

IV

(Notices)

NOTICES FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND AGENCIES

EUROPEAN COMMISSION

COMMISSION NOTICE

Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights

(Text with EEA relevance)

(2021/C 525/01)

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## INTRODUCTION

The purpose of Directive 2011/83/EU of the European Parliament and of the Council <sup>(1)</sup> on consumer rights (hereinafter referred to as 'CRD' or 'Directive') is to achieve a high level of consumer protection across the EU and to contribute to the proper functioning of the internal market by approximating certain aspects of Member States' laws, regulations and administrative provisions concerning contracts concluded between consumers and traders <sup>(2)</sup>.

The purpose of this Guidance Notice (hereinafter referred to as 'Notice') is to facilitate the effective application of the Directive. The Notice also aims at increasing awareness of the Directive amongst all interested parties, such as consumers, businesses, the authorities of the Member States, including national courts, and legal practitioners, across the EU. It covers the amendments introduced by Directive (EU) 2019/2161 of the European Parliament and of the Council <sup>(3)</sup> as regards the better enforcement and modernisation of Union consumer protection rules that enter into application from 28 May 2022. Accordingly, a part of this guidance reflects and discusses the rules that have not yet entered into application as of the date of issuance of this Notice. The relevant sections and points are clearly indicated.

The Notice reflects the case law of the Court of Justice of the European Union (hereinafter referred to as 'CJEU' or 'the Court') on the Directive since its entry into application on 13 June 2014. From its date of application, the Directive replaced Council Directive 85/577/EEC <sup>(4)</sup> to protect the consumer in respect of contracts negotiated away from business premises and Directive 97/7/EC of the European Parliament and of the Council <sup>(5)</sup> on the protection of consumers in respect of distance contracts. CRD retained certain provisions of the former Directives 85/577/EEC and 97/7/EC. Therefore, the relevant case law of the Court related to the interpretation of those Directives is also referred to in this document where applicable.

The Notice does not analyse the application of the Directive in the individual Member States, including the decisions of national courts and other competent bodies. In addition to different information sources available in the Member States, information on the national provisions transposing the Directive, on case law and on legal literature is available in the Consumer Law Database accessible via the E-justice portal <sup>(6)</sup>.

This Notice is addressed to the EU Member States and to Iceland, Liechtenstein and Norway as signatories of the Agreement on the European Economic Area <sup>(7)</sup> (EEA). References to the EU, the Union or the Single Market should therefore be understood as references to the EEA or to the EEA market.

This Notice is intended purely as a guidance document – only the text of the EU legislation itself has legal force. Any authoritative reading of the law has to be derived from the text of the Directive and directly from the decisions of the Court. This Notice takes into account rulings of the Court published until October 2021 and cannot prejudice further developments of the Court's case law.

The views expressed in this Notice cannot prejudice the position that the European Commission might take before the Court. The information contained in this Notice is of a general nature and does not specifically address any particular individuals or entities. Neither the European Commission nor any person acting on behalf of the European Commission is responsible for any use that may be made of the following information.

As this Notice reflects the state of the art at the time of drafting, the guidance offered may be modified at a later date.

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<sup>(1)</sup> Directive 2011/83/EU of the European Parliament and of 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 of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ L 304, 22.11.2011, p. 64).

<sup>(2)</sup> See Article 1 of the Directive.

<sup>(3)</sup> Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules (OJ L 328, 18.12.2019, p. 7).

<sup>(4)</sup> Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ L 372, 31.12.1985, p. 31).

<sup>(5)</sup> 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 – Statement by the Council and the Parliament re Article 6(1) – Statement by the Commission re Article 3(1), first indent (OJ L 144, 4.6.1997, p. 19).

<sup>(6)</sup> [https://e-justice.europa.eu/591/EN/consumer\\_law\\_database](https://e-justice.europa.eu/591/EN/consumer_law_database)

<sup>(7)</sup> OJ L 1, 3.1.1994, p. 3

## 1. Scope of application

### 1.1. *The notions of ‘trader’ and ‘consumer’*

As laid down in its Article 1, the CRD applies to ‘contracts concluded between consumers and traders’. Therefore, for a contract to be covered by the Directive, it is necessary to establish that one party thereto is a trader, as defined in Article 2(2), and the other party a consumer, as defined in Article 2(1).

