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THE CONSUMER RIGHTS DIRECTIVE

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The Consumer Rights Directive

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The Consumer Rights Directive

1. Introduction

The Consumer Rights Directive¹ (hereinafter “CRD”) is the latest addition to the body of European directives in the field of consumer law. It was adopted at the end of 2011 and is now going through the process of implementation in the national laws of the Member States. In substance, however, the directive is not entirely new: it replaces two existing directives (regulating respectively distance contracts and off-premises contracts)² and makes smaller amendments to two others (pertaining to unfair terms and consumer sales).³ Nevertheless, the directive introduces a few significant changes and it has been hailed as an important step in consumer protection in Europe. When the European Parliament – by overwhelming majority – voted in favour of its adoption in June 2011, European Commissioner Viviane Reding stated:⁴

This is a good day for Europe’s 500 million consumers. Today’s adoption of the new EU Consumer Rights Directive will strengthen consumer rights by outlawing Internet fraudsters who trick people into paying for horoscopes or recipes that appear to be offered for free. Shoppers will no longer be trapped into buying unwanted travel insurance or car rentals when purchasing a ticket online. And everyone will have 14 days if they wish to return goods bought at a distance, whether by internet, post or phone.

This contribution discusses the impact of the CRD on Dutch private law.⁵ How will the new directive influence consumer rights and how does this fit with existing law? At the time of writing this contribution, the law implementing the CRD into Dutch law has just been published.⁶ It is expected to obtain parliamentary approval in the course of 2013 so that the new legislation can enter into force by 13 June 2014. The Dutch legislature aims to implement the directive’s provisions in places where they fit the systematic structure of the Dutch Civil Code. Seeing that the majority of the directive’s provisions relate to information duties, they are to be implemented in a new part 2B in Book 6, Title 5 of the Code, i.e., directly following the general rules on formation of contracts. A number of

¹ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights; OJ EU 22.11.2011, L 304/64.

² Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts; OJ EU 04.06.1997, L 144/19. Hereinafter: “Distance Selling Directive”. Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises; OJ EU 31.12.1985, L 372/31. Hereinafter: “Doorstep Selling Directive”.

³ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts; OJ EU 21.04.1993, L 95/29. Hereinafter: “Unfair Contract Terms Directive”. Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees; OJ EU 07.07.1999, L 171/12. Hereinafter: “Consumer Sales Directive”.

⁴ EU press release of 23 June 2011, MEMO/11/450, << http://europa.eu/rapid/press-release_MEMO-11-450_en.htm >>.

⁵ For other articles discussing this subject see: M.B.M. Loos, J.A. Luzak, ‘De nieuwe Richtlijn consumentenrechten’, TvC 2011/5, p. 184-192; M.B.M. Loos, J.A. Luzak, ‘Richtlijn consumentenrechten in eindfase’, NTER 2011/7, p. 249-253.

⁶ Implementatiewet Richtlijn consumentenrechten, *Kamerstukken II* 2012/2013, 33520. See also Memorie van implementatie van de Richtlijn consumentenrechten, << <http://www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2013/02/01/memorie-van-implementatie-van-de-richtlijn-consumentenrechten.html> >>. The proposed articles of the Dutch Civil Code that we refer to in this chapter are as introduced in this draft law.

provisions that are specific to sales contracts will be implemented in the title on sale in Book 7 of the Dutch Civil Code. Further, with the introduction of new provisions on distance and doorstep selling, the old provisions contained in part 9A of Book 7, Title 1 as well as the Doorstep Selling Act ('Colportagewet') will be repealed.⁷

Considering the background of the directive and its importance for European consumer law, however, we discuss consumer rights in the light of a broader perspective. The directive is emblematic for the current state of consumer law in the EU, being both the most recent and probably also the most contested legislation in European consumer law. The current text is the end product of a review of the consumer acquis which initially encompassed eight consumer law directives.⁸ The project gradually was brought back to its current scope, which is indeed much narrower but seemed – for now – the only feasible outcome in the light of disagreement on policy objectives and content between the Member States, the EU institutions and other stakeholders. The final text and the process through which it came about, therefore, are good indicators of the current state of affairs of European consumer law. In that light, we find it helpful to not only discuss the content of the new provisions introduced by the directive, but also to sketch the legislative (and political) background against which they came into being.

In the following pages, we will 'unpack' the text of the CRD by focusing on a number of key issues. Part 2 gives a brief overview of the directive's background and the major points on which criticism was raised and concessions were made in the legislative process. Parts 3-7 discuss the directive's content, starting with the scope of the directive before moving to the 'consumer' definition, information duties, the right of withdrawal, and a few other provisions that are new in comparison to previous legislation. We will indicate at which points discussions arose between the various legislative actors at EU and national level, and how these debates have played out in the final text of the directive.

Since the directive has not yet been implemented and the new rules, therefore, have not been tested in practice, we will not be able to fully assess the impact that the directive will have on Dutch private law, in particular on case law. Where relevant, we will, however, point out significant changes that the directive makes to the existing rules. Also, comparisons will be made with the rules of the directives that will be replaced by the CRD, taking into account relevant case law that has appeared since the first edition of the volume in which this contribution appears. For an introduction to the rules on distance contracts and off-premises contracts in Dutch law, we refer to the contributions on these directives in the previous edition.⁹

2. A brief history of the Consumer Rights Directive

The first draft of the CRD was introduced by the European Commission on 8 October 2008.¹⁰ After three years of intensive works the CRD has finally been adopted on 10 October 2011, however, its

⁷ A number of provisions from the Colportagewet will not be affected by the repeal of the Doorstep Selling Directive and will be incorporated into the Dutch Civil Code. For details see the Memorie van implementatie van de Richtlijn consumentenrechten [footnote 6], pp. 6-7.

⁸ See: Green Paper on the Review of the Consumer Acquis, COM(2006) 744 final, 08.02.2007, <<http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/green-paper_cons_acquis_en.pdf>>

⁹ J.B. Spath, 'De Europese colportagerichtlijn: een voet tussen de deur voor de consumentenbescherming', in: *Europa en Nederlands privaatrecht (serie Onderneming en Recht, deel 42-II)*, A.S. Hartkamp, C.H. Sieburgh and L.A.D. Keus (eds.), Deventer 2007, pp. 51-70; V. Mak, 'Contracten op afstand' ('Distance contracts'), *ibid.*, pp. 235-50.

¹⁰ Original draft of the Consumer Rights Directive introduced by the European Commission, COM(2008) 614 def, available online at:

scope was changed drastically during this time period.¹¹ The original intention of the European Commission was to revolutionize European consumer protection by introducing a full, horizontal harmonisation measure instead of four existing, important European consumer protection directives. These four directives were: the Consumer Sales Directive, the Unfair Contract Terms Directive, the Distance Selling Directive and the Doorstep Selling Directive. The first draft of the CRD received, however, many critical comments, among others because it seemed to aim at lowering the existing level of consumer protection in many Member States.¹² Therefore, it did not come as a surprise that the final adoption of the CRD was delayed and contrary to original promises did not take place within a year from the announcement of its draft text.

