAK, point 64, ECJ 14 January 2010, ECLI:EU:C:2010:12, *Zentrale zur Bekämpfung unlauteren Wettbewerbs/Plus Warenhandelsgesellschaft*, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62008CJ0304>, and Opinion of A-G TRSTENJAK, point 71, ECJ 23 April 2009, ECLI:EU:C:2009:244, *VTB-VAB/Total Belgium and Galatea/Sanoma Magazines Belgium*, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62007CJ0261>.

100 In Member States like Germany and Austria competitors control compliance to the Directive (COM (2013) 139), p 26.

101 S. 8-10 UWG.

102 BGH 14 May 1974, *Neue Juristische Wochenschrift* 1974, 1503, *Prüfzeichen*.

103 Proposal of the federal government of 29 September 1978, *BT-Drucks* 8/2145, Proposal of the federal government of 1 June 1982, *BT-Drucks* 9/1707, Proposal of the federal government of 18 May 1983, *BT-Drucks* 10/80, and Proposal of the federal government of 29 January 1986, *BT-Drucks* 10/4741.

response to these proposals a right to terminate the contract was included in section 13a UWG.¹⁰⁴ Only a few cases are known in case law in which a party terminates a contract on the basis of this provision.¹⁰⁵ Authors therefore conclude that this remedy is of no significance in practice.¹⁰⁶ Referring to this argument, the German government has abolished this remedy in 2004.¹⁰⁷ Prior to this decision, there has been debate about whether the scope of section 13a UWG should be expanded,¹⁰⁸ but this did not happen because according to the legislator the BGB contained enough remedies on behalf of consumers.¹⁰⁹

36. On the other hand, competitors and consumer associations can act, under the UWG in case of unfair commercial practices.¹¹⁰ Scholars mention the possibility to act against a breach of an information duty through the UWG.¹¹¹ A competitor can, based on section 3a UWG or a misleading omission, go to court and get injunctive relief or claim damages.¹¹² A claim based on section 3a UWG must meet various

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- 104 I. SCHAFFERNAK, *Das wettbewerbsrechtliche Vertraglösungsrecht nach § 13a UWG* (diss.) (München: VVF 1991) has written a dissertation about this remedy.
- 105 A-G Dortmund 15 January 2002, 125 C 10307/01, OLG Zweibrücken 2 July 1996, *NJW-RR* 1997, 175, OLG Düsseldorf 19 January 1990, *NJW-RR* 1990, 875, and OLG Nürnberg 3 Oktober 1989 *GRUR* 1990, 141.
- 106 M. LEHMANN & A. DÜRRSCHMIDT, 'Haftung für irreführende Werbung über Garantien - Zum Vorschlag einer Richtlinie des Europäischen Parlaments und des Rates über den Verbrauchsgüterkauf und - garantien vom 18.6.1996', *GRUR* 1997, p 549.
- 107 Proposal for a Competition Act, *BT-Drucks* 15/1487, p 14.
- 108 K-H. FEZER, 'Das wettbewerbsrechtliche Vertragsauflösungsrecht in der UWG-Reform', *WRP* 2003, pp 127-143, F. WEILER, 'Ein lauterkeitsrechtliches Vertragslösungsrecht des Verbrauchers?', *WRP* 2003, pp 423-431, and H. KÖHLER, 'UWG-Reform und Verbraucherschutz', *GRUR* 2003, pp 265-272.
- 109 *BT-Drucks* 15/1487, pp 14, and 15.
- 110 S. 8 Abs. 3 UWG.
- 111 C. WENDEHORST, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch: BGB* 2016, s. 312d, Rn. 16, Schirnbacher, in: Spindler/Schuster, *Recht der elektronischen Medien* 2015, BGB s. 312d, Rn. 54, and A. BÖRGER, *Sanktionen für die Verletzung vorvertraglicher Informationspflichten*, pp 107-109.
- 112 S. 8 and 9 UWG. Case law about competitors acting against breaches of information duties based on the UWG: April 2010, I ZR 66/08, BGH 4 Oktober 2007, I ZR 22/05, OLG Celle 8 February 2016, *BeckRS* 2016, 04998, OLG Frankfurt 4 February 2016, *BeckRS* 2016, 04874, OLG Hamm 23 May 2013, *MMR* 2014, 30, OLG Hamm 4 August 2009, 4 U 11/09, OLG Hamm 2 July 2009, *MMR* 2009, 850, OLG Hamm 26 May 2009, 4 U 27/09, OLG Hamm 12 March 2009, 4 U 225/08, OLG Düsseldorf 15 April 2008, *BeckRS* 2008, 08624, OLG Stuttgart 4 February 2008, 2 U 71/07, *BeckRS* 2008, 06267, OLG Hamm 18 Oktober 2007, *MMR* 2008, 176, OLG Köln 3 August 2007, *MMR* 2007, 713, OLG Hamburg 24 August 2006, *MMR* 2006, 675 en OLG Hamm 14 April 2005, 4 U 2/05, *NJW* 2005, 2319. BGH 29 April 2010, I ZR 66/08, *MMR* 2011, 29 (*Holzhocker*), r.o. II.3, and BGH 20 July 2006, I ZR 228/03, (*Anbieterkennzeichnung im Internet*), r.o. II.(3).3.a. H. KÖHLER & in: Köhler/Bornkamm, *Beck'scher Kurze Kommentare, Gesetz gegen den unlauteren Wettbewerb UWG mit PAngV und UKlaG*, S. 3a UWG, 35. Auflage, München: Verlag C.H. Beck 2017, Rn. 1.24, and C. von Jagow, in: Harte-Bavendamm & Henning-Bodewig, *Gesetz gegen den*

conditions. First, the rule that has been violated must aim to regulate market behaviour. The *Bundesgerichtshof* has ruled, at the time the Distance Contract Directive was still in force, that the information duties stemming from this directive must be regarded as market regulations.¹¹³ Also the information duties of the Consumer Rights Directive are considered market regulations.¹¹⁴ Secondly, the violation must have the potential to materially affect the interests or decision-making process of market participants.¹¹⁵ According to Köhler that can be determined from the purpose of the infringed market regulation whether it is suitable for this.¹¹⁶ Thirdly, there must be a competitive relationship between the competitor and the business that uses unfair commercial practices.¹¹⁷ Such a relationship exists, according to the *Bundesgerichtshof* when the competitor and the business that is guilty of an unfair commercial practice sell similar goods or goods within the same circle to consumers.¹¹⁸

