Consumer protection with regard to distance contracts after the transposition of the Consumer Rights Directive in Belgium and France

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Introduction

1. In 2011, the European legislator enacted the Consumer Rights Directive (hereafter: CRD)[1], which mainly aims at modernizing the 1997 Distance Selling Directive (hereafter DSD)[2] and the 1985 Doorstep Selling Directive[3],[4]. Amending the provisions incorporated in these Directives had become necessary in order to simplify and update the rules on distance contracts and contracts concluded outside the trader's premises, to remove inconsistencies and to close unwanted gaps.

This paper will only focus on *distance contracts* and more specifically at the Belgian and French transposition of the provisions on distance contracts included in the CRD. It will not deal with the specific provisions relating to distance contracts concerning *financial services*, which transpose the 2002 Directive on the distance marketing of consumer financial services[5], since these rules are not amended by the CRD (which does not apply to financial services (art. 3.3 (d) CRD).

In Belgium, the implementation of the CRD has taken place in Book VI of the new Code of Economic Law (CEL)[6] dealing with market practices and consumer protection[7]. In France, the transposition is realized through the amendment of the *Code de Consommation* (CC)[8]. Since the Directive is based on the principle of full harmonization - which implies that Member States are not given the possibility to maintain or introduce measures which offer more protection to consumers, than the protection offered by the Directive (art. 4 CRD) - Belgian and French legislation will most often contain identical or similar provisions. Therefore, both legal systems will be addressed at the same time. French and Belgian provisions will only be mentioned explicitly where differences remain, for example because the CRD leaves it to the Member States to introduce certain optional rules (see for example *infra* nr. 33).

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[1] Directive 2011/83/EU of the European Parliament and the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and the Council and repealing Council Directive 85/577/EEC and Directive 97/7EC of the European Parliament and the Council, OJ L 22 December 2011, 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 L 4 June 1997, 144/19.

[3] Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ L 31 December 1985, 372/31.

[4] See also: B. KEIRSBILCK, „The context of the Consumers Rights Directive", *European Review of Consumer Law* (2013) Volume 9 (Issue xxx), p. Xxx.

[5] 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 L 9 October 2002, 271/16.

[6] The introduction of the Code of Economic Law is taking place in parts. See about Book VI: J. STUYCK, „The implementation in Belgium: the new book VI on market practices and consumer protection in the Economic Law Code", *European Review of Consumer Law* (2013) Volume 9 (Issue xxx), p. Xxx.

[7] Next to Book VI, a Book XIV will contain identical or at least similar provisions for persons exercising a liberal profession: see also E. TERRYN, " Scope of application and level of harmonisation" *European Review of Consumer Law* (2013) Volume 9 (Issue xxx), p. Xxx.

[8] See: D. VOINOT, „Transposition de la Directive en droit français: première étape avant l'adaption d'un nouveau code de la consommation", *European Review of Consumer Law* (2013) Volume 9 (Issue xxx), p. Xxx

2. Consumer protection with regard to distance contracts is based on the one hand on the obligation imposed on traders to provide consumers with certain *information* and on the other hand on the possibility for consumers to *withdraw* from the contract within a certain period of time and without having to pay a compensation.

After analyzing the definition of a *distance contract*, this paper will discuss the information requirements which are imposed on traders and the right of withdrawal awarded to consumers in the case of a distance contract. As far as the *information requirements* are concerned, it will first be determined which information must be provided, in which point in time and in what way. Further, attention will be paid to the relation between the information requirements laid down in the rules on distance contracts (CRD) and the information requirements that can be found in legislation implementing other Directives, such as the Services Directive[9] and the Electronic Commerce Directive[10]. With regard to the *right of withdrawal*, it will be examined when a consumer is entitled to withdraw from the contract, within which period, in which way and what the consequences are of exercising the right of withdrawal. It will also be examined whether the objectives pursued by the information requirements and the right of withdrawal are likely to be realized.

I. Definition of a distance contract

3. The CRD, as well as Belgian (art. I.8,15° CEL) and French (Art. L. 121-16 *Code de la Consommation* (hereafter CC)) law, define a distance contract as any contract concluded between a trader and a consumer under an organized distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded (art. 2.7 CRD).

Contrary to the DSD, the CRD no longer contains a separate definition of a "means of distance communication". However, the CRD has incorporated the specific features of a means of distance communication (i.e. the absence of simultaneous physical presence) in the definition of a distance contract itself[11]. Therefore, the only difference between the CRD and the DSD at this point is that the CRD does not provide an indicative list of means which can be considered means of distance communication.

1. The exclusive use of means of distance communication

4. Distance contracts are concluded through means of distance communication. Means of distance communication include the Internet, e-mail, regular mail, (mobile) phone, fax, etc… It is irrelevant whether the parties only use *one* means of distance communication to negotiate and to conclude the contract or combine *different* means of distance communication (e.g. website and phone). Also, it does not matter whether the parties meet each other after the

[9] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 27 December 2006, 376/36.

[10] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 17 July 2000, 178/1.

[11] The Belgian legislator has maintained a separate definition of a means of distance communication (art. I.8, 16° CEL), next to the new defintion of a distance contract.

conclusion of the contract (e.g. at the time of delivery or payment). Decisive is that the contracting parties, or their representatives, are not simultaneously physically present before or at the time of conclusion of the contract.

5. According to recital 20 of the CRD, the requirement of the exclusive use of means of distance communication only applies to the actual negotiations and the conclusion of the contract. It does not prevent that a contract is regarded as a distance contract if the consumer has merely visited the business premises for the purpose of gathering information about the goods or services and afterwards has negotiated and concluded the contract at a distance. The Belgian, as well as the French legislator, have not included this "rule" into their national legislation[12]. Taking into account that the recitals of a Directive are not binding as such[13] and that the text of the recital seems to be contrary to the definition included in the Directive itself (which requires the *exclusive* use of means of distance communication), it seems possible to argue that the definition of a distance contract does not cover situations where the consumer concludes a contract at a distance after he has visited the trader's premises to gather information. Such interpretation is supported by the fact that a broad interpretation of a distance contract is not consistent with the objectives pursued with the right to withdraw from a distance contract (*infra* nr. 48).

6. Recital 20 of the CRD also determines that the concept of a distance contract does not include reservations made by a consumer through a means of distance communication to request the provision of a good or a service from a professional[14]. One must be careful with this reasoning. More specifically, it is necessary to distinguish between on the one hand the situation where a reservation does not bind the consumer (i.e. where it does not create any obligation on behalf of the consumer)[15] and on the other hand the situation where the reservation creates the obligation to pick up the goods or to receive the services ordered on behalf of the consumer (and where the violation of this contractual obligation entitles the trader to a compensation). It is clear that in the latter case a real distance contract has been concluded, since the contract has become binding, following the exclusive use of means of distance communication.

2. The requirement of an organized scheme

7. An organized scheme requires that the trader concludes contracts regularly at a distance[16]. This requirement implies that not every contract that is concluded by a means of distance communication falls under the scope of application of the provisions on distance contracts. For example, if a trader only exceptionally concludes a contract by e-mail or telephone with a consumer, at the consumer's request, this contract cannot be regarded as a distance contract in the meaning of the Directive (and the Belgian and French legislation).

It is important to emphasize that it is not necessary that the trader itself runs the organized scheme. When a trader sells goods, using websites such as e-bay, the rules on distance

[12] In Belgium, this has been stated in the preparatory works: Exposé des motifs, *La Chambre*, Doc. 53, 3018/001, p. 12.
[13] C.J. 19 November 1998, C-162/97, *Gunnar Nilsson*, [1998] ECR I-4777; C.J. 24 November 2005, C-136/04, *Deutsches Milch-Kontor GmbH*, [2005] ECR I-10095.
[14] See also (Belgium): Exposé des motifs, *La Chambre*, Doc. 53, 3018/001, p. 12.
[15] See also: E. TERRYN, „Richtlijn 2011/83/EU betreffende consumentenrechten – Nieuwe regels op komst voor de directe verkoop", *Rechtskundig Weekblad* 2012-2013, p. 928.
[16] C. BIQUET-MATHIEU and J. DECHARNEUX, « Aspects de la conclusion du contrat par voie électronique », in *Le Commerce électronique : un nouveau mode de contracter*, Liege, Jeune barreau de Liège, 2001, p . 173.

contracts apply (see also recital 20 CRD). Although this view was already accepted by the German *Bundesgerichtshof* under the DSD[17], the CRD and its implementing legislation remove all possible doubts by adapting the definition of a distance contract which was laid down in the DSD. More specifically, it removes the requirement that the organized scheme is *run by the supplier*.

8. It is interesting to mention that the final definition - where it requires that the contract is concluded *within an organized scheme of distance communication* - differs from the initial definition which was incorporated in the proposal for a CRD, since the proposal did not contain the requirement of an organized scheme. Therefore, it is clear that it was originally the Commission's intention to broaden the scope of a distance contract to cover all contracts where the parties (trader and consumer) exclusively made use of one or more means of distance communication[18], whether or not an organized scheme was used. In this article, it will be argued that, although there are good reasons to exempt traders from the information requirements incorporated in the CRD where the contract has not been concluded within an organized scheme, there are no good reasons to exclude distance contracts, which were not concluded within an organized scheme for *the sale of goods*, from the *right of withdrawal*, which is normally awarded to the consumer in case of a distance contract (*infra* nr. 48).

II. Information requirements

9. In case of a distance contract (and an off-premises contract) the trader must provide the consumer with certain information (art. 6-8 CRD). The European legislator clearly believes that consumer protection increases when the trader must provide additional information to the consumer, since the CRD - compared to the DSD - contains additional information requirements[19]. Further, it is important to emphasize that the amount of information to be provided in case of a distance (or off-premises) contract is more extensive than the information which must be provided in case of consumer contracts that are not concluded at a distance or outside the trader's premises[20].

10. According to article 6.2 CRD the information requirements not only apply to contracts relating to "traditional" goods or services, but also apply 1) to contracts for the supply of water, gas or electricity, where they are not put up for sale in a limited volume or set quantity, and of district heating and 2) to contracts of digital content which is not supplied on a tangible medium.

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[17] Bundesgerichtshof 3 November 2004, available at: http://www.jurpc.de/rechtspr/20040281.htm.

[18] G. HOWELLS and R. SCHULZE, "Overview of the proposed Consumer Rights Directive", *Modernizing and Harmonizing Consumer Contract Law*, European Law Publishers, 2009, p. 10; C. TWIGG-FLESNER and D. METCALFE, "The proposed Consumer Rights Directive – less haste, more thought?", *European Review of Consumer Law* (2009) Volume 5 (Issue 3), p. 378-379.

[19] C. TWIGG-FLESNER and D. METCALFE, "The proposed Consumer Rights Directive – less haste, more thought?", *European Review of Consumer Law* (2009) Volume 5 (Issue 3), p. 381.

[20] See art. 5 CRD, art. VI.2 CEL and art. L-111-1 CC. See also: A. DE BOECK, "Les obligations d'information générales et le droit des obligations en Belgique et en France", *European Review of Consumer Law* (2013) Volume 9 (Issue xxx), p. Xxx; J. DELVOIE and S. RENIERS, „ Precontractual information in the proposal for a Common European Sales Law", in *The Draft Common European Sales Law: Towards an Alternative Sales Law? A Belgian Perspective*, Cambridge, Intersentia, 2013, p. 58; O. UNGER., "Richtlinie über Verbraucherrechte", *Zeitschrift für Europäisches Privatrecht* (2012) Volume 20 (Issue 2), p. 282.

Whereas, this is also stated in the *Code de Consommation*, (art. L-121-16.2 CC), article VI.45 CEL (Belgium) does not repeat explicitly that the information requirements are applicable to these types of contracts[21]. Moreover, some information requirements specifically relate to *goods and services*. However this does not mean that providers of gas, electricity, water, district heating or digital content (which is not supplied on a tangible medium) are exempted from these information requirements (which would also be contrary to the CRD). Gas, water and electricity have always been considered goods under Belgian Law. As far as digital content (which is not supplied on a tangible medium) is concerned, the legislator believes that digital content (which is not supplied on a tangible medium) must be seen as a service[22]. Whereas this argument is not always convincing (e.g. in case of a license which entitles the consumer to use certain software), it is clear that the information requirements also apply to contracts relating to digital content which is not supplied on a tangible medium.

11. The information which is provided to the consumer forms an integral part of the distance contract. For example, if it is mentioned on the trader's website that delivery will take place within a certain time, exceeding this period of time will constitute a breach of contract[23]. Changes to the information, which has been provided to the consumer, are only possible if the consumer *expressly* agrees (art. 6.5 CRD, art. VI.45 §4 CEL). Taking into account the mandatory nature of the pre-contractual information requirements, it is clear that the trader, whenever he wishes to alter one of the elements on which information was provided, will have to obtain the consumer's express consent. For example, the parties could, when concluding the contract by e-mail, expressly agree on a different time of delivery of the goods than the one mentioned on the trader's website. On the other hand, a provision in the general terms and conditions indicating in advance that the trader can make changes to the information provided will not be sufficient[24].