Due to the criticism received on the CRD's original draft the Council of the EU suggested a far-going limitation of its scope in its general approach published on 10 December 2010.¹³ Pursuant to the General Approach the provisions of the CRD should only have applied to distance or off-premises contracts.¹⁴ The limitation of the scope of the CRD's draft was also related to an impasse in the discussions on the further harmonisation of other European consumer protection rules among members of the Council of the EU. As a result, the Council's draft of the CRD fully harmonised only two, above-mentioned aspects of European consumer law. From other original chapters of the CRD that were to regulate the consumer sale contracts as well as unfair contract terms in consumer contracts only a few provisions remained in the text of the CRD, appropriately adapted. These provisions regulated the delivery of the goods¹⁵ as well as the passing of the risk¹⁶ when a consumer sale contract was concluded. These provisions were generally perceived as having a beneficial influence on currently binding European consumer sales law. However, due to the fact that the scope of application of the CRD was limited by the Council to consumer distance or off-premises sales contracts these provisions would not be applicable to regular sales contracts.

When the Council's draft reached the European Parliament, the latter initially rejected the idea of such a far-going limitation of the CRD's scope of application. In the first reading of the draft, the European Parliament decided to continue works on the original draft as introduced by the European Commission,

<<http://ec.europa.eu/consumers/rights/docs/COMM_PDF_COM_2008_0614_F_EN_PROPOSITION_DE_DIRRECTIVE.pdf>>.

¹¹ See EU press release of 10 October 2011, MEMO/11/675: <<<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/675&format=HTML&aged=0&language=en&guiLanguage=en>>>.

¹² Various authors in: *Modernising and Harmonising Consumer Contract Law*, G. Howells, R. Schulze (eds.), Munich 2009; H.-W. Micklitz, N. Reich, 'The Commission Proposal for a "Directive on Consumer Rights"', *Common Market Law Review*, 2009, vol. 46, p. 471; P. Rott, E. Terry, 'The Proposal for a Directive on Consumer Rights: No Single Set of Rules', *Zeitschrift für Europäisches Privatrecht*, 2009, p. 456; M.B.M. Loos, 'Herziening van het consumentenrecht: een teleurstellend richtlijn-voorstel', *TvC* 2008/5, p. 173-178; M.B.M. Loos, 'Volledige harmonisatie van het Europese consumentenrecht: voorzichtigheid geboden!', *TvC* 2009/2, p. 33-36; 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* 2011/5, p. 168-177; various authors in: *Het voorstel voor een Europese richtlijn consumentenrechten. Een Nederlands perspectief*, M.W. Hesselink, M.B.M. Loos (eds.), Den Haag: Boom, 2009.

¹³ Proposal for a Directive of the European Parliament and of the Council on consumer rights – general approach was published on 10 December 2010 and is available at: <<<http://register.consilium.europa.eu/pdf/en/10/st16/st16933.en10.pdf>>>.

¹⁴ See Art. 4 Par. 1 of the proposal [footnote 13]. The Council of the EU suggested also a change of the name of the directive to: Directive on consumer rights in distance and off-premises contracts.

¹⁵ See Art. 22 of the proposal [footnote 13].

¹⁶ See Art. 23 of the proposal [footnote 13].

and adopted its texts, with amendments, on 24 March 2011.¹⁷ In order to reach a compromise with other European bodies involved in the legislative process, the European Parliament suggested in its draft to change the character of the harmonisation of the provisions of the CRD concerning unfair contract terms and consumer sales contract from full to minimum harmonisation. As a result, the difference between the positions of the European Parliament and the Council of the EU was not as great as it would have seemed at a glance. After all, due to changes suggested by the Council of the EU the unfair contract terms and consumer sales contracts would still have been regulated by the currently binding directives with minimum harmonisation clauses.

Upon realizing this, it was just a step away to a final compromise between the European Parliament, the Council of the EU and the European Commission. On 23 June 2011 the European Parliament accepted in the first reading the amended draft of the CRD.¹⁸ This text was accepted without further adjustments by the Council of the EU. The final wording of the CRD is a result of intensive negotiations between the representatives of the European Commission, the Council of the EU and the European Parliament. The CRD's text was published on 22 November 2011 and it should be implemented by the Member States by 13 December 2013. It will start applying, at the latest, to consumer contracts concluded after 13 June 2014.¹⁹

3. Scope of the Directive

As indicated in the previous part, the CRD has had to narrow its ambitions on numerous points. As a result, its scope is now limited in several respects. The original draft of the CRD intended to fully harmonise the information duties and the associated right of withdrawal, as well as provisions regulating the consumer sales contracts and unfair contract terms.²⁰ In the final text, the scope of the directive has been limited mainly to distance and off-premises contracts. As to full harmonisation, the directive now cuts a careful balance between those provisions that are fully harmonised, and those for which Member States are allowed to adopt a higher level of consumer protection. Besides this, the scope of the directive is circumscribed also by other EU legislation and national laws. What follows is a brief overview of the 'harmonised field'.²¹

¹⁷ See European Parliament amendments adopted on 24 March 2011 to the proposal for a directive of the European Parliament and of the Council on consumer rights – first reading, available online at: <<<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0116+0+DOC+XML+V0//EN>>>. It is relevant that the Parliament did not vote on the proposal but sent the document back to further works in the commissions, which meant that further changes could still be adopted in the first reading.

¹⁸ See EU press release [footnote 4]. The text adopted by the European Parliament: <<<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0293+0+DOC+XML+V0//EN>>>.

¹⁹ See <<http://ec.europa.eu/justice/consumer-marketing/rights-contracts/directive/index_en.htm>>.

²⁰ On full harmonisation see: V. Mak, 'Review of the Consumer Acquis — Towards Maximum Harmonisation?', *European Review of Private Law*, 2009, vol. 17, p. 55ff; G. Howells, R. Schulze, 'Overview of the Proposed Consumer Rights Directive', in: *Modernising and Harmonising Consumer Contract Law*, G. Howells, R. Schulze (eds.), Munich 2009, pp. 6–8; H.-W. Micklitz, 'The Targeted Full Harmonisation Approach: Looking Behind the Curtain', in: *Modernising and Harmonising Consumer Contract Law*, G. Howells, R. Schulze (eds.), Munich 2009, p. 47ff; M. Hesselink, 'Towards a Sharp Distinction between b2b and b2c? On Consumer, Commercial and General Contract Law after the Consumer Rights Directive', *ERPL*, 2010, vol. 1, pp. 78–91; H.-W. Micklitz, N. Reich, [footnote 12], pp. 474–481; P. Rott, E. Terryn, [footnote 12], pp. 458–465; M.B.M. Loos, *Full harmonization as a regulatory concept and its consequences for the national legal orders. The example of the Consumer rights directive*, w: *Vollharmonisierung im Europäischen Verbraucherrecht?*, M. Stürner (ed.), Munich 2010, p. 47 ff.

²¹ For this term, see H.-W. Micklitz, N. Reich [footnote 12], p. 480.

3.1 Minimum and maximum harmonisation: What is out and what is in?

The CRD mostly focuses on regulating the information duties and the right of withdrawal applicable to distance or off-premises contracts. Article 4 of the CRD determines clearly, that the CRD aims at achieving full harmonisation of the EU consumer law. In accordance with this provision, there are only a few options given to the Member States in the CRD to derogate from the full harmonisation character of the CRD.