According to Article 2(1), ‘**consumer**’ is any natural person who, in contracts covered by the Directive, is acting for purposes which are outside his/her trade, business, craft or profession. It follows from that provision that **two cumulative conditions** must be satisfied in order for a person to fall within the scope of that concept, namely that: (i) the person is a natural person, and (ii) the persons acts for non-professional purposes.

As explained in Recital 13, Member States may maintain or introduce national legislation corresponding to the provisions of the Directive in relation to contracts that fall outside the scope of the Directive, for example, by extending the application of national rules also to natural persons who are not consumers within the meaning of Article 2(1) or to legal persons, such as non-governmental organisations, start-ups or small and medium-sized enterprises.

In this respect, in case C-329/19 *Condominio di Milano* <sup>(8)</sup>, the Court confirmed that the concept of ‘consumer’ can be expanded by national case-law in such a way that its protective rules also apply to a contract between a trader and a subject of the law, which is not a natural person, such as the ‘*condominio*’ (co-owners’ association) in Italian law.

Furthermore, the Court held that the concept of ‘consumer’ refers to an individual not engaged in commercial or trade activities <sup>(9)</sup>. This second criterion should be interpreted in light of Recital 17, which introduces the qualification of ‘predominant use’: ‘[...] in the case of dual purpose contracts where the contract is concluded for purposes partly within and partly outside the person’s trade and **the trade purpose is so limited as not to be predominant in the overall context of the contract that person should also be considered as a consumer**’.

Thus, a natural person who, in contracts covered by this Directive, is acting for purposes which are *primarily* outside of his trade, business, craft or profession would also fall under the definition of ‘consumer’. Such classification should be based on a case-by-case assessment <sup>(10)</sup>.

‘**Trader**’ is defined in Article 2(2) as a natural or legal person acting ‘for purposes relating to his trade, business, craft or profession’ or in the name or on behalf of a trader. Not only privately owned, but also publicly owned persons can be qualified as a trader.

In case C-105/17 *Kamenova* <sup>(11)</sup>, the Court noted that the concept of ‘trader’ is defined almost identically in both the CRD and the Unfair Commercial Practices Directive 2005/29/EC of the European Parliament and of the Council <sup>(12)</sup> (hereinafter referred to as ‘UCPD’) and thus must be interpreted uniformly. Relying on the case law developed under the UCPD, the Court interpreted the notion of ‘trader’ broadly considering that it must be determined in relation to the related but diametrically opposed concept of ‘consumer’. In relation to a trader, the consumer is in a weaker position, and he/she must be deemed to be less informed, economically weaker and legally less experienced than the other party to the contract. Classification as a ‘trader’ requires a case-by-case assessment of the, taking into account the following indicative criteria:

- (i) whether the sale was carried out in an organised manner;
- (ii) whether that sale was intended to generate profit;
- (iii) whether the seller had technical information and expertise relating to the products which they offered for sale which the consumer did not necessarily have, with the result that the seller was placed in a more advantageous position than the consumer;
- (iv) whether the seller had a legal status which enabled them to engage in commercial activities;

<sup>(8)</sup> See C-329/19, *Condominio di Milano*, ECLI:EU:C:2020:263, paragraph 34.

<sup>(9)</sup> C-105/17, *Kamenova*, ECLI:EU:C:2018:808, paragraph 33.

<sup>(10)</sup> By analogy C-105/17 *Kamenova*, paragraphs 36 – 37.

<sup>(11)</sup> C-105/17, *Kamenova*, ECLI:EU:C:2018:808, paragraphs 27 – 29, 34.

<sup>(12)</sup> 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 (‘Unfair Commercial Practices Directive’) (OJ L 149, 11.6.2005, p. 22).