1. Content of the information

12. Which information must be provided in case of a distance contract is clearly enumerated in the Directive (art. 6 CRD). Taking into account the fact that the Directive is based on maximum harmonization no other pre-contractual information requirements may be imposed by the Member States[25]. The Belgian legislator has copied the Directives' list in article VI.45

[21] Water, gas or electricity, where they are put up for sale in a limited volume or set quantity, as well as digital content which is supplied on a tangible medium are considered goods.
[22] Exposé des motifs, *La Chambre*, Doc. 53, 3018/001, p. 16.
[23] O. UNGER., "Richtlinie über Verbraucherrechte", *Zeitschrift für Europäisches Privatrecht* (2012) Volume 20 (Issue 2), p. 286.
[24] J. DELVOIE and S. RENIERS, „ Precontractual information in the proposal for a Common European Sales Law", in *The Draft Common European Sales Law: Towards an Alternative Sales Law? A Belgian Perspective*, Cambridge, Intersentia, 2013, p. 62.
[25] See also: art. 8.10 CRD. In this context it is worth mentioning that Member States remain free to impose additional information requirements for contracts that have not been concluded at a distance or outside the trader's premises (art. 5.4 CRD) (O. UNGER., "Richtlinie über Verbraucherrechte", *Zeitschrift für Europäisches Privatrecht* (2012) Volume 20 (Issue 2), p. 282). It has been argued before that there are good reasons for distinguishing between general information requirements (minimum harmonization) and information requirements relating to distance and off-premises contracts (full harmonization) (G. HOWELLS and N. REICH, *The Current limits of European harmonisation in consumer contract law*, Era-Forum Volume 12 (Issue 1), p. 53). Finally, it must also be mentioned that the CRD allows Member States to maintain or introduce in their national law language requirements regarding the contractual information, in order to ensure that such information is easily understood by the consumer. The Belgian and French legislator have not made use of the latter possibility (see also (Belgium): Exposé des motifs, *La Chambre*, Doc. 53, 3018/001, p. 33-34).

CEL. The French legislator has spread the information requirements over several articles in the *Code de la Consommation* (art. 111-1 and 121-17 CC).

For a complete list of the information to be provided, reference is made to the text of article 6 CRD and its implementing legislation. However, some information requirements require some explanation.

a) Main characteristics and total price

13. First, the trader must provide information on the main characteristics of the goods or services, to the extent *appropriate to the medium and to the goods or services concerned* (art. 6.1 (a) CRD, art. VI.45 §1, 1° CEL, art. 111-1, 1° and L.121-17, 1° CC). This means that when determining the information to be provided on the main characteristics one must take into account the means of distance communication used to offer the goods or services[26], as well as the nature of the goods or services. The fact that reference is made to the medium used, as well as the goods or services offered, is logical, since these criteria can also be found in the provisions on misleading through omission in the Unfair Commercial Practices Directive[27] (art. 7.4 (a)) .

The fact that the *nature* of the goods or services can be taken into account implies that no - or at least less - information on the main characteristics must be provided, if these goods or services are common and their characteristics are well-known to the average consumer[28]. Further, the fact that the means of commercial communication used do not allow to provide much information will also play a role. In *Ving Sverige* the Court of Justice argued - with regard to the information to be included in an invitation to purchase (art. 7.4 UCPD) - that the same degree of detail cannot be required in the description of a product irrespective of the form which the commercial communication takes (e.g. radio, television, electronic or paper[29]). The Court also stated that it may be sufficient for only certain of a product's main characteristics to be given and for the trader to refer in addition to its website, on condition that on that site there is essential information on the product's main characteristics[30].

14. Further, the trader must provide information on the *total* price of the goods or services inclusive of taxes (art. 6.1 (e) CRD, art. VI.45 §1, 5° CEL, art. L- 111-1, 2° and L.121-17-I, 1° CC)[31]. If the nature of the goods or services is such that the price cannot reasonably be calculated in advance, the trader must inform the consumer about the manner in which the price must be calculated. Where applicable, the trader must also inform the consumer about all additional freight, delivery or postal charges and any other costs. Where those charges cannot reasonably be calculated in advance, the trader must inform the consumer about the

[26] C.J. 12 May 2011, C-122/10, *Konsumentombudsmannen v. Ving Sverige*, [2011] ECR I-3903.

[27] 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 and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, OJ L 11 June 2005, 149/22.

[28] See also, B. KEIRSBILCK, *The new European law of unfair commercial practices and competition law*, Oxford, Hart Publishing, 2011, p. 354.

[29] See also recital 36 CRD which states that the technical constraints of certain media, such as the restrictions on the number of characters on certain mobile telephone screens or the time constraint on television sales spots, must be taken into account.

[30] C.J. 12 May 2011, C-122/10, *Konsumentombudsmannen v. Ving Sverige*, [2011] ECR I-3903.

[31] See article VI.4 CEL, which requires the trader to indicate the total price, including VAT and all other taxes and costs which the consumer has to pay (to the trader). See also: Arrêté du 3 décembre 1987 relatif à l'information du consommateur sur les prix (en France).

fact that such additional charges may be payable (art. L.113-3-1 CC). Once again reference can be made to article 7.4 UCPD, which requires that this information is included in an invitation to purchase. Contrary to the UCPD, article 6.6 CRD itself contains a specific remedy in case the trader does not comply with the information requirements on additional charges or other costs. In such situation the consumer does not have to bear those charges or costs (art. VI.45 §5 CEL, art. L.121-17-II CC).

15. In the case of a contract of indeterminate duration or a contract containing a subscription, the total price must include the total costs per billing period. Where such contracts are charged at a fixed rate, the total price also means the total monthly costs. Where the total costs cannot be reasonably calculated in advance, the manner in which the price is to be calculated must be provided (art. 6.1 (e) CRD, art. VI.45 §1, 5° CEL, art. L. 113-3-1-II CC).

b) The trader

16. The trader must also provide information on its identity (art. 6.1, b) CRD, art. VI.45 §1, 2° CEL, art. L.111-1, 4° and L.121-17, 1° CC), its geographical address and – *where available* – its telephone number, fax number and e-mail address[32], in order to enable the consumer to contact the trader quickly and communicate with him efficiently (art. 6.1 c) CRD, art. VI.45 §1, 3° CEL). The wording "where available" means that it is not necessary for the trader to mention for example its telephone number on his website *if other means are available which enable the consumer to contact the trader quickly and communicate with him efficiently*. The solution adopted for distance contracts differs from the one which applies to contracts which cannot be regarded as distance or off-premises contracts (art. 5 CRD), where it is in all cases mandatory to mention the telephone number. This is a rather strange solution, since consumers, particularly in the case of a distance contract would prefer to be able to contact the trader by phone, rather than by other means of distance communication[33]. By not making the mentioning of the telephone number mandatory in the case of a distance contract, the European legislator acknowledges the reasoning of the Court of Justice in the *Deutsche Internet Versicherung*-case (with regard to the Electronic Commerce Directive)[34].

c) The right of withdrawal

17. The consumer must also be informed about the right of withdrawal[35]. This is essential. In order for the withdrawal right to be effective consumers need to be aware of the possibility to withdraw from the contract[36]. More specifically, the consumer must be informed about the conditions of the right of withdrawal and the time limit and procedures to exercise the right of

[32] In case the contract falls under the scope of the Electronic Commerce Directive, the e-mail adress must always be mentioned (*infra* nr. 36).
[33] See also: H.W. MICKLITZ, "An Optional Law on Off-premises, Distance Sales and Unfair Terms for European Business and Consumers?", *EUI Working Papers in Law 2012/04*, p. 42.
[34] C.J. 16 October 2008, C-298/07, *Bundesverband der Verbraucherzentralen und Verbraucherverbände versus Deutsche internet versicherung AG*, [2008] ECR I-7841. In this case, the ECJ decided that article 5(1)(c) of the Electronic Commerce Directive must be interpreted as meaning that a service provider is required to supply to recipients of the service, before the conclusion of a contract with them, in addition to its electronic mail address, other information which allows the service provider to be contacted rapidly and communicated with in a direct and effective manner. That information does not necessarily have to be a telephone number.
[35] The information requirements with regard to the existence,exercise or absence of the right of withdrawal can be found in art. 6.1. (h) – (k) CRD, art. VI.45 §1, 8°-11° CEL, art. L. 121-17-I CC.
[36] H.W. MICKLITZ, J. STUYCK, J and E. TERRYN, *Cases, Materials and Text on Consumer Law*, Oxford. Hart Publishing, 2010, p. 255.

withdrawal. Also, the trader must provide the consumer with the model withdrawal form, set out in Annex I(B) of the CRD.

Further, the consumer must be informed about the fact that he will have to bear the costs for returning the goods in case he exercises his right of withdrawal. If the goods, by their nature, cannot normally be returned by post, the consumer must be informed about the cost of returning the goods. This requirement will be considered to have been met, for example, if the trader specifies one carrier (for instance the one he assigned for the delivery of the good) and one price concerning the cost of returning the goods. 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 (Recital 36 CRD).

Finally, the consumer must be informed that when he exercises the right of withdrawal after having made a request to start with the performance of services or the supply of water, gas or electricity (where they are not put up for sale in a limited volume or set quantity), or of district heating during the withdrawal period, he will have to pay reasonable costs to the trader (*infra* nr. 66).

18. The information on the right of withdrawal, the costs for returning the goods and the costs to be paid in case services, water, gas or electricity have been delivered within the withdrawal period can be provided by means of the model instructions on withdrawal set out in Annex I(A) of the CRD. A trader is considered having fulfilled these information requirements if he has supplied these instructions to the consumer, correctly filled in. This rule benefits traders, in that sense that it increases legal certainty[37].

21. If the trader has not complied with the information requirements on the costs of returning the goods, the consumer does not have to bear those charges or costs (art. 6.6 CRD, art. VI.45 §5 CEL, art. L.121-17-II CC). If the trader does not provide the consumer with the information on the right of withdrawal or the model withdrawal form, the withdrawal period is extended substantially. In such a situation, the withdrawal period only expires 12 months from the end of the initial withdrawal period[38] (art. 10 CRD, art. VI.48 CEL, art. L. 121-21, al. 1 CC).

Another possibility in order to remedy the lack of information with regard to the right of withdrawal would have been to determine that the withdrawal period never starts running, if the consumer is not informed about the withdrawal right. Such remedy was previously accepted by the Court of Justice in the *Heiniger* case[39]. However, an indefinite period of

[37] E. TERRYN, „Richtlijn 2011/83/EU betreffende consumentenrechten – Nieuwe regels op komst voor de directe verkoop", *Rechtskundig Weekblad* 2012-2013, p. 930.

[38] However if the trader fulfils its obligation to provide information with regard to the withdrawal right within that period of 12 months (e.g. after six months), a new withdrawal period starts, that will expire 14 days after the day upon which the consumer receives the information.

[39] See: C.J. 13 December 2001, Case C-481/99, *Heiniger v Bayerische Hypo- und Vereinsbank AG*, [2001] ECR I-9945 (with regard to doorstep selling). See also: C. RAMBERG, *Electronic Commerce in the Context of the European Contract Law Project*, ERA-Forum Volume 6 (Issue 1), p. 56; O. UNGER., "Richtlinie über Verbraucherrechte", *Zeitschrift für Europäisches Privatrecht* (2012) Volume 20 (Issue 2), p. 289.

withdrawal was considered incompatible with the principle of legal certainty by the European legislator (recital 43)[40].

19. In the absence of a right of withdrawal, the trader has to inform the consumer that he will not benefit from a right of withdrawal. Where applicable the consumer must be informed about the circumstances under which the consumer loses his right of withdrawal.

d) The legal guarantee

20. One of the new information requirements is the obligation on behalf of the trader to remind the consumer of the existence of a legal guarantee of conformity for *goods* (art. 6.1 (l) CRD, art. VI.45 §1, 12° CEL, art. L. 111-1, 4° and L.121-17, 1° CC). First, it is important to see that the requirement to inform the consumer about the existence of a legal guarantee is introduced by the CRD, since it was not included in the Consumer Sales Directive[41]. Further, it is remarkable that more and more, consumers are no longer required to learn themselves about their legal rights. The task to inform consumers about their legal rights is given to traders. This can also been seen in the jurisprudence of the Court of Justice. In het *Invitel*-case, the Court decided that the fact that the consumer is not informed about the rights he has on the basis of a legal act, plays a role in the assessment of the unfairness of a term[42]. In the past, the Court of Appeal in Brussels argued that consumers are supposed to know their legal rights and therefore traders do not have to inform consumers on their legal rights[43]. It is clear that, even where the legislator does not require explicitly to inform consumers about their legal rights, this reasoning of the Court of Appeal can no longer always be upheld.

Further, it is interesting to mention that according to the Unfair Commercial Practices Directive it is a *per se* misleading practice to present rights given to consumers in law as a distinctive feature of the trader's offer. A distinction must be made between the mere mentioning of the legal guarantee in a clear and comprehensible manner (which is obligatory according to the CRD) on the one hand and laying emphasis on the existence of the legal guarantee in order to let consumers believe that the trader offers an additional guarantee, compared to the legal guarantee (which is prohibited by the UCPD) on the other hand.

e) Digital content

21. Finally, it is worth mentioning some specific information requirements with regard to digital content (art. 6.1 (r)-(s) CRD, art. VI.45 §1, 18°-19° CEL, art. L. 111-1, 4° and L.121-17, 1° CC). More specifically, the trader must, where applicable, inform the consumer on the functionality, including applicable technical protection measures, of digital content and any relevant interoperability of digital content with hardware and software that the trader is aware of or can reasonably be expected to have been aware of. This information requirement is new. It is highly relevant for consumers.