From the perspective of Dutch law, it is good to mention at this point that the Dutch legislature has chosen mostly not to make use of any of the ‘may-options’ in the CRD, i.e., the points where the directive explicitly indicates that the Member States ‘may’ adopt stricter requirements than those laid down in the directive.²² Only in two specific instances has the legislature chosen to pursue stricter rules in accordance with the directive’s options. First, the Member States may exclude the application of the CRD to off-premises contracts if under such contracts the payment obligation for the consumers does not amount to more than 50 euro (art. 3 par. 4).²³ The Dutch legislature has opted to do so as obliging traders to provide all the required information in such cases imposes significant costs.²⁴ Second, the Member States may limit the amount of information that would need to be given to consumers by traders in case of off-premises contracts, when consumers clearly approached the trader in order to conclude a contract for repair or maintenance and the contract would be immediately performed and did not cost consumers more than 200 euro (art. 7 par. 4). The Dutch legislature has chosen to ‘opt-out’ of this option, as permitted by art. 7 par. 4, since the additional information will still have to be given at some point in the transaction and therefore this option is thought not to result in significant cost savings.²⁵

Another option given to the Member States with regards to the process of implementation of the directive was to introduce a requirement for the trader who concluded a contract with a consumer over a phone to confirm in writing the offer made to the consumer, or on a durable medium – at consumer’s request. Such a contract would only then be binding for the consumer after he signed the offer or after he sent his written (or expressed on a durable medium) agreement to the conclusion of the contract to the trader (art. 8 par. 6). Such a regulation should limit the negative effects of so-called *cold calling*, that is, consumers receiving unsolicited phone calls from unknown traders who surprise them with offers to conclude contracts.²⁶ The Dutch legislature has chosen to adopt this option, following a motion from the Dutch parliament.²⁷

Other ‘may-options’ were not used by the Dutch legislature. For the sake of comprehension, we discuss them briefly. First, an important option was given to the Member States with regard to maintaining or adopting language requirements that would be applicable to information duties in

²² Memorie van implementatie van de Richtlijn consumentenrechten [footnote 6], p. 6.

²³ That amount was a compromise between the suggestion of the European Parliament to set it at 40 euro but make it a binding, full harmonisation provision, and the proposal of the Council of the EU to make it an option for the Member States and to set the amount at 60 euro. Pursuant to the Doorstep Selling Directive the Member States could have excluded the application of the consumer protection to off-premises contracts worth less than 60 euro. The Netherlands used the option and at the moment Colportagewet is not applicable to contracts with a financial value of less than 34 euro, see: art. 26 par. 1 Colportagewet with art. 3 Uitvoeringsbesluit Colportagewet; correcting for inflation, the amount will from now on be set at 50 euro.

²⁴ Memorie van implementatie van de Richtlijn consumentenrechten [footnote 6], p. 6. Proposed art. 6:230h par. 2 sub a of the Dutch Civil Code.

²⁵ *ibid.*

²⁶ See, e.g., CJEU judgment of 10 May 1995, case C-384/93 (Alpine Investments BV).

²⁷ Memorie van implementatie van de Richtlijn consumentenrechten [footnote 6], p. 7. Proposed art. 6:230v par. 6 of the Dutch Civil Code.

national laws (art. 6 par. 7). This means that the Member States may oblige traders to provide consumers with information in the language of the consumer.²⁸ This could guarantee more comprehensiveness and clarity of the information given to consumers. This, as well as two other options relating to information duties were not taken up by the Dutch legislature (see part 5.1 below).

Further, pursuant to art. 9 par. 3 the Member States are free to maintain already binding provisions in their national laws forbidding traders to collect payment from consumers for a specific amount of time after conclusion of the contract. However, from the moment of the transposition of the CRD adoption of such a prohibition is forbidden. In this instance, it was the European Parliament who managed to convince other European bodies to its position on the matter. This success in allowing to maintain stricter levels of consumer protection in some Member States on this point was offset by a failure of the European Parliament to introduce a provision to the CRD that would allow the Member States to prolong the maximum period of time for making use of the right of withdrawal in case of the breach of information duties regarding the right of withdrawal, beyond the period of one year and 14 days granted by the CRD in such a case. If any Member State decides to use one of the options to broaden consumer protection provided for in the CRD, it needs to notify the European Commission about this (art. 29).

3.2 Scope in relation to other EU legislation and to national law

As far as the scope of application of the CRD is concerned, art. 3 par. 2²⁹ determines that its provisions should apply to contracts concluded between consumers and traders (art. 3 par. 1³⁰), however, if specific areas within which these contracts are concluded are also regulated by other EU legislation, then the provisions of these other EU legal acts have priority with respect to provisions of the CRD. This seems to indicate that, for example, specific provisions of directive 2006/123/EC on services in the internal market,³¹ as well as directive 2000/31/EC on e-commerce³² which, accordingly, regulate conclusion of service contracts or e-commerce contracts, would have priority in application before the provisions of the CRD. That does not, however, seem to be the case with regard to information duties in sales contracts. In general, the information duties contained in the CRD are supposed to exhaust information duties of traders,³³ though they clearly do not create an obstacle to place other information duties on traders on the basis of other directives (for example, the two above-listed).³⁴ Notwithstanding this, pursuant to art. 6 par. 8 which is applicable to distance and off-premises contracts if information duties flowing from the directive on services in the internal market or the directive on e-commerce would differently regulate the scope of the information and the method of its provision to consumers than the text of the CRD, the provisions of the CRD on this matter have priority and are decisive in establishing whether there was a breach of information duties.³⁵

²⁸ Pursuant to recital 15 CRD the directive does not require full harmonisation in that scope.

²⁹ Implemented in proposed art. 6:230i par. 3 of the Dutch Civil Code.

³⁰ Implemented in proposed art. 6:230h par. 1 of the Dutch Civil Code.

³¹ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market; OJ EU 27.12.2006, L 376/36.

³² Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on electronic commerce; OJ EC 17.07.2000, L 178/1.

³³ See art. 7 par. 5 and art. 8 par. 10 CRD.

³⁴ As far as the binding character of the information duties of art. 9-11 of the E-commerce Directive for distance contracts see art. 8 par. 9 CRD.

³⁵ Implemented in proposed art. 6:230i par. 4 of the Dutch Civil Code.

When would, therefore, art. 3 par. 2 be applied? For example, when additional duties are placed on traders by directives 2009/72/EC³⁶ and 2009/73/EC³⁷ concerning common rules for the internal market in electricity and natural gas. The CRD is explicit about its application to consumer contracts concerning supply of water, natural gas, electricity and district heating, including by public providers, as long as these commodities are delivered to consumers on a contractual basis (art. 3 par. 1). However, the CRD does not regulate the public law aspects of conclusion of such contracts, for example, the necessity of the continuity of supply of electricity during extremely cold temperatures.

Pursuant to art. 3 par. 3³⁸ the CRD is not applicable to contracts related to: social services (e.g., social housing, childcare); healthcare services; gambling; financial services; package travel; timeshare and other holiday products; construction, conversion of existing buildings and rental of accommodation for residential purposes. Further, any contract concluded through a vending machine or an automated commercial premise, as well as through public payphone with telecommunications operators is also excluded from the scope of CRD's application. The exclusion encompasses also contracts concluded in the presence of a public office-holder who has a statutory obligation to be independent and impartial and who must ensure, by providing comprehensive legal information, that the consumer only concludes the contract on the basis of careful legal consideration and with knowledge of its legal scope.

Paragraph 5 of this article clearly states that in so far as general contract law aspects are not regulated in the CRD, the CRD shall not affect national general contract law which means that it is up to national legislation to regulate matters of, e.g., validity or formation of the contract. For the sake of clarity, par. 6 guarantees traders the right to offer consumers contractual arrangements that are more beneficial to them than the protection granted by the CRD, e.g., by granting consumers the right of withdrawal when the CRD excluded its application or by prolonging the length of the cooling-off period granted by the CRD.³⁹

4. Definition of the 'consumer'

In the original draft of the CRD the European Commission decided to sustain a narrow version of the term 'consumer' and, therefore, a narrow scope of its application.⁴⁰ The European Commission defined, accordingly, a consumer as "any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession" (art. 2a of the draft of the CRD). The use of this wording draws attention since in the Draft Common Frame of Reference,⁴¹ which was prepared by the academics upon a mandate from the European Commission, purposefully the definition of a consumer was broadened to: "any natural person who is acting *primarily* for purposes which are not related to his or her trade, business or profession."⁴² (emphasis – J.L., V.M.). This broader definition of a term 'consumer' would allow for the inclusion also of mixed (dual purpose) contracts in the scope of the application of the CRD. For example, a person buying a computer, which would be used both to correct professional correspondence as well as to play

³⁶ Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity; OJ EU 14.08.2009, L 211/55.