37. A competitor can also base his claim in case of a breach of an information duty on a misleading omission (s. 5a UWG).¹¹⁹ For such an action material information

unlauteren Wettbewerb, S. 3a, München: Verlag C.H. Beck 2016, Rn. 69. KÖHLER in: Köhler/Bornkamm 2017 UWG s. 3a, Rn. 1.97. KÖHLER in: Köhler/Bornkamm 2017 UWG s. 3a, Rn. 1.99. S. 8 Abs. 3 Nr. 1 jo. s. 2 Abs. 1 Nr. 2 UWG. BGH 10 April 2014, *GRUR* 2014, 1114 (*Nickelfrei*). Cited by KÖHLER in: Köhler/Bornkamm 2017 UWG s. 2, Rn. 107. The provision that information duties established by Community law must be regarded as essential has been implemented in s. 5a Abs. 4 UWG. KÖHLER in: Köhler/Bornkamm 2017 UWG s. 5a Rn. 4.2, DREYER, Harte-Bavendamm/Henning Bodewig 2016, UWG s. 5a, Rn. 181. About the redundancy of the *Relevanz*-requirement: BGH 29 April 2010, *GRUR* 2011, 82, Rn. 33 (*Preiswerbung ohne Umsatzsteuer*) en BGH 29 April 2010, *MMR* 2011, 29, Rn. 24 (*Holzhocker*). Reg. 27A (2)-(6) CPR 2008. Inserted by Reg. 3 CPR 2014. OLG Celle 8 February 2016, *BeckRS* 2016, 04998, OLG Frankfurt 4 February 2016, *BeckRS* 2016, 04874, BGH 29 April 2010, I ZR 66/08, BGH 4 Oktober 2007, I ZR 22/05, OLG Celle 8 February 2016, *BeckRS* 2016, 04998, OLG Frankfurt 4 February 2016, *BeckRS* 2016, 04874, OLG Hamm 23 May 2013, *MMR* 2014, 30, OLG Hamm 4 August 2009, 4 U 11/09, OLG Hamm 2 July 2009, *MMR* 2009, 850, OLG Hamm 26 May 2009, 4 U 27/09, OLG Hamm 12 March 2009, 4 U 225/08, OLG Düsseldorf 15 April 2008, *BeckRS* 2008, 08624, OLG Stuttgart 4 February 2008, 2 U 71/07, *BeckRS* 2008, 06267, OLG Hamm 18 Oktober 2007, *MMR* 2008, 176, OLG Köln 3 August 2007, *MMR* 2007, 713, OLG Hamburg 24 August 2006, *MMR* 2006, 675, and OLG Hamm 14 April 2005, 4 U 2/05, *NJW* 2005, 2319.

113 BGH 29 April 2010, I ZR 66/08, *MMR* 2011, 29 (*Holzhocker*), r.o. II.3, and BGH 20 July 2006, I ZR 228/03, (*Anbieterkennzeichnung im Internet*), r.o. II.(3).3.a.

114 H. KÖHLER & in: Köhler/Bornkamm, Beck'scher Kurze Kommentare, Gesetz gegen den unlauteren Wettbewerb UWG mit PAngV und UKlaG, s. 3a UWG, 35. Auflage, München: Verlag C.H. Beck 2017, Rn. 1.24, and C. von Jagow, in: Harte-Bavendamm & Henning-Bodewig, Gesetz gegen den unlauteren Wettbewerb, s. 3a, München: Verlag C.H. Beck 2016, Rn. 69.

115 KÖHLER in: Köhler/Bornkamm 2017 UWG s. 3a, Rn. 1.97.

116 KÖHLER in: Köhler/Bornkamm 2017 UWG s. 3a, Rn. 1.99.

117 S. 8 Abs. 3 Nr. 1 jo. s. 2 Abs. 1 Nr. 2 UWG.

118 BGH 10 April 2014, *GRUR* 2014, 1114 (*Nickelfrei*). Cited by KÖHLER in: Köhler/Bornkamm 2017 UWG s. 2, Rn. 107.

119 The provision that information duties established by Community law must be regarded as essential has been implemented in s. 5a Abs. 4 UWG.

must have been withheld and a competitive relationship must exist. In contrast to previous rulings of the *Bundesgerichtshof*, withholding the information must also have the potential to influence the decision of the average consumer.¹²⁰

4.3. *English Law*

38. The English legislator has implemented the Unfair Commercial Practices Directive in the Consumer Protection from Unfair Trading Regulations 2008 (CPR 2008). These regulations have been amended by the Consumer Protection (Amendment) Regulations 2014 that provide the right of redress to consumers in case of an unfair commercial practice. This remedy is subject to three conditions.¹²¹ The first condition is that the consumer enters into a contract with a trader. The second condition is that the trader engages in a prohibited practice in relation to the product, and in case of goods and digital content, that the trader is aware of the commercial practice that constitutes the prohibited practice or could reasonably be expected to be aware of it. The third condition is that the prohibited practice is a significant factor in the consumer's decision to enter into the contract.

39. The Unfair Commercial Practices Directive does not use the term 'prohibited practice'. A 'prohibited practice' refers to misleading actions and aggressive commercial practices.¹²² By using this definition, misleading omissions are excluded, and therefore a consumer is not entitled to a right of redress if a trader withholds material information.¹²³ This limits the scope of this remedy.