- (v) to what extent the sale was connected to the seller's commercial or professional activity;
- (vi) whether the seller was subject to VAT;
- (vii) whether the seller, acting on behalf of a particular trader or on his/her own behalf or through another person acting in his/her name and on his/her behalf, received remuneration or an incentive;
- (viii) whether the seller purchased new or second-hand goods in order to resell them, thus making that a regular, frequent and/or simultaneous activity in comparison with their usual commercial or business activity;
- (ix) whether the goods for sale were all of the same type or of the same value; and
- (x) whether the offer was concentrated on a small number of goods.

The CJEU emphasised that these criteria are neither exhaustive nor exclusive, and, in principle, compliance with one or more of the criteria is not sufficient, by itself, to classify that person as a 'trader'. The mere fact that the sale is intended to generate profit or that a natural person publishes, simultaneously, on an online platform a number of advertisements offering new and second-hand goods for sale cannot suffice, by itself, to classify that person as a 'trader' <sup>(13)</sup>.

In situations where an intermediary (such as an online marketplace) or a trader representing another trader is involved, these different traders should make it clear to the consumer **which trader is the contractual party for the consumer** and what the respective roles and responsibilities of the different traders are. This question is further addressed in section 3.2.2.1.

In this respect, Directive (EU) 2019/2161 amended the CRD, introducing a requirement for the providers of online marketplaces to inform the consumer whether the third party supplier is acting as a 'trader' or 'non-trader' (peer-consumer), on the basis of a declaration by the third party supplier to the provider of the online marketplace. The information requirements for online marketplaces are addressed in section 3.4.2.

## 1.2. **The notion of 'contract'**

The triggering factor for the application of the Directive is the offer to conclude a contract between a trader and a consumer. The Directive does not define 'the contract' and does not determine the circumstances when a contract to which the Directive applies is deemed to have been concluded. It is for the national courts and enforcement authorities in the Member State concerned to assess whether a legal relationship **constitutes a 'contract'**. According to its Article 3(5):

### Article 3

5. *This Directive shall not affect national general contract law such as the rules on the validity, formation or effect of a contract, in so far as general contract law aspects are not regulated in this Directive.*

For example, the Directive is without prejudice to national contract law rules on the **transfer of contractual rights and obligations** from one consumer to another.

It should be noted that a **single contract can cover multiple items**, both goods and digital content items. For example, depending on its terms, a single subscription contract may cover the supply of a range of digital content. If covered by a subscription contract, each supply of individual digital content under that contract would not, accordingly, constitute a new contract for the purposes of the Directive.

In C-922/19 *Stichting Waternet* <sup>(14)</sup>, the Court dealt with the question whether the continued supply of water to a dwelling in the case of change of occupancy without the new occupant's express request constitutes 'inertia selling' in the meaning of point 29 of the UCPD Annex I ('blacklist'), resulting in a right for the consumer not to pay for such supply in accordance with Article 27 of the CRD. The case required, inter alia, a determination whether a contract may be regarded as concluded between a water supply company and a consumer, in the absence of that consumer's express consent.

<sup>(13)</sup> C-105/17, *Kamenova*, ECLI:EU:C:2018:808, paragraphs 27 – 29, 34 – 40 and 45.

<sup>(14)</sup> C-922/19, *Stichting Waternet*, ECLI:EU:C:2021:91.

The Court recognised that the supply of water **may not always require the existence of a contract**. It is also possible for the legal relationship between the respective supplier and consumer to be **regulated entirely by national legislation, concerning both the supply of water by [that] trader and the costs associated with that supply payable by the consumer** <sup>(15)</sup>.

In such a case where there is no contract, the Directive would not apply to the relationship between the supplier and consumer. In any event, it remains decisive whether the respective relationship is regarded as ‘contract’ under the applicable national law.

### 1.3. **Contracts covered**

The Directive regulates certain aspects of contracts between a trader and a consumer. First, it distinguishes between different contracts according to the circumstances of their conclusion:

- (1) contracts concluded outside the trader’s business premises (**off-premises contracts**);
- (2) contracts concluded using distance means of communication – over the internet, including on online marketplaces, by telephone etc. (**distance contracts**); and
- (3) contracts other than distance or off-premises contracts (typically these are contracts concluded in regular brick-and-mortar shops, hereinafter referred to as **‘on-premises’ contracts**).