³⁷ Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas; OJ EU 14.08.2009, L 211/94.

³⁸ Implemented in proposed art. 6:230h par. 2 sub b-m and par. 5 of the Dutch Civil Code.

³⁹ Implemented in proposed art. 6:230i par. 1 of the Dutch Civil Code.

⁴⁰ About the difference in the scope of the notion of 'consumer', see, e.g.: H-W. Micklitz, N. Reich [footnote 12], pp. 481-484.

⁴¹ *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (Outline edition)*, Ch. von Bar et al. (eds.), München 2009.

⁴² Draft Common Frame of Reference, Annex I, p. 329.

computer games, could then be seen as a consumer, as long as the computer would not be used mostly for professional purposes. In order to include such cases within the scope of the application of the CRD, the European Parliament broadened this definition. However, the Council of the EU was a proponent of the narrow definition introduced by the European Commission and based on the existing consumer acquis. In the discussions on this provision, the European Parliament unfortunately, in our opinion, failed to convince the other European institutions and in the final text of the CRD the term ‘consumer’ was defined narrowly. However, pursuant to the proposal of the European Parliament a recital 17 was added, according to which if a person concluded a dual purpose contract, buying a good partly for professional purposes, but these would be so limited as not to be predominant in the overall context of the contract, then such a person should be considered a consumer. Additionally, Member States are free to broaden the scope of the application of the CRD to other persons, that is, such who do not fall under the definition of a consumer.⁴³ For clarity’s sake, this has been expressly stipulated in recital 13, where possible extensions of the scope of the application of the CRD are stated, e.g., to non-governmental organisations, start-ups or small and medium-sized enterprises.

5. Information duties

Information duties have become a central element of any consumer law legislation in the EU. The CRD includes a broad range of information duties that in many respects are new in comparison to pre-existing legislation. We will discuss them here, with reference to the potential impact they may have.

5.1 Information duties for contracts concluded ‘on-premise’⁴⁴

Article 5 determines the information duties for contracts concluded in shops or on other business premises.⁴⁵ Pursuant to this provision, a trader needs to provide a consumer with all information mentioned in this article before the consumer is bound by a contract or any corresponding offer. The information given becomes part of the terms of the contract, except where the parties determine otherwise. Accordingly, any information that has not been corrected before the conclusion of the contract, or corrections with which the consumer explicitly agrees after the conclusion of the contract become part of the contract. The consumer will be entitled to hold this information for correct, pursuant to the general provisions of Dutch contract law.⁴⁶

Notably, when providing the information a trader needs to take into consideration any specific needs of particularly vulnerable consumers (recital 34). The reference to vulnerable consumers is new in this context. It brings to mind the notion of consumers adopted in directive 2005/29 on unfair commercial practices.⁴⁷ That directive uses the ‘average consumer’ as a benchmark to determine whether a practice is unfair and determines that in cases where a group of vulnerable consumers can be identified

⁴³ See e.g., M. Hesselink [footnote 20], p. 74.

⁴⁴ An analysis of information duties of the draft proposal was presented, e.g. by: A. Nordhausen Scholes, ‘Information Requirements’, in: *Modernising and Harmonising Consumer Contract Law*, G. Howells, R. Schulze (eds.), Munich 2009, p. 216ff; J.A. Luzak, ‘Information duties in the new proposal for the Directive on consumer rights’, in: *Het voorstel voor een Europese richtlijn consumentenrechten*, M.B.M. Loos, M. Hesselink (eds.), Den Haag 2009, p. 113ff; H.-W. Micklitz, N. Reich, [footnote 12], pp. 484–492; P. Rott, E. Terry, [footnote 12], pp. 467–469.

⁴⁵ Implemented in proposed art. 6:230l of the Dutch Civil Code.

⁴⁶ See art. 7:17 par. 2 and art. 18 par. 1 of the Dutch Civil Code for consumer sales contracts; and art. 6:228 par. 1 sub a of the Dutch Civil Code and HR 15 november 1957, *NJ* 1958, 67 (*Baris/Riezenkamp*) for ‘dwaling’.

⁴⁷ 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; OJ EU 11.6.2005, L 149/22. Hereinafter: “UCP Directive”.

the assessment should be made from the perspective of an average member of that group (UCP Directive, art. 5).

Art. 5 par. 3 of the CRD declares that Member States may decide not to implement the information duties listed in the article with respect to contracts which involve day-to-day transactions and which are performed immediately at the time of their conclusion. It seems, that this exception could apply to contracts concluded in a grocery store, where the consumer, upon payment, immediately receives the purchased goods. What exactly the term ‘day-to-day transactions’ encompasses is not fully clear, since this term was not defined in the CRD. For example, this term could possibly but not necessarily, apply to contracts concluded and immediately performed with a shoemaker for a repair of shoes or with an operator of a copy machine to copy some documents etc. Another question may be raised with respect to purchases that a consumer makes in, e.g., an IKEA store: do the sellers in IKEA have an information duty if a consumer purchases a mattress or a Billy bookcase (which would need to be delivered) but they do not have that obligation when a consumer buys towels, a hammer and a lamp (where he receives and takes them home immediately)? Because of the uncertain limits of the term, the Dutch legislature has chosen not to exclude ‘day-to-day transactions’ from the scope of the implementing legislation.⁴⁸

Pursuant to art. 5 par. 4 of the CRD the Member States may maintain or adopt additional pre-contractual information duties as far as contracts concluded on business premises are concerned. This provision is one of a few in the CRD which have a minimum harmonisation character. Taking into account the magnitude of the information duties introduced by the CRD it is not surprising that the Dutch legislature has chosen not to extend their scope while implementing the CRD.⁴⁹

The CRD specifically states that the above-mentioned information duties are also applicable to the contracts for the supply of gas, water, electricity when they are not sold in a limited volume or quantity, as well as of district heating and of digital content which is not supplied on a tangible medium (art. 5 par. 2 CRD).⁵⁰

The CRD clearly determines that the traders are not only obliged to inform consumers about the arrangements for payment, delivery and performance of the contract, but also need to determine the time of delivery of goods or of performance of services, as well as the trader’s complaint handling policy (art. 5 par. 1d CRD).⁵¹ Furthermore, the traders are obliged to remind consumers of the existence of a legal guarantee of conformity for goods (art. 5 par. 1e CRD).⁵²

As far as digital content contracts are concerned, there are special, detailed information duties binding the traders when such a contract is to be concluded. The traders are, accordingly, obliged to inform consumers on the functionality, including applicable protection measures, of digital content and on any relevant interoperability thereof with hardware and software that the trader is or should be aware of (art. 5 par. 1g and h CRD).⁵³ The notion of ‘functionality’ should refer to the ways in which digital content can be used, e.g., for the tracking of consumer behaviour, as well as to the absence or presence of any technical restrictions such as, e.g., region coding. The notion of ‘relevant interoperability’ means to describe the information regarding the standard hardware and software environment with

⁴⁸ Memorie van implementatie van de Richtlijn consumentenrechten [footnote 6], p. 5.