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[40] See also: G. HOWELLS and N. REICH, *The Current limits of European harmonisation in consumer contract law*, Era-Forum Volume 12 (Issue 1), p. 53.

[41] 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 L 7 July 1999, 171/12.

[42] C.J. 26 April 2012, C-472/10, *Nemzeti Fogyasztóvédelmi Hatóság versus Invitel Távközlési Zrt*, not yet published in ECR. More specifically, the Court argues that the assesment of the unfair nature of a contractual term must take place in light of all the terms appearing in the general business conditions of the consumer contracts which include the contested term, *and the national legislation setting out the rights and obligations* which could supplement those provided by the GBC at issue.

[43] Court of Appeal Brussels 3 May 2002, *Revue de Droit de la Consomation* 2003, 53, note E. TERRYN

2. When and how must the information be provided?

a) In general

22. The information provided to the consumer must be given in a clear and comprehensible manner. What constitutes clear and comprehensible information, must normally be determined taking into account the so-called average consumer. However, the trader should take into account the specific needs of consumers who are particularly vulnerable because of their mental, physical or psychological infirmity, age or credulity in a way which the trader could reasonably be expected to foresee. Strangely, the CRD ads that taking into account specific needs should not lead to different levels of consumer protection (Recital 32 CRD). It is hard to see how a trader can differentiate without distinguishing levels of protection[44].

With regard to the point in time on which the information must be provided, a distinction must be made between the obligation to provide information *before the consumer is bound* and the obligation to confirm that information *within a reasonable period after the conclusion of the contract*, at the latest at the time of delivery of the goods or before the performance of the services begins.

It is clear that the objective pursued with both information requirements is different. Where the trader is required to provide the information before the consumer is bound, it is the legislator's intention to ensure that the consumer disposes of the necessary information to give an *informed consent*. Where the information can be given within a reasonable time after the conclusion of the contract (at the latest at delivery of the goods / before the execution of the services agreement), the objective is clearly different. This information requirement wants to ensure that the consumer can easily dispose of the information in the period following the delivery of the goods or (the start of) the execution of the services. Since the consumer should be able to consult this information within a longer period of time, the legislator also requires that the confirmation of the information is given on a durable medium.

b) Before the consumer is bound

23. Before the consumer is bound by a distance contract, or any corresponding offer (if the consumer legally makes the offer), the trader must give the information - or *make it available* to the consumer - in a way *appropriate to the means of distance communication used* in plain and intelligible language. In so far as that information is provided on a durable medium, it must be legible (art. 8.1 CRD, art. VI.46 §1 CEL, art. L.121-19 CC).

When the goods or services are offered over the Internet, the information can be provided through the trader's website. Where the information is not mentioned at the page on which the order is placed, it is *at least* necessary that on this page a hyperlink is shown to the webpage on which the information is available. Since the information must be presented in a clear and comprehensible manner (art. 6 CRD, art. VI.45 §1 CEL, art. L.121-17-I CC), the average consumer must be able to access the information easily. This will certainly not be the case if

[44] H.W. MICKLITZ, "An Optional Law on Off-premises, Distance Sales and Unfair Terms for European Business and Consumers?", *EUI Working Papers in Law 2012/04*, p. 41.

the information required is spread over several web pages or if an average consumer would not notice the hyperlink referring to the information required before placing the order. As already mentioned, specific information requirements apply in case a distance contract, which is concluded by electronic means, places the consumer under an obligation to pay (*infra* nr. 28)

c) Confirmation of the information on a durable medium

24. Within a reasonable time after the conclusion of the distance contract and at the latest at the time of the delivery of the goods or before the performance of the service begins, the trader must *provide* the consumer with the confirmation of the contract concluded, on a durable medium (art. 8.7 CRD, art. VI.46 §7 CEL, art. L. 121-19-2 CC). The wording is clearly different from the wording used in respect of the pre-contractual information. When confirming the pre-contractual information it is not sufficient to make the information available. The information must be provided. Although the wording is different from the wording in the DSD (which required that the consumer *received* the information), it is still clear that the information must actually be communicated to the consumer[45]. Traders cannot ask from consumers that they act actively in order to consult the information (e.g. by requiring them to click on a hyperlink, mentioned in an e-mail)[46]. Other language versions of the CRD make this even more clear by distinguishing between "beschikbaar stellen" and "verstrekken" (Dutch), "mettre à la disposition" and "fournir" (French) and "zur Verfügung stellen" and "aufstellen" (German)[47]. The French legislator has even chosen to maintain the existing terminology (le consommateur reçoit) instead of the terminology of the CRD, which is only compatible with the CRD if one accepts that at the confirmation on a durable medium must actually be communicated to him.

25. The confirmation must include all the information which has been provided before the consumer was bound[48]. It is remarkable that the CRD requires that all information which has been made available before the consumer is bound, must be confirmed on a durable medium[49]. The solution is clearly different from the one that was laid down in the DSD, which only required the confirmation of certain information that was provided before the consumer was bound. Taking into account that the objective of both information requirements is different, it would have made sense to distinguish between the content of the pre-contractual information and the information which must be confirmed[50]. From a consumer's viewpoint different information becomes important at different moments. For example, whereas information on delivery is essential before the conclusion of the contract, it is not important anymore once delivery has taken place. The same goes for example for information

[45] E. TERRYN, „Richtlijn 2011/83/EU betreffende consumentenrechten – Nieuwe regels op komst voor de directe verkoop", *Rechtskundig Weekblad* 2012-2013, p. 933.
[46] See also: C.J. 5 July 2012, C-49/11, *Content Services Ltd versus Bundesarbeitskammer*, not yet published in ECR.
[47] See also: O. UNGER., "Richtlinie über Verbraucherrechte", *Zeitschrift für Europäisches Privatrecht* (2012) Volume 20 (Issue 2), p. 283-284.
[48] In case of the supply of digital content which is not supplied on a tangible medium, it must – where the consumer has requested the performance - also mention the consumer's prior request to start the performance, as well as his acknowledgment that he thereby loses his right of withdrawal.
[49] Only when the trader already provided the information to the consumer on a durable medium before the consumer was bound, the trader does not need to confirm it after the conclusion of the contract.
[50] M. LOOS, "Review of the European Consumer Acquis". *Working Paper Series Centre for the Study of European Contract Law*, 2008, http://ssrn.com:abstract=1123850, p. 32.

on the costs for using means of distance communication for the conclusion of the contract (not calculated at the basic rate) or information on the interoperability of digital content. The other way around, it makes no sense to inform consumers about their legal guarantee before the conclusion of the contract, but is can be useful to remind consumers about the existence of the legal guarantee at the time of delivery.

26. A durable medium means any instrument which enables the consumer or the trader to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored (art. 2 (10) CRD, art. I. 8, 19° CEL, art. L.121-16-3° CC). As well a piece of paper, a CD-rom, a USB-stick as an e-mail send to the consumer and containing the information required can be considered a durable medium. An ordinary website on the other hand, to which is referred in an e-mail send to the consumer, cannot be considered a durable medium, not even if it contains all the information required[51].

27. In Belgium, the transposition of the CRD has lead to the abolishment of formal requirements with regard to the mentioning of the existence or absence of the right of withdrawal. More specifically, article 46 of the Act on Market Practices required that a certain formula was mentioned in bold, in a separate box and at the first page. It is clear that the Belgian legislator had no other choice than abandoning these formal requirements, taking into account the maximum harmonization character of the CRD. However, taking into account that a model withdrawal form has to be send to the consumer, the level of consumer protection has clearly not been decreased.

d) Obligation to pay on behalf of the consumer

28. New is that specific requirements apply in case a distance contract, which will be concluded by electronic means, places the consumer under an obligation to pay (art. 8.2 CRD, art. VI.46 §2 CEL, art. L. 121-19.3 CC). More specifically, the trader must make the consumer aware in a clear and *prominent* manner - *and directly before the consumer places his order* - of the information on the main characteristics of the goods or services, the total price of the goods or services, the duration of the contract and where applicable, the minimum duration of the consumer's obligations under the contract. This rule must ensure that the essential information is brought under the consumer's attention, immediately before he concludes an agreement which puts him under an obligation to pay[52]. Further, the European legislator wanted to ensure that the consumer realises when he exactly places the order[53]. Therefore, the trader must ensure that the consumer, when placing his order, explicitly acknowledges that the order implies an obligation to pay.

[51] C.J. 5 July 2012, C-49/11, *Content Services Ltd versus Bundesarbeitskammer*, not yet published in ECR. See also: A. STADTLER and J. WEISSEL, "Fernabsatz-Richtlinie: Hyperlink kein «dauerhafter Datenträger»", (2012) *European Law Reporter* p. 117-120; O. UNGER., "Richtlinie über Verbraucherrechte", *Zeitschrift für Europäisches Privatrecht* (2012) Volume 20 (Issue 2), p. 283-284.

[52] E. TERRYN, „Richtlijn 2011/83/EU betreffende consumentenrechten – Nieuwe regels op komst voor de directe verkoop", *Rechtskundig Weekblad* 2012-2013, p. 932.

[53] H.W. MICKLITZ, "An Optional Law on Off-premises, Distance Sales and Unfair Terms for European Business and Consumers?", *EUI Working Papers in Law 2012/04*, p. 45.

29. If placing an order entails activating a button or a similar function, the button or similar function must be 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. If the trader has not complied with this requirement, the consumer is not bound by the contract or order.

e) Trading websites

30. Trading websites, i.e. websites which make it possible to order good or services through the website, must, next to the other information which is required by article 6.1 CRD, indicate clearly and legibly whether any delivery restrictions apply and which means of payment are accepted. The information must be provided at the latest at the beginning of the ordering process (art. 8.3 CRD, art. VI. 46 §3 CEL, art. L. 121-19.3, al. 3 CC).

31. Delivery restrictions may for instance relate to the countries in which delivery is possible. Therefore, consumers residing in countries to which the trader's offer is not directed must clearly be informed about this. In this context it is interesting to mention that information on the delivery restrictions may play an important role in determining the law applicable to the contract. Article 6 of the Rome I-Regulation determines that the law of the consumer's country applies if the parties did not choose the applicable law and that, in case another law (in most cases the law of the trader's country) has been chosen, this choice of law cannot deprive the consumer from the protection which is offered to him by the "mandatory" provisions[54] of the law of the country where the consumer has his habitual residence. However, this specific rule of private international law only applies if the trader pursues his commercial activity in or directs his commercial activity towards the consumer's country (or to several countries including the consumer's country). With regard to distance contracts, the precondition of directing its activity to the consumer's country is of particular importance[55].

The Court of Justice decided that in order to determine whether a professional whose activity is presented on its website can be considered to be 'directing' its activity to the Member State of the consumer's domicile, it must be ascertained whether, before the conclusion of any contract with the consumer, it is apparent from those websites and the professional's overall activity that the professional was envisaging doing business with consumers domiciled in one or more Member States, including the Member State of that consumer's domicile, in the sense that it was intended to conclude a contract with them[56]. It is clear that if the trader mentions on his website that delivery can take place within a certain country, he can be considered directing its activity towards that country[57].

f) Means of distance communication with limited space or time

[54] Provisions which cannot be derogated from by contract.

[55] However, the scope is not limited to contracts that have been concluded at a distance: C.J. 6 September 2012, Case C-190/11, *Daniela Mühlleitner v. Ahmad Yusufi and Wadat Yusufi*, not yet published in ECR.

[56] C.J. 7 December 2010, C-585/08, *Peter Pammer v. Reederei Karl Schlüter GmbH & Co. KG*, [2010] ECR I-12527.

[57] Recently, the Court of Justice acknowledged that in order to apply the specific rule of private international law, it is not necessary that the consumer can prove the existence of a causal link between the means used to direct the commercial activity to the consumer's country and the conclusion of the contract: Case C-218/11, *Lokman Emrek v. Vlado Sabranovic*, [2013], not yet published in ECR.

32. A specific rule applies if the contract is concluded through a means of distance communication which allows limited space (e.g. sms) or time to display the information (art. 8.4 CRD, art. VI.46, §4 CEL, art. L.121-19-1 CC). If so, the trader must provide at least the pre-contractual information[58] regarding the main characteristics of the goods or services (*supra* nr. 13), the identity of the trader, the total price, the right of withdrawal, the duration of the contract and, if the contract is of indeterminate duration, the conditions for terminating the contract. This information must be provided on that particular means of distance communication (e.g. SMS) and *prior to the conclusion of such a contract.* The other information which is required according to article 6.1 CRD, must also be provided by the trader to the consumer, but *only* in a way appropriate to the means of distance communication used and in plain and intelligible language. For instance, such information could be made available through the trader's website[59]. Although the text of the CRD and its implementing legislation are not entirely clear, it seems that "the other information" must also be provided prior to the conclusion of the contract[60].

Once again, reference can be made to the provisions on misleading omissions incorporated in the Unfair Commercial Practices Directive. Article 7.3 UCPD determines that where the medium used to communicate the commercial practice imposes limitations of space or time, these limitations and any measures taken by the trader to make the information available to consumers by other means must be taken into account in deciding whether information has been omitted[61]. The CRD is clearly more specific than the UCPD, since it not only states that measures taken by the trader to make the information available to consumers by other means must be taken into account, but enumerates (by referring to article 6.1 CRD) the information which must be provided to the consumer "in an appropriate way".

g) Contracts concluded over the telephone

33. If the trader makes a telephone call to the consumer with a view to concluding a distance contract, it is not sufficient to mention the information on the main characteristics of the goods or services (*supra* nr. 13), the identity of the trader, the total price, the right of withdrawal, the duration of the contract and, if the contract is of indeterminate duration, the conditions for terminating the contract. Also, he must at the beginning of the conversation with the consumer, disclose his identity. If the person making the call acts on behalf of another person the identity of this person must be mentioned. Finally, it is necessary to mention the commercial purpose of the call (art. 8.5 CRD, art. VI.46 §5 CEL, art. L.212-19-3 CC).

