

## NEW STANDARDS IN EU CONSUMER RIGHTS PROTECTION? THE NEW DIRECTIVE 2011/83/EU

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### Abstract

In recent years, consumer law has come more and more into the focus of legislation within the EU. One of the EU's key objectives, completing the final stage of the internal market, is to place consumer rights in the centre of it. Following the adaption of various consumer law measures for some decades, the EU had undertaken a thorough review of its consumer *acquis*. After years of consultations, the Consumer Rights Directive 2011/83/EU, which was supposed to set new standards of consumer protection, came into force and will have to be implemented by the Member States by 13 December 2013.

Renouncing its principal practice of minimum harmonisation in the area of consumer law, i.e. allowing Member States on the basis of Directives to adopt more protective rules, the EU legislator now turned to a targeted full harmonisation approach by means of the Consumer Rights Directive, aiming at increasing the consumer protection across the EU by bringing together the currently distinct laws for distance selling and off-premises contracts as well as other types of consumer contracts in a single instrument.

The article briefly introduces the background of the Directive and discusses the shift in means of harmonisation concepts. Then it analyses the scope, concepts and content of the Directive, which mainly brings considerable reforms in the areas of information requirements and the right of withdrawal. Taking into account the Directive's improvements and shortcomings, it concludes the need for further harmonisation and a uniform and universally applicable set of European consumer rights.

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**Keywords:** Consumer rights protection, EU, harmonisation

### Introduction

The new Consumer Rights Directive 2011/83/EU<sup>333</sup> (hereafter: CRD), which was published on 22 November 2011 and came into force on 12 December 2011, has to be implemented in national law by the EU Member States by 13 December 2013. Its objective is to increase consumer protection across the EU by bringing together the currently distinct national laws for distance selling and off-premises contracts as well as other types of consumer contracts in a single instrument. According to the Directive's aim, a real business-to-consumer (B2C) internal market shall be achieved, striking the right balance between a high level of consumer protection and the competitiveness of enterprises.<sup>334</sup>

By 13 June 2014, the Consumer Rights Directive (CRD) will replace the current Directive 97/7/EC on the protection of consumers in respect of distance contracts (*Distance Selling Directive*)<sup>335</sup> and the current Directive 85/577/EEC to protect consumers in respect of contracts negotiated away from business premises (*Doorstep Selling Directive*)<sup>336</sup>. The

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<sup>333</sup> OJ 2011 L 304/64.

<sup>334</sup> See: Recitals 4-6 CRD.

<sup>335</sup> OJ 1997 L 144/19.

<sup>336</sup> OJ 1985 L 372/31.

following Directives will be partly amended but remain in force for the remaining parts: Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees<sup>337</sup> and Directive 93/13/EEC on unfair terms in consumer contracts<sup>338</sup>.

With its more systematic approach and its conceptual about-turn from minimum standard harmonisation to full harmonisation, the new Directive on Consumer Rights is supposed to be a milestone in the development of the EU consumer law. However, it is doubtful, whether the new Directive will meet the needs and challenges of an up-to-date consumer rights protection, which further economic and technical developments of present and future times will entail.

This essay will attempt to evaluate the new Consumer Rights Directive by scrutinizing its aim and realization in terms of content. It starts with the history of the Directive and discusses its new approach of targeted full harmonisation. After that, the scope and the concepts of the Directive will be explained. Then, the main content of the Directive will be examined, systematically subdivided into the reforms in the areas of information requirements and the right of withdrawal. Finally, the Directive as a whole will be evaluated accordingly.

### Development of the Consumer Rights Directive

The beginning of harmonising European Consumer Law goes back to the early 1980s. After the ideas of US consumer protection were inherited by the European Economic Community (EEC) and slowly developed in its Member States, the Commission widened its priorities to achieve a “Common Market” which should later become the “Internal Market”. Previously, in accordance with the classical notion of free trade, the increase of life quality was dependent on the promotion of a European policy laying its focus on production and distribution. Consumer welfare and higher standards of living were quasi automatic by-products of market freedoms when certain conditions were fulfilled.<sup>339</sup> Only with the Single European Act<sup>340</sup> from 1987, the objective of achieving the Single European Market in terms of free movement of persons, goods, services and capital was established in Art. 8a EEC (now: Art. 26 TFEU). The newly added Art. 100a EEC (now: Art. 114 TFEU) granted the Council of Ministers (CoM) in cooperation with the European Parliament (EP) extensive powers to enact “measures” establishing and improving the functioning of the internal market. From that point on, consumer policy in the triple sense of freedom of choice, legitimate expectations and protection of legal interests played an increased role in the realization of the internal market.<sup>341</sup>