⁴⁹ *ibid.*

⁵⁰ Implemented in proposed art. 6:230h par. 1 of the Dutch Civil Code.

⁵¹ Implemented in proposed art. 6:230l sub d of the Dutch Civil Code.

⁵² Implemented in proposed art. 6:230l sub e of the Dutch Civil Code.

⁵³ Implemented in proposed art. 6:230l sub g-h of the Dutch Civil Code.

which the digital content is compatible, e.g., the operating system (recital 19 CRD). The Dutch legislature has chosen not to define these terms in the implementing legislation.

5.2 Information duties for distance and off-premises contracts

Besides the information duties of Article 5 CRD that are applicable to contracts concluded on business premises, the CRD also determines information duties for distance and off-premises contracts in Article 6 CRD.⁵⁴ Based on its Paragraph 5 these information duties constitute an integral part of the contract, unless the parties explicitly agree otherwise.⁵⁵ This means that if a trader does not rectify incorrect information given to a consumer prior to conclusion of a contract or if upon conclusion of a contract the consumer does not explicitly agree to correction of such erroneous information, then the consumer may rely on the correctness of the information provided to him and base his expectations as to the delivered goods or provided services on this information. The burden of proof that the information duties were fulfilled rests with a trader (art. 6 par. 9 CRD).⁵⁶

Just like in case of contracts concluded on business premises, a trader needs to provide a consumer with all required information prior to being bound by a distance or off-premises contract, or any corresponding offer (art. 6 par. 1 CRD).⁵⁷ These pre-contractual information duties are also applicable to contracts concluded for the supply of gas, water or electricity when they are not sold in a limited volume or quantity, as well as of district heating and of digital content which is not supplied on a tangible medium (art. 6 par. 1r and 1s CRD).⁵⁸

Among other information duties, a trader is obliged to inform a consumer about the existence and the conditions of deposits or other financial guarantees to be paid or provided by the consumer at the request of the trader, including an arrangement whereby an amount is blocked on the consumer's credit or debit card (art. 6 par. 1q and recital 33 CRD).⁵⁹ A trader has to also inform a consumer that the consumer will have to bear the cost of returning the goods in case of withdrawal. In case the goods, by their nature, cannot normally be returned by post, the trader needs to cover the cost of returning the goods to the consumer (art. 6 par. 1i CRD).⁶⁰ Pursuant to recital 36 a trader would fulfil this last requirement by, e.g., pointing out a carrier (for instance the one he assigned for the delivery of the goods to the consumer) and the price that carrier demands for such a service. Where the cost of returning the goods cannot reasonably be calculated in advance by the trader, for example because the trader does not offer to arrange for the return of the goods himself, the trader should provide a statement that such a cost will be payable, and that this cost may be high, along with a reasonable estimation of the maximum cost, which could be based on the cost of delivery to the consumer. If the trader does not provide the consumer with such information, then the consumer shall be released from his obligation to cover the costs of returning the goods to the trader in case of withdrawal (art. 6 par. 6 CRD).⁶¹

5.3 Format of information for distance and off-premises contracts

⁵⁴ Implemented in proposed art. 6:230m par. 1 of the Dutch Civil Code.

⁵⁵ Implemented in proposed art. 6:230n par. 2 of the Dutch Civil Code.

⁵⁶ Implemented in proposed art. 6:230n par. 4 of the Dutch Civil Code.

⁵⁷ Implemented in proposed art. 6:230m par. 1 of the Dutch Civil Code.

⁵⁸ Implemented in proposed art. 6:230m par. 1 sub r-s of the Dutch Civil Code.

⁵⁹ Implemented in proposed art. 6:230m par. 1 sub q of the Dutch Civil Code.

⁶⁰ Implemented in proposed art. 6:230m par. 1 sub i of the Dutch Civil Code.

⁶¹ Implemented in proposed art. 6:230n par. 3 of the Dutch Civil Code.

The Council of the EU and the European Parliament differed as to the form in which the information should be provided to consumers in case of off-premises contracts. The Council suggested a regulation pursuant to which the information would be provided on a durable medium unless the consumer would agree to receiving this information in writing. The Parliament preferred a solution according to which the trader would need to provide the information to the consumer on a prescribed order form, annexed to the CRD. The final text of the CRD is a compromise: in general, a consumer needs to receive the information in writing unless he agrees to the trader using another durable medium (art. 7 par. 1 CRD).⁶²

The form in which information was to be provided when distance contracts were concluded was less controversial. The CRD determines that the information needs to be given in a way appropriate to the means of distance communication used. The European Parliament introduced a requirement pursuant to which the trader needed to clearly inform the consumer about his obligation to pay when a contract was concluded by electronic means. This provision was approved by all European institutions and further specified in the text of the CRD. Accordingly, if such a contract places an obligation on the consumer to pay, the trader makes the consumer aware of the required information in a clear and prominent manner and directly before the consumer places his order (art. 8 par. 2 CRD).⁶³ Moreover, pursuant to art. 8 par. 2 sentence 2 the trader is obliged to make sure that the consumer when placing his order explicitly acknowledges that he is aware that the order implies an obligation to pay.⁶⁴ This may take place by the consumer placing an order, if placing of that order entails activating a button or a similar function, provided that the button or similar function is labelled in an easily legible manner only with the words ‘order with obligation to pay’ or a corresponding unambiguous formulation indicating that placing the order entails an obligation to pay the trader. The sanction for not fulfilling of that requirement by the trader is harsh, since the consumer would not be seen as being bound by the contract or order.

6. Right of withdrawal

Both directives being replaced by the CRD, the Distance Selling Directive and the Doorstep Selling Directive, granted consumers the right of withdrawal.⁶⁵ The right of withdrawal allows consumers to terminate a concluded contract within a specific period of time without giving any reason for it. The cooling-off period within which a consumer could use his right of withdrawal differed between these two directives, from 7 working days in case of distance selling contracts to 7 calendar days in case of doorstep selling contracts. Most of the more recent directives assumed that a period of 14 calendar days was the optimal period for withdrawing from a contract⁶⁶, therefore, it did not surprise that the

⁶² On problems when using other solutions see, e.g.: G. Howells, R. Schulze, [footnote 20], p. 15. Implemented in proposed art. 6:230t par. 1 of the Dutch Civil Code.

⁶³ Implemented in proposed art. 6:230v par. 2 of the Dutch Civil Code.

⁶⁴ Implemented in proposed art. 6:230v par. 3 of the Dutch Civil Code.

⁶⁵ See art. 6 of the Distance Selling Directive and art. 5 of the Doorstep Selling Directive.

⁶⁶ See, e.g.: art. 6 par. 1 Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services; OJ EC 09.10.2002, L 271/16; art. 6 par. 1 Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts; OJ EC 03.02.2009, L 033/10; art. 14 par. 1 Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers; OJ EU 22.05.2008, L 133/66.