40. The *Department of Trade & Industry* has signalled the option under the Unfair Commercial Practices Directive to provide competitors with remedies in case of unfair commercial practices.¹²⁴ However, the Department felt that the existing enforcement system was sufficiently adequate to sanction unfair

120 KÖHLER in: Köhler/Bornkamm 2017 UWG s. 5a Rn. 4.2, DREYER, Harte-Bavendamm/Henning Bodewig 2016, UWG s. 5a, Rn. 181. About the redundancy of the *Relevanz*-requirement: BGH 29 April 2010, *GRUR* 2011, 82, Rn. 33 (*Preiswerbung ohne Umsatzsteuer*) en BGH 29 April 2010, *MMR* 2011, 29, Rn. 24 (*Holzocker*).

121 Reg. 27A (2)-(6) CPR 2008. Inserted by Reg. 3 CPR 2014.

122 Reg. 27 B jo. Reg. 5 and 7 CPR 2008. Reg. 27B has been inserted by Reg. 3 CPR 2014.

123 Department for Business, Innovation & Skills, *Misleading and Aggressive Commercial Practices - New Private Rights for Consumers: Guidance on the Consumer Protection (Amendment) Regulations 2014*, London: Department for Business, Innovation & Skills August 2014, p 5 emphasizes consumers do not have a remedy in case of a misleading omission.

124 Department of Trade and Industry, *The Unfair Commercial Practices Directive: Consultation on implementing the EU Directive on Unfair Commercial Practices and Amending Existing Consumer Legislation*, London: Department of Trade and Industry December 2005, pp 39 and 40, and Department of Trade and Industry, *Summary of Responses to the Consultation on implementing the EU Directive on Unfair Commercial Practices and Amending Existing Consumer Legislation*, London: Department of Trade and Industry June 2006.

commercial practices. In addition, the department pointed out that enforcers, like *Trading Standards*, had to maintain consistency, something that did not apply to competitors.¹²⁵ The prevailing view is that competitors cannot act in case of unfair commercial practices.¹²⁶ Therefore, they cannot act in case of a breach of an information duty.

4.4. Dutch Law

41. The Unfair Commercial Practices Directive has been implemented in Articles 6:193a-6:193j BW. A consumer has, based on Article 6:193j (3) BW, the right to rescind the contract with the trader in case of an unfair commercial practice, for example a breach of an information duty. In addition to an unfair commercial practice, Article 6:193j (3) BW requires a causal relationship between the unfair commercial practice of the trader and the concluded contract. The proof of causality makes this remedy inaccessible for consumers.¹²⁷

42. The Dutch legislator has not explicitly provided the competitor with remedies in case of an unfair commercial practice.¹²⁸ Scholars are divided over whether competitors can act. Various arguments are put forward against an action in favour of a competitor. First, the legislator would discourage such an action because he did not design a specific provision allowing for a competitor's intervention.¹²⁹ Secondly, the legislator has separated the protection of consumers and competitors at the time he transposed the Unfair Commercial Practices

125 Department of Trade and Industry, Government Response to the Consultation Paper on Implementing the Unfair Commercial Practices Directive, London: Department of Trade and Industry December 2006, p 6, and BERR, Implementation of the Unfair Commercial Practices Directive: Government Response to the consultation on draft Consumer Protection from Unfair Trading Regulations, London: Department for Business, Enterprise & Regulatory Reform 2008, p 15.

126 S. SINGLETON, 'The Consumer Protection from Unfair Trading Regulations', *Computer and Telecommunications Law Review* 2009, p 78, and H. COLLINS, 'Harmonisation by Example: European Laws against Unfair Commercial Practices', *Modern Law Review* 2010, p 89-112

127 See for a discussion of case law based on this provision: C.M.D.S. Pavillon & L.B.A. Tigelaar, 'Vernietiging van de overeenkomst bij een oneerlijke handelspraktijk; een hanteerbare sanctie?', *Contracteren* 2018, pp. 71-79.

128 In the parliamentary documents the concept of 'competitor' or 'competition' only emerges in the context of the Dutch competitive position in relation to non-European countries (*Kamerstukken II* 2006/07, 30928, 6, p 2 (Verslag), and *Kamerstukken II* 2006/07, 30928, 8, p 2-4 (Nota naar aanleiding van Verslag)).

129 L. KROON & C.S. MASTENBROEK, 'De Richtlijn oneerlijke handelspraktijken en de implementatie daarvan in het BW: mogelijke complicaties in de praktijk', *Intellectuele Eigendom en Reclamerecht* 2008, pp 260 and 261, W.H. VAN BOOM, 'Inpassing en handhaving van de Wet oneerlijke handelspraktijken', *Tijdschrift voor Consumentenrecht & Handelspraktijken* 2008, p 14, and C.J.J.C. VAN NISPEN, J.L.R.A. HUYDECOPER & T. COHEN JEHORAM, *Industriële eigendom Deel 3 Vormen, namen en reclame* (Deventer: Kluwer 2012), p 383.

Directive and the Directive concerning Misleading and Comparative Advertising.¹³⁰ He has opted for a system in which regulations concerning unfair commercial practices aim to protect consumers, and regulations concerning misleading and comparative advertising aim to protect traders. Consequence of this choice would be that a competitor cannot act when unfair commercial practices arise in the relationship between a consumer and a trader.¹³¹ Thirdly, competitors would not have a legitimate interest to act because they would then act in a different interest than their own.¹³²

43. Other scholars argue for an action in favour of a competitor, and put forward the following reasons. First, the legislator's attitude would have to be interpreted differently. An explicit action in favour of a competitor might have been desirable, but not necessarily required. A competitor could simply act in case of unfair commercial practices based on tort (Art. 6:162 BW).¹³³ Secondly, regardless of the chosen system of the legislator, Articles 6:193a-6:193j would protect traders in view of recital 8, and Article 11 of the Unfair Commercial Practices Directive.¹³⁴ In line with this, a competitor could also derive a legitimate interest of this Directive.¹³⁵ Thirdly, and that is a teleological argument, the competitors are the ones who will act against consumer deception in practice.¹³⁶ Unlike consumers, competitors can properly assess a commercial practice because of their knowledge of the market, and have the financial means to litigate.¹³⁷

130 Dir. 2006/114 of 12 December 2006 concerning misleading and comparative advertising, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32006L0114>.