In short time intervals, several Directives on consumer protection were enacted. In the field of consumer contract law, the relevant Directives are: Doorstep Selling Directive 85/577/EEC<sup>342</sup>, Consumer Credit Directive 87/102/EEC<sup>343</sup>, Package Travel Directive 90/314/EEC<sup>344</sup>, Unfair Terms in Consumer Contracts Directive 93/13/EEC<sup>345</sup>, Distance Selling Directive 97/7/EC<sup>346</sup>, Consumer Sales Directive 1999/44/EC<sup>347</sup> and Service Directive

<sup>337</sup> OJ 1999 L 171/12.

<sup>338</sup> OJ 1993 L 95/29.

<sup>339</sup> Bourgoignie, Thierry: *Consumer law, common markets, and Federalism in Europe and the United States*, Berlin 1986, p. 200; Reich, Norbert: *Economic Law, Consumer Interests and EU Integration*, in: Micklitz, Hans-Wolfgang/ Reich, Norbert/ Rott, Peter: *Understanding EU Consumer Law*, Antwerp 2009, p. 9.

<sup>340</sup> OJ 1987 L 169/1.

<sup>341</sup> Reich, p. 12.

<sup>342</sup> OJ 1985 L 372/31.

<sup>343</sup> OJ 1987 L 42/48.

<sup>344</sup> OJ 1990 L 158/59.

<sup>345</sup> OJ 1993 L 95/29.

<sup>346</sup> OJ 1997 L 144/19.

2006/123/EC<sup>348</sup>. All these Directives followed a minimum harmonisation approach which led to an approximation of the national laws by allowing different approaches in the Member States, provided that the Directive's basic threshold of protection was maintained. And all of the Directives were based on the basic consensus that the consumer, as weaker party in a contract, had to be protected by legal instruments.<sup>349</sup>

According to Art. 114 III TFEU, a high level of consumer protection shall be provided within the EU. Choosing Art. 114 TFEU instead of Art. 169 TFEU as legal basis for consumer protection measures, the objective of Chapter 3 TFEU was highlighted, namely the "approximation of [national]<sup>350</sup> laws" (in the area of consumer law), which leaves national law effectively not untouched.<sup>351</sup> However, having predominantly used the minimum harmonisation approach in consumer Directives for various reasons, the EU-wide standards of consumer protection still differ and cause barriers in the internal market. Therefore, the Commission carried out a review of the consumer *acquis*<sup>352</sup>, comprising eight Directives: Doorstep Selling Directive 85/577/EEC, Package Travel Directive 90/314/EEC, Unfair Terms in Consumer Contracts Directive 93/13/EEC, Timeshare Directive 94/47/EC<sup>353</sup>, Distance Selling Directive 97/7/EC, Price Indication Directive 98/6/EC<sup>354</sup>, Injunctions Directive 98/27/EC<sup>355</sup> and Consumer Sales Directive 1999/44/EC. A comparative analysis of these Directives resulted in the Consumer Law Compendium<sup>356</sup> and a database<sup>357</sup>. However, these results as well as the results of the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), which had published a Draft Common Frame of Reference<sup>358</sup> (DCFR) were not taken into account drafting the proposed Directive on Consumer Rights.<sup>359</sup> Instead, the final Proposal for a Directive on Consumer Rights<sup>360</sup> encompassed only four of the previously reviewed Directives, namely the Distance Selling Directive, the Doorstep Selling Directive, the Unfair Terms in Consumer Contracts Directive and the Consumer Sales Directive. And finally, this proposal was once again cut to half, so that only the Distance Selling Directive and the Doorstep Selling Directive are included in the final version of the Consumer Rights Directive, which came into force on 12 December 2011.

### Targeted full harmonisation to have confident consumers

Designing a new Directive on Consumer Rights, the EU legislator was motivated by the fact that cross-border sales are not taking off either in distant selling (particularly via the

<sup>347</sup> OJ 1999 L 171/12.

<sup>348</sup> OJ 2006 L 376/36.

<sup>349</sup> Heining, C-481/99 [2001] ECR I-9945, para 38; Micklitz, Hans-Wolfgang: *The targeted full harmonisation approach: looking behind the curtain*, in: Howells, Geraint/ Schulze, Reiner: *Modernising and Harmonising Consumer Contract Law*, Munich 2009, pp. 47, 83; Reich, p. 46; Tonner, Klaus/ Fangerow, Kathleen: *Directive 2011/83/EU on consumer rights: a new approach in European consumer law?*, in: EUVR (2012) 2, p. 69.