CRD also adopted such a timeframe, aiming at further harmonisation of the consumer cooling-off periods (art. 9 par. 1 CRD).⁶⁷

6.1 Commencement of the cooling-off period

Both the Council of the EU and the European Parliament agreed that the length of the cooling-off period should be the same for the two main types of contracts covered by the directive: distance and doorstep selling contracts.⁶⁸ However, the commencement of that period depends on the *object* that these contracts relate to, that is, the sale of goods and the provision of services. In case of contracts for the sale of goods, the right of withdrawal starts running from the moment of the delivery of goods⁶⁹, while in case of contracts for the supply of services, water, electricity etc. that period starts running from the moment of conclusion of the contract (art. 9 par. 2 CRD).⁷⁰

If the trader does not provide the consumer with the information on the existence of the right of withdrawal and the conditions of its performance, the cooling-off period is prolonged to one year from the end of the initial withdrawal period (art. 10 par. 1 CRD).⁷¹ Interestingly, if the trader does not provide consumer with other pre-contractual information listed in the CRD than the one regarding the right of withdrawal, the sanction of the prolongation of the cooling-off period does not apply (which was the case under previously binding rules).^{72,73} This means that in case of the breach of pre-contractual information other than referring to the right of withdrawal, the Member States will have free reign to determine the sanctions for it, provided that they would be effective, proportional and dissuasive (art. 24 CRD). Taking into account the full harmonisation character of the provisions of the CRD, it is questionable whether the Member States would be able to sanction the breach of the pre-contractual information duties from the CRD by prolonging the cooling-off period for the consumer. It is likely, rather, that the sanctions that would apply in the Netherlands would enable the consumer a termination of the contract as a result of a mistake,⁷⁴ fraud⁷⁵ or a compensation for non-performance of (pre-)contractual obligations.⁷⁶ In some cases, the trader could also be fined for conducting an unfair commercial practice.⁷⁷

6.2 Format of the withdrawal

As far as the possibility of termination of the contract is concerned, the consumer does not need to conform to a specific form of a termination notice, as long as his notice is clear.⁷⁸ Notwithstanding this,

⁶⁷ See, e.g.: M.B.M. Loos, 'Rights of Withdrawal', in: *Modernising and Harmonising Consumer Contract Law*, G. Howells, R. Schulze (eds.), Munich 2009, p. 242ff. Implemented in proposed art. 6:230o par. 1 of the Dutch Civil Code.

⁶⁸ Other solutions have been criticised by, e.g.: G. Howells, R. Schulze, [footnote 20], pp. 16–17; M.B.M. Loos, [footnote 67], p. 253ff.

⁶⁹ Implemented in proposed art. 6:230m par. 1 sub b of the Dutch Civil Code.

⁷⁰ Implemented in proposed art. 6:230o par. 1 sub a and sub c of the Dutch Civil Code.

⁷¹ Implemented in proposed art. 6:230o par. 2 of the Dutch Civil Code. If during this period of one year the trader provides the consumer with necessary information, then the consumer will have 14 days to withdraw from the contract since that day; see art. 10 par. 2 CRD.

⁷² See art. 6 par. 1 Distance Selling Directive.

⁷³ See also: M.B.M. Loos [footnote 67], p. 257.

⁷⁴ Art. 6:228 of the Dutch Civil Code.

⁷⁵ Art. 3:44 of the Dutch Civil Code.

⁷⁶ Art. 6:74 and 6:95 ff. of the Dutch Civil Code.

⁷⁷ Art. 2.9 of the *Wet handhaving consumentenbescherming* (Consumer protection enforcement Act) together with 6:193a ff. of the Dutch Civil Code.

⁷⁸ For critical remarks on this solution see, e.g.: G. Howells, R. Schulze, [footnote 20], p. 18. Implemented in proposed art. 6:230o par. 3 of the Dutch Civil Code.

the trader is obliged to provide the consumer with an example of a model withdrawal form,⁷⁹ and he may enable the consumer to fill in such a model form electronically, on the internet website of the trader. The Dutch legislature has chosen not to add the model withdrawal form in the implementing legislation and instead refers to the model withdrawal form as attached to the Directive.⁸⁰ If the consumer uses that last method to withdraw from a contract, the trader is obliged to immediately send the consumer a confirmation, on a durable medium, of receipt of his termination notice (art. 11 par. 3 CRD).⁸¹ This is a significant safety measure for the protection of consumers' rights, since it enables consumers to present proof that they withdrew from a contract within the prescribed period (art. 11 par. 4 CRD).⁸² The validity of the timely withdrawal from the contract is governed by the postal rule, or mailbox rule: the moment of sending the termination notice by the consumer to the trader is decisive. Therefore, if the consumer sends the termination notice within the cooling-off period, but the trader receives it after this period has lapsed, the withdrawal from the contract is seen as valid (art. 11 par. 2 CRD).⁸³

6.3 Consequences of exercising the right of withdrawal

The main consequence of the exercise of the right of withdrawal by the consumer is the termination of the contractual relation between the trader and the consumer (art. 12 CRD)⁸⁴, as well as automatic termination of any ancillary contracts, e.g., a consumer credit contract, which was concluded with the trader to finance the conclusion of a distance or a doorstep selling contract (art. 15 CRD).⁸⁵ When the consumer uses his right of withdrawal, the trader is obliged to immediately return to the consumer all payments he had received from the consumer, not later than within 14 days from the day of the receipt of the termination notice (art. 13 par. 1 sentence 1 CRD).⁸⁶ This includes, pursuant to the Court of Justice of the European Union (CJEU) judgment in the *Heine* case⁸⁷, also the delivery costs. However, while this judgment states an obligation of the trader to return to the consumer all amounts paid to him, including the costs of the delivery, the CRD's provisions declare that the trader is not obliged to reimburse supplementary costs of the delivery, if the consumer has expressly opted for a type of delivery other than the least expensive type of standard delivery offered by the trader, e.g., 24-hour express delivery (art. 13 par. 2 and recital 46 CRD).⁸⁸ In general, the trader needs to reimburse the consumer by using the same means of payment as the consumer used for the initial transaction, unless the consumer has expressly agreed otherwise and provided that the consumer does incur any fees as a result of such reimbursement (art. 13 par. 1 sentence 2 CRD).⁸⁹ Pursuant to recital 46 of the CRD the consumer may expressly agree to reimbursement by voucher, which he would be able to use for his next order. Unfortunately, the CRD does not provide for the trader's duty to inform the consumer that he has a right to demand the reimbursement in cash.⁹⁰

⁷⁹ The model withdrawal form needs to comply with the requirements specified in Annex I, part B; see art. 11 par. 1 CRD.

⁸⁰ Implemented in proposed art. 6:230o par. 3 of the Dutch Civil Code.

⁸¹ Implemented in proposed art. 6:230o par. 4 of the Dutch Civil Code.

⁸² Implemented in proposed art. 6:230o par. 5 of the Dutch Civil Code.

⁸³ Implemented in proposed art. 6:230o par. 3 of the Dutch Civil Code.

⁸⁴ This has already been regulated by art. 6:271 of the Dutch Civil Code.

⁸⁵ Implemented in proposed art. 6:230q par. 2 of the Dutch Civil Code.

⁸⁶ Implemented in proposed art. 6:230r par. 1 of the Dutch Civil Code.

⁸⁷ CJEU judgment of 15 April 2010, case C-511/08 (Heinrich Heine).

⁸⁸ Implemented in proposed art. 6:230r par. 3 of the Dutch Civil Code.

⁸⁹ Implemented in proposed art. 6:230r par. 2 of the Dutch Civil Code.

⁹⁰ Unless the consumer made the initial payment by the use of a voucher, since then the trader is allowed to reimburse the consumer by issuing a new voucher.