The Directive further distinguishes between the following types of contracts based on the subject matter:

- (1) **sales contracts**;
- (2) **service contracts**, including **contracts for digital services**;
- (3) contracts for the supply of digital content which is not supplied on a tangible medium (**‘contracts for online digital content’**); and
- (4) contracts for the supply of water, gas or electricity, where they are not put up for sale in a limited volume of set quantity, or of district heating (**‘contracts for the supply of public utilities’**).

Sales contracts and service contracts are defined in Article 2(5) and (6) of the Directive. Contracts for online digital content and for the supply of public utilities are not expressly defined but Recital 19 explains that, for the purposes of the Directive, they are **not classified as sales or as service contracts**.

Although many provisions of the Directive apply generally to all four types of contracts, there are rules that apply only to a specific type of contract. In particular, different contracts (see Article 9) have different rules on calculating the period during which the right of withdrawal can be exercised (see also section 5 on the right of withdrawal).

Recital 19 also clarifies that **the Directive considers as ‘goods’ digital content supplied on a tangible medium**. It refers to digital content supplied on CD or a DVD as examples but the same approach applies also to digital content supplied on other carriers or on a smart device, such as a gaming console with pre-installed games. Regardless of the type of the tangible medium <sup>(16)</sup>, the **contract for such digital content falls under the rules of the CRD on the right of withdrawal applicable to sales contracts** <sup>(17)</sup>.

Since the definition of the sales contract (see below) refers to the transfer of ownership of goods by the trader to the consumer (i.e. business-to-consumer contracts), the Directive does not apply to contracts under which it is **the consumer who transfers goods to the trader**, for example, a second-hand car or jewellery.

<sup>(15)</sup> Ibid, paragraph 39.

<sup>(16)</sup> In contrast, the type of medium is important for the application of the Digital Content Directive (EU) 2019/770 and the Sale of Goods Directive (EU) 2019/771 since the former applies to digital content which is supplied on a tangible medium, such as DVDs, CDs, USB sticks and memory cards, as well as to the tangible medium itself, provided that the *tangible medium serves exclusively as a carrier of the digital content* (see Recital 20 of the Digital Content Directive).

<sup>(17)</sup> The relevant limitations will also apply, such as the exception for a right of withdrawal under point (i) of the first paragraph of Article 16 with respect to the supply of sealed audio or sealed video recordings or sealed computer software, which were unsealed after delivery.



#### 1.4. *Mixed purpose contracts*

##### Article 2

(5) 'sales contract' means any contract under which the trader transfers or undertakes to transfer ownership of goods to the consumer, including any contract having as its object both goods and services;

(6) 'service contract' means any contract other than a sales contract under which the trader supplies or undertakes to supply a service, including a digital service, to the consumer;

In practice, many contracts concluded between traders and consumers, to which the Directive applies, contain elements of both services and goods. In these cases, the last part of the definition under Article 2(5) is relevant since it defines a sales contract also as 'any contract having as its object both goods and services'.

According to the definition under Article 2(5), the criterion for classifying a contract as a 'sales contract' is the **transfer of the ownership of goods** to the consumer. Therefore, if a contract's main purpose is the transfer of ownership of certain goods, it should be classified as a sales contract even if it also covers related services provided by the seller, such as installation, maintenance or any other processing, irrespective of the relative value of the goods and services.

Examples of contracts that cover both goods and services and should usually be considered as sales contracts because of their main purpose:

- *the purchase of a new kitchen set, including its installation at the consumer's apartment;*
- *the purchase of specific construction elements, such as windows and doors, including their installation in the consumer's house;*
- *the purchase of a mobile smartphone bundled with a subscription to an electronic communications service.*

In contrast, if the transfer of the ownership of specific goods is not the main purpose of the mixed contract, the contract should not be considered a sales contract.

Examples of contracts that cover both services and goods that should be classified as service contracts because of their main purpose:

- *a contract for the repair, renovation and construction of an annex to a building (see Recital 26);*
- *a contract for attending a lecture, including delivery of pens and folders to the participants;*
- *a contract for a training course, including delivery of a course book for each participant.*

This interpretation is supported by well-established case-law of the CJEU on the free movement of goods and the freedom to provide services, which remains pertinent also in the context of this Directive.