131 L. STEIJGER, 'Wetgevingspraktijken onder de loep genomen: een analyse van de implementatie van de Richtlijn Oneerlijke handelspraktijken in Nederland', *Nederlands Tijdschrift voor Europees Recht* 2007, pp 133 and 134, W.H. VAN BOOM, *Tijdschrift voor Consumentenrecht & Handelspraktijken* 2008, p 13, and L. KROON & C.S. MASTENBROEK, *Intellectuele Eigendom en Reclamerecht* 2008, pp 260 and 261.

132 W.H. VAN BOOM, *Tijdschrift voor Consumentenrecht & Handelspraktijken* 2008, p 14, and L. KROON & C.S. MASTENBROEK, *Intellectuele Eigendom en Reclamerecht* 2008, pp 260 and 261.

133 P.G.F.A. GEERTS & E.R. VOLLEBREGT, *Oneerlijke handelspraktijken, misleidende reclame en vergelijkende reclame* (Deventer: Kluwer 2009), p 8, and D.W.F. VERKADE, *Misleidende (B2B) reclame en vergelijkende reclame* (Deventer: Kluwer 2011), number 9.

134 D.W.F. VERKADE, *Oneerlijke handelspraktijken jegens consumenten* (Deventer: Kluwer 2016), number 7, D.W.F. VERKADE, *Misleidende (B2B) reclame en vergelijkende reclame*, number 9, P.G.F.A. GEERTS & E.R. VOLLEBREGT, *Oneerlijke handelspraktijken, misleidende reclame en vergelijkende reclame*, p 8, and M.F.H. BROEKMAN, 'De Richtlijn Oneerlijke Handelspraktijken', *Tijdschrift voor Consumentenrecht & Handelspraktijken* 2005, p 181.

135 M.F.H. BROEKMAN, *Tijdschrift voor Consumentenrecht & Handelspraktijken* 2005, p 181.

136 D.W.F. VERKADE, *Misleidende (B2B) reclame en vergelijkende reclame*, number 9, L. KROON & C.S. MASTENBROEK, *Intellectuele Eigendom en Reclamerecht* 2008, p 260, and M.F.H. BROEKMAN, 2005, pp 18 and 182.

137 L. KROON & C.S. MASTENBROEK, *Intellectuele Eigendom en Reclamerecht* 2008, pp 260 and 261, and L. STEIJGER, *Nederlands Tijdschrift voor Europees Recht* 2007, p 134.

44. In several cases, competitors have already invoked Articles 6:193a-6:193j BW.¹³⁸ In some cases, courts assumed that competitors had such an action,¹³⁹ in other cases they left this question open or rejected an appeal.¹⁴⁰ There are no cases where a competitor brought a claim, based on unfair commercial practices against a trader that breaches an information duty.

5. Enforcement of Information Duties

5.1. EU Law

45. Member States shall ensure that there are adequate and effective means to ensure compliance with the Consumer Rights Directive.¹⁴¹ These means including provisions whereby public bodies, consumer organizations, and/or professional organizations may take action under national law before the courts or competent administrative bodies.¹⁴² Consumer and professional organizations must have a legitimate interest in protecting consumers.¹⁴³

138 Rb. Gelderland, 19 juli 2017, ECLI:NL:RBGEL:2017:4187, Rb. Amsterdam 28 maart 2017 ECLI:NL:RBAMS:2017:2066, Hof Arnhem-Leeuwarden 20 December 2016, ECLI:NL:GHARL:2016:10382

63 (*Trebs/Food & Fun*), Rb. Amsterdam, 27 januari 2016, ECLI:NL:RBAMS:2016:397, Rb. Amsterdam (vzr.), 20 November 2015, ECLI:NL:RBAMS:2015:9676, Hof s Gravenhage, 23 December 2014, ECI:NL:GHDHA:2014:4446 (*Hotels.nl B.V./Hotel Booker B.V.*), Rb. Gelderland (vzr.) 17 April 2014, IEPT20140417 (*IMS/Rofra*), Rb. Amsterdam (vzr.) 2 April 2014 ECLI:NL:RBAMS:2014:1822 (*Kleding.nl/Kleding.com*), Rb. Rotterdam (vzr.) 27 maart 2014, ECLI:NL:RBROT:2014:2601 (*Omega Pharma/Procter & Gamble*), Rb. Arnhem (vzr.) 25 mei 2011, ECLI:NL:RBARN:2011:BQ7149, Rb. Amsterdam (vzr.) 25 November 2010, ECLI:NL:RBAMS:2010:BO6710 (*Mars/Nestlé*), Rb. Amsterdam (vzr.) 24 December 2009, ECLI:NL:RBAMS:2009:BK9104 (*KPN/UPC*), and Rb. Leeuwarden 29 April 2009, ECLI:NL:RBLEE:2009:BI4085 (*Huis & Hypotheek/DSB*).

139 Rb. Gelderland, 19 juli 2017, ECLI:NL:RBGEL:2017:4187, r.o. 4.19, Rb. Amsterdam 28 maart 2017 ECLI:NL:RBAMS:2017:2066, r.o. 4.3, Rb. Amsterdam, 27 januari 2016, ECLI:NL:RBAMS:2016:397, r.o. 4.1, Hof s Gravenhage, 23 December 2014, ECI:NL:GHDHA:2014:4446 (*Hotels.nl B.V./Hotel Booker B.V.*), r.o. 4.13, Rb. Amsterdam (vzr.) 2 April 2014, ECLI:NL:RBAMS:2014:1822 (*Kleding.nl/Kleding.com*), r.o. 4.10-4.12, Rb. Rotterdam (vzr.) 27 maart 2014, ECLI:NL:RBROT:2014:2601 (*Omega Pharma/Procter & Gamble*), r.o. 4.7, and Rb. Leeuwarden 29 April 2009, ECLI:NL:RBLEE:2009:BI4085 (*Huis & Hypotheek/DSB*), r.o. 4.8.