The consumer's obligations after using the right of withdrawal are also regulated in the CRD. Firstly, the consumer must immediately return the received goods, not later than within 14 days from informing the trader of withdrawing from the contract.⁹¹ The costs of the direct return of the goods are to be covered by the consumer, unless the trader failed to inform the consumer about this obligation prior to the conclusion of the contract or when the trader offered to bear these costs (art. 14 par. 1 sentence 3 CRD).⁹² If the consumer sends back the goods before the period of 14 days expires, he is seen as having complied with his obligation (art. 14 par. 1 sentence 2 CRD). Again the postal rule applies, and it does not matter that the trader might have not received the goods within this period of time. However, the trader may withhold reimbursement of the payments made by the consumer until he receives his goods back or until the consumer has supplied him with evidence of having sent back the goods, e.g., by showing the trader the confirmation of posting the goods (art. 13 par. 3 CRD).⁹³

An exceptional provision has been added regarding the withdrawal from an off-premises contract where the trader delivered the goods to the consumer's home at the moment of conclusion of the contract, i.e., the trader brought these goods along with him when visiting the consumer. If these goods, by their nature, could not normally be returned by post (e.g., they are too heavy or too big, like a chair or a mattress), the trader is obliged to collect them from consumer's place at his own expense (art. 14 par. 1 sentence 4 CRD).⁹⁴

One of the controversial aspects of the current legislation, i.e. the Distance Selling Directive, was the lack of clear rules on responsibility of the consumer for the diminished value of the goods due to their testing and use during the cooling-off period.⁹⁵ The CJEU's judgment in its *Messner*⁹⁶ case pointed out that the consumer's right of withdrawal would only then be effective, if the consumer would not need to take into account other costs thereof than the direct cost of sending the goods back to the trader when deciding whether to make use of this right. The CJEU also stated that the consumer has to have an opportunity to look at the goods and to test them without fear that he would need to reimburse the trader for that opportunity when he decides to withdraw from the contract. This reasoning justifies such consumer behaviour like taking the goods out of their packaging or using the goods for a short period of time, in order to assess whether the goods fulfil the consumer's expectations. Such use of the goods by the consumer should not need to be compensated in case the consumer withdraws from the contract. However, the CJEU decided that in certain cases the consumer could have an obligation to compensate the trader for the diminished value of the goods, namely, "where he has made use of the goods acquired under a distance contract in a manner incompatible with the principles of civil law, such as those of good faith or unjust enrichment".⁹⁷ This means that the right to use the goods during the cooling-off period is limited by the use in accordance with good faith. This suggests that the consumer may use the goods only for a period and in the scope necessary to establish whether the

⁹¹ Implemented in proposed art. 6:230s par. 1 of the Dutch Civil Code. It would seem logical to assume that the period for the return of the goods starts running from the moment of the sending of the notice of withdrawal, however, art. 14 par. 1 CRD states that this period starts running from the moment in which the consumer "communicated his decision to withdraw from the contract to the trader". This wording raises some doubts whether the moment of receipt of the notice would not be decisive for the calculation of the period for the return of the goods.

⁹² Implemented in proposed art. 6:230s par. 2 of the Dutch Civil Code.

⁹³ Implemented in proposed art. 6:230r par. 4 of the Dutch Civil Code.

⁹⁴ Implemented in proposed art. 6:230t par. 4 of the Dutch Civil Code.

⁹⁵ About this issue see, e.g.: M.B.M. Loos [footnote 67], pp. 268-271.

⁹⁶ CJEU judgment of 3 September 2009, case C-489/07 (*Pia Messner*); see also: P. Rott, 'The Balance of Interests in Distance Selling Law — Case Note on *Pia Messner v. Firma Stefan Krüger*', *ERPL* 2010, vol 18, p. 192.

⁹⁷ *Messner* case [footnote 96], par. 25-26.

goods fulfil his expectations and whether he intends to keep them, or in other words “handling of the goods... necessary to establish the nature, characteristics and functioning of the goods”. The rules specified in this judgment are now codified in art. 14 par. 2 CRD with a slight addition. That is, if the trader did not provide the consumer with the information on the existence of the right of withdrawal and conditions of its performance, the consumer would not be held liable for any diminished value of the goods upon their return.⁹⁸

We have mentioned here that the right of withdrawal from a contract for the supply of services, as well as supply of water, gas, electricity, district heating or digital content, begins to run at the moment of the conclusion of the contract. If the trader, with an express agreement of the consumer, begins to provide such services during the cooling-off period, this does not lead to the loss of the right of withdrawal, contrary to currently binding rules.⁹⁹ Instead, the consumer is obliged to reimburse the trader for an amount which is in proportion to what has been provided until the time the consumer has informed the trader of the exercise of the right of withdrawal. This amount should be calculated on the basis of the total price agreed in the contract, unless the total price is excessive, then on the basis of the market value of what has been provided (art. 14 par. 3 CRD).¹⁰⁰ Separate provisions have been added to regulate the use of the right of withdrawal from a contract for the supply of digital content. Pursuant to art. 16 point m CRD the consumer loses his right of withdrawal from a contract for the supply of digital content delivered on medium other than tangible (e.g., by enabling consumer to download digital content directly from the internet), if the performance thereof has begun with the consumer’s prior express consent and his acknowledgment that he thereby loses his right of withdrawal.¹⁰¹ The trader needs to confirm this loss, by including the information about this among other information delivered to the consumer on a durable medium at the latest at the moment the digital content is delivered to the consumer (art. 8 par. 7 CRD).¹⁰² If the consumer has not given his prior express consent to the beginning of the performance before the end of the withdrawal period or to the loss through this of his right of withdrawal, he retains his right of withdrawal, which means that he does not need to pay for the delivery of the digital content (art. 14 par. 4b CRD).¹⁰³

7. Other provisions

Despite the fact that the CRD replaces the currently binding Distance Selling and Doorstep Selling Directives, it contains a few provisions that apply also to other type of sale contracts. As we have already mentioned, art. 5 regulates duties to inform for consumer sale contracts concluded on business premises. Additionally, art. 18 and 20 CRD apply to all types of consumer sale contracts, regardless of the circumstances in which the contract was concluded (e.g., in a shop, at a distance), with the exception of contracts for the supply of water, gas, electricity, district heating and digital content, while art. 19, 21 and 22 apply also to these last contracts as well as contracts for the provision of services (art. 17 CRD).

⁹⁸ Implemented in proposed art. 6:230s par. 2 of the Dutch Civil Code.

⁹⁹ See art. 6 par. 3 Distance Selling Directive.

¹⁰⁰ Implemented in proposed art. 6:230s par. 4 of the Dutch Civil Code.

¹⁰¹ Implemented in proposed art. 6:230p sub g of the Dutch Civil Code.

¹⁰² Implemented in proposed art. 6:230v par. 7 of the Dutch Civil Code.

¹⁰³ Implemented in proposed art. 6:230s par. 5 of the Dutch Civil Code. It remains unclear what will happen when the consumer expressly agrees to lose his right of withdrawal by consenting to receive digital content services before the expiry of the withdrawal period, but the trader does not confirm that fact on a durable medium. Art. 14 par. 4 point 5(iii) CRD suggests that the consumer also under such circumstances would be released from his obligation to pay for the delivered digital content, while pursuant to art. 16m the consumer has already lost his possibility to withdraw from a contract.