<sup>350</sup> Addition by the author.

<sup>351</sup> Tonner/ Fangerow, S. 77; Twigg-Flesner, Christian: "Time to do the job properly" – *The case for a new approach to EU consumer legislation*, in: *Journal of Consumer Policy* (2010) 33, p. 357.

<sup>352</sup> Green Paper on the Review of the Consumer Acquis, COM (2006) 744 final.

<sup>353</sup> OJ 1994 L 280/83.

<sup>354</sup> OJ 1998 L 80/27.

<sup>355</sup> OJ 1998 L 166/51.

<sup>356</sup> Available online under:

[http://ec.europa.eu/consumers/rights/docs/consumer\\_law\\_compendium\\_comparative\\_analysis\\_en\\_final.pdf](http://ec.europa.eu/consumers/rights/docs/consumer_law_compendium_comparative_analysis_en_final.pdf).

<sup>357</sup> Accessible online under: <http://www.eu-consumer-law.org/index.html>.

<sup>358</sup> Bar, Christian von/ Clive, Eric/ Schulte-Nölke, Hans (Ed.): *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (DCFR)*, Outline Edition, Munich 2009.

<sup>359</sup> Nordhausen Scholes, Annette: *Information Requirements*, in: Howells, Geraint/ Schulze, Reiner (Ed.), *Modernising and Harmonising Consumer Contract Law*, Munich 2009, p. 215.

<sup>360</sup> COM (2008) 614 final.

internet) or direct selling (particularly in the utilities service sector) and that, on that account, consumers do not sufficiently benefit from the internal market yet.<sup>361</sup> By considerably increasing the legal certainty for both consumers and traders, disproportionate fragmentation should be eliminated and consumer confidence should be strengthened.<sup>362</sup> Therefore, in the new CRD, the EU legislator, renouncing its minimum harmonisation policy being practised in nearly all of the former Consumer Law Directives, opted for harmonisation of the consumer rights at a maximum level in most respects.<sup>363</sup>

Minimum harmonisation has been used in the area of consumer protection in the past as a compromise because Member States' legislation already existed or had recently been adopted and these Member States were not yet prepared to accept a binding common standard of consumer rights protection.<sup>364</sup> The minimum standard principle reduced the differences in national legislation by opposing a lower or zero protection, while allowing advanced Member States to maintain their higher protection standards or to provide better protection measures in the harmonised areas.<sup>365</sup> In this way, the average standard of consumer rights protection in the EU was raised. The Court of Justice of the EU (hereafter: CJEU) also accepted the minimum harmonisation approach, but set in its *Tobacco Advertising* judgment<sup>366</sup> and its *Gysbrechts* judgment<sup>367</sup> limits to its minimum protection clauses under aspects of the internal market and the proportionality criteria.<sup>368</sup>

Full harmonisation was only targeted in a few recent Directives, namely in the Distance Marketing of Financial Services Directive 2002/65/EC<sup>369</sup>, the Unfair Commercial Practices Directive 2005/29/EC<sup>370</sup>, the Consumer Credit Directive 2008/48/EC<sup>371</sup> and the Timeshare Directive 2008/122/EC<sup>372</sup>. The full harmonisation principle, which was introduced in the Consumer Policy Strategy 2002-2006<sup>373</sup> and more clearly stated in the Consumer Policy Strategy 2007-2013<sup>374</sup>, aimed not only at the an approximation but full unification of the consumer law in the Member States. However, even full harmonisation Directives do not lead to the same law in different Member States as each Member State fills the framework of the Directive in its own way, corresponding with the prevailing specific traditions and features of its own national law body. Consequently, full harmonisation still leaves fields for autonomous national law.<sup>375</sup>

In spite of strong criticism,<sup>376</sup> the EU legislator established the full harmonisation principle in Art. 4 CRD which requires Member States not to “maintain or introduce, in their

<sup>361</sup> See: Recital 5 CRD.

<sup>362</sup> Recital 6-7 CRD.

<sup>363</sup> According to recitals 2 & 13 CRD, Member States remain competent to maintain or adopt national rules in relation to certain aspects of the CRD, such as information duties for other contracts than distance or off-premises contracts (Art. 5 IV CRD), pre-contractual information duties for distance or off-premises contracts (Art. 6 VIII CRD) and the applicability of an off-premises contract threshold (Art. 7 IV CRD), or beyond the scope of the CRD.