140 Hof Arnhem-Leeuwarden 20 December 2016, ECLI:NL:GHARL:2016:10382 (*Trebs/Food & Fun*), r.o. 5.43, Rb. Amsterdam (vzr.), 20 November 2015, ECLI:NL:RBAMS:2015:9676, r.o. 4.1, Rb. Gelderland (vzr.) 17 April 2014, IEPT20140417 (*IMS/Rofra*), r.o. 4.17 en 4.18, Rb. Arnhem (vzr.) 25 mei 2011, ECLI:NL:RBARN:2011:BQ7149, r.o. 4.13, Rb. Amsterdam (vzr.) 25 November 2010, ECLI:NL:RBAMS:2010:BO6710 (*Mars/Nestlé*), r.o. 5.6, and Rb. Amsterdam (vzr.) 24 December 2009, ECLI:NL:RBAMS:2009:BK9104 (*KPN/UPC*), r.o. 4.6.

141 Art. 23 para. 1 Consumer Rights Directive, and Art. 11 Unfair Commercial Practices Directive.

142 Art. 23 para. 2 Consumer Rights Directive, and Art. 11 Unfair Commercial Practices Directive.

143 Art. 23 para. 2 Consumer Rights Directive, Art. 11 para. 1 Unfair Commercial Practices Directive, and Art. 3 Dir. 2009/22 of 23 April 2009 on injunctions for the protection of consumers' interests, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32009L0022>.

46. Courts and administrative authorities should have the power to order cessation in case of an unfair commercial practice or another infringement or to institute appropriate legal proceedings to obtain such an order.¹⁴⁴ Member States could require that the party that intends to seek an injunction can only start this procedure after trying to achieve the cessation in consultation with the trader.¹⁴⁵ Furthermore, Member States may confer powers upon courts or administrative authorities to require publication of the final decision, and the publication of a corrective statement.¹⁴⁶ Through publication the public can find out that there is an infringement. The Unfair Commercial Practices Directive also states that Member States shall confer powers upon courts and/or administrative authorities to reverse the burden of proof in civil or administrative proceedings.¹⁴⁷ The directive does not prescribe how courts and administrative authorities should use this discretionary power.¹⁴⁸

47. It is up to Member States to decide whether the enforcement have a civil or an administrative nature.¹⁴⁹ According to the Unfair Commercial Practices Directive, courts and administrative authorities should be able to order cessation quite easily, without proof of actual loss or damage at consumer's side or negligence on the part of the trader.¹⁵⁰ All that is required, is that the infringement harms the collective interests of consumers.¹⁵¹

5.2. German Law

48. In Germany, consumer associations (*Verbraucherzentralen*) and a competition association (*Wettbewerbszentrale*) enforce consumer law based on the *Unterlassungsklagengesetz* (UKlaG) or *Gesetz gegen den unlauteren Wettbewerb* (UWG).¹⁵² Both are registered associations that can start a civil procedure, and claim a prohibition in case of a breach of an information duty. The regional *Verbraucherzentralen* are members of the central consumer association, *Verbraucherzentrale Bundesverband* (VZBV). The VZBV emphasizes its

144 Art. 11 para. 2 Unfair Commercial Practices Directive and Art. 2 para. 1 (a) and (c) Injunctions Directive.

145 Art. 11 para. 2 Unfair Commercial Practices Directive and Art. 5 Injunctions Directive.

146 Art. 11 para. 2 Unfair Commercial Practices Directive and Art. 2 para. 1 (b) Injunctions Directive.

147 Art. 12 Unfair Commercial Practices Directive.

148 B. KEIRSBILCK, *The New European Law of Unfair Commercial Practices and Competition Law* (Oxford and Portland: Hart Publishing 2011) qualifies this as a discretionary power.

149 Art. 12 Unfair Commercial Practices.

150 Art. 11 para 2 Unfair Commercial Practices Directive.

151 Art. 1 para 2 Injunctions Directive.

152 S. 3 jo. s. 4 UKlaG jo. s. 8 Abs. 3 Nr. 3 UWG jo. Liste qualifizierter Einrichtungen gemäß s. 4 des Unterlassungsklagengesetzes (UKlaG) – Stand 1 January 2018, and s. 8 Abs. 3 Nr. 2 UWG.

independence, and indicates that it only acts in the consumers' interests.¹⁵³ The *Wettbewerbszentrale* is an association that aims to strengthen competition, and in this context ensures compliance with consumer law.¹⁵⁴

49. Quite a lot of scholars point to the possibility to claim a prohibition based on section 2 UKlaG.¹⁵⁵ *Verbraucherzentralen* do not often base their claim on the UWG, because such a claim requires that additional conditions must be met concerning market regulations and influencing consumer behaviour.¹⁵⁶ The following requirements must be met, if a claim, based on section 2 UKlaG, is to be successful. Firstly, there must be an infringement of consumer protection regulations, for example information duties.¹⁵⁷ Secondly, there must be a chance that the trader will once again commit this infringement.¹⁵⁸ The infringement itself creates the presumption that this danger exists. The trader can refute this presumption by making a declaration to abstain from the infringement, but a *Verbraucherzentrale* is not obliged to accept this statement.¹⁵⁹ Thirdly, and this requirement has been derived from the Injunctions Directive, the infringement has to harm the collective interests of consumers.¹⁶⁰

50. There are cases of the *Bundesgerichtshof* in which the VZBV or the *Wettbewerbszentrale* enforce information duties in case of distance selling.¹⁶¹ The question, in the cases of 2005 and 2009, is whether traders have breached their information duty concerning performance (delivery costs), and the right of withdrawal.¹⁶² One of the trader's general conditions that aims to inform

153 S. 2, and s. 3 Ab. 1 Satzung Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V. (vzbv), https://www.vzbv.de/sites/default/files/downloads/2017/12/22/satzung_vzbv.pdf.

