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Publication date

2020

Document Version

Final published version

Published in

European Review of Private Law

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Article 25fa Dutch Copyright Act

[Link to publication](#)

Citation for published version (APA):

Loos, M. B. M. (2020). The modernization of European Consumer Law (continued): More meat on the bone after all. *European Review of Private Law*, 28(2), 407-423.

<https://kluwerlawonline.com/journalarticle/European+Review+of+Private+Law/28.2/ERPL2020019>

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The Modernization of European Consumer Law (Continued): More Meat on the Bone After All

Marco B.M. Loos*

Abstract: This article discusses to what extent the final text of the Modernization Directive ultimately delivers on the promises of the Communication ‘A New Deal for Consumers’ regarding the modernization and better enforcement of European consumer protection rules. In particular, I will discuss the provisions regarding individual and public enforcement of EU consumer law and go into the matter of dynamic pricing and online choice architecture. Specific attention is paid to online market places: which information duties apply and with whom does the consumer conclude a contract? The directive also introduces additional rules regarding the consumer’s right of withdrawal, and some simplifications for the position of the trader. I conclude that the Modernization Directive indeed does deliver on the New Deal’s promises, albeit that a further modernization of EU consumer law is still needed to keep it fit for the 2020s.

Résumé: Cet article examine dans quelle mesure le texte final de la directive de modernisation tient les promesses de la communication ‘Une nouvelle donne pour les consommateurs’ concernant la modernisation et une meilleure application des règles européennes de protection des consommateurs. J’aborderai en particulier les dispositions relatives à l’application individuelle et publique du droit communautaire de la consommation et aborderai la question de la tarification dynamique et de l’architecture de choix en ligne. Une attention particulière est accordée aux places de marché en ligne: quelles sont les obligations d’information applicables et avec qui le consommateur conclut-il un contrat? La directive introduit également des règles supplémentaires concernant le droit de rétractation du consommateur et certaines simplifications pour la position du professionnel. Je conclus que la directive de modernisation tient effectivement les promesses de la communication, même si une nouvelle modernisation du droit communautaire de la consommation est encore nécessaire pour qu’il reste adapté aux années 2020.

Zusammenfassung: In diesem Artikel wird diskutiert, inwieweit der endgültige Text der Modernisierungsrichtlinie letztlich die Versprechen der Mitteilung ‘Neue Rahmenbedingungen für die Verbraucher’ zur Modernisierung und besseren Durchsetzung der europäischen Verbraucherschutzvorschriften erfüllt. Insbesondere werde ich auf die Bestimmungen zur individuellen und öffentlichen Durchsetzung des EU-Verbraucherrechts eingehen und auf die Frage der dynamischen Preisgestaltung und der Online-Wahlarchitektur eingehen. Besonderes Augenmerk wird auf Online-Marktplätze gelegt: Welche Informationspflichten gelten und mit

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wem schließt der Verbraucher einen Vertrag? Die Richtlinie enthält auch zusätzliche Vorschriften für das Widerrufsrecht des Verbrauchers und einige Vereinfachungen für die Position des Gewerbetreibenden. Ich komme zu dem Schluss, dass die Modernisierungsrichtlinie die Zusagen der Mitteilung tatsächlich erfüllt, obwohl eine weitere Modernisierung des EU-Verbraucherrechts noch erforderlich ist, um es für die 2020er Jahre fit zu halten.

1. Introduction

1. In the first issue of this review of 2019, I discussed the European Commission's recent Communication 'A New Deal for Consumers' (hereinafter: the Communication)¹ and the proposal for a Directive regarding the modernization and better enforcement of European consumer protection rules (hereinafter: the Modernization Directive)² that was published simultaneously. The second proposal accompanying the Communication, a proposal for a directive on representative actions,³ was the subject of a series of papers published later that year.⁴

2. In my article,⁵ I was fairly critical of the Communication and the Modernization Directive because, in my view, the European Commission had missed the opportunity to advance the consumer acquis by implementing the many recommendations made to it within the framework of the fitness check carried out for this purpose at the request of the Commission.⁶ Furthermore, in addition to some proposals to improve the

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- 1 Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee of 11 April 2018, A New Deal For Consumers, COM (2018) 183 final.
 - 2 Proposal for a directive of the European Parliament and of the Council of 11 April 2018 amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernizing the rules for consumer protection in the EU, COM (2018) 185 final.
 - 3 Proposal for a directive of the European Parliament and of the Council of 11 April 2018 on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM (2018) 184 final.
 - 4 See ERPL 2019/6.
 - 5 M.B.M. Loos, 'The modernization of European Consumer Law: a pig in a poke?', (1) *European Review of Private Law* 2019, pp 113-134.
 - 6 REFIT Fitness Check of consumer law, *Evaluation and Fitness Check (FC) Roadmap* (December 2015), p 1; Civic Consulting, *Study for the Fitness Check of EU Consumer and Marketing Law, Final Report, Part 1 – Main Report* (2017); Civic Consulting, *Consumer Market Study to Support the Fitness Check of EU Consumer and Marketing Law, Final Report* (2017); GfK Belgium, *Consumer Market Study to Support the Fitness Check of EU Consumer and Marketing Law, Final Report* (2017); ICF, *Study on the Costs and Benefits of the Minimum Harmonization Under the Consumer Sales and Guarantees Directive 1999/44/EC and of Potential Full Harmonization and Alignment of EU Rules for Different Sales Channels*, EUR 2017.2801 EN (2017). For the record, I would like to point out that together with Willem van Boom (Leiden) and Esther van

position of consumers, the draft Directive also contained some provisions that undermined the position of consumers. I therefore concluded that neither the Modernization Directive nor the Communication deserved the association with a ‘New Deal’.