7.1 Delivery and remedies for late delivery

Art. 18 regulates the delivery of the purchased goods and the consequences of late delivery.¹⁰⁴ It will require a revision of the Dutch rules on exigibility or enforceability of claims ('opeisbaarheid') and the rules on default ('verzuim'). Art. 18 has a maximum harmonisation character and regulates that the delivery needs to take place without undue delay, but not later than 30 days from the conclusion of the contract (art. 18 par. 1 CRD).¹⁰⁵ This means that the buyer will only be able to claim remedies for non-performance of the trader's obligations when 30 days from the day of the conclusion of the contract lapse, since the trader will only then be late with his delivery. The parties may, however, agree on a specific date for a delivery, which would then replace the presumed deadline of 30 days.¹⁰⁶ Notable is that where the contract concerns the sale of goods and the seller is late with delivery, the buyer has the right to terminate the contract under the conditions specified in art. 18 CRD. These require that the consumer gives the trader an additional time for performance, unless the seller has refused to deliver the goods or unless delivery within the agreed period is essential (art. 18 par. 2 CRD).¹⁰⁷ This means that the consumer will only after this (second!) time period be able to terminate the contract. The conditions set out in art. 18 par. 2 are similar to the Dutch 'verzuim'-rules,¹⁰⁸ but they are not exactly the same.¹⁰⁹ In particular, art. 18 par. 2. does not prescribe formal requirements for the way in which the notice is given. The Dutch rule of art. 6:82 par. 1 Civil Code, on 'ingebrekestelling' may therefore not apply to consumer contracts falling within the scope of the CRD.¹¹⁰

7.2 Passing of risk

Art. 20 determines the moment of the passing of risk to the consumer for loss of, or damage to the goods as a moment when the consumer or a third party indicated by him (other than the carrier, e.g., a neighbour) has acquired the physical possession of the goods.¹¹¹ The risk could also pass to the consumer earlier, upon delivery of the goods to the carrier, if the carrier was commissioned by the consumer and that choice was not offered by the trader. This last addition was requested by the European Parliament, but it did not fully clarify the moment of the passing of the risk in case of so-called "IKEA situations". In the IKEA situation a consumer needs to first pay for the purchased goods at the trader's cashier desk, and then – if he chooses to have the goods delivered - he walks over to another desk, located in the same building, to conclude an additional delivery/carriage of goods contract with another party. It is doubtful, whether the fact that the IKEA enables a certain carrier to offer his services to consumers in its building would be seen as a carrier's choice offered by the trader to the consumer. Therefore, it remains unclear whether under such circumstances the risk of loss of or damage to the goods passes to the consumer at the moment of delivery of these goods to the carrier.

7.3 Payment and fees

¹⁰⁴ About this see, e.g.: H.-W. Micklitz, N. Reich, [footnote 12], pp. 506–507; P. Rott, E. Terry, [footnote 12], pp. 480–481; Ch. Twigg-Flesner, 'Fit for purpose? The proposals on Sales', <<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1342702&http://www.google.nl/search?hl=nl&q=twigg+flesner+fit+for+purpose&btnG=Google+zoeken&meta=&aq=f&oq=>>>>, p. 7ff.

¹⁰⁵ Implemented in proposed art. 7:9 par. 4 of the Dutch Civil Code.

¹⁰⁶ See proposed art. 7:9 par. 4 and 7:19a of the Dutch Civil Code.

¹⁰⁷ Implemented in proposed art. 7:19a par. 1 and par. 2 of the Dutch Civil Code.

¹⁰⁸ Art. 6:81-83 of the Dutch Civil Code.

¹⁰⁹ Compare art. 6:83 sub a of the Dutch Civil Code with proposed art. 7:19a par. 2 sub b and sub c of the Dutch Civil Code.

¹¹⁰ See A.L.M. Keirse, S.A. Kruisinga, M.Y. Schaub, 'Twee nieuwe wetgevingsinstrumenten: de Richtlijn Consumentenrechten en het gemeenschappelijk Europees kooprecht', *Contracteren*, 2012, nr. 1, pp. 16-17.

¹¹¹ Implemented in proposed art. 7:11 par. 2 of the Dutch Civil Code.

Regardless of the type of contract that is being concluded between a consumer and a trader, if that contract is covered by the scope of the CRD, art. 19 prohibits traders from charging consumers, in respect of the use of a given means of payment, fees that exceed the cost borne by the trader for the use of such means.¹¹² It has been specifically pointed out in recital 27 CRD that this provision applies also to passenger transport contracts. This provision should increase the transparency of the fees set by the low budget airlines. For example, it will be forbidden to demand from the consumer a payment of 50 euro for the use of a credit card when the consumer purchases a flight ticket with it, when the ticket itself would often be worth less than 500 euro. Of course, upon implementation of this provision to the national legal system the prices of low budget airlines' tickets are likely to rise.

The increase in the transparency of consumer contracts was also the purpose behind adding Article 22 to the CRD. Pursuant to this provision the trader needs to seek the express consent of the consumer to any extra payment in addition to the remuneration agreed upon for the trader's main contractual obligation.¹¹³ For example, the trader would only be able to request from the consumer an extra payment for checking in his luggage at the airport or for travel insurance if the consumer expressly consented to such an additional payment. If the trader chooses certain options for the consumer, e.g., by checking in certain boxes on an online form, and the consumer did not reject these options during the conclusion of the contract, which obliged him to pay additional fees, the consumer may demand from the trader the reimbursement of such payments. Finally, the traders who offer consumers a possibility to contact them by phone in relation to the contract concluded, are obliged to provide for such a telephone line the use of which would not cost consumers more than a basic rate (art. 21 CRD).¹¹⁴ This could put a stop to the practice of setting up expensive connection with service lines by many traders, the use of which was often necessary for consumers.

8. Concluding remarks

Many of the Consumer Rights Directive's provisions add new rights to the already quite extensive body of consumer protection provisions originating in European consumer law. It is notable that the directive introduces new rights for a number of specific consumer contracts, e.g., those relating to the delivery of gas, water or electricity, or digital content. Further, the time period for withdrawal in distance and off-premises contracts has been harmonised to a standard of 14 calendar days which simplifies the law and will likely make it easier for businesses and consumers to know their rights on this point. The directive also specifies some consequences of the exercise of the right of withdrawal which were not present in the earlier directives but have since been filled in through the case law of the CJEU, in particular in relation to costs that may be charged in case the consumer makes use of his right of withdrawal. Finally, the directive prohibits internet sellers from using pre-ticked boxes that add extra products (at extra cost) to the consumer's chosen purchase.

Although significant from the viewpoint of consumer protection, these new rights do not require significant alterations to the structure of Dutch general private law. Many of these changes are likely to be introduced in the place of the specific rules for distance and off-premises contracts in Book 7 of the Dutch Civil Code. Obviously, the directive will have to be implemented in an appropriate manner, which will require amendments of specific provisions in the Civil Code. In particular the information duties prescribed by the directive are more stringent than those of the earlier directives and existing rules will have to be amended accordingly.

¹¹² Implemented in proposed art. 6:230k par. 1 of the Dutch Civil Code. See also recital 54 CRD.

¹¹³ Implemented in proposed art. 6:230j of the Dutch Civil Code.

¹¹⁴ Implemented in proposed art. 6:230k par. 2 of the Dutch Civil Code.

The Consumer Rights Directive, nevertheless, can be seen as an important step in European consumer law. It has drawn together some existing instruments and has achieved that these rules are more coherent, at least within the limited scope of the directive. In parallel to this development, the EU legislature has presented a draft for an Optional Instrument on a Common European Sales Law (CESL).¹¹⁵ This instrument, if it is formally adopted, will be available as an option – mainly – for cross-border sales contracts between businesses and consumers, and for business-to-business sales contracts in which one of the parties is a small or medium-sized enterprise. Together, the CRD and the CESL emphasize the central position that consumer law, and the protection of weaker parties more generally, has in European private law. That element is at the core of the EU's actions in this field and it is an important influence on national private laws. The CRD, in this regard, should be seen as an important boost to the further development of consumer rights in Europe.

¹¹⁵ Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011) 635 final, available online at: <<<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0635:FIN:EN:PDF>>>.