<sup>364</sup> Tonner/ Fangerow, p. 74.

<sup>365</sup> Howells, Geraint/ Reich, Norbert: *The current limits of European harmonisation in consumer contract law*, in: ERA Forum (2011) 12, p. 41; Reich, p. 40.

<sup>366</sup> *Germany vs EP and Council*, C-376/98 [2000] ECR I-8419 at paras 103-105.

<sup>367</sup> *Gysbrechts*, C-205/07 [2008] ECR I-9947 at para 60.

<sup>368</sup> Howells/ Reich, p. 48.

<sup>369</sup> OJ 2002 L 271/16.

<sup>370</sup> OJ 2005 L 149/22.

<sup>371</sup> OJ 2008 L 133/66.

<sup>372</sup> OJ 2009 L 33/10.

<sup>373</sup> COM (2002) 208.

<sup>374</sup> COM (2007) 99.

<sup>375</sup> Tonner/ Fangerow, p. 75.

<sup>376</sup> See for a collection of these criticisms addressed to the full harmonisation approach in this area: Faure, Michael: *Towards a Maximum Harmonization of Consumer Contract Law?!?*, in: Maastricht Journal 2008/4,

national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive”. This full harmonisation approach may be particularly appreciated by small and medium sized enterprises which do not have sufficient in-house legal teams to give advice on the different national laws in the Member States and whose cross-border sales activities may be only in small quantities which do not justify modifying their contracts, products or packaging according to the new markets.<sup>377</sup> However, it can be considered that full harmonisation *per se* does not inevitably have to be the best and most appropriate solution for guaranteeing the highest level of consumer rights protection and for enhancing the consumer confidence. Of course, an extended transposition of EU law concepts encourages an “Europeanisation” of Civil law in the Member States and makes it become similar. But it remains doubtful, whether particular rules in private law, such as the remedies for breach of contract, limitation periods and notification periods actually create trade barriers or distort competition to the extent, that their full harmonisation is necessary.<sup>378</sup> Because the maximum harmonisation approach entails the danger of setting minimum standards as a maximum demand, which *de facto* decreases the level of the consumer protection. For example, in some Member States with high standards of consumer protection some consumer friendly rights or remedies can be removed or new hurdles can be created for accessing the courts, if the newly set full harmonisation complies with the former minimum standards.<sup>379</sup> In this case, the Consumer Rights Directive’s full harmonisation approach would rather disappoint than raise consumer confidence.

To avoid a decrease in consumer protections standards, the CRD does not practise full harmonisation in an absolute sense. By leaving some matters, such as additional pre-contractual information requirements for distance, off-premises and other contracts explicitly in the hands of the Member States, and by leaving the consequences of a breach of the pre-contractual information requirements – with exception of extending the right of withdrawal – to the Member States, it rather follows the principle of targeted full harmonisation. This means that full harmonisation does not cover all fields of the Directive, but leaves room for Member States to adopt or maintain autonomous regulations for problems which are not

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pp. 440; Micklitz, Hans-Wolfgang/ Reich, Norbert: *Crónica de una muerte anunciada: The Commission Proposal for a ‘Directive on Consumer Rights’*, in: CMLRev 2009, p. 471; Rott, Peter/ Terryn Evelyne: *The proposal for a Directive on consumer rights: no single set of rules*, in: ZEuP 2009, p. 456; Smits, Jan M.: *Full Harmonization of Consumer Law? A Critique on the Draft Directive on Consumer Rights*, in: European Review of Private Law, 2010, Vol. 18, pp. 5-14; Tonner, Klaus/ Tamm, Marina: *Der Vorschlag für eine Richtlinie über Verbraucherrechte und seine Auswirkungen auf das nationale Verbraucherrecht*, in: JZ 2009, p. 277; Twigg-Flesner, Christian/ Metcalfe, Daniel: *The Proposed Consumer Rights Directive – less haste, more thought?*, in: European Review of Contract Law 2009, p. 368; Wilhelmsson, Thomas: *Full harmonisation of consumer law?*, in: ZEuP 2008, p. 225.

<sup>377</sup> Howells, Geraint/ Schulze, Reiner: *Overview of the Proposed Consumer Rights Directive*, in: Howells, Geraint/ Schulze, Reiner (Ed.): *Modernising and Harmonising Consumer Contact Law*, Munich 2009, p. 6.