[58] This rule only applies with regard to the information which must be provided before the consumer is bound. It does not apply to the obligation to confirm the information on a durable medium, which must contain alle information (*supra* nr. 24). See also: E. TERRYN, „Richtlijn 2011/83/EU betreffende consumentenrechten – Nieuwe regels op komst voor de directe verkoop", *Rechtskundig Weekblad* 2012-2013, p. 932.

[59] O. UNGER., "Richtlinie über Verbraucherrechte", *Zeitschrift für Europäisches Privatrecht* (2012) Volume 20 (Issue 2), p. 284.

[60] J. DELVOIE and S. RENIERS, „ Precontractual information in the proposal for a Common European Sales Law", in *The Draft Common European Sales Law: Towards an Alternative Sales Law? A Belgian Perspective*, Cambridge, Intersentia, 2013, p. 63.

[61] See also: C.J. 12 May 2011, C-122/10, *Konsumentombudsmannen v. Ving Sverige*, [2011] ECR I-3903.

With regard to the situation where a distance contract can be concluded by telephone, art. 8.6 CRD leaves it to the Member States: 1) to determine whether the trader has to confirm the offer to the consumer, who is bound only once he has signed the offer or has sent his written consent, and 2) to determine whether such confirmations have to be made on a durable medium. In Belgium, the CEL itself does not introduce the obligation to confirm the offer. However, the introduction of such obligation does not require the legislator to change the law, since it can take place by Royal Decree (art. VI.46 §6 CEL). Contrary to the Belgian legislator the French legislator has chosen to use the possibility to require a confirmation of the offer. More specifically, article L. 121-20 CC determines that the trader who has contacted the consumer by phone must send a confirmation of the offer, containing all the information mentioned in article L. 121-17 CC, on paper or on a durable medium. Further, article L. 121-20 CC states that the consumer can only be bound by the offer when he has signed the offer in writing or has given his consent by electronic means. It has been questioned whether such an additional protection – which creates additional costs for traders - is really necessary, since the consumer is already entitled to withdraw from the contract (*infra* nr. 44)[62].

3. Information requirements incorporated in other Directives

34. The information requirements laid down in the CRD (and its implementing legislation) are in addition to information requirements contained in the Services Directive and the Electronic Commerce Directive (art. 6.8 CRD). Therefore, in case *services* are offered over the *Internet*, the trader must not only comply with the information requirements incorporated in the CRD, but also with those in the Electronic Commerce Directive and the Services Directive (and its implementing legislation). Only when provisions of the Services Directive or Electronic Commerce Directive on the content *and the manner in which the information is to be provided* conflict with a provision of the CRD, the provision of the CRD prevails. The latter for example means that the application of the Electronic Commerce Directive or Services Directive cannot imply that the (information society) service provider is exempted from the obligation to confirm the information *on a durable medium*.

35. More specifically, the Electronic Commerce Directive contains two sets of information requirements. First, there is certain information which must be rendered easily, directly and permanently accessible to the recipients of the service (art. 5)[63]. Secondly, there is information which must be given to the recipient of the service prior to the order being placed (art. 10)[64]. Therefore, the latter information requirement only applies if the website enables the consumer to place an order.

Looking at both sets of information requirements it is clear that the Electronic Commerce Directive contains some additional information requirements whenever the offering of goods or services at a distance can be considered an information society service[65] (e.g. when a

[62] E. TERRYN, „Richtlijn 2011/83/EU betreffende consumentenrechten – Nieuwe regels op komst voor de directe verkoop", *Rechtskundig Weekblad* 2012-2013, p. 932.
[63] Art. 7 Belgian Law of 11 March 2003 on certain legal aspects of information society services; art. 19 French law n° 2004-575 of 21 June 2004 „pour la confiance dans l'économie numérique".
[64] Art. 8 Belgian Law of 11 March 2003 on certain legal aspects of information society services, art. 1369-4 Code Civil.
[65] Any service normally provided for remuneration at a distance, by means of electronic equipment for the processing and storage of data, at the individual request of a recipient of the service.

distance contract is concluded over the Internet). For example, contrary to the CRD, the Electronic Commerce Directive requires that the e-mail address of the service provider is *always* provided (e.g. every website will have to mention the e-mail address of the trader). Must also be accessible (where applicable): the trade register in which the service provider is entered and his registration number[66] and the VAT identification number[67]. When it is possible to place an order, it is also necessary to provide information on 1) the different technical steps to follow to conclude the contract, 2) whether or not the concluded contract will be filed by the service provider and whether it will be accessible, 3) the technical means for identifying and correcting input errors prior to the placing of the order and 4) the languages offered for the conclusion of the contract. Contract terms and general conditions provided to the recipient must be made available in a way that allows him to store and reproduce them.

36. According to article 22 of the Services Directive, service providers must make certain information available to the recipient of the service[68]. Whenever the distance offering of goods or services *cannot* be regarded as an information society service, additional information will have to be made available by the service provider (such as trade register number). Therefore, the trader will have to check the information requirements incorporated in these three Directives.

When the offering of goods or services also constitutes an information society service (and therefore the Electronic Commerce Directive also applies), the Services Directive, in general[69], does not contain additional information requirements. When the service provider has complied with all information requirements incorporated in the CRD and the Electronic Commerce Directive he can trust that he will have fulfilled the information requirements resulting from the Services Directive. Even if one accepts that the Electronic Commerce Directive does not actually obliges the service provider to provide information on the contractual terms[70], the Services Directive – where it explicitly requires information on the general terms and conditions and the existence of contractual clauses, if any, used by the provider concerning the law applicable to the contract and/or the competent courts – will not add anything. Information on the contractual terms, including the applicable law and the competent court, must in any case be given in order to incorporate such provisions into the contract. If the consumer would not have had the possibility to take notice of these terms before the conclusion of the contract - which requires at least that he is informed about these terms and they are available to him – these terms could not be a part of the contract.

37. The CRD determines that Member States retain the possibility to impose additional information requirements in accordance with the Services Directive or Electronic Commerce Directive. Whereas the CRD is based on maximum harmonization, the Services Directive and the Electronic Commerce Directive are not. More specifically, this implies that additional

[66] Or equivalent means of identification in that register.
[67] Apart from that there are some specific information requirements for reglated professions and activities which are subject to an authorization scheme.
[68] For a complete list of the information to be made available reference is made to the text of the Directive. See also: art. L. 111-2 CC and the article 18 of the Belgian Services Law of 26 March 2010.
[69] Only where the service provider is subject to a liability insurance or a guarantee, additional information on this insurance or liablility has to be made available.
[70] The Electronic Commerce Directive only requires that contractual terms are made available in a way that allows the recipient of the service to store and reproduce them.

information requirements are only permitted to the extent that their scope is limited to (information society) services. Additional information requirements may not apply to all distance contracts (because of the fact that they are concluded at a distance).

4. Burden of proof

38. It is explicitly determined that it is up to the trader to proof that he has complied with all information requirements (art. 6.9 CRD, art. VI.45 §6 CEL, art. L.121-17-III CC)). The burden of proof is clearly imposed on the trader, who must ensure that in case the consumer argues that he did not receive the information required, he will be able to prove the opposite.

5. Remedies

39. The CRD contains limited remedies in case the trader does not provide the information required, either before the consumer is bound, either within a reasonable time after the conclusion of the agreement. More specifically, the consumer will not have to pay certain costs, when he was not informed about these costs (art. 6.6 CRD, art. VI.45 §5 CEL, art. L.121-17-II CC) or will not be bound by the contract or the order if the button, which must be activated to place an order is not clearly labelled as creating an obligation to pay (art. 8.2 CRD, art. VI.46 §2 CEL, art. L.121-19-3 CC). Further, the consumer will be entitled to withdraw from the contract for an extra period of 12 months if he is not informed about the right of withdrawal or did not receive the model withdrawal form (art. 10 CRD, art. VI.48 CEL, art. L.121-21-1 CC).

The remedy extending the withdrawal period up to 12 months is clearly more severe than the remedy which was incorporated in the DSD, since the DSD only extended the withdrawal period to three months. However, one must take into account that this remedy only applies where the trader does not provide the information *with regard to the withdrawal right*. The sanctioning of the violation of other information requirements is – contrary to what was the case under the DSD (in case of violations of the obligation to confirm the information on paper or on durable medium) - not dealt with in the CRD[71]. It is up to the Member States to determine which remedies are effective, proportionate and dissuasive (art. 24 CRD). Whereas information requirements are harmonized, civil remedies in the case of the violation of these requirements are not. The lack of civil remedies available in the case of a violation of the information requirements can be considered an important shortcoming of the provisions on information requirements[72]. Although the introduction of civil remedies in itself can not be sufficient to ensure the application of the information requirements - since individual incentives to enforce these remedies will often be too weak - civil remedies are a useful complement to other sanctions, for example of administrative nature (such as fines imposed by the competent authorities)[73].

[71] G. HOWELLS and R. SCHULZE, "Overview of the proposed Consumer Rights Directive", *Modernizing and Harmonizing Consumer Contract Law*, European Law Publishers, 2009, p. 17; C. TWIGG-FLESNER and D. METCALFE, "The proposed Consumer Rights Directive – less haste, more thought?", *European Review of Consumer Law* (2009) Volume 5 (Issue 3), p. 380-381.

[72] See also: H.W. MICKLITZ, "An Optional Law on Off-premises, Distance Sales and Unfair Terms for European Business and Consumers?", *EUI Working Papers in Law 2012/04*, p. 47.

[73] H. EIDENMÜLLER, F. FAUST, H.C. GRIGOLET, N. JANSEN, G. WAGNER. and R. ZIMMERMAN, "Towards a Revision of the Consumer Acquis", *Common Market Law Review* (2011) Volume 48 (Issue 4), p. 1117-1118.

40. As far as civil remedies are concerned it is worth mentioning that - apart from the remedies included in the CRD (*supra* nr. 39) – the Belgian legislator did not incorporate any *specific* civil remedy in case information requirements are not met. Off course, the Belgian legislator needed to abandon the remedy included in article 46 of the Act on Market Practices, determining that the consumer was entitled to keep the good or service delivered without having to pay for it, if the consumer did not receive on paper or on a durable medium the information required by article 46 AMP. Since the CRD is based on maximum harmonization and determines that in case the information on the right of withdrawal is not provided, the withdrawal period is extended, another (more severe) remedy could not be maintained. However, the CRD does not prevent Member States from elaborating specific civil remedies in case other information requirements are not met. On the contrary, it requires to introduce effective remedies. What sense does it make to introduce extensive information requirements if appropriate civil remedies are lacking[74]? Whether, in this regard, it would have been possible to maintain the remedy of extending the withdrawal period to three months is question to debate. One could argue that such remedy would be contrary to the CRD – since the CRD has harmonized the withdrawal period (including the extended withdrawal period in case of a violation of the information requirements) – and therefore the CRD only allows Member States to provide for other remedies, such as compensation or nullity of the contract[75].

41. The question arises whether, in Belgium, the lack of *specific* civil remedies in case of violation of the information requirements can be remedied by article VI.38 CEL. Article VI.38 CEL contains a remedy in case an agreement has been concluded following an *unfair commercial practice*. Unfair commercial practices, amongst others, relate to misleading through omission of material information. The pre-contractual information which must be provided before the consumer is bound, is automatically considered material information (art. VI.99 §5 CEL). If the consumer can prove 1) that the omission of this material information causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise and 2) that he has concluded an agreement *following*[76] the omission of this information, the court *can* decide that the consumer can keep the good or service without having to pay for it. Another possibility for the court would be to award a compensation. Up till now, article VI.38 CEL has not been very popular. Research has shown that there are most likely no applications of this remedy[77]. In any case, taking into account the requirement that the agreement must have been concluded *following* the unfair commercial practice, it is impossible to apply article VI.38 CEL in case the information has not been confirmed on a durable medium (as required by article VI.46 CEL).

As the Belgian legislator, the French legislator has chosen not to incorporate additional civil remedies, next to those included in the CRD and general civil law (i.e. obligation to pay a compensation when a consumer suffers damages due to the violation of the information

[74] See also: H.W. MICKLITZ, "An Optional Law on Off-premises, Distance Sales and Unfair Terms for European Business and Consumers?", *EUI Working Papers in Law 2012/04*, p. 47.
[75] M. LOOS and J. LUZAK, „De nieuwe Richtlijn consumentenrechten", *Tijdschrift voor Consumentenrecht* 2011, 188; E. TERRYN, „Richtlijn 2011/83/EU betreffende consumentenrechten – Nieuwe regels op komst voor de directe verkoop", *Rechtskundig Weekblad* 2012-2013, 935.
[76] See: R. STEENNOT, "The Belgian civil remedy in case of an unfair commercial practice towards a consumer: an effective, proportionate and dissuasive sanction?", *Business and Economics Series*, 2012, p.17-23.
[77] See: P.G.F.A. GEERTS, H.B. KRANS, R. STEENNOT and A.J. VERHEIJ, *Oneerlijke Handelspraktijken: praktijkervaringen in België met de sanctie van artikel 41 WMPC*, The Hague, Boom Juridische Uitgevers, 2011, 81-82.

requirements). Moreover, French consumer law does not contain a remedy similar to article VI.38 CEL.