3. By the time my article was published, the legislative process had been well under way: on 29 March 2019, a political agreement was reached between the European Parliament and the Council of Ministers on the content of the Modernization Directive. On 18 October 2019, when this article was finalized, the Council adopted the Directive at first reading. It was expected that the European Parliament would do the same before the end of the year.⁷ In this contribution, I will examine whether the Modernization Directive in its final form – despite largely ignoring the recommendations of the fitness check – delivers on the promise made in the Communication of providing consumers with better opportunities to enforce their rights themselves and by supporting effective enforcement by supervisors (together referred to below as ‘enforcement’) and of modernizing existing consumer protection rules and complementing them with new rules to improve the consumer acquis (together referred to below as ‘modernization’).⁸ Other aspects mentioned in the Communication⁹ – such as improving cooperation in the field of consumer protection with third countries, combatting ‘dual quality’ of consumer products and improving consumers’ and traders’ knowledge of their rights and obligations – will not be discussed here.

2. Individual Enforcement

4. How to enforce European consumer law has long been seen as a question to be left to the Member States on the basis of the principle of procedural autonomy. A number of directives set out the rights a consumer should have,¹⁰ but failed to address the question of how these rights could be enforced. And if a Directive did contain provisions on enforcement, it was often only stipulated that Member States should ensure that adequate and effective means were put in place to enforce the rights conferred by it or to combat infringements of the Directive¹¹ and/or that Member States should provide for sanctions to be imposed on traders who infringed

Schagen (then Groningen, now Utrecht) I was responsible for the Dutch country report for the Main report of Civic Consulting.

7 See <https://www.consilium.europa.eu/register/en/content/int/?lang=en&typ=ADV>, enter ‘2018/0090(COD)’ under ‘Institutional file’ (accessed 21 October 2019).

8 Communication, pp 3–4.

9 Communication, pp 3–4.

10 Compare Art. 5 Package Travel Directive (Directive 90/314/EEC, *OJ* 1990, L 158/59); Art. 3 Consumer Sales Directive (Directive 1999/44/EC, *OJ* 1999, L 171/12).

11 Compare Art. 7 Unfair Contract Terms Directive (Directive 1993/13/EEC, *OJ* 1993, L 95/29); Art. 11 Unfair Commercial Practices Directive (Directive 2005/29/EC, *OJ* 2005, L149/22); Art. 23 Consumer Rights Directive (Directive 2011/83/EU, *OJ* 2011, L 304/64); Art. 24 Package Travel Directive 2015 (Directive (EU) 2015/2302, *OJ* 2015, L 326/1).

such a Directive, which sanctions should be effective, proportionate and dissuasive.¹² Overall, European law did not provide much guidance for a uniform method of enforcement.

5. Accompanying the Communication, two separate proposals were submitted in order to meet this concern. The proposal for a Directive on representative actions was intended to provide an opportunity for collective action by consumer organizations. The Modernization Directive discussed here should, among other things, focus on two other ways of enforcement: individual private enforcement of the Unfair Commercial Practices Directive, and public enforcement of various European consumer law directives by the competent supervisory authorities.

6. The final version of the Modernization Directive provides for both. Article 3 (5) of the Modernization Directive amends the Unfair Commercial Practices Directive by introducing a new Article 11a in that Directive. This provision is intended to encourage the *private enforcement* of the Unfair Commercial Practices Directive by the consumer that fell victim to an unfair commercial practice¹³ and, unlike the rest of the Directive, only provides for minimum harmonization.¹⁴ The first section of this new Article requires Member States to make available ‘proportionate and effective remedies’ to consumers who have been the victim of an unfair commercial practice to remedy the consequences of the unfair commercial practice, including at least the right to damages and, where relevant, the right to price reduction or the right to ‘unilateral termination’ of the contract. Price reduction may then be an appropriate remedy if the consumer wishes to keep the goods or services provided by the trader, but only at a lower price. Unilateral termination is, however, advisable if the consumer no longer wishes to receive or keep the goods or services. This could be the case, for example, if the consumer, had he been able to freely decide whether or not to conclude the contract, would never have concluded it. In such a case, avoidance of the contract for mistake or abuse of circumstances might be available as a remedy under national contract law. However, the application of such a remedy would typically require the consumer to prove the causal connection between the trader’s use of the unfair commercial practice and his (the consumer’s) decision to conclude the contract. Yet, from the point of view of the consumer it might be irrelevant whether or not there would be a causal link between the unfair commercial practice and the conclusion of the contract: he might also want to be freed from any contractual relations with the trader for the simple reason that he no longer has

12 Compare Art. 8 Price Indication Directive (Directive 98/6/EG, *OJ* 1998, L 80/27); Art. 13 Unfair Commercial Practices Directive; Art. 15 Timeshare Directive 2008 (Directive 2008/122/EG, *OJ* 2008, L 33/10); Art. 24 Consumer Rights Directive; Art. 24 Package Travel Directive 2015.