<sup>378</sup> *Alsthom Atlantique vs Sulzer*, C-339/89 [1991] ECR I-107.

<sup>379</sup> For example, according to § 355 III 3 BGB (German Civil Code) the right to withdraw from a contract has no time limit if the consumer is not properly informed about his right to withdrawal. This provision was adopted to the German Civil Code after the CJEU ruled in Case 481/99 (*Heininger/Bayerische Hypo- und Vereinsbank AG*) ECR 2001 I-09945, that an unlimited right to withdrawal follows from the Doorstep Selling Directive. After this CJEU decision, the German legislator did not only grant the unlimited right to withdrawal to doorstep selling transactions, but to all cases of consumer contracts in which a right to withdrawal exists, such as consumer credit or distance selling contracts. However, according to Art. 10 I CRD the right to withdraw expires after 12 months from the end of the initial withdrawal period in case the trader has not provided the consumer with the information of his right of withdrawal. Implementing the CRD based on the full harmonisation principle, the German legislator is now forced to repeal § 355 III 3 BGB. This means a clear curtailment of the to date more extensive consumer protection.

addressed or covered by the Directive.<sup>380</sup> This approach is in perfect harmony with the shared competence of the EU and its Member States in the field of consumer protection pursuant to Art. 4 II f TFEU and the principles of sincere cooperation (Art. 4 III TEU) and subsidiarity (Art. 5 III TEU).

### **Scope of the Consumer Rights Directive**

The original proposal for a CRD aimed to consist of the Distance Selling Directive, the Doorstep Selling Directive, the Consumer Sales Directive and the Unfair Terms Directive.<sup>381</sup> However, during the legislative process, this purpose was considerably curtailed. This resulted in a CRD, which only includes the former Distance Selling Directive and the Doorstep Selling Directive, plus some general provisions on pre-contractual information duties.

According to Art. 1 I CRD, the Directive shall apply to “any contract concluded between a trader and a consumer”, including off-premises contracts and those concluded by distance means. Beyond that, it also applies to the provision of utilities such as water, gas, electricity or district heating. However, the CRD does not apply to a number of contracts listed in Art. 1 III CRD, including contracts for social services, healthcare, gambling, financial services, immovable property, rental of accommodation, construction or sale of land and buildings and passenger transport services.

### **Concepts of the Consumer Rights Directive**

For the purpose of the Directive, the main concepts and contract types are defined in Art. 2 CRD: A consumer is, according to Art. 2 I CRD, any natural person who is acting for purposes which are outside his trade, business, craft or profession. The Directive here uses the general core definition of the “consumer” which appears in several Directives in similar wording. However, it misses the opportunity to additionally provide a more specific terminology of the consumer in certain areas also covered by the CRD, such as in the sectors of telecommunication and energy. Especially in the telecommunication sector, encompassing e.g. the use of mobile (smart)phones and the internet, the term “user” instead of “consumer” is commonly used, the same as “customer” in the energy sector.<sup>382</sup>

The counterpart of the consumer, the trader, is defined in Art. 2 II CRD as any natural or legal person acting for purposes relating to his trade, business, craft or profession in respect of the particular contract.

The contracts, covered by the CRD, can either be sales contracts, service contracts, distance contracts, off-premises contracts or ancillary contracts. According to Art. 2 V CRD, a sales contract is any contract under which the trader transfers the ownership of goods to the consumer who, on his part, pays the price for the purchased goods. In contrast to that, a service contract is any contract under which the consumer pays the trader for a supplied service (Art. 2 VI CRD). A distance contract pursuant to Art. 2 VII CRD, is broadly any contract concluded between a trader and a consumer entirely by means such as internet, telephone, fax etc., where the parties are not at any stage physically present at the same place. An off-premises contract is a contract concluded between a trader and consumer at a location which is not the trader’s business premises (Art. 2 VIII CRD). According to Art. 2 XV CRD, an ancillary contract is a contract in which a third person plays an intermediary role in the

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<sup>380</sup> Tonner/ Fangerow, p. 78.

<sup>381</sup> COM (2008) 614 final.

<sup>382</sup> See: Framework Directive for Electronic Communication Networks and Services (OJ 2002 L 108/33), Electricity Directive 2009/72/EC (OJ 2009 L 211/55) and Natural Gas Directive 2009/73/EC (OJ 2009 L 211/94).

consumer's acquisition of goods or services supplied by the trader or a third party related to a distance or off-premises contract.