For example, in case C-20/03 *Marcel Burmanjer* the Court stated that an economic activity should be examined in the context of **either** the free movement of goods **or** the freedom to provide services if one of these elements **'is entirely secondary in relation to the other and may be considered together with it'** <sup>(18)</sup>.

This also means that a mixed contract should be considered as sales contract if facts show that its actual purpose is the transfer of the ownership of goods:

- *For example, if the sale of the course book had a particularly prominent place in the trader's offer for a training course and in communication between the parties, and if this course book had significant relative value compared to the overall price of the training, the contract may be classified as a sales contract rather than a service contract for the purposes of the Directive.*

<sup>(18)</sup> C-20/03, *Marcel Burmanjer*, ECLI:EU:C:2005:307, paragraphs 24–35. The same approach was confirmed by the Court in case C-108/09, *Ker-Optika bt*, ECLI:EU:C:2010:725 (see paragraph 43).

On the other hand, even where a mixed contract results in the production of something in a tangible form, it should be considered as a service contract as long as **the subject matter of the contract is an intellectual or skilled service** and the subsequent delivery has only ancillary function <sup>(19)</sup>:

- *For example, the contract with an architect to design a house and the contract with a lawyer to prepare and file a lawsuit are both service contracts, even though at the end there is a tangible result (e.g. construction blueprints, a claim, or an application). Similarly, the contract with an artist to draw a painting and the contract with a photographer for a wedding photo session are service contracts.*

In a nutshell, each mixed contract should be classified based on its real main purpose. The fact that the contract may include an option to enter into subsequent agreements should not per se change its characteristics. For example:

- *If a contract for the rental of goods only includes an option to transfer ownership, not an obligation, it should be classified as a service contract for the purposes of the Directive.*

Classifying a contract as either a sales or a service contract determines how the withdrawal period is calculated (Article 9). For **service contracts**, the 14-day withdrawal period starts running from the conclusion of the contract. For **sales contracts**, the withdrawal period only starts running after the goods are received. In addition, some of the Directive's provisions, such as Articles 18 and 20 on delivery and the passing of risk, only apply to sales contracts.

The same sales or service contract may also cover services that are not governed by the Directive. For example, a sales or service contract may make it possible to pay the price in instalments at a certain interest rate. Such a contract would also be subject to the specific rules governing consumer financial services <sup>(20)</sup>. The rules on ancillary contracts in Article 15 of the Directive would apply by analogy (see section 5.10).

### 1.5. **Distinction between digital services and online digital content**

Directive (EU) 2019/2161 clarified the definition of 'services contract' in the CRD as including also contracts for 'digital services' (see the definition in the previous section). In addition, Directive (EU) 2019/2161 introduced, in Article 2(16), a **definition of 'digital service'**, which refers to its definition in point (2) of Article 2 of the Digital Content Directive (EU) 2019/770 of the European Parliament and of the Council <sup>(21)</sup> ('DCD').

Article 2 of Digital Content Directive provides:

#### Article 2

- (1) 'digital content' means data which are produced and supplied in digital form;
- (2) 'digital service' means:
  - (a) a service that allows the consumer to create, process, store or access data in digital form; or
  - (b) a service that allows the sharing of or any other interaction with data in digital form uploaded or created by the consumer or other users of that service;

Recital 19 of the DCD explains that 'in order to cater for fast technological developments and to maintain the future-proof nature of the notion of digital content or digital service, this Directive should cover, inter alia, computer programmes, applications, video files, audio files, music files, digital games, e-books or other e-publications, and also digital services [...] **including software-as-a-service**, such as video and audio sharing and other file hosting, word processing or games offered in the cloud computing environment and social media.' It should be noted that while the second set of examples are clearly attributed to the category of digital services, the classification of the first set of examples as digital content or services depends on the mode of transmission or access as well as other specifics of the business model.

<sup>(19)</sup> See in that respect C-208/19, NK, paragraphs 58 – 59.

<sup>(20)</sup> In particular, Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (OJ L 271, 9.10.2002, p. 16) and Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ L 133, 22.5.2008, p. 66).