42. However, as well in Belgium as in France the violation of information requirements may lead to sanctions of administrative or penal nature (see for example art. XV.83 CEL, art. L. 111-5, L. 121-22 – L. 121-23 CC).

6. Evaluation of information requirements

43. There is no doubt that information requirements increase consumer protection. Especially on the Internet (but not necessarily for other types of distance contracts), it seems that consumers are actually comparing the offers of several traders before concluding a contract[78]. However, the information required by the CRD may be too extensive, in particular if one looks at the details about which the consumer must be informed. Too much information risks to decrease – instead off increase - consumer protection, since the human capacity to absorb and process a multitude of information is limited (bounded rationality)[79]. Too much information (details) may distract the consumer's attention from more important aspects and may therefore even impede the decision making process[80]. In order to avoid an information overload, information requirements must be limited to whatever information is necessary for the average consumer. Details about which consumers must be informed should be reduced according to their relative importance. Further, too extensive information requirements create additional administrative costs for traders. Therefore, information requirements can only be justified if they are necessary, on the one hand in order to provide an adequate response to an informational imbalance, on the other hand in order to contribute to the average consumer's ability to make an informed consent.

III. Right of withdrawal

44. In principle, consumers are entitled to withdraw from a distance contract without paying any penalty and without giving any reason (art. 9 CRD, art. VI.47 CEL, art. L. 121-21 CC). As far as the *existence* of a withdrawal right is concerned, it is irrelevant whether the contract relates to goods, services, water, gas, electricity (where they are not put up for sale in a limited volume or set quantity) or digital content[81].

The right of withdrawal can be considered as a nuance to the principle of *pacta sunt servanda*[82], which is considered a principle that is necessary to reach legal certainty[83]. Being a nuance to one of the basic principles of civil law and creating additional costs because of

[78] See also: H.W. MICKLITZ, "An Optional Law on Off-premises, Distance Sales and Unfair Terms for European Business and Consumers?", *EUI Working Papers in Law 2012/04*, p. 41.
[79] See also: A. DE BOECK, "Les obligations d'information générales et le droit des obligations en Belgique et en France", *European Review of Consumer Law* (2013) Volume 9 (Issue xxx), p. Xxx.
[80] H. EIDENMÜLLER, F. FAUST, H.C. GRIGOLET, N. JANSEN, G. WAGNER. and R. ZIMMERMAN, "Towards a Revision of the Consumer Acquis", *Common Market Law Review* (2011) Volume 48 (Issue 4), p. 1117-1118.
[81] The practical scope of application of a right of withdrawal for digital content contracts can hardly be seen, since consumers will not wait with starting downloading during the withdrawal period and the beginning of performance leads to the loss of the right of withdrawal.
[82] B. STAUDER, „Pacta sunt servanda et le droit de repentir". *La Semaine Juridique* 1982. p. 481-500.
[83] H. EIDENMÜLLER, "Why Withdrawal Rights?. *European Review of Consumer Law* (2011) Volume 7 (Issue 1), p. 2.

uncertainty and delay[84], it is necessary to have a closer look at the rationales behind the right of withdrawal[85].

1. Justification of a withdrawal right

45. A right of withdrawal can be justified for several reasons[86], which have all in common that they relate to circumstances in which there is a danger that the consumer was not able to come to a substantially free decision[87]. First, a right to withdraw from the contract is justified when the consumer did not behave rationally when concluding the contract. This will for instance be the case if the consumer has been overwhelmed and / or put under pressure to conclude the agreement (e.g. when the agreement is concluded at the consumers' home)[88]. However, this will normally not be the case when a contract is concluded at a distance. One exception might be where the contract is concluded over the phone.

Secondly, a right to withdraw from the contract can be useful, where the consumer at the time of conclusion of the contract, did not possess sufficient information to make an informed decision (informational asymmetries). This can be due to the fact that the agreement is a complex agreement, the consumer not being able to immediately absorb all relevant information[89]. But complexity would not be able to justify the existence of a right of withdrawal with regard to all distance contracts, since the mere fact that the contract is concluded at a distance does not make the contract a complex contract.

46. In the case of a *distance contract*, the informational asymmetries justifying the existence of the withdrawal right, result from the way the contract is concluded, i.e. from the fact that means of distance communication are used to conclude the contract. The consumer buying goods (e.g. clothes, television) at a distance will not have the opportunity to actually see the goods and to assess their quality in the same way as a consumer buying these goods at the trader's premises[90]. This is why the consumer must be entitled to withdraw from the contract.

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[84] See: P. REKAITI and R. VAN DEN BERGH, "Cooling-off periods in the consumer laws of the EC Member States. A comparative law and economics approach", *Journal of Consumer Policy* (2000) Volume 23 (Issue 4), p. 383.

[85] H. EIDENMÜLLER, F. FAUST, H.C. GRIGOLET, N. JANSEN, G. WAGNER. and R. ZIMMERMAN, "Towards a Revision of the Consumer Acquis", *Common Market Law Review* (2011) Volume 48 (Issue 4), p. 1096-1097.

[86] See also: I. RAMSAY, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets*, Oxford, Hart Publishing, 2007, p.330; P. REKAITI and R. VAN DEN BERGH, "Cooling-off periods in the consumer laws of the EC Member States. A comparative law and economics approach", *Journal of Consumer Policy* (2000) Volume 23 (Issue 4), p. 373-381; H.W. MICKLITZ, J. STUYCK, J and E. TERRYN, *Cases, Materials and Text on Consumer Law*, Oxford. Hart Publishing, 2010, p. 240.

[87] P. ROTT, "Can German Law serve as an Example for EC Consumer Law?". *German Law Journal* (2006) Volume 7 (Issue 12), p. 112-113.

[88] See also: H. EIDENMÜLLER, F. FAUST, H.C. GRIGOLET, N. JANSEN, G. WAGNER. and R. ZIMMERMAN, "Towards a Revision of the Consumer Acquis", *Common Market Law Review* (2011) Volume 48 (Issue 4), p. 1084-1085.

[89] H. EIDENMÜLLER, F. FAUST, H.C. GRIGOLET, N. JANSEN, G. WAGNER. and R. ZIMMERMAN, "Towards a Revision of the Consumer Acquis", *Common Market Law Review* (2011) Volume 48 (Issue 4), p. 1102, who argue that a fourteen day withdrawal period will not be sufficient for the consumer to absorb all information.

[90] H. EIDENMÜLLER, "Why Withdrawal Rights?". *European Review of Consumer Law* (2011) Volume 7 (Issue 1), p.7-8; P. REKAITI and R. VAN DEN BERGH, "Cooling-off periods in the consumer laws of the EC Member States. A comparative law and economics approach", *Journal of Consumer Policy* (2000) Volume 23 (Issue 4), p. 379-380.

In economic literature it has been emphasized that the informational asymmetries-argument is only convincing for search and experience goods and not for so-called credence goods[91]. Credence goods are goods for which it is difficult for consumers to ascertain their quality, even after they have used these goods. Therefore, a withdrawal right will be of limited use to protect consumers buying credence goods at a distance. On the contrary, when a contract relates to experience goods, a withdrawal right is useful, since the consumer will (only) be able to ascertain the quality of the goods upon consumption. Search goods are goods where the consumer can assess their quality upon inspection. If the agreement is concluded using means of distance communication it becomes impossible for consumers to ascertain their quality upon the conclusion of the contract. Therefore, a right of withdrawal with regard to search goods bought at a distance makes sense. However, since it would be difficult to distinguish between these different types of goods in legislation, it is argued that the existence of a right of withdrawal should be accepted for all goods. If a withdrawal right for certain types of goods is problematic, they should be exempted from the right of withdrawal[92]. This is also the approach used in the CRD.

47. Further, the question arises whether the above can also justify the existence of the right to withdraw from a services contract, concluded at a distance. In many circumstances, the consumer concluding a services contract at a distance will have exactly the same information as a consumer concluding this type of a contract in the trader's premises[93]. Therefore, informational asymmetries cannot justify the existence of the right of withdrawal for services contracts concluded at a distance. Probably, the rationale behind such right of withdrawal is not ensuring consumer protection but stimulating cross-border distance contracts relating to services. Awarding the consumer to withdraw from the contract must increase consumer's confidence in distance contracts. However, awarding a right of withdrawal for such reasons is not very convincing[94]. Moreover, informational asymmetries are also not able to justify the existence of a withdrawal right expiring after fourteen calendar days from the day of conclusion of the contract with regard to contracts for gas, water and electricity where they are not put up for sale in a limited volume or set quantity.

48. Finally, the definition of a distance contract and its interpretation by the European legislator are not in line with the objectives pursued with a right of withdrawal. As mentioned earlier in this text, Recital 20 determines that the mere visit of the business premises for the purpose of gathering information about the goods or services does not prevent that a contract is regarded as a distance contract, the only requirement being that the contract afterwards is negotiated and concluded at a distance. Well, if the consumer has visited the trader's premises, he will most likely have had the opportunity to have a closer look at the goods. In such situation, a right of withdrawal is not justified, merely because of the fact that afterwards the contract is negotiated and concluded at a distance.

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[91] P. REKAITI and R. VAN DEN BERGH, "Cooling-off periods in the consumer laws of the EC Member States. A comparative law and economics approach", *Journal of Consumer Policy* (2000) Volume 23 (Issue 4), p. 380; H. EIDENMÜLLER, F. FAUST, H.C. GRIGOLET, N. JANSEN, G. WAGNER. and R. ZIMMERMAN, "Towards a Revision of the Consumer Acquis", *Common Market Law Review* (2011) Volume 48 (Issue 4), p. 1100. These authors argue that the right to withdraw from the contract should not be mandatory but optional. In that way, only consumers choosing for a distance contract from which can be withdrawn, should have to pay the costs related to the right of withdrawal.

[92] E. TERRYN, *Bedenktijden in het Consumentenrecht,* Antwerp, Intersentia, 2008, p. 562.

[93] E. TERRYN, *Bedenktijden in het Consumentenrecht,* Antwerp, Intersentia, 2008, p. 640.

[94] H. EIDENMÜLLER, "Why Withdrawal Rights?. *European Review of Consumer Law* (2011) Volume 7 (Issue 1), p. 6; E. TERRYN, *Bedenktijden in het Consumentenrecht,* Antwerp, Intersentia, 2008, p. 575.

Taking into account the justification of the right of withdrawal, the right of withdrawal should not be limited to contracts concluded within an organized scheme for distance selling. Whereas it can be accepted that traders, only occasionally concluding distance contracts, are not subject to the detailed information requirements laid down in the CRD, there are no good reasons to exempt consumers from the right of withdrawal[95].

2. Withdrawal period

49. The consumer disposes of a period of fourteen days to withdraw from a distance contract (art. 9 CRD, art. VI.47 CEL, art. L. 121-21 CC). In comparison to the DSD, the CRD has extended the right of withdrawal from seven working days to fourteen *calendar* days. The Belgian Legislator in 2010 already extended the withdrawal period to 14 calendar days when introducing the Act on Market Practices in 2010. In France, consumers had to wait until the transposition of the CRD for the extension of the withdrawal period to take place.

It is important to stress that the main reason for the extension of the withdrawal period is not increasing consumer protection, but increasing legal certainty and the reduction of compliance costs for traders. More specifically, it was the European legislator's objective to come to one withdrawal period which is the same for all distance contracts (including those on financial services) and off-premises contracts. Moreover, the Timesharing Directive[96] (art. 42.1) and the Consumer Credit Directive[97] (art. 14) contain the same withdrawal period.

A uniform withdrawal period should also help consumers to remember the duration of the withdrawal period.[98] However, research in the field of behavioral economics has shown that the choice of one single withdrawal period can also be criticized. One single withdrawal period does not take into account the time consumers really need to decide whether or not to withdraw from a certain type of contract. Whereas fourteen days is a rather short period in the case of a consumer credit agreement (due to its complexity and the fact that the economic effects are only felt after several months) and a timesharing contract, in the case of a distance contract, it can be considered rather (or even too) long.[99] Entitling the consumer to withdraw from the contract over a period of time that is longer than necessary creates delays and uncertainty – and therefore economic costs – for the seller, which could be avoided.

a) Sales contracts and services contract

50. Since the calculation of the withdrawal period is different in the case of a sale of goods and in the case of a provision of services, one needs to make a distinction between sales

[95] Contra: E. TERRYN, „Richtlijn 2011/83/EU betreffende consumentenrechten – Nieuwe regels op komst voor de directe verkoop", *Rechtskundig Weekblad* 2012-2013, p. 928.
[96] Directive 2008/122/EC of the European Parliament and the Council of 14 January 2008 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts, OJ L 3 February 2009, 33/10.
[97] Directive 2008/48/EC of the European Parliament and the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ L 22 May 2008, 133/66.
[98] See also: H. EIDENMÜLLER, F. FAUST, H.C. GRIGOLET, N. JANSEN, G. WAGNER. and R. ZIMMERMAN, "Towards a Revision of the Consumer Acquis", *Common Market Law Review* (2011) Volume 48 (Issue 4), p. 1105.
[99] See also: H.W. MICKLITZ, "An Optional Law on Off-premises, Distance Sales and Unfair Terms for European Business and Consumers?", *EUI Working Papers in Law 2012/04*, p. 48; P. REKAITI and R. VAN DEN BERGH, "Cooling-off periods in the consumer laws of the EC Member States. A comparative law and economics approach", *Journal of Consumer Policy* (2000) Volume 23 (Issue 4), p. 380.

contracts and service contracts. A sales contract is a contract under which the trader transfers or undertakes to transfer the ownership of *goods* to the consumer and the consumer pays or undertakes to pay the price thereof (art. 2(5) CRD, art. I.8, 33° CEL). Goods are tangible movable items (art. 2(4) CRD, art. I, 1, 6° CEL).