Being aware of the controversial case of so-called dual purpose contracts which cannot explicitly be distinguished from trade or business contracts as they belong to the professional as well as to the private sphere of at least one of the parties at the same time, the EU legislator offered some interpretation guidelines. In accordance with the narrow interpretation of the CJEU in *Johann Gruber*<sup>383</sup> recital 17 CRD contains the consideration that in case of a dual purpose contract where “the trade purpose is so limited as not to be predominant in the overall context of the contract, that person should also be considered as a consumer”.

### **Main content of the Consumer Rights Directive**

Beyond providing a high level of harmonisation by implementing the principle of full harmonisation, the CRD brings considerable reforms in the areas of information requirements and the right of withdrawal. These new information requirements and amended rights of withdrawal will replace the still existing Distance Selling Directive and Doorstep Selling Directive, which will formally be repealed by 13 June 2014 (Art. 31 CRD). The key features will be highlighted briefly as follows:

#### **Information requirements**

The CRD relies on the information approach which had been followed in all contract-related Directives.<sup>384</sup> It starts out from the premise that a consumer, who is provided with all the available information, will make an informed choice. At the same time, an informed consumer is considered to be a confident consumer, who is able and willing to exercise his choice within the internal market, regardless of national borders.<sup>385</sup> In order to reach this goal, the CRD introduces several pre-contractual information duties which have to be fulfilled by the trader in order to better protect the consumer and to enable him to consider all relevant facts before concluding a contract. These can be summed up as follows:

#### **a) Product and service information**

Arts. 5 & 6 CRD include prescribed information which the trader has to provide the consumer in respect of the offered good and service and in respect of himself or his business in advance before the contract is being concluded. The required information will vary according to whether the contract is a distance or off-premises contract. Without regard to the type of contract, all required information has to be given in a clear and comprehensible manner. In case of distance and off-premises contracts, enhanced information must be provided.

Art. 5 CRD includes a list of information requirements for contracts other than distance or off-premises contracts, which is not exclusive and which encompasses e.g. information about the main characteristics of the goods or service, the identity of the trader, the total price or the arrangements for payment, delivery and performance. The non-exclusiveness of the list is an exemption from the full harmonisation principle and enables the Member States to introduce additional information duties.

Art. 6 CRD enhances the pre-contractual information duties for traders for distance or off-premises contracts to a total number of 20.<sup>386</sup> Beyond the main characteristics of the

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<sup>383</sup> See: *Johann Gruber vs Bay Wa AG*, C-464/01[2005] ECR 2005 I-00439.

<sup>384</sup> See: Reich, pp. 21-26, 45, 46.

<sup>385</sup> Nordhausen Scholes, p. 216.

<sup>386</sup> In comparison, the Distance Selling Directive in its Art. 4 I only includes a number of nine pre-contractual information requirements, whereas the Doorstep Selling Directive does not separately mention any pre-

goods or service, the identity of the trader, the total price and the arrangements for payment, delivery and performance, the trader also has to inform the consumer about his geographical address, his place of business, the cost of using means of distance communication, the details of exercising the right of withdrawal and various technical details of the contract or the purchased goods or service, e.g. the interoperability of digital content with hardware or software being used by the consumer. In addition to that, Arts. 7 & 8 CRD determine formal (information) requirements for off-premises contracts (Art. 7 CRD) and distance contracts (Art. 8 CRD). Listing 20 information duties for the trader in cases of distance and off-premises contracts, and still giving the Member States the opportunity to impose additional information requirements,<sup>387</sup> on the one hand provides the consumer with all necessary information before concluding a contract. On the other hand, the large amount of information to be read and understood by the consumer also might confuse him and deter him from checking the relevant information carefully.<sup>388</sup>

#### **b) Increased price transparency**

For any kind of contract, according to Art. 5 I c and 6 I e CRD, traders have to disclose the total cost of the product or service, as well as any extra fees. This will especially strengthen the rights of online shoppers who will not have to pay a charge or other cost if they were not properly informed before they placed an order.

#### **c) Clear information on associated costs in case of returning goods**

In cases where the trader wants the consumer to bear the cost of returning goods after he changed his mind and withdraws from the contract, he has to clearly inform the consumer about that beforehand, otherwise the trader has to pay for the return himself (Art. 6 I h, 14 I 3 CRD). According to recital 36 CRD, in cases of goods purchased online or by other means of distance selling, the traders must clearly give at least an estimate of the maximum costs of returning bulky goods (e.g. furniture), before the purchase.