13 Compare recital (16) of the preamble to the Modernization Directive.

14 Compare Art. 11a (2) Unfair Commercial Practices Directive.

confidence in the trader or in the qualities of the goods or services to be provided by the trader now that he knows that the trader does not shy away from concluding contracts in an unfair manner. The requirement in Article 11a (1) Unfair Commercial Practices Directive that the consumer should have a proportionate and effective remedy seems to imply that the consumer should be able to terminate the contract in this second case as well (through either avoidance or termination of the contract), but this is not entirely certain: the Article also stipulates that it is up to the Member States to determine the conditions under which the consumer can make use of these remedies. It can be argued that if there is no (proof of a) causal link between the trader's use of the unfair commercial practice and the consumer concluding the contract the consumer should only be able to terminate the contract if it is certain or if there are good reasons to fear that there will be a fundamental non-performance by the trader.¹⁵ The mere fact that the trader has made use of an unfair commercial practice to promote the conclusion of the contract would then probably not be sufficient to allow for termination. If a Member State would like to grant the consumer a right to terminate the contract also in this situation it will probably have to explicitly regulate such possibility.

7. This amendment to the Unfair Commercial Practices Directive may also lead to substantial changes in another area. In the *Bankia* judgment, the Court of Justice ruled that, while the Directive stated that unfair commercial practices were 'prohibited', it left the Member States a margin of discretion in the choice of national measures to combat them. In addition, the Directive left open the possibility of an individual claim for damages or for the avoidance or termination of the contract on the basis of national contract law. For these reasons, the Court concluded that the effectiveness of the Unfair Commercial Practices Directive did not require the national court to review of its own motion or at the request of a party whether a trader's claim is invalid on the ground that it arises from an unfair commercial practice committed by that trader.¹⁶ After the entry into force of Article 11a of the Unfair Commercial Practices Directive, Member States will be required by the Directive to offer the consumer at least the possibility of damages and price reduction or unilateral termination of the contract. This may lead the Court to determine that Member States courts should also apply the Unfair Commercial Practices Directive of their own motion: the mere fact that Member States *may* also grant other remedies has not stood in the way of the Court of Justice recognizing such an obligation

15 In such case national contract law may provide for such remedy, see for instance Art. III. - 3:504 Draft Common Frame of Reference (Termination for anticipated non-performance) and Art. 6:80 Dutch Civil Code (Anticipatory breach).

16 CJEU 19 September 2018, case C-109/17, ECLI:EU:C:2018:735 (*Bankia/Mari Merino et al.*), points 31-34.

under the Consumer Sales Directive, which also only introduced remedies for lack of conformity on the basis of minimum harmonization.¹⁷

3. Public Enforcement

8. The harmonization of *public enforcement* of European consumer law is encouraged by the introduction of – largely consistent – provisions in the Unfair Commercial Practices Directive,¹⁸ Consumer Rights Directive,¹⁹ Unfair Contract Terms Directive²⁰ and Price Indication Directive.²¹ These provisions oblige Member States to provide for the possibility of imposing an administrative fine for infringements of these Directives. In addition, the maximum fine to be imposed must be at least 4% of the trader’s annual turnover in the Member State(s) concerned.²² When determining the amount of the fine, the supervisory authority or the national court must, however, comply with the principle of proportionality,²³ which implies that the maximum fine will not (and cannot) be imposed easily. In the case of the Unfair Contract Terms Directive, it is also stipulated that the Member States may limit the imposition of an administrative fine to cases in which a term has been regarded by the legislator as unfair in all circumstances (i.e. if the term is ‘blacklisted’) or to cases in which the trader has continued to use the term after it has been declared unfair by the court in collective redress proceedings.²⁴ On the other hand, Member States are also free to go further and to provide that the supervisory authority itself has the power to determine that a term is unfair and to subsequently impose a fine, subject of course by revision by a court. The preamble to the Modernization Directive even seems to suggest that Member States may provide that fines may also be imposed by civil courts in the context of an individual case in which a term is regarded as unfair.²⁵

17 Compare CJEU 3 October 2013, case C-32/12, ECLI:EU:C:2013:637 (Duarte Hueros); CJEU 4 June 2015, case C-497/13, ECLI:EU:C:2015:357 (Faber).

18 Compare Art. 3 (6) Modernization Directive, leading to the replacement of Art. 13 Unfair Commercial Practices Directive.

19 Compare Art. 4 (13) Modernization Directive, leading to the replacement of Art. 24 Consumer Rights Directive.

20 Compare Art. 1 Modernization Directive, leading to the incorporation of Art. 8b Unfair Contract Terms Directive.

21 Compare Art. 2 (2) Modernization Directive, leading to the replacement of Art. 8 Price Indication Directive.

22 Compare the new provisions of Art. 13 (3) Unfair Commercial Practices Directive, Art. 24 (3) Consumer Rights Directive, and Art. 8b (4) Unfair Contract Terms Directive. The Price Indication Directive does not contain a corresponding provision.