The European legislator excludes items sold by way of execution or otherwise by authority of law from the definition of goods. The solution is not very elegant, but what the European legislator wants to obtain is that the provisions with regard to goods / sales contracts are not applicable to the situation where goods are sold by way of execution or otherwise by authority of law. A services contract is any contract other than a sales contract under which the trader supplies or undertakes to supply a service to the consumer and the consumer pays or undertakes to pay the price thereof (art. 2 (6) CRD, art. I.8, 34° CEL). Since "services" itself are not defined, they must receive their usual interpretation under EU-law (see: art. 57 Treaty of the Functioning of the EU)[100] (art. I.1, 5° CEL).

Contracts having as its object both goods and services are considered sales contracts, which implies that the calculation of the withdrawal period must be done according to the provisions on sales contracts. This provision is new and constitutes a welcome clarification. Contrary to what is the case in for instance the CISG[101] (art. 3.2), it seems that one does not need to determine whether the sale of the good or the provision of a certain service is the most important object of the contract. The rules on sales contracts seem to apply as soon as goods are supplied[102].

51. In the past, it has not always been easy to determine the status of contracts relating to gas, water and electricity. Are these to be considered as sales contracts or as services contracts? This has been an important question in case of a distance contract, since the calculation of the withdrawal period has always been different for goods and services. One of the advantages of the CRD is that it explicitly solves this interpretation problem. First, the CRD states that water, gas and electricity are goods, but only where they are put up for sale in a limited volume or set quantity. If they are not, they are not considered goods. However, they are not considered services either. A specific rule applies for the calculation of the withdrawal period (art. 9.2 (c) CRD, art. VI.47, §2, 3° CEL, art. 121-21, 1° CC).

The European legislator has applied the same reasoning with regard to contracts concerning digital content. Digital content which is delivered on a tangible medium, such as a DVD, is considered a good. Digital content which is not delivered on a tangible medium and which the consumer for example receives through downloading or streaming, is not considered a good. Once again, such content is not considered a service either. A specific rule for the calculation of the withdrawal period applies art. 9.2 (c) CRD)[103]. Since in Belgium, the legislator considers the delivery of digital content which is not supplied on a tangible medium as a service, no specific rule is incorporated in the CEL. The rule relating to service agreements applies (*infra* nr. 53).

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[100] W. VAN BOOM, "De ontwerprichtlijn Consumentenrechten: gemaakte keuzes en gekozen onderbouwing", in *Het Voorstel voor een Richtlijn Consumentenrechten*, Den Haag, Boom Juridische Uitgevers, 2009, p. 16.

[101] The United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980.

[102] C. TWIGG-FLESNER and D. METCALFE, "The proposed Consumer Rights Directive – less haste, more thought?", *European Review of Consumer Law* (2009) Volume 5 (Issue 3), p. 378.

[103] K. TONNER and K. FANGEROW, „Directive 2101/83/EU on Consumer Rights: a new approach to European Consumer Law?". *Zeitschrift für Europäisches Unternehmers- und Verbraucherrecht* (2012) Volume 1 (Issue 2), p. 71.

b) Calculating the withdrawal period

52. In the case of a sales contract, the withdrawal period expires after fourteen calendar days from the day on which the consumer acquires physical possession of the goods. The European legislator has chosen for a phrasing which is different from the one in the DSD[104] in order to make it clear that withdrawal can take place as soon as the consumer is bound by a distance contract or an offer. The consumer does not have to wait to withdraw from the contract until the goods have actually been delivered.

Also new is that specific rules apply in the case of multiple goods ordered by the consumer in one order and delivered separately, in the case of delivery of a good consisting of multiple lots or pieces and in the case of contracts for regular delivery of goods during defined period of time (art. 9 (2), b) CRD, art. VI.47, §2, 2° CEL, art. L.121-21, 2° CC). This will increase legal certainty. More specifically, the withdrawal period expires 14 days from: (1) the day on which the consumer acquires physical possession of the last item in the case of a contract for the sale of *multiple goods ordered by the consumer in one order and delivered separately*; (2) the day on which the consumer acquires physical possession of the last lot or piece in the case of a contract where the goods consist of *multiple lots or pieces*; (3) the day on which the consumer acquires physical possession of the first item where the contract is for *regular delivery of goods during a defined period of time.*

When the consumer has entitled a third party to acquire physical possession of the goods on his behalf (e.g. his neighbour), the withdrawal period expires after fourteen days from the day on which that party has acquired physical possession of the goods. In order to avoid that the withdrawal period already starts during transportation of the goods, the CRD it is explicitly determined that the third party acquiring physical possession must be another one than the carrier (art. 9.2 (b) CRD, art. VI.47 §2, 2° CEL, art. L. 121-21, 2° CC). This means that the fact that the carrier acquires physical possession of the goods does not start the withdrawal period.

Taking into account the justification of the right of withdrawal in the case of a sales contract concluded at a distance, it immediately becomes clear that the rules on the calculation of the withdrawal period, which only starts running when the consumer has acquired possession of the goods, are in line with the objectives pursued with a right of withdrawal[105]. Only when the goods have been delivered, the consumer will be able to assess the goods bought at a distance.

53. In the case of a services contract the withdrawal period expires after fourteen days from the day of the conclusion of the contract (art. 9 (a) CRD, art. VI.47 §2, 1° CEL, art. L.121-21, 1° CC). The same rule applies in the case of contracts for water, gas and electricity not put up for sale in a limited volume or set quantity and in the case of contracts of digital content which is not supplied on a tangible medium (art. 9 (c) CRD, VI.47, §2, 3° CEL, art. L.121-21, 1° CC)

[104] Article 6 determines that the period for exercise of this right begins in case of goods, on the day of receipt of the goods. In a literal interpretation, one could argue that the consumer was not entitled to withdraw from the contract before delivery.

[105] P. ROTT and E. TERRYN, "The proposal for a Directive on Consumer Rights: No single set of Rules", *Zeitschrift für Europaisches Privatrecht* (2009) Volume 17 (Issue 3), p. 467.

54. According to the CRD, the calculation of the withdrawal period must take place according to the Council Regulation 1182/71 of 3 June 1971 determining the rules applicable to periods, dates and time limits (recital 41)[106]. This implies that if the period is to be calculated from the moment at which an event occurs or an action takes place, the day during which that event occurs or that action takes place should not be considered as falling within that period. This means that the withdrawal period only starts running the day after the delivery of the good or the day after the conclusion of the services contract.

55. A consumer who wishes to withdraw from the contract must inform the trader of his decision to withdraw from the contract, before the end of the withdrawal period (art. 11.2 CRD, art. VI.49 §2 CEL, art. 121-21-2 CC). It is sufficient that the consumer dispatches the notice of withdrawal within the period of 14 calendar days (or the extended period of 12 months). It is not necessary that the trader actually receives this notification within this period of time. Therefore, it may take a few days longer than fourteen calendar days after delivery before the trader is certain that the contract will be definitely binding.

3. Exercising the right of withdrawal

56. A consumer who wishes to exercise his withdrawal right may either use the model withdrawal form[107], either make any other unequivocal statement setting out his decision to withdraw from the contract (art. 11.1 CRD, art. VI.49 §1 CEL, art. L.121-21-2 CC). The introduction of a model withdrawal form should simplify the withdrawal process, i.e. make it easier for the consumer to withdraw from the contract. The consumer can freely choose whether he actually makes use of this form, since any other statement setting out his decision to withdraw from the contract will have the same effect[108]. On the contrary, the simple return of the goods is not sufficient to constitute proper exercise of the right of withdrawal[109]. The solution differs from the one accepted under the DCFR (Book II- 5: 102), where returning the subject matter of the contracts is considered a notice of withdrawal unless the circumstances indicate otherwise.

Although no formal requirements apply, consumers must bear in mind that the burden of proof of exercising the right of withdrawal is imposed on them (art. 11.4 CRD, art. VI.49 §4 CEL, art. L.121-21-2 CC)[110]. Therefore, the European legislator states that it is in the interest of the consumer to use a durable medium (Recital 44 CRD). However, one must take into account that not every durable medium will guarantee that the consumer will be able to prove that he has withdrawn from the contract (e.g. a regular letter).

It is possible for traders to entitle consumers to withdraw from the contract electronically by filling in on the trader's website the model withdrawal form or any other unequivocal

[106] See also: Exposé des motifs, *La Chambre*, Doc. 53, 3018/001, p. 37.
[107] Member States cannot provide for any formal requirements, such as the font size, applicable to the model withdrawal form other than those set out in Annex I(B).
[108] O. UNGER, "Richtlinie über Verbraucherrechte", *Zeitschrift für Europäisches Privatrecht* (2012) Volume 20 (Issue 2), p. p. 289.
[109] G. HOWELLS and R. SCHULZE, "Overview of the proposed Consumer Rights Directive", *Modernizing and Harmonizing Consumer Contract Law*, European Law Publishers, 2009, p. 18; C. TWIGG-FLESNER and D. METCALFE, "The proposed Consumer Rights Directive – less haste, more thought?", *European Review of Consumer Law* (2009) Volume 5 (Issue 3), p. 383; O. UNGER., "Richtlinie über Verbraucherrechte", *Zeitschrift für Europäisches Privatrecht* (2012) Volume 20 (Issue 2), p. 289.
[110] See also: "Review of the European Consumer Acquis". *Working Paper Series Centre for the Study of European Contract Law*, 2008, http://ssrn.com:abstract=1123850, p. 11.

statement on the trader's website (art. 11.3 CRD, art. VI. 49 §3 CEL, art. L.121-21.-3 CC). It is clear that this is an additional option. The consumer must always retain the possibility to withdraw from the contract in another way. If the consumer makes use of the possibility to withdraw from the contract electronically, the trader must without delay communicate to the consumer an acknowledgement of receipt of such a withdrawal on a durable medium.

4. Effects of the exercise of the right of withdrawal

57. The exercise of the right of withdrawal terminates the obligations of the parties to perform the distance contract or to conclude the distance contract, in cases where an offer was made by the consumer and where the consumer exercises his right of withdrawal before the actual conclusion of the agreement (art. 12 CRD, art. VI.52 §1 CEL, art. L. 121-21-7 CC).

58. Since it is possible that goods or services have already been delivered within the withdrawal period and payment has already been made by the consumer, the question arises as to the consequences of the withdrawal on these performances and deliveries. The articles 13 and 14 of the CRD (art. VI.50-51 CEL, art. L.121-21-3 and 4 CC) deal with these questions.

In this context, it is interesting to mention article 9.3 CRD, which prevents Member States from prohibiting the contracting parties from performing their obligations during the withdrawal period. More specifically, Member States can no longer determine in their national legislation that traders cannot claim payment or an advance from the consumer during the withdrawal period. The former Belgian Act on Trade Practices of 1991 actually contained a prohibition to demand payment within the withdrawal period. In 2010, when the Act on Market Practices was introduced, this prohibition was abandoned. In that way the Belgian legislator anticipated on the CRD[111].

Where a consumer wants the performance of services, or the supply of water, gas or electricity, where they are not put up for sale in a limited volume or set quantity, or of district heating, to begin during the withdrawal period, the trader must require that the consumer make an express request (8.8 CRD, art. VI.46 §8 CEL, art. L.121-21-5 CC).

a) Obligations on behalf of the trader

59. When the consumer has paid the trader before exercising the right of withdrawal, the trader must reimburse all payments received from the consumer. Not only the price must be reimbursed, but also the cost for the initial delivery of the goods (art. 13.1 CRD, art. VI.50 CEL, art. L.121-21-4 CC)[112]. Therefore, a distinction must be made between the costs for sending the goods to the consumer and the costs for sending them back to the trader, when or after exercising the right of withdrawal. Only the latter have to be borne by the consumer.

[111] In the Gysbrechts-case the Court of Justice decided that article 29 EC does not preclude national rules which prohibit a supplier, in cross-border distance selling, from requiring an advance or any payment from a consumer before expiry of the withdrawal period, but Article 29 EC does preclude a prohibition, under those rules, on requesting, before expiry of that period, the number of the consumer's payment card (as a guarantee): C.J. 16 December 2008, Case C-205/07, *Lodewijk Gysbrechts and Santurel Inter BVBA* [2008] ECR I-9947. Therefore the Belgian legislator could have maintained the prohibition in 2010 until the implementation date of the CRD, but eventually did not choose to preserve this prohibition.

[112] However, if the consumer has chosen expressly for a type of delivery which creates extra costs (although the trader has offered a cheaper type of delivery, which is common and generally acceptable), the consumer must bear the difference in costs between these two types of delivery.