<sup>(21)</sup> Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (OJ L 136, 22.5.2019, p. 1).

Recital 30 of Directive (EU) 2019/2161 provides further guidance on distinguishing the contracts for online digital content from contracts for digital services. In particular, '[e]xamples of digital services are video and audio sharing services and other file hosting, word processing or games offered in the cloud, cloud storage, webmail, social media and cloud applications'. In contrast, '[m]any contracts for the supply of **[online] digital content** [...] are characterised by a **single act of supply** to the consumer of a specific piece or pieces of digital content, such as specific music or video files.'

Accordingly, digital services are, for example:

- subscriptions to internet-based storage of pictures created by the consumer, to social networks or to internet voice/video telephony;
- subscriptions to online weather or traffic services;
- subscriptions to online newspapers/newsletters (see also the exception from the right of withdrawal under point (j) of the first paragraph of Article 16, which applies to the supply of a newspaper but not to newspaper subscriptions).

Recital 30 of Directive (EU) 2019/2161 acknowledges that it may be nevertheless difficult to distinguish between certain types of online digital content and digital services. Therefore, '[w]here **there is doubt** as to whether the contract is a service contract or a contract for the supply of digital content which is not supplied on a tangible medium, **the rules on right of withdrawal for services should apply**.'

**The distinction between contracts for online digital content and contracts for digital services** is important because of the different right of withdrawal regimes. The rules on the **right of withdrawal for service contracts effectively allow the consumer to test the service** and decide, during the 14-day period from the conclusion of the contract, whether to keep it or not.

In contrast, under point (m) of the first paragraph of Article 16 **there is no right of withdrawal in the case of supply of online digital content**, subject to several conditions. In accordance with the amendments introduced by Directive (EU) 2019/2161, these conditions are that the performance has begun with the consumer's prior express consent and acknowledgment that the consumer thereby loses the right of withdrawal and that the trader has provided confirmation of the contract concluded (see also section 5.7).

The Court clarified in C-641/19 *PE Digital* that the exception to the right of withdrawal under Article 16(m) CRD applicable to contracts for online digital content should be interpreted strictly<sup>(22)</sup>. The case concerned withdrawal from a premium subscription agreement for a dating website, but only after the consumer had taken a personality test that provided a selection of partner recommendations based on a proprietary algorithm.

The Court stated that Article 16(m), read in conjunction with Article 2(11) of the CRD, must be interpreted as meaning that the generation of such a personality report does not constitute the supply of 'digital content'. The Court also noted more generally that, in the light of Recital 19 of the Directive, **a web-based service that allows the consumer to create, process, store or access data in digital form and allows the sharing of or any other interaction with data in digital form uploaded or created by the consumer or other users of that service cannot, as such, be regarded as the supply of 'digital content'** within the meaning of Article 16(m)<sup>(23)</sup>.

For example, the provision of **video games** may involve both contracts for online digital content and contracts for digital services. **Downloadable games** would normally qualify as online digital content when their use does not depend on continuous involvement of the game supplier. In contrast, **online games provided in a cloud environment** would qualify as digital services.

**In-game micro-transactions (in-app purchases)** in such games that **enhance the playing experience of the respective user**, such as virtual items, would normally qualify as contracts for online digital content. Also in-app purchases **of content that could be used outside the game** (e.g. a recording of the gaming session that can be downloaded or shared on a video-sharing platform) would normally constitute a contract for online digital content. In contrast, the purchase of premium content that **expands the online gaming environment** would represent a new digital service that complements the original one.

<sup>(22)</sup> C-641/19, *PE Digital*, ECLI:EU:C:2020:808, paragraphs 41 – 46.

<sup>(23)</sup> *Ibid*, paragraph 44.

### 1.6. *Contracts against payment and contracts where the consumer provides personal data*

Article 3 of the CRD defining its scope was amended by Directive (EU) 2019/2161. The amended paragraph 1 now refers to **'payment of the price'** as condition for the application of the Directive.

At the same time, a new paragraph 1a was added **extending the scope of application of the Directive to contracts for online digital content and to contracts for digital services where the consumer provides personal data** to the trader (subject to some exceptions).