23 See also CJEU 21 December 2016, case C-119/15, ECLI:EU:C:2016:987 (Biuro Partner), points 45 and 46.

24 Compare Art. 8b (2) Unfair Contract Terms Directive.

25 Compare recital (14) of the preamble to the Modernization Directive.

4. Dynamic Pricing and Online Choice Architecture

9. In recent years, the use of personal data and big data has grown considerably. Consumers experience the results of this – sometimes without realizing it – as personalized information is being offered to them on the basis of the collected data, in the form of the messages they read or the offers that are shown to them during an online search. This is advantageous for a trader because the consumer can be approached in a targeted way with offers that are tailored to his person; the trader's offers are therefore potentially more interesting to the targeted consumer, who will thus be more inclined to accept the offer and to conclude a contract.²⁶ Consumers can benefit from this if goods or services are offered to them at a lower price, but the reverse is of course just as well possible. Many consumers believe that the mere fact that they have previously searched for a specific flight in order to be able to book that flight later affects the level of the price that is shown to them at a later date in a new search. A study from 2014 showed that this form of price discrimination did not occur at that time,²⁷ but of course that could be different by now. Whether price discrimination (to the benefit or to the detriment of an individual consumer) should be permitted is controversial.²⁸ However, the Modernization Directive makes it clear that traders are indeed allowed to personalize the prices of their offers to specific consumers or to groups of consumers on the basis of algorithms and online profiling, provided that the trader respects the requirements of the General Data Protection Regulation.²⁹ Yet, consumers should be informed if the trader has determined its price offer on the basis of automated decision-making. This information obligation, however, does not apply in the case of dynamic or 'real-time pricing', where the price changes rapidly on the basis of changes in supply and demand.³⁰ This means that an airline does not have to inform the consumer that if there are many people searching for an online flight from Amsterdam to Barcelona at a certain date and time, the price for that flight will increase, even though the number of bookings may not have increased.

26 Compare J.M. BENNING, 'The Average Online Consumer. A proposal for a new approach to assessing the fairness of online behavioral advertising under the Unfair Commercial Practices Directive', (5) *Tijdschrift voor Consumentenrecht en handelspraktijken* 2018, p 218.

27 Compare E. CONSTANTINIDES & R.H.J. DIERCKX, *Airline Price Discrimination: A Practice of Yield Management or Customer Profiling?*, 2014, <https://research.utwente.nl/en/publications/airline-price-discrimination-a-practice-of-yield-management-or-cu> (accessed 2 August 2019).

28 Compare the negative blogpost by R. Zenger of 16 March 2016 on the website of the Dutch consumer-privacy organization Bits of Freedom, <https://www.bitsoffreedom.nl/2016/03/24/prijs-discriminatie-mag-niet-ook-geen-positieve/> (accessed 2 August 2019).

29 Regulation (EU) 2016/679, *OJ* 2016, L 119/1.

30 Compare recital (45) of the preamble to and Art. 4 (4) of the Modernization Directive, leading to the incorporation of Art. 6 (1) (ea) Consumer Rights Directive.

10. Online choice architecture may also contribute to maximizing the number of agreements made via an online store and the turnover achieved in the process. Research by the European Commission has shown that consumers have an almost blind faith in the good intentions of webshops and that they are hardly aware that their purchasing decisions are strongly influenced by the strategies used by the webshops.³¹ The Dutch Authority for Consumers and Markets (ACM), the Dutch regulator, has indicated in this respect that traders must design their webshops in such a way that they do not abuse the fact that consumers are inclined (in a completely predictable manner) to take unfavourable decisions for them.³² The Modernisation Directive does not contain any instrument on the basis of which the regulator can easily intervene: there is no explicitly prohibited commercial practice. This means that a public regulator can only proceed with enforcement if the way in which the online choice architecture is designed can be regarded as an unfair commercial practice within the meaning of Article 5 (2) of the Unfair Commercial Practices Directive. According to the ACM, the existing regulations do offer points of departure for this: in its opinion, the directive's requirement of professional diligence entails a duty of care that should prevent providers from designing their online choice architecture in such a way that the behavioural pitfalls of a consumer are abused.³³ If the website does not meet this requirement and a consumer enters into a contract that he would not otherwise have entered into in this form, this could be regarded as an unfair commercial practice. However, the required case-by-case approach seems to severely complicate public enforcement by the regulator.

5. Information Duties for Online Marketplaces

11. The Modernization Directive introduces a number of specific rules for online marketplaces. An online marketplace is where a trader provides consumers with a service consisting of the ability to conclude distance contracts with other traders or

31 Compare F. LUPIÁÑEZ-VILLANUEVA et al., *Behavioural Study on the Transparency of Online Platforms, Executive Summary*, 2018, p 5. The study is available at https://ec.europa.eu/info/publications/behavioural-study-transparency-online-platforms-2018_en (accessed 29 August 2019).

32 For instance, consumers are inclined to overestimate short term benefits ('Pay € 10/months during the first 3 months!') and to underestimate long term risks (after 3 months the price will be increased to € 25/month) te onderschatten. See regarding such behavioural pitfall extensively B.B. DUIVENVOORDE, *The Consumer Benchmarks in the Unfair Commercial Practices Directive* (Cham/Heidelberg/New York/Dordrecht/London: Springer 2015), available also online at https://pure.uva.nl/ws/files/2068830/142773_thesis.pdf (accessed 29 August 2019).