Although not explicitly determined in the DSD, the Court of Justice applied the same distinction under the DSD[113].

In principle, the trader must reimburse the consumer using the same means of payment as the consumer used for the initial transaction. This implies that reimbursement cannot take place via vouchers (except where the original payment was done in the same way). Reimbursement by other means is only possible if the consumer expressly agrees and such reimbursement does not create extra costs on behalf of the consumer. The precondition of an express agreement implies that such agreement cannot be included in the general terms and conditions.

Reimbursement must take place without undue delay and in any event not later than fourteen calendar days from the day on which he is informed of the consumer's decision to withdraw from the contract [114]. However, unless the trader has offered to collect the goods himself, with regard to sales contracts, the trader may withhold the reimbursement until he has received the goods back, or until the consumer has supplied evidence of having sent back the goods, whichever is the earliest (art. 13.3 CRD, art. VI.50 §3 CEL, art. L.121-21-4 CC). This provision is new and clearly benefits the trader[115].

The CRD (Recital 48) determines that when the trader does not execute its obligation in due time, the consequences need to be determined according to the national law of the Member States. In Belgian law, no specific rule has been introduced. Therefore, general principles on late payment of sums of money apply, i.e. a compensation for late payment calculated on the basis of the legal interest. In France, the legislator has incorporated a specific rule in order to protect the consumer from a late reimbursement by the trader. When the trader does not reimburse the consumer in time, the amount to be reimbursed is increased with 1, 5, 10, 20 or 50%, depending on the delay (e.g. 1% if reimbursement takes place 10 days late, 10% if reimbursement is between 20 and 30 days late and 50% if it is between 60 and 80 days late). If reimbursement takes place more than 80 days late, the compensation is increased by 5% extra for every additional month of delay, until the entire price of the product has been reached (art. L. 121-21-4 CC).

b) Obligations on behalf of the consumer

60. Dealing with the obligations of the consumer, one needs to make a distinction between on the one hand the situation where goods were delivered and on the other hand the situation where services were performed during the withdrawal period or gas, water or electricity (not put up for sale in a limited volume or set quantity) or digital content (which is not supplied on a tangible medium) has been delivered during the withdrawal period. For contracts having as their object both goods and services, the rules on the return of goods apply to the goods aspects and the compensation regime for services applies to the services aspects.

[113] C.J. 15 April 2010, Case C-511/08, *Handelsgesellschaft Heinrich Heine GmbH v. Verbraucherzentrale Nordrhein-Westfalen eV* [2010] ECR I-3047.

[114] Under the DSD reimbursement had to take place within 30 days. The starting point of this period was not explicitly determined. See also Book II.-5:105 DCFR, which also contains a 30 day period.

[115] K. TONNER and K. FANGEROW, „Directive 2101/83/EU on Consumer Rights: a new approach to European Consumer Law?". *Zeitschrift für Europäisches Unternehmers- und Verbraucherrecht* (2012) Volume 1 (Issue 2), p. 71; O. UNGER., "Richtlinie über Verbraucherrechte", *Zeitschrift für Europäisches Privatrecht* (2012) Volume 20 (Issue 2), p. 290-291.

61. In the case of the withdrawal from a sales contract, the consumer will have to send the goods back[116] or hand them over to the trader or to a person authorized by the trader to receive the goods. The consumer has to do so without undue delay and in any event not later than fourteen calendar days from the day on which he has communicated his decision to withdraw from the contract to the trader (art. 14.1 CRD, art. VI.51 §1 CEL, art. L.121-21-3 CEL). This provision is new. The deadline is considered to be met if the consumer sends back the goods before the period of fourteen days has expired. As already indicated (*supra* nr. 59), the trader can withhold reimbursement until he has received the goods back, or until the consumer has supplied evidence of having sent back the goods.

The consumer bears the direct costs of returning the goods unless the trader has agreed to bear these costs himself or the trader failed to inform the consumer that the consumer has to bear them.

In this context, it must also be determined who bears the risk if something goes wrong when returning the goods. Since article 14.5 CRD (art. VI.51 §2 CEL, art. L.121-21-3 CC) states that the consumer does not incur any liability *as a consequence of the exercise of the right of withdrawal*, except as provided in article 13 (2) and 14 CRD (and these articles don't determine that the consumer is liable for the transportation of the goods to the trader), it can be argued that the trader has to bear this risk. However, such interpretation could be deemed contrary to article 20 CRD, which determines that when goods are dispatched, the risk is passed to the consumer when he acquires physical possession of the goods. In my view, article 20 CRD no longer applies once the consumer has exercised his right of withdrawal. Two arguments support this view. First, one must take into account the objective of article 20 CRD, which is only to protect consumers from having to bear the risk for the transport of the goods from the trader to the consumer (and not to deal with the consequences of withdrawal). Secondly, since article 20 CRD does not contain a rule concerning the passing of risk in case the consumer has send the goods back following the exercise of his right of withdrawal, it would imply that the risk would even remain with the consumer after the trader has acquired possession of the goods which were send back by the consumer exercising his right of withdrawal. This cannot be the legislator's intention.

As is the case with the obligations of the trader, the consequences of a consumer violating his obligation to send the goods back must be determined according to national law. Belgian, as well as French law do not contain a specific rule. Since, according to art. 13.3 CRD (art. VI.50 §3 CEL, art. 121-21-4 CC) the trader is in principle entitled to withhold reimbursement until he has received the goods back or the consumer supplied evidence of having sent back the goods, a specific remedy benefiting the trader does not seem to be necessary.

62. Further, the question arises whether the consumer can be held liable if, in the case of the withdrawal from the contract the value of the goods has diminished. This question is dealt with in article 14.2 CRD (art. VI.51 §2 CEL, art. L. 121-21-3 CC). It states that the consumer can only be held liable for any diminished value of the goods resulting from the handling of the goods other than what is necessary to establish the *nature, characteristics and functioning* of the goods. The European legislator makes a distinction between the mere testing of the good and the actual use of the good. The mere possession of the goods during the withdrawal period, as well as the unpacking of the goods[117] will not imply that the consumer has to pay

[116] Unless the trader has indicated to collect the goods himself.
[117] M. LOOS, "Review of the European Consumer Acquis". *Working Paper Series Centre for the Study of European Contract Law*, 2008, http://ssrn.com:abstract=1123850, p. 12.

this compensation[118]. The consumer must (be able to) handle and inspect the goods in the same manner as he would be allowed to do in a shop, without incurring financial consequences when withdrawing from the contract. But the CRD goes even further, where it allows the consumer to do whatever is necessary for establishing the *functioning* of the goods (which is not always allowed in a shop[119]). It has been questioned whether such a far-reaching protection is really necessary[120].

It is up to the trader to prove that the consumer has gone beyond the testing of the goods and has actual made use of the goods[121]. Whereas such proof will be easy to deliver with regard to goods having a clock, such as cars and computers, it will be hard to prove that a consumer has worn a sweater instead of merely trying it on.

The consumer cannot be held liable for the diminished value of the goods where the trader has failed to provide notice of the right of withdrawal as required by article 6.1 CRD (art. VI.45 §1, 8° CEL, art. L. 121-17-I CC). This rule is especially important when the consumer decides to withdraw from the contract after several months. As mentioned earlier (*supra* nr. 39), the withdrawal period is extended to twelve months in the case the consumer is not informed about the right of withdrawal. If the consumer would have to bear the cost of the diminished value of the goods resulting from the use of the good during the extended withdrawal period, this would discourage him from withdrawing from the agreement in such a situation, which would make this specific remedy useless.

63. A compensation for the diminished value of the goods needs to be distinguished from a compensation for the benefits the consumer obtained from the actual use of the goods[122]. The difference between these two types of compensations is clear. A compensation for the diminished value of the goods is calculated in function of the trader's loss, whereas a compensation for the actual use of the goods is determined in function of the consumer's benefits from using the good during the withdrawal period[123]. With regard to compensations for the benefits resulting from the use of a good during the withdrawal period, the ECJ decided in the *Messner*-case that the DSD does not prevent the consumer from being required to pay a compensation for the use of the goods in the case where he has made use of those goods *in a manner incompatible with the principles of civil law, such as those of good faith or unjust enrichment*[124]. However, according to the ECJ such compensation may not adversely affect the efficiency and effectiveness of the right of withdrawal. This would, for example, be the case if the amount of compensation were to appear disproportionate in relation to the purchase price of the goods at issue or also if the consumer would have to prove that he did not use the goods in a manner which went beyond what was necessary to permit him to make effective use of his right of withdrawal.

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[118] P. ROTT, „The Balance of Interests in Distance Selling Law - Case Note on Pia Messner v. Firma Stefan Krüger", *European Review of Private Law* (2010) Volume 18 (Issue 1), p. 89.
[119] For example, making a cup of coffe with a senseo.
[120] E. TERRYN, „Richtlijn 2011/83/EU betreffende consumentenrechten – Nieuwe regels op komst voor de directe verkoop", *Rechtskundig Weekblad* 2012-2013, p. 937.
[121] M. LOOS, "Review of the European Consumer Acquis". *Working Paper Series Centre for the Study of European Contract Law*, 2008, http://ssrn.com:abstract=1123850, p. 13; Rott. P. (2010). „The Balance of Interests in Distance Selling Law - Case Note on Pia Messner v. Firma Stefan Krüger", *European Review of Private Law* (2010) Volume 18 (Issue 1), p. 191.
[122] P. ROTT, „The Balance of Interests in Distance Selling Law - Case Note on Pia Messner v. Firma Stefan Krüger", *European Review of Private Law* (2010) Volume 18 (Issue 1), p. 194.
[123] P. ROTT and E. TERRYN, "The proposal for a Directive on Consumer Rights: No single set of Rules", *Zeitschrift für Europaisches Privatrecht* (2009) Volume 17 (Issue 3), p. 474.
[124] C.J. 3 September 2009, Case C-489/07, *Messner*, [2009] ECR, I-7315.

It is accepted that a compensation for the actual use of the goods must not be calculated in line with the normal price for renting the good for the time in question. The difference in value should be calculated on the basis of the expected total performance of the good. For example, in Germany the courts accept that the compensation for the use of a car with an expected durability of 200.000 km equals 0.5% of the purchase price per 1000 km[125].

64. Under the CRD and its implementing legislation, there seems to be no room for a compensation for the actual use of the goods during the withdrawal period (art. 14.5 CRD)[126]. The European legislator has chosen for a compensation for the diminished value of the goods, instead of a compensation for the actual use of the goods. It is clear that a compensation for the diminished value of the goods may be much higher than a compensation for the actual use of the goods during the withdrawal period, since the use of the goods will have turned them into second-hand goods[127]. In Belgium and Germany for example, the value of a car will diminish with 10% or even 20% when it has been used. A huge difference compared to the compensation for the actual use of a car. It is regretful that the CRD (and therefore also its implementing legislation), contrary to the DCFR (Book II-5:105), do not require that consumers are explicitly warned (informed) about the possible financial consequences of actually using (instead of testing) the goods during the withdrawal period[128].

65. Finally, it must be determined who must bear the risk if the goods are lost or damaged during the withdrawal period, due to circumstances which do not result from testing or using the goods, and before the consumer exercises the right of withdrawal. For example, a few hours after delivery of a new car, which is bought at a distance, the car, is damaged by giant hailstones. Immediately afterwards, the consumer who has not yet driven the car withdraws from the contract. The question arises whether the consumer fulfils its requirements by sending back the damaged car. Three possible views exist.

First, one could argue that the trader bears the risk by stating that article 14.5 CRD (art. VI.51 §2 CEL, art. L. 121-21-3 CC), where it determines that the consumer does not incur any liability *as a consequence of the exercise of the right of withdrawal*, includes the situation of damages to or losses of the goods within the withdrawal period, due to unforeseeable circumstances appearing before exercising the right of withdrawal[129]. Another possibility, leading to the opposite result, would be to apply article 20 CRD, which determines that the risk passes to the consumer as soon as the consumer acquires physical possession of the goods. However, as already argued, in my view article 20 CRD does not apply when one has to determine the consequences of the exercise of the right of withdrawal (*supra* nr. 61). A final option, which I support, is to accept that this question has not been harmonized by the CRD (contrary to the DCFR), which implies that the outcome would depend on civil law

[125] P. ROTT, „The Balance of Interests in Distance Selling Law - Case Note on Pia Messner v. Firma Stefan Krüger", *European Review of Private Law* (2010) Volume 18 (Issue 1), p. 191.
[126] P. ROTT and E. TERRYN, "The proposal for a Directive on Consumer Rights: No single set of Rules", *Zeitschrift für Europaisches Privatrecht* (2009) Volume 17 (Issue 3), p. 474; O. UNGER., "Richtlinie über Verbraucherrechte", *Zeitschrift für Europäisches Privatrecht* (2012) Volume 20 (Issue 2), p. 294.
[127] P. ROTT, "Can German Law serve as an Example for EC Consumer Law?", *German Law Journal* (2006) Volume 7 (Issue 12), p. 1127-1128. See also: Austrian Supreme Court 27 September 2005, *Verbraucher und Recht* 2006, p. 242.
[128] P. ROTT and E. TERRYN, "The proposal for a Directive on Consumer Rights: No single set of Rules", *Zeitschrift für Europaisches Privatrecht* (2009) Volume 17 (Issue 3), p. 474.
[129] O. UNGER., "Richtlinie über Verbraucherrechte", *Zeitschrift für Europäisches Privatrecht* (2012) Volume 20 (Issue 2), p. 293-294, supports this view.

principles incorporated in the law that is applicable to the contract. In Belgium, it has been argued that the trader has to bear the risk, unless when the consumer did not use reasonable care towards the goods[130]. Such solution would be in line with the DCFR where it is stated that the consumer cannot be held liable for damages to or loss of the goods during the withdrawal period, unless the consumer did not use reasonable care to prevent, destruction, loss or damage (Book II-5:105).