#### **d) Elimination of hidden charges and costs on the internet**

The CRD also protects the consumer against “cost traps” in the internet, e.g. when fraudsters try to trick people into paying for declared or expected “free” services, such as horoscopes, recipes or any forms of downloads. According to Art. 8 II CRD, a consumer has to explicitly confirm that he understands that a charge applies for a service before he may become liable for that charge.

#### **e) Ban of pre-ticked boxes on websites**

Currently, consumers are often forced to untick so-called “pre-ticked” boxes when purchasing a service on websites, which offer them an additional service bearing a charge, such as travel insurances or service packages. Art. 22 CRD prohibits additional services in online shopping, which are offered through so-called ‘pre-ticked’ boxes.

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contractual information duties for the trader. Just according to Art. 4 Doorstep Selling Directive, the trader is required to “give consumers written notice of their right of cancellation within the period laid down in Article 5 [which is dated between the offer or the conclusion of the contract]\*, together with the name and address of a person against whom it can be exercised”. \*Addition by the author

<sup>387</sup> Art. 6 VIII CRD.

<sup>388</sup> Wendlandt, Bettina: *EC Directives for Self-Employed Commercial Agents and on Time-Sharing – Apples, Oranges and the Core of the Information Overload Problem*, in: Howells, Geraint/ Janssen, André/ Schulze, Reiner (Ed.): *Information Rights and Obligations*, Aldershot 2005, pp. 76, 74.



#### **f) Information on digital content**

Information on digital content will have to be clearer, including regarding its compatibility with hardware and software (Art. 5 I g, 6 I s CRD) and the application of any technical protection measures (Art. 5 I h, 6 I r CRD), such as any limit on the consumer's right to make copies of its content.

#### **g) Ban of the surcharges for the use of credit cards and hotlines**

Art. 19 CRD prohibits traders to charge consumers more for paying by any means of payment (especially credit card payment) than what it actually costs the trader to offer such means of payment. Traders, who operate telephone hotlines allowing the consumer to contact them in relation to the contract, will be prohibited to charge more than the basic telephone rate for the telephone calls (Art. 21 CRD).

### **2.) Right of withdrawal**

The purpose of the right of withdrawal is the protection of the consumer from making rash decisions.<sup>389</sup> Within a relatively short cooling-off period, the consumer may ponder on his decision to conclude a contract, sometimes even if the contract already has been performed by the parties. The CRD strengthens the consumer rights also in the case of withdrawal and clarifies the prevailing rights and duties, without disregarding the interests of the trader.

#### **a) Extension of the withdrawal period (cooling-off period)**

According to Art. 9 I CRD, the current 7-days-period under which consumers can withdraw from a distance or off-premises contract is extended to 14 calendar days. In cases of a service contract, it will start at the day of the conclusion of the contract (Art. 9 II a), in cases of sales contracts, from the moment the consumer receives the goods (Art. 9 II b). In certain circumstances, the cooling-off period will be extended, e.g. to 12 months, if the seller has not clearly informed the consumer about his right of withdrawal (Art. 10 I CRD) or to 14 additional days, if the trader provided the consumer with the required information within 12 months from the start of the regular withdrawal period (Art. 10 II CRD). The right of withdrawal will also be extended to circumstances including solicited visits or online auctions, if the counterpart is a professional trader.

Exemptions from the right of withdrawal are listed in Art. 16 CRD, including e.g. service contracts after the service has been fully performed (e.g. music or video downloads from the internet up until the point at which the downloading process begins), supply of goods which were personalised or made according to the consumer's specifications or are liable to deteriorate or expire rapidly (e.g. food).

#### **b) Introduction of an EU-wide model withdrawal form**

According to Art 11 I CRD, if a consumer changes his mind and wishes to withdraw from a distance or off-premises contract, he can use a harmonised model withdrawal form for consumers, which is provided in Annex I (B) of the CRD. Nevertheless, pursuant to recital 44 CRD, the consumer is still free to withdraw in his own words using any means of communication.

#### **c) Enhanced refund rights**

In order to accelerate the withdrawal process, Art. 13 I CRD imposes on the trader a duty to reimburse all payments received from the consumer, including the delivery costs,

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<sup>389</sup> Loos, Marco: *Rights of Withdrawal*, in: Howells, Geraint/ Schulze, Reiner (Ed.), *Modernising and Harmonising Consumer Contract Law*, Munich 2009, p. 239.

within 14 days of the consumer withdrawing from the contract. As a countermove, according to Art. 14 I CRD, the consumer is obliged to send back or hand over the goods no later than 14 days from the day he communicated his decision to withdraw to the trader. In order to guarantee restitution with simultaneous performance, Art. 13 III CRD gives the trader the right to “withhold the reimbursement until he has received the goods back, or until the consumer has supplied evidence of having sent back the goods”. In general, the trader will bear the risk for any damage to goods during transportation, as long as the consumer does not take possession of the goods (Art. 20 CRD).