33 AUTORITEIT CONSUMENT EN MARKT, *Signaal 2019. Consumentenbescherming in een veranderende maatschappij*, 2019, pp 3-5. The report is available online at <https://www.acm.nl/nl/publicaties/acm-signaal-2019-consumentenbescherming-een-veranderende-maatschappij> (accessed 29 August 2019).

consumers using software, a website or part of a website, or an app operated by or on behalf of the trader.³⁴ Where in such a marketplace it is possible to search for products offered by different traders or consumers, the search results are displayed to the searching consumer in a certain way. The Consumer Rights Directive, as amended by the Modernization Directive, requires the trader offering the online marketplace to provide general information, in clear and comprehensible language, on the key variables and their weighting in order to show the order of the search results, without this information having to be tailored to the specific search request of the consumer. The information on the variables should be directly and easily accessible from the webpage where the search results are displayed.³⁵ This is in line³⁶ with the requirements of the new Regulation on promoting fairness and transparency for business users of online intermediation services.³⁷ Failure by the online marketplace provider to provide such information would constitute a misleading omission and thus an unfair commercial practice, as the information is considered ‘material’.³⁸ However, the provider is not required to disclose its algorithms.³⁹ When the trader posts consumer reviews on its website, it should indicate whether and how it ensures that the published reviews actually come from consumers who bought or used the product. This information is also considered to be material,⁴⁰ so failure to provide such information would again constitute a misleading omission. In both cases, the posting of *incorrect* information constitutes a misleading commercial practice.⁴¹ In addition, the black list of unfair commercial practices is supplemented with the practice that the reviews of goods or services are said to originate from consumers who have actually bought or used these goods or services without the trader having taken reasonable steps to verify that this is the case.⁴² Moreover, traders are prohibited from posting false reviews and endorsements themselves, such as likes on social media, and from commissioning others to do so, as well as from manipulating reviews and endorsements, e.g. by only publishing positive reviews and removing negative ones.⁴³

34 Compare Arts 3 (1) (b) and 4 (1) (e) Modernization Directive, leading to the incorporation of Art. 2 (1) (n) Unfair Commercial Practices Directive and Art. 2 (17) Consumer Rights Directive.

35 Compare Art. 7 (4a) Unfair Commercial Practices Directive and Art. 6a (1) (a) Consumer Rights Directive.

36 Compare explicitly recital (21) of the preamble to the Modernization Directive.

37 Compare Arts 5-7 Regulation (EU) 2019/1150, *OJ* 2019, L 186/57.

38 Compare Art. 3 (4) (b) Modernization Directive, leading to the incorporation of Art. 7 (4a) Unfair Commercial Practices Directive.

39 Compare recital (23) of the preamble to the Modernization Directive.

40 Compare Art. 3 (4) (c) Modernization Directive, leading to the incorporation of Art. 7 (6) Unfair Commercial Practices Directive.

41 Compare the already existing provision of Article 6 (1) Unfair Commercial Practices Directive.

42 Compare point 23b in Annex I to the Unfair Commercial Practices Directive.

43 Compare point 23c in Annex I to the Unfair Commercial Practices Directive.

12. The black list of unfair commercial practices is further supplemented by a trader's failure to disclose the fact that it has a commercial interest in determining the order in which search results are displayed.⁴⁴ Such commercial interest may include another trader paying the online marketplace provider to display its goods or services higher in the ranking than would result from the weighting of the variables. Secondly, the commercial interest may also lead to the inclusion of goods or services in the search results that do not meet consumer's request but are related to it. For example, when entering the query 'purchase television', a specific website may be shown first; secondly, at the beginning of the list of search results, an online shop may be listed that does not sell televisions, but rather audio equipment. In both cases, the provider of the online marketplace fulfils its obligation by clearly indicating in the search result that this search result is in fact a sponsored link or an advertisement.

6. Online Market Places: With Whom Does the Consumer Conclude a Contract?

13. When a consumer clicks on one of the search results displayed by an online marketplace such as Amazon.eu to order the displayed goods or services, he often does not know whether he is contracting with the marketplace itself, with another trader, or with another consumer.⁴⁵ The new Article 6a (1) of the Consumer Rights Directive provides that the provider of the online marketplace must clarify, in a 'clear and comprehensible manner', inter alia, whether the third party is a trader, whether European consumer law applies to the contract to be concluded and, if so, who is required to comply with consumer rights under European consumer law.⁴⁶ It is not sufficient to include this information in the standard contract terms, but the online marketplace does not need to provide an exhaustive overview of what rights consumers do and do not have under the contract concluded via the online marketplace.⁴⁷ Again, this information is considered to be material,⁴⁸ so that its omission is considered a misleading commercial practice.

However, in determining whether the third party is a trader, the online marketplace may rely on a statement provided by the third party to the online marketplace, as is stated explicitly in Article 6a (1) (b) of the Consumer Rights Directive. The online marketplace therefore has no obligation to monitor the correctness of this statement.⁴⁹ This is in line with the E-commerce

44 Compare Art. 3 (7) (a) Modernization Directive, leading to the incorporation of point 11a in Annex I to the Unfair Commercial Practices Directive.