In any case, it is regrettable that this situation is not explicitly dealt with in the CRD.

66. Contrary to what has been the case under the DSD, the beginning of the performance of services during the withdrawal period does not imply that the consumer loses his right to withdraw from the contract (*infra* nr. 70). This made it necessary to determine which costs must be borne by the consumer if he exercises his right to withdraw from the contract after the trader has started to execute the contract. First, it is important to emphasize that the consumer will only have to bear the cost of the services delivered if the consumer has expressly requested the trader to perform services within the withdrawal period (art. 14. 4 CRD, art. VI.51 §4, 1° CEL, art. L.121-21-5 CC). The same goes for the supply of gas, electricity or water (not put up for sale in a limited volume or set quantity) during the withdrawal period.

If the consumer has expressly requested performance during the withdrawal period, he will have to pay to the trader 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, in comparison with the full coverage of the contract (art. 13.3 CRD, art. VI.51 §3 CEL, art. L.121-21-5 CC). The proportionate amount to be paid by the consumer to the trader must be calculated on the basis of the total price agreed in the contract. However, if the total price is excessive, the proportionate amount must be calculated on the basis of the market value of what has been provided. The market value must be defined by comparing the price of an equivalent service performed by other traders at the time of conclusion of the contract.

If the trader has failed to provide information on the right of withdrawal or on the obligation to pay reasonable costs for services performed within the withdrawal period, the consumer does not have to pay for the services performed and the gas, water or electricity supplied during the withdrawal period (art. 14 4 CRD, art. VI. 51 § 4 CEL, art. L.121-21-5 and 6 CC).

67. In the case of the supply, in full or in part, of digital content which is not supplied on a tangible medium the consumer will not bear any cost if 1) the consumer has not given his prior express consent to the beginning of the performance before the end of the withdrawal period or 2) the consumer has not acknowledged that he loses his right of withdrawal when giving his consent; or 3) the trader has failed to provide the confirmation of the contract concluded, as required by article 8.7 CRD (art. 14. 4 CRD, art. VI.51 §4, 2° CEL, art. L.121-21-6 CC).

4 Ancillary contracts

68. If the consumer exercises his right of withdrawal with regard to a distance contract, any ancillary contract is automatically terminated, without any costs for the consumer (art. 15.1 CRD, art. VI.52 §2 CEL, art. L. 121-21-7 CC). Ancillary contracts are contracts by which the consumer acquires goods or services related to a distance contract and where those goods are

[130] E. TERRYN, *Bedenktijden in het Consumentenrecht,* Antwerp, Intersentia, 2008, p. 443-457.

supplied or those services are provided by the trader itself or by a third party on the basis of an arrangement between that third party and the trader (art. 2.15 CRD, art. I.8, 38° CEL).

This provision is new, since the DSD only contained a rule on "linked credit agreements". It is important to emphasize that the provision on ancillary contracts incorporated in the CRD does not apply to linked credit agreements, which fall under the scope of the Consumer Credit Directive (CCD)[131]. More specifically, article 15 CCD determines that, in the case the consumer withdrawals from a contract on the basis of Community legislation (e.g. distance contract), the consumer is no longer bound by a linked credit agreement.

5 Exceptions to the right of withdrawal

69. Article 16 CRD (art. VI.53 CEL, art. L.121-21-8 CC) enumerates in which cases the consumer is not entitled to withdraw from the distance contract. The CRD contains 13 exceptions to the right of withdrawal. Apart from these exceptions, one must take into account that the consumer will also not be entitled to withdraw from the contract if that type of contract is excluded from the scope of the CRD (see art. 2 CRD) or its implementing provisions (see art. L.121-16-1-I CC).

Before discussing *some* of these exceptions, it is worth mentioning that the Belgian list seems to contain one more exception to the right of withdrawal than the list in the CRD and the French *Code de Consommation* (i.e. contracts for gambling and lotteries) (14 instead of 13). However, one must take into account that in the Belgian CEL, contracts for gambling and lotteries are not excluded from the scope of the provisions on distance contracts, as is the case in the CRD (art. 3.2 (c)) and the French CC (art. L. 121-16-1-I, 3° CC). Therefore, the exclusion from the right of withdrawal for contracts relating to gambling and lotteries cannot be considered an additional exception to the right of withdrawal.

70. The consumer is no more entitled to withdraw from a *services contract*, after the service has been *fully performed*. It is important to emphasize that the consumer only loses his right of withdrawal if the performance has begun with the consumer's prior express consent, and with the consumer's acknowledgement that he will lose his right of withdrawal once the contract has been fully performed by the trader. Comparing this exception, with the one laid down in the DSD, it becomes immediately clear that the protection offered by the CRD is larger. Under the DSD, the consumer already lost his right to withdraw from the contract when the provision of the services or performance *had begun* during the withdrawal period (with the consumer's agreement). The new regime is the same as the one incorporated in the 2002 Distance Selling of Financial Services Directive.

71. Another exception relates to contracts for the supply of digital content which is not supplied on a tangible medium. More specifically, the consumer loses the possibility to withdraw from the contract, once the performance has begun with the consumer's prior *express* consent and his acknowledgement that he thereby loses his right of withdrawal. The requirement of an express consent precludes that the consumer's consent is included in the general terms and conditions.

[131] C. TWIGG-FLESNER and D. METCALFE, "The proposed Consumer Rights Directive – less haste, more thought?", *European Review of Consumer Law* (2009) Volume 5 (Issue 3), p. 384.

72. Another important exception to the right of withdrawal concerns (services) contracts relating to the provision of accommodation other than residential purpose (e.g. hotel booking), *transport of goods*, car rental services, catering or services related to leisure activities (e.g. theatre, movies, sports games). This exception, which only applies if the contract provides for a specific date or period of performance, is important, since this type of contracts are often concluded over the Internet[132]. Contrary to the DSD it is determined explicitly that there is no right of withdrawal for car rental services. However, this cannot be considered a change to the previous rules, since the Court of Justice decided in the past that car rental services were also exempted from the right of withdrawal under the DSD[133].

Looking more carefully at the Belgian rules, it immediately becomes clear that the Belgian legislator probably made a mistake, when *only* copying the exception from the CRD. As far as contracts of carriage are concerned, the exception, as it is included in the CRD and the CC is limited to the transport of *goods*. Under the CRD and the CC, this is logical, since contracts relating to the transport of persons are excluded from the scope of the Directive (art. 2 CRD) or from the rules on distance contracts and contracts concluded outside the trader's premises (art. L. 121-16-1-I, 9° CC). In the Belgian CEL, such an exclusion from the scope cannot be found. Therefore, contracts relating to the transport of passengers would fall under the scope of the provisions on distance contracts and consumers would be entitled to withdraw from these contracts (contrary to what was the case under the Royal Decree of 18 November 2002). Although not contrary to the CRD (the principle of maximum harmonization does not prevent Member States to adopt the rules included in the Directive to contracts falling outside the Directive's scope), this was most probably not the legislator's intention[134]. The same reasoning can be applied to contracts falling under the scope of the Directive on package travel, package holidays and package tours[135], since they are – contrary to what is the case under the CRD and the CC - not excluded from the scope of the Belgian provisions (on distance contracts) and not exempted from the right to withdraw from the contract.

73. Further, the consumer is not entitled to withdraw from contracts concluded at a public auction. Public auctions are methods of sale where goods or services are offered by the trader to the consumer, who attend or are given the possibility to attend the auction in person, through a transparent, competitive bidding procedure run by an auctioneer and where the successful bidder is bound to purchase the goods or services (art. 2.13 CRD, art. I. 8, 36° CEL). It is clear that the use of online platforms for auction purposes (e.g. e-bay) is not considered as a public auction in the meaning of the CRD[136]. Therefore, this exception is not relevant with regard to distance contracts.

74. As under the DSD, the consumer is not entitled to withdraw from a contract as regards the supply of a newspaper, periodical or magazine. However, the CRD determines that this exception from the right of withdrawal does not apply to subscription contracts for the supply of such publications.

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[132] I. RAMSAY, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets*, Oxford, Hart Publishing, 2007, p.340.
[133] See: C.J. 10 March 2005, Case C-336/03, *EasyCar (UK) Ltd v Office of Fair Trading*, [2005] ECR I-1947.
[134] See: Exposé des motifs, *La Chambre*, Doc. 53, 3018/001, p.38.
[135] Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, OJ L 23 June 1990, 158/59.
[136] O. UNGER., "Richtlinie über Verbraucherrechte", *Zeitschrift für Europäisches Privatrecht* (2012) Volume 20 (Issue 2), p. 290.

Conclusions

75. With regard to distance contracts consumer protection is mainly realized by imposing information requirements on the trader and by entitling the consumer to withdraw from the contract during 14 calendar days.

Looking more closely to the CRD and its implementing legislation one can see that information requirements are more extensive than under the DSD (and its implementing legislation in Belgium and France). The European legislator clearly believes that an extension of information requirements leads to an increase of consumer protection. Although *certain* new information requirements can be welcomed (e.g. the model withdrawal form, information on the interoperability of digital content), it is clear that a considerable extension of the information to be provided not necessarily implies an increase of consumer protection.

In this context, it is particularly worth stressing that *all* information which is made available by the trader before the consumer is bound (e.g. at the trader's website), must be confirmed on a durable medium. This paper has shown that some information is only relevant in the pre-contractual phase - in order to enable the consumer to give an informed consent - which makes it useless to oblige the trader to confirm this information (e.g. information on the delivery) on a durable medium after the contract has been concluded. Other information is only useful if problems arise after the conclusion of the contract (e.g. on the legal guarantee), which implies that this information should not be provided before the conclusion of the contract.

Moreover, the extensive and detailed list of information requirements can not only be criticized looking at it from the consumer's viewpoint. It creates unjustified administrative costs for traders. This is especially the case when they are offering goods or services over the Internet, in which case they also have to take into account information requirements which are incorporated in the Electronic Commerce Directive. On the other hand, the CRD benefits traders (and increases legal certainty) where it allows them to provide the information on the right of withdrawal in a standardized form (model instructions).

76. Next to adding *a couple of useful* information requirements, the main advantages of the CRD with regard to the information requirements seems to be that detailed rules were elaborated for contracts concluded by electronic means and trading websites. These must ensure that the consumer is well-informed about essential information elements before committing himself to a payment obligation and that the consumer realizes clearly when exactly he places the order. Also, the limits which are imposed by certain (modern) means of distance communication (such as SMS) were taken into account, in line with the rules on Unfair Commercial Practices.

One of the major drawbacks of the CRD is that the CRD only contains civil remedies when some information requirements are not met (e.g. with regard to the right of withdrawal). Whereas the information to be provided and the way in which it has to be provided are harmonized, (civil) remedies are not. The Belgian and the French legislator have chosen not to incorporate specific civil remedies, not included in the CRD. What sense does it make to have that much information requirements if the non-fulfillment cannot be remedied in the relation between the trader and the consumer?

77. As far as the right of withdrawal is concerned, this paper has shown that the CRD, compared to the DSD, slightly increases consumer protection with regard to the right of withdrawal, for example by extending the withdrawal period, by providing a model withdrawal form, by allowing the consumer to inspect and test the goods ordered at a distance and by determining that the mere fact that the performance of a services contract has begun during the withdrawal period does not lead to the loss of the right to withdraw from the contract. Further, the provisions in the CRD are much more detailed, offering welcome clarifications, in particular with regard to the consequences of exercising the right of withdrawal and the calculation of the withdrawal period (amongst others with regard to contracts for gas, water electricity and digital content). These clarifications certainly benefit legal certainty. Moreover they create uniformity within the European Union. However it is regrettable that a few questions are not (explicitly) dealt with (e.g. liability in case the good is damaged during the withdrawal period due to *force majeur*).

From a consumer's viewpoint the main drawbacks seem to be 1) the possibility for the trader to withhold reimbursement until the consumer, exercising his right of withdrawal has send back the goods and 2) the liability for the diminished value in the case of the use of the goods during the withdrawal period. Both might have an adverse effect on the effectiveness of the right of withdrawal.

78. It has also been shown that the justification of the right of withdrawal in the case of a distance contract is to be found in informational asymmetries. Therefore, the right of withdrawal is not necessary in order to protect consumers concluding a services contract or a contract relating to gas, water and electricity, not being put up for sale in a limited volume at a distance. Further, a right of withdrawal seems not to be justified when a consumer has visited the trader's premises before negotiating and concluding the contract at a distance. On the other hand, a right of withdrawal should exist when goods are bought at a distance using means of distance communication outside an organized scheme for distance selling.

As far as the transposition of the provisions on the right of withdrawal in case of distance contracts in France and Belgium is concerned, I would especially like to mention that the Belgian legislation (accidently) implies a right of withdrawal for contracts relating to the transport of passengers. Further, it is interesting to see that the French legislator has included a specific remedy in case the trader does not reimburse the consumer, who has exercised his right of withdrawal, in due time.