154 S. 2 Satzung Wettbewerbszentrale, <https://www.wettbewerbszentrale.de/de/institution/satzung/>.

155 M. TAMM, *Das neue Schuldrecht*, p 114, M. TAMM, *Verbraucher und Recht*, p 17, C. WENDEHORST, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*: BGB 2016, s. 312d, Rn. 16, and Schirmbacher, in: Spindler/Schuster, *Recht der elektronischen Medien 2015*, BGB s. 312d, Rn. 53.

156 H. KÖHLER, in: Köhler/Bornkamm/Feddersen, *Beck'scher Kurze Kommentare, Gesetz gegen den unlauteren Wettbewerb UWG mit PAngV und UKlaG*, s. 2, 35. Auflage, München: Verlag C.H. Beck 2018, Rn. 32, and H-W. MICKLITZ/P. ROTT, in: *Münchener Kommentar zur ZPO*, s. 2 UKlaG, München: Verlag C.H. Beck 2017, Rn. 11.

157 S. 2 Abs. 1 UKlaG.

158 H. KÖHLER, in: Köhler/Bornkamm/Feddersen, UKlaG, s. 2, Rn. 37, and H-W. MICKLITZ/P. ROTT, in: *Münchener Kommentar zur ZPO 2017*, s. 2 UKlaG, Rn. 55.

159 H. KÖHLER, in: Köhler/Bornkamm/Feddersen 2018, UKlaG, s. 2, Rn. 37.

160 H. KÖHLER, in: Köhler/Bornkamm/Feddersen 2018, UKlaG, s. 2, Rn. 38, and H-W. MICKLITZ/P. ROTT, in: *Münchener Kommentar zur ZPO 2017*, s. 2 UKlaG, Rn. 55.

161 BGH 5 October 2005 VIII ZR 382/04, *NJW* 2006, 211, BGH 20 July 2006 I ZR 228/03, *NJW* 2006, 3633 (Anbieterkennzeichnung im Internet) en BGH 9 December 2009 VIII ZR 219/08, *NJW* 2010, 989.

162 The Bundesgerichtshof assesses the way information has been provided from the framework that applies in case of unfair terms.

consumers about the right to withdraw does not pass the test in the case of 2009.¹⁶³ The case *Anbieterkennzeichnung im Internet* is about the question of whether a trader has provided her personal data in a clear and comprehensible manner. The *Bundesgerichtshof* ruled that providing personal data through two hyperlinks was conform the transparency-requirement.

5.3. *English Law*

51. Trading Standards Services can enforce a breach of an information duty based on the Consumer Contract Regulations 2013 or the Consumer Protection from Unfair Trading Regulations 2008 (CPR 2008). These authorities have been given a greater responsibility in the enforcement of consumer law.¹⁶⁴ Every City Council of County Council has a department ‘Trading Standards’, which ensures compliance with consumer law in their region. Trading Standards are in contact with the Competition & Markets Authority (CMA), they have to inform this authority under certain circumstances.¹⁶⁵

52. Trading Standards have been obliged to consider any complaint made to them about a breach of an information duty.¹⁶⁶ If they suspect that there is an infringement, they have to approach the business for the purpose of achieving the cessation of the infringement.¹⁶⁷ Relevant factors to decide whether such an action is necessary are the intention of the business, the history of breaches by the business, and the damage being done to consumers.¹⁶⁸ In most cases, Trading Standards will write a letter to the business in which they describe details of the business activity causing concern, invite the business to open a dialogue, and outline the consequences of a failure to respond to this request.¹⁶⁹ In this way, Trading Standards try to persuade the business to promise to stop the infringement.¹⁷⁰ In case a trader persists in her detrimental behaviour, Trading standards can go to court, and obtain an enforcement order which contains a prohibition.¹⁷¹ Such an order will be given if there is an infringement which harms the collective interests of

163 BGH 9 December 2009 VIII ZR 219/08, *N/W* 2010, 989.

164 Competition & Markets Authority, Consumer protection: Guidance on the CMA’s approach to use of its consumer powers 2014 (now withdrawn), pp 13 and 14.

165 The Competition & Markets Authority has replaced the Office of Fair Trading and is created based on s. 24 Enterprise and Regulatory Reform Act 2013).

166 Reg. 44 (1) CCR.

167 S. 214 (1) and (2) Enterprise Act 2002.

168 Office of Fair Trading, Enforcement of consumer protection legislation, Guidance on Part 8 of the Enterprise Act, 2003, p 29.

169 OFT 2003, p 29.

170 S. 219 Enterprise Act 2002.

171 S. 215 Enterprise Act 2002. Failure to comply with such an order could be found by a court to be contempt of court, which could lead to a fine of imprisonment (OFT 2003, p 22).

consumers.¹⁷² The Competition & Markets Authority has replaced the Office of Fair Trading. During the time the Office of Fair Trading existed, two cases have been published in which Trading Standards have enforced a breach of an information duty.¹⁷³ Both cases are about a breach of the information duty concerning the right of withdrawal.

53. Trading Standards can also enforce the information duties under the Consumer Rights Directive on the basis of the Consumer Protection from Unfair Trading Regulations 2008 (CPR 2008).¹⁷⁴ Such an action of Trading Standards requires that (1) a business has omitted or hid material information or has provided material information in a unclear, unintelligible, ambiguous or untimely manner.¹⁷⁵ Secondly, omitting or hiding the information causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise. Thirdly, this practice has to harm the collective interests of consumers.¹⁷⁶ During the time the Office of Fair Trading existed, several cases have been published in which Trading Standards have approached business because of a misleading omission.¹⁷⁷ Trading Standards can opt between civil enforcement or criminal enforcement, because a business is guilty of an offence in case of an unfair commercial practice.¹⁷⁸ In a few cases a business has been prosecuted because of a misleading omission.¹⁷⁹

172 S. 211 (1) (c) Enterprise Act 2002.

173 *Norfolk County Council Trading Standards v. Paul E* (Final Order obtained 18 September 2008) en *Fife Council v. Rose C* (Formal undertaking obtained 30 January 2008). These cases had been published on the website of the OFT. The website of the OFT has been archived (<https://webarchive.nationalarchives.gov.uk/20140525130048/http://oft.gov.uk/>), but it does not work properly anymore.