#### Article 3

1. **This Directive shall apply**, under the conditions and to the extent set out in its provisions, to any contract concluded between a trader and a consumer **where the consumer pays or undertakes to pay the price**. It shall apply to contracts for the supply of water, gas, electricity or district heating, including by public providers, to the extent that these commodities are provided on a contractual basis.

1a. **This Directive shall also apply where** the trader supplies or undertakes to supply digital content which is not supplied on a tangible medium or a digital service to the consumer and **the consumer provides or undertakes to provide personal data to the trader**, except where the personal data provided by the consumer are exclusively processed by the trader for the purpose of supplying the digital content which is not supplied on a tangible medium or digital service in accordance with this Directive or for allowing the trader to comply with legal requirements to which the trader is subject, and the trader does not process those data for any other purpose.

#### 1.6.1. *Contracts against payment*

Directive (EU) 2019/2161 amended the **definitions of sales and service contracts** set out in Article 2(5) and (6) of the CRD which no longer refer to the consumer paying a 'price'. However, taking into account the amendments in Article 3, **these contracts remain subject to the Directive only where the consumer has to pay a price** (unless the subject of a service contract is a digital service – see below).

The **'payment of a price'** should be understood broadly, covering also instruments with a certain convertible or monetary value (even if it can vary in time), such as vouchers, <sup>(24)</sup> gift cards, loyalty points, as well as digital representation of value <sup>(25)</sup> such as e-vouchers, e-coupons and virtual currencies.

The Directive applies irrespective of the value of the transaction, thus low value subscription services (e.g. EUR 5 per month or per year to receive access to premium goods or offers) are also covered. The Directive also applies to service contracts, including contracts for digital services, that include **a free trial period** and are automatically converted into paid contracts once the trial period ends (unless the consumer terminates the contract before the trial period ends).

Where a (limited version) of the digital service is available for free, following which the consumer can opt for the paid (full) service, two successive separate contracts will be concluded. The Directive will apply in this case to the paid contract, whereas its applicability to the first contract for the free (limited) version of the digital service will depend on whether the consumer provides personal data under the conditions provided in Article 3(1a).

<sup>(24)</sup> See Recital 46, which, when explaining Article 13(1) on the reimbursement of the amounts received from the consumer, also expressly refers to consumers' payment with vouchers. The voucher acquisition contract itself will be subject to the CRD requirements, including in particular with respect to provision of pre-contractual information on the validity term, conditions of exchange for goods and services, and transferability.

<sup>(25)</sup> The concept of 'digital representation of value' is clarified by Recital 23 of the Digital Content Directive (EU) 770/2019 with reference to the examples of electronic vouchers, e-coupons and virtual currencies, to the extent the latter are recognised by national law.

The Directive does **not** apply to gifts or to services provided by the trader without the payment of the price, i.e. for 'free' <sup>(26)</sup>.

#### 1.6.2. *Contracts where the consumer provides personal data*

The Directive applies to contracts for online digital content and contracts for digital services under which the consumer provides personal data to the trader <sup>(27)</sup>. In this respect, the CRD follows the same approach as the Digital Content Directive ('DCD').

— *For example, the CRD will apply to contracts providing free access to online digital content or digital services and the consumer consents to personal data processing also for marketing purposes.*

However, like the DCD, the CRD **does not cover contracts** for online digital content and contracts for digital services **where the personal data are only processed for the purpose of performing the contract and complying with legal requirements**. Recital 34 of Directive (EU) 2019/2161 clarifies that such legal requirements can include, for instance, **registration of the consumer for security and identification purposes** where specifically laid down by applicable law.

Furthermore, as explained in Recital 35 of Directive (EU) 2019/2161, the Directive does not apply to situations where the consumer, without having concluded a contract with the trader, **is exposed to advertisements** exclusively in order to gain access to digital content or a digital service <sup>(28)</sup>.

It also clarifies that the Directive does not apply to situations where the trader **only collects metadata**, such as information concerning the consumer's device or browser ('device fingerprinting' or 'browser fingerprinting') or browsing history, except where this situation is considered to be a contract under national law <sup>(29)</sup>.