## Conclusion

The landscape of EU consumer law is currently a colourful combination of EU-based and national Member State’s law. Where the EU legislator had been active in forms of Directives, the Member States have reached at least common minimum standards in consumer protection. In the areas in which the EU legislator had remained passive to date, the Member States were able to fill the gap with their own national laws. With regard to the Distance Selling Directive and the Doorstep Selling Directive, which will be repealed by the new CRD as of 13 June 2014, nowadays 27 national rules on distance and doorstep selling exist.<sup>390</sup> Against the background of this current legal situation, the CRD’s targeted full harmonisation approach is generally to be welcomed.

Following the principle of targeted full harmonisation, the CRD only explicitly leaves some matters, such as additional pre-contractual information requirements for distance, off-premises and other contracts in the hands of the Member States. However, by leaving the consequences of a breach of the pre-contractual information requirements – with exception of extending the right of withdrawal in that case – to the Member States, the CRD comes short of reaching its goal of full harmonisation. Because, if a breach of providing the consumer the required information leads to a claim of damages in one Member State and to nullity in another Member State, the gap of different standards of consumer protection is rather deepened than shortened.<sup>391</sup> Beyond that, as has been shown above, in some cases, the full harmonisation approach even leads to decreasing the consumer protection standards in some Member States, in favour of creating uniform standards and enhancing legal security for the traders.

Of course, the new CRD improves the situation of consumers in the areas of distance selling and off-premises contracts (formerly known as doorstep contracts), especially with regard to their information and withdrawal rights. Firstly, it enables the consumer to make a well informed decision whether to purchase a good or service from a particular trader or not. Secondly, it extends the cooling-off period and clearly determines with which rights and duties for both contracting parties the consumer can exercise his right of withdrawal.

Therefore, the new CRD shall neither be underestimated nor overvalued. On the one hand, it only merges two former Directives under the roof of a single Directive and missed the opportunity to unite more Directives which had been under review. For instance, it could have included a list of unfair contract terms or established a uniform cooling-off period for all kinds of contracts. On the other hand, executing the step of simplifying and merging

<sup>390</sup> After Croatia’s accession to the EU on 1 July 2013 even 28.

<sup>391</sup> See also: Grynbaum, Luc: *Precontractual information duties: the foreseeable failure of full harmonisation*, in: Schulte-Nölke, Hans/ Tichy, Lubos (Ed.): *Perspectives for European Consumer Law. Towards a Directive on consumer rights*, Munich 2010, p. 11; Gsell, Beate/ Schellhase, Hans Martin: *Vollharmonisiertes Verbraucher-kreditrecht – ein Vorbild für die weitere europäische Angleichung des Verbrauchervertragsrechts?*, in: JZ 2009, pp. 23; Loos, Marco: *Full harmonisation as a regulatory concept and its consequences for the national legal orders. The example of the Consumer rights directive*, in: Stürner, Michael (Ed.): *Vollharmonisierung im Europäischen Verbraucherrecht?*, München 2010, p. 67; Rott/ Terryn, p. 459.

previously fragmented rules into uniform rules in a single regulatory framework, the CRD can serve as a role model for future legislation on EU level. In this sense, it could be seen as a first step and integral part to a common European Contract Law for (at least) civil and commercial cross-border transactions, no matter if it can be realized by amending the Treaty, using the instrument of a Regulation or continuing the practice of (full harmonisation) Directives. Only by providing a uniform and universally applicable set of consumer rights for all EU Member States, will the consumer actually be placed in the centre of the internal market, as has been set as the general objective by the Proposal for a Regulation of the European Parliament and of the Council on a consumer programme 2014-2020<sup>392</sup>. The aim is that the consumer will not be hesitant to participate in cross-border distance transactions. However, it remains questionable, if any harmonising EU law measures will succeed in bringing cross-border transactions up to the same level as domestic ones. Because of many consumers as well as traders, obstacles of greater significance to cross-border trade are differences in language, cultural attitudes and habits, practical regulations of labelling and packaging, technical standards and court procedure.

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<sup>392</sup> COM (2011) 707 final.

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