174 Reg. 6 CPR 2008. The Office of Fair Trading points to this possibility (Office of Fair Trading, Guidance on the UK Regulations implementing the Unfair Commercial Practices Directive 2008, p 33).

175 The term ‘material information’ covers any information requirement which applies in relation to a commercial communication as a result of a Community obligation (Reg. 6 (3) (b) CPR 2008).

176 S. 217 (9)–(11) Enterprise Act 2002 jo. Reg. 26 CPR 2008.

177 *Highland v. Norman H* (Interim Order obtained 21 June 2013), *Nottinghamshire County Council v. John C* (Court declares contempt of court 26 November 2012), *Nottinghamshire County Council v. Carl Nicholas M* (Court declares contempt of court 12 September 2012), *North Somerset Council v. Arcadian Investment Group Ltd* (Undertaking obtained with no admission 18 August 2011), *North Somerset Council v. John C trading as Golden-hoarde* (Undertaking obtained 16 August 2011), *Stoke-on-Trent City Council v. Anthony M t/a Easy Seal* (Final order obtained 24 September 2010), *Warwickshire Trading Standards v. Paul L* (Formal Undertaking obtained 12 July 2010), *Southampton Trading Standards Service v. Filife Ltd* (Undertaking obtained 29 September 2009), *Gloucestershire Trading Standards Service v. Millennium Experience Ltd* (Undertaking obtained 11 August 2009), *Gloucestershire Trading Standards Service v. Matters Consulting Ltd* (Undertaking obtained 11 August 2009), and *Buckinghamshire Trading Standards v. Falik N* (Undertaking obtained 24 September 2008). It is not clear whether in these cases business actually breached an information duty.

178 Reg. 8-18 CPR 2008.

179 *Regina (House of Cars) v. Derby Car and Van Contracts Limited* [2012] CTL 62, *The Queen v. Victor Mears, Henry Mears* [2011] WL 5105190, and *Regina v. Lewis Thomas Gilbertson* [2009] WL 2392208.

5.4. Dutch Law

54. The *Autoriteit Consument & Markt* (ACM) is an independent administrative authority responsible for the enforcement of consumer law in the Netherlands, and can act based on the *Wet handhaving consumentenbescherming*.¹⁸⁰ The Secretary of Economic Affairs provides staff to this body, but cannot instruct this authority in individual cases.¹⁸¹ The *Autoriteit Consument & Markt* can, in case of an infringement order cessation in combination with a penalty payment and/or impose a fine.¹⁸² These decisions can be scrutinized by court.¹⁸³

55. The *Autoriteit Consument & Markt* can only act in case of an infringement if the violation harms or could harm the collective interests of consumers.¹⁸⁴ Some guidelines have been given regarding the interpretation of ‘collective interests’ during the parliamentary debate. The objective of the provision can be important to the question of whether the collective interests have been damaged. Some regulations in consumer law aim to protect consumers at an individual level, others aim to protect consumers collectively against detrimental behaviour of businesses.¹⁸⁵ For example, provisions for warranty and provisions regarding the burden of proof concern the individual relation between consumers and business, regulations against unfair terms or misleading advertising aim to protect consumers at a collective level.¹⁸⁶ In any case, the number of complaints received by the ACM is not decisive for the question of whether the collective interest of consumers has been harmed.¹⁸⁷ In practice, a violation of the collective interests is assumed quite quickly.

56. The *Authority Consument & Markt* has several times imposed sanctions for breaches of information duties of the Consumer Rights Directive, and of its predecessor, the Distance Selling Directive.¹⁸⁸ Since 2007, it has twenty-two times imposed a sanction on businesses that breached an information duty under these directives.¹⁸⁹ In some of the cases, the *Authority Consument & Markt* act also

180 Art. 2.2 *Wet handhaving consumentenbescherming*, and Art. 2 (6) *Instellingswet Autoriteit Consument en Markt*.

181 Arts 5 (1) and 9 *Instellingswet Consument en Markt*.

182 Art. 2.9 *Wet handhaving consumentenbescherming*.

183 Art. 7 *Bijlage 2, Wet handhaving consumentenbescherming*.

184 Art. 1.1 (f) *Wet handhaving consumentenbescherming*.

185 *Kamerstukken II 2005/06*, 30411, 3, p 16 (MvT), and *Kamerstukken II 2005/06*, 30411, 6, p 3.

186 *Kamerstukken II 2005/06*, 30411, 3, p 16 (MvT), and *Kamerstukken I 2006/07* 30411, C, p 4 (MvA).

187 *Kamerstukken I 2006/07*, 30411, C, p 4 (MvA).

188 Art. 8.2a *Wet handhaving consumentenbescherming* jo. Art. 6:230l, and Art. 6:230m *Burgerlijk Wetboek*.

189 *Besluit 28 September 2016 (Cool Cat)*, *Besluit 28 September 2016 (Kiesdejuistesportbh)*, *Besluit 28 September 2016 (Hip voor de heb)*, *Besluit 28 September 2016 (Shoebaloo B.V.)*, *Besluit 28*

against a breach of an information duty based on unfair commercial practices.¹⁹⁰ A few of the twenty-two cases has led to a ruling.¹⁹¹