45 Compare also the Communication, p 5.

46 Compare Art. 4 (5) Modernization Directive.

47 Compare recital (27) of the preamble to the Modernization Directive.

48 Compare Art. 3 (4) (a) (ii) Modernization Directive, leading to the incorporation of Art. 7 (4) (f) Unfair Commercial Practices Directive.

49 Compare recital (28) of the preamble to the Modernization Directive.

Directive.⁵⁰ According to Article 14 of that Directive, the provider of an information society service shall not be liable for the accuracy of the information it transmits where the information society service consists of the storage of information provided by a recipient of the service, provided that it does not have actual knowledge of the unlawful activity or information or, as soon as it does have actual knowledge or becomes aware of it, acts expeditiously to remove or to disable access to the information. It follows from the case-law of the Court of Justice that this exemption from liability also applies to the provider of an online search engine where that service provider has not played an active role such that it has knowledge of, or control over, the stored data.⁵¹

14. Article 6a of the Consumer Rights Directive is thus in line with the existing rules of the E-commerce Directive. This seems to offer online marketplaces a license to simply take the third party's message that it is not a trader at face value. The third party may have an interest in creating the false impression that it is not a professional. In practice, the abuse of such possibility is likely to be limited. First, it should be noted that the downside of posing as a consumer is that (other) consumers may be less likely to consider the supplier as a reliable supplier of goods or services. In any case, it will be difficult for consumers (and regulators) to get hold of truly malicious traders: setting up a webshop nowadays takes hardly any time⁵² and the number of unreliable web shops is alarmingly high as it is.⁵³ Therefore, the 'need' for fraud to take place by means of false information about whether or not the third party is a trader does not seem to be too great – on the contrary: it is in the interests of rogue traders to come across as a serious and reliable online store. Finally, many traders may shy away from using such a misleading commercial practice because of the new enforcement options available to regulators, and especially because of the threat posed by the imposition of a high administrative fine, in particular if the regulator not only takes enforcement action

50 Directive 2000/31/EC, *OJ* 2000, L 178/1.

51 Compare CJEU 23 March 2010, ECLI:EU:C:2010:159 (Google France SARL and Google Inc et al./ Louis Cuitton Malletier SA et al.).

52 When filling in the Dutch search terms 'hoe lang duurt het opzetten van een webshop' ('how long does it take to set up a webshop') for an online search service, the first two (sponsored) links indicated that setting up the webshop via these services would take appr. 30 minutes (<https://www.lightspeedhq.nl/ecommerce>) and only a few minutes (<https://www.mijnwebwinkel.nl/webshop-starten>) (accessed 31 July 2019).

53 In 2018, the Dutch consumer organization *Consumentenbond* carried out a study into fake webshops. According to *Consumentenbond*, at least 1 in 5 webshops is unreliable; at the time, the consumer organization drew up a list of 2,000 suspicious webshops aimed at the Dutch market, cf. <https://www.consumentenbond.nl/online-kopen/nep-webwinkels> (accessed 31 July 2019). The Belgian consumer organization Testaankoop reports having exposed 800 false webshops in the same period, cf. <https://www.test-aankoop.be/hightech/internet/nieuws/800-valse-webshops-ont-maskerd> (accessed 31 July 2019).

but this is subsequently the subject of media attention. This means that incorrect information about the identity as a trader will probably mainly come from small professional parties who started out as a hobbyist but who now have to be regarded as a trader (possibly even without their being aware of it). Indeed, an online marketplace or online search engine cannot be required to verify the identity of all such parties. If the online marketplace has been informed of the inaccuracy of the information, it will have to remove the incorrect information promptly in order to be exempt from liability. This will mean that it will have to ensure that the third party's offer no longer appears in the search results, so that consumer no longer can contract on the basis of this inaccurate information.

15. In my opinion, in order to prevent abuse of the exemption from liability by the online marketplace, courts should not place undue demands on the consumer, the consumer organization or the regulator in proving that the online marketplace knew or could be expected to know that the information provided by the third party is incorrect: as soon as the online marketplace has received complaints about a specific third party from a number of consumers or from a consumer organization, in my opinion, social diligence requires the online marketplace to carry out an investigation into the correctness of those complaints. Such a duty of care arises from ordinary tort law rules under national law and is not in conflict with the E-commerce Directive. It is true that under that Directive Member States may not impose a general obligation on service providers to actively look for facts or circumstances indicating illegal activities,⁵⁴ but this prohibition expressly does not preclude the possibility for Member States to require service providers to exercise the care that may reasonably be expected of them in the course of their business. To the extent that the duty of care is established by national law and serves (i.e.) to detect and prevent certain types of illegal activities, consumers will be able to rely on a breach of such duty.⁵⁵ In line with this, Article 6a (2) of the Consumer Rights Directive now provides that, in order to maintain a high level of consumer protection, Member States may impose more stringent national information requirements on online marketplaces. Such measures should be proportionate and non-discriminatory and should be without prejudice to the E-commerce Directive. The preamble indicates that the measures may be particularly necessary in view of the rapid technological developments in relation to online marketplaces.⁵⁶