Where the contract involves the processing of personal data, the trader must comply with its obligations under consumer law and – in its capacity of controller – also with the obligations under the General Data Protection Regulation (EU) 2016/679 of the European Parliament and of the Council <sup>(30)</sup> ('GDPR'). **Both legal frameworks apply to the business-to-consumer relationship simultaneously and in a complementary manner.**

For all contracts where the consumer provides personal data (irrespective of whether payment is involved or not), **the trader must inform the consumer about the purposes of processing** at the time when the personal data are obtained. Furthermore, the controller has to demonstrate that the processing of the personal data can be based on one of the legal grounds laid down in Article 6(1) GDPR. 'Contract' (Article 6(1)(b) GDPR) is one of the authorised legal bases thereunder. However, it is valid only for the processing '**necessary for the performance of the contract**' which is strictly interpreted <sup>(31)</sup>.

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<sup>(26)</sup> However, sector-specific EU legislation can make (certain provisions of) the CRD applicable also to such 'free' contracts. Namely, Article 102 of Directive (EU) 2018/1972 establishing the European Electronic Communications Code ('EECC') requires information referred to in Articles 5 and 6 of the CRD to be provided also with respect to electronic communications services that are provided without direct monetary payment, but that impose other obligations on users. In these cases, the Commission Implementing Regulation (EU) 2019/2243 establishing a template for the contract summary for publicly available electronic communications services pursuant to Directive (EU) 2018/1972 requires traders to indicate in the 'price' section that the service is provided subject to certain obligations for users.

<sup>(27)</sup> For the avoidance of doubt, a contract against payment could also involve provision of personal data by the consumer, but for classification purposes it is regarded as a contract against payment.

<sup>(28)</sup> In these situations the trader must process personal data in accordance with the GDPR.

<sup>(29)</sup> Fingerprinting can be used to fully or partially identify individual users or devices even when cookies are turned off. In any event, any collection of information (whether personal data, such as location or subscriber data, or other data, such as information about browser type and version, operating system, active plugins, time zone, language, etc.) from the user's terminal equipment has to comply with the ePrivacy Directive, in particular its Article 5(3).

<sup>(30)</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119 4.5.2016, p. 1). Article 4(7) defines the 'controller'.

<sup>(31)</sup> The EDPB guidelines (October 2019) about the application of Article 6(1)(b) of the GDPR confirm the earlier position of WP29 regarding the previous Directive 95/46/EC that 'necessary for the performance of a contract with the data subject': ... must be interpreted strictly and does not cover situations where the processing is not genuinely necessary for the performance of a contract, but rather unilaterally imposed on the data subject by the controller. Also the fact that some processing is covered by a contract does not automatically mean that the processing is necessary for its performance.

Accordingly, for the processing operations that are not necessary for the performance of the contract, the trader must additionally rely on another authorised legal basis for processing under the GDPR, for example, the consumer's free and informed consent (Article 6(1)(a)) <sup>(32)</sup>. In accordance with the GDPR, consumers' consent is only valid if it is freely given, specific, informed and unambiguous. In the context of a contractual relationship, consent can only be freely given if it is not conditional to the performance of contract (Article 7(4) GDPR). Being able to withdraw consent without detriment is therefore an essential requirement for the validity of consent (Recital 42 GDPR). After the consent is withdrawn, the trader can no longer lawfully process the personal data whose processing was based on that consent.

Accordingly, for the processing operations that are not necessary for the performance of the contract, the trader-controller must ensure that there is another legal basis for processing under the GDPR. In contrast, the **'contract' in the meaning of the CRD encompasses all the rights and obligations of the parties**, regardless of the distinction in the legal basis for personal data processing under the GDPR.

Identifying the processing activities in the context of contracts with consumers and the correct legal basis under the GDPR can help the trader to understand if the 'contract' that it concludes with the consumer is subject to the CRD. **In practice, when the trader has to rely on a separate consumer consent or other legal basis under the GDPR (except legal obligation) for processing of personal data of consumers, the contract in the context of which this processing is taking place will be subject to the requirements of the CRD.**