6. Conclusion

57. This article started with the question: ‘In which way can the information duties of the Consumer Rights Directive be classified, and do German, English and Dutch law provide for sanctions if businesses breach those information duties?’¹⁹² In section 2 the information duties under the Consumer Rights Directive have been classified, based on their objective, into three categories. Information duties regarding performance, and personal data, the obligation to provide information on time, and to provide it in a clear and comprehensible manner aim (1) to support the decision-making process of the consumer. The obligation to provide the information on a durable medium, and to do so on time aims (2) to enable the consumer to store the information which the business has provided. Information duties concerning personal data, the right to withdraw, the contract, and the obligation of the business to provide it in a clear and comprehensible manner aim (3) to facilitate the exercise of rights.¹⁹³

58. Section 3 discussed the remedies that German, English, and Dutch law provide to consumers in case of a breach of an information duty of the Consumer Rights Directive. In Germany, consumers can invoke *Irrtum* or *culpa in contrahendo*, in England, consumers can in case of a breach apply the statutory rights under the Consumer Rights Act 2015 or the right of redress under the Consumer

September 2016 (*Bever B.V.*), Besluit 15 September 2015 (*Energieflex*), Besluit 14 September 2015 (*Calatus*), Besluit 29 July 2015 (*Gewoon Energie*), Besluit 9 July 2015 (*WindUnie*), Besluit 18 June 2015 (*Nuon*), Besluit 21 September 2010 (*Garant-O-Matic*), Besluit 6 September 2010 (*NEM*), Besluit 17 June 2010 (*Celldorado*), Besluit 14 January 2010 (*Fotosessie*), Besluit 13 Oktober 2009 (*KPN*), Besluit 23 March 2009 (*Tele2*), Besluit 26 January 2009 (*Smart Services*), Besluit 4 December 2008 (*Pretium*), Besluit 7 August 2008 (*Holdvest Investments*), Besluit 23 April 2008 (*UPC*), Besluit 23 January 2008 (*PostGarant*), and Besluit 5 November 2007 (*Naturpost*).

190 For example, Besluit 21 September 2010 (*Garant-O-Matic*), Besluit 17 June 2010 (*Celldorado*), and Besluit 14 January 2010 (*Fotosessie*).

191 Rb. Rotterdam 13 December 2012, ECLI:NL:RBROT:2012:BY6184 (*NEM*), Rb. Rotterdam 14 June 2012, ECLI:NL:RBROT:2012:BW8407 (*Fotosessie*), Rb. Rotterdam 19 April 2012, ECLI:NL:RBROT:2012:BW3358 (*Artiq Mobile (Celldorado)*), Rb. Rotterdam 4 May 2011, ECLI:NL:RBROT:2011:BQ3528 (*Pretium*), Rb. Rotterdam 26 April 2010, ECLI:NL:RBROT:2010:BM3076 (*UPC*), and Rb. Rotterdam 25 February 2010, ECLI:NL:RBROT:2010:BL6368 (*PostGarant*). An appeal was lodged in two cases: College van Beroep voor het Bedrijfsleven 25 August 2015, ECLI:NL:CBB:2015:285 (*Celldorado*), and College van Beroep voor het Bedrijfsleven 4 April 2013, ECLI:NL:CBB:2013:BZ7807 (*PostGarant*).

192 See number 5 of this contribution.

193 See table 1, number 16.

Protection (Amendment) Regulations 2014, and in the Netherlands consumer can invoke *dwaling* or apply Article 6:193j (3) Dutch Civil Code. Problem of all those remedies is that they require a causal relationship between the breach and the conclusion of the contract with the trader, and/or damage. These requirements make the remedies inaccessible.

59. This inaccessibility could be solved partly by a presumption regarding causality. Whether such a presumption is in place, can be assessed on the basis of the objective of the information duty in question. If an information duty aims to support the decision-making process, the causal relationship can be assumed, and the consumer does not have to prove it. A presumption would not lead to a large increase in cases, due to the ignorance of consumers and their lack of financial means to litigate.

60. A breach of an information duty can also be qualified as a misleading omission in terms of the Unfair Commercial Practices Directive. This qualification is valuable because on the basis of this directive competitors can be given the right to take action against unfair commercial practices. Section 4, therefore, examined which remedies in Germany, England and the Netherlands apply in case of unfair commercial practices. Consumers do not have a remedy according to German law in case of an unfair commercial practice, but competitors do. They can go to court and get injunctive relief or claim damages. The number of cases shows that competitors based on the *Gesetz gegen den unlauteren Wettbewerb* (UWG) act on a large scale if a business breaches an information duty. They are the ones in their country who mainly sanction a breach of information duties, which is not surprising because they have the knowledge of the market and have the financial resources to litigate. In England, consumers have a right of redress against a business guilty of a forbidden practice, but this right does not apply in case of a misleading omission. Competitors do not have the right to act in case of an unfair commercial practice according to English law. In the Netherlands, consumers have the right to rescind a contract (Art. 6:193j (3) BW) if an unfair commercial practice occurs. Scholars discuss the question whether a competitor has the right to act in case of an unfair commercial practice. Despite this discussion, courts have assigned several times claims of competitors.

61. The three legal systems all have their own system of enforcing consumer law. In Germany, civil associations, *Verbraucherzentralen*, enforce consumer law through civil law. In England, departments of municipalities, Trading Standards, enforce consumer law through civil or criminal law. Extra regulations do apply to these organizations. In the Netherlands, a central administrative authority, *Autoriteit Consument & Markt*, enforces consumer law through administrative law. In contrast to consumers, enforcers can in all systems enforce a breach of an information duty quite easily. There must be an infringement, which can be a breach of an information duty or a misleading omission, and this infringement

must be able to harm the collective interests of consumers. Nevertheless, it is not the case that enforcers enforce a breach of information duties massively, which has to do with the facts that their resources are limited, and that they have to prioritize.

62. This article shows that sanctioning not only depends on the existence of sanctions but also who can invoke or impose them. A remedy that a consumer can invoke must be accessible for actual use. A competitor is more likely to apply a sanction because he has more incentives to do so. An enforcer has the obligation to enforce consumer law. He has to prioritize. In short, the crucial questions are ‘who can apply a sanction and what does this actor has to prove?’ In answering these questions, one can assess the applicability of sanctions.