54 Compare Art. 15 (1) E-commerce Directive.

55 Compare recital (48) of the preamble to the E-commerce Directive.

56 Compare recital (29) of the preamble to the Modernization Directive.

7. Simplification of the Trader's Position

16. On a number of points, the Modernization Directive simplifies the position of traders. For example, traders will no longer have to provide the model withdrawal form before the conclusion of the contract if the contract is concluded by means of distance communication that offers limited space (e.g. text message, mobile phone) or time (TV advertising) for displaying the information. This amendment to Article 8 (4) of the Consumer Rights Directive, which was already mentioned in the original proposal for the Modernization Directive,⁵⁷ has been explained more elaborately in the preamble to the final text of that Directive by pointing out that, for example, in the case of orders placed by telephone or by means of a voice operated shopping assistant, it may be technically impossible to send the model form to the consumer in a user-friendly manner before the conclusion of the contract.⁵⁸ In such a case, the model form, as well as other information that could not be provided before the conclusion of the contract, should be made available in an appropriate manner as soon as possible after the conclusion of the contract.⁵⁹

17. The obligation on a trader to provide a fax number by which the consumer could easily contact the trader, provided for in Article 6 (1) (c) of the Consumer Rights Directive, has been deleted because the use of a fax has become obsolete.⁶⁰ Instead, the trader is obliged to provide information on any other means of communicating with it online in a fast and effective manner, provided that it is ensured that the consumer receives a written report of the communication indicating the date and time of the contact.⁶¹ This will not lead to a substantial change in practice, as the Court of Justice has recently already determined that a trader is not obliged to activate and to provide to the consumer a telephone number, fax number or email address if it does not use these means of communication. Yet, in such case the trader would be required to provide another means of communication that meets the requirements of direct and efficient communication, the Court decided.⁶² This requirement is met, for example, if the trader offers the possibility of an online chat conversation that can be downloaded as a text file at the end of the conversation. The new wording of Article 6 (1) (c) Consumer Rights Directive thus codifies this case-law.

57 Compare Art. 2 (12) (a) of the original proposal for the Modernization Directive.

58 Compare recital (41) of the preamble to the Modernization Directive.

59 Compare the end of Art. 8 (4) Consumer Rights Directive, which has not been amended on this point by the Modernization Directive.

60 Compare recital (46) of the preamble to the Modernization Directive.

61 Compare Art. 4 (4) (a) (i) Modernization Directive, leading to the incorporation of the new text of Art. 6 (1) (c) Consumer Rights Directive.

62 CJEU 10 July 2019, case C-649/17, ECLI:EU:C:2019:576 (Bundesverband der Verbraucherzentralen und Verbraucherverbände/Amazon EU Sàrl).

8. Right of Withdrawal

18. The New Deal Communication had already announced that consumers would be granted the same rights with regard to pre-contractual information obligations and the right of withdrawal in the case of ‘free’ digital content and digital services as they already have with regard to paid versions of such content or services.⁶³ In line with the new Digital Content and Digital Services Directive,⁶⁴ the Consumer Rights Directive will in the future also apply to contracts for the supply of digital content not supplied on a durable medium and to the supply of digital services, where the consumer does not pay a price in money but where he undertakes to provide personal data to the trader. An exception applies (as under the Digital Content and Digital Services Directive) in cases where the personal data are used by the trader for the sole purpose of performing the contract and/or legal obligations.⁶⁵ A 14-day cooling-off period will also apply to digital content and digital services that are not supplied in exchange for a price in money, which period will start at the time of the conclusion of the contract.⁶⁶

19. However, both for paid and ‘free’ digital content and services there are cases where the consumer can no longer use his right to withdraw from the contract during the cooling-off period. For contracts for the supply of services, including digital services, the consumer loses the right to withdraw from the contract if the contract has been fully performed and, to the extent that the consumer has agreed to pay a price in money, performance has taken place with the prior consent of the consumer and the recognition by that consumer that he has lost his right to withdraw from the contract as soon as the performance has been *completed*.⁶⁷ For the delivery of digital content, the right of withdrawal expires under the same conditions already at the moment when the delivery *begins*.⁶⁸ This makes it relevant to distinguish between the delivery of digital content and the delivery of digital services - especially in the case of contracts that last for a longer period, such as a subscription to updates of antivirus software or to access an online game account. The supply of digital content occurs when specific, individualized digital data are provided over which the consumer can exercise effective control. This includes the

63 Communication, p 5.

64 Directive (EU) 2019/770, *OJ* 2019, L 136/1.

65 Compare Art. 4 (2) (b) Modernization Directive leading to the incorporation of Art. 3 (1a) Consumer Rights Directive; cf. also recitals (31-34) of the preamble to the Modernization Directive.

66 Compare the current text of Art. 9 (2) (a) and (c) Consumer Rights Directive.

67 Compare Art. 16 (1) (a) Consumer Rights Directive, as amended by Art. 4 (12) (a) Modernization Directive. The Modernization Directive also renumbers the current Art. 16 Consumer Rights Directive into Art. 16 (1) and adds two more paragraphs.

68 Compare Art. 16 (1) (m) Consumer Rights Directive, as amended by Art. 4 (12) (b) Modernization Directive.

supply of a downloadable music, audio or video file, computer programs, apps, digital games, e-books or other e-publications.⁶⁹ This also includes the supply of antivirus software or a subscription to such software. As soon as the consumer downloads the antivirus software – under the aforementioned conditions – he loses his right to withdraw from the contract.

By contrast, the supply of digital services occurs where the service enables the consumer to create, process or store data in digital form, or to access such data, or provides for the possibility of sharing data or any other interaction with data in digital form uploaded or created by the consumer or by other users of that service.⁷⁰ This includes, for example, Software-as-a-Service, which allows for the online use of software such as versions of Word or Acrobat Reader, but also services for hosting files (cloud storage) or providing access to games played online and to social media, whether or not for a certain period of time.⁷¹ According to the preamble, if there is any doubt as to whether the delivery pertains to digital content or to a digital service, the rules regarding the cooling-off period for services should be applied, so that the right to withdraw only expires when the performance has been completed.⁷²

9. Conclusion

20. In this contribution, I examined whether the Modernization Directive in its final form fulfils the promise made in the New Deal Communication of modernizing European consumer law and improving the enforcement thereof. It is clear that the (possibility of) *enforcement* is greatly improved by the granting of individual remedies to consumers when they are confronted with unfair commercial practices by traders. In addition, the possibility of imposing serious administrative fines for breaches of the Unfair Commercial Practices Directive, the Consumer Rights Directive, the Price Indication Directive and the Unfair Contract Terms Directive provides a clear incentive for public enforcement. Yet, it is difficult to understand why the European legislator did not take the opportunity to include corresponding provisions in neither the recently adopted Digital Content and Digital Services Directive and the new Sale of Goods Directive,⁷³ nor in the existing Consumer Sales Directive,⁷⁴ especially since the

69 Compare recital (30) of the preamble to the Modernization Directive and recital (19) of the preamble to the Digital Content and Digital Services Directive.

70 Compare Art. 2 (16) Consumer Rights Directive, referring to Art. 2 (2) Digital Content and Digital Services Directive.

71 Compare recital (19) of the preamble to the Digital Content and Digital Services Directive.

72 Compare recital (30) of the preamble to the Modernization Directive.

73 Directive (EU) 2019/771, *OJ* 2019, L 136/28.

74 Directive 1999/44/EC, *OJ* 1999, L 171/12; this directive will be replaced by the Sale of Goods Directive for consumer sales contracts concluded after 1 January 2022, see Arts 23 and 24 of that directive.

Modernization Directive has brought the Unfair Commercial Practices and Consumer Rights Directives into line with the Digital Content and Digital Services Directive in many other respects.

21. With regard to the *modernization* of consumer law, the European legislator is right to devote a great deal of attention to the role of online marketplaces. The lack of *substantive* rules dealing with online marketplaces may be regretted. However, given the policy agenda of Von der Leyen, the new President of the European Commission, it may be expected that the new European Commission will come up with proposals in this area.⁷⁵ The modernization directive does, however, already contain useful suggestions. This applies in particular to the addition to the list of prohibited commercial practices of inadequate information or checks regarding the truthfulness of online reviews and other statements of support, such as likes on social media, and the failure to make it clear that other interests may have contributed to determining the order in which search results are displayed. These bans can have an important disciplining effect on online trading, especially if the regulator makes use of the increased possibilities for enforcement.

The extension of the scope of the Consumer Rights Directive to digital content and digital services provided ‘free of charge’ is in line with the corresponding regime in the Digital Content and Digital Services Directive. However, the distinction between digital content and digital services is so subtle that, in my opinion, it would have been better to develop a uniform regulation on the loss of the right of withdrawal in the event of the consumer’s consent to delivery during the cooling-off period. In order to avoid problems of demarcation between digital services and other services, it would have been sensible to simply align the relevant exemption for digital content and digital services with those for (other) services. We will have to wait and see whether this will actually lead to problems in practice, or whether the indication in the preamble that, in case of doubt, the rules for (digital) services should be followed, will be sufficient.

Somewhat more questionable is the decision of the European legislator to allow online profiling and price discrimination. It seems important to keep a close eye on whether the permitted price discrimination on the basis of personal preferences does not degenerate into prohibited discrimination on the grounds of, for example, race, nationality or religion. Surely it should not be the case that the unfair commercial practice of profiling on the basis of zip codes makes a comeback through the back door of the consumers’ IP addresses. Time will tell whether the regulators are sufficiently equipped to be able to supervise these kinds of practices as well.

⁷⁵ See U. VON DER LEYEN, *A Union that Strives for More. My Agenda for Europe*, 2019, p 13. The statement of (then candidate-) President Von der Leyen is available at https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf (accessed 25 September 2019).

22. The Modernization Directive therefore does indeed lead to modernization and improvement of (the possibility of) enforcement of European consumer law. This does not mean that European consumer law is up to date on all points. For example, in today's digital society, it seems difficult to explain why general terms and conditions are absolutely forbidden in some countries and perfectly fine in others. For internationally operating companies such as Facebook, Google and Amazon, it must therefore be difficult to draft uniform general terms and conditions that can be used everywhere in the EU - assuming that these companies would be willing to comply with the law to begin with, of course. The time may have come to update the Unfair Contract Terms Directive, which has been in force for more than 25 years. The aforementioned fitness check from 2017 offers more than enough handles for such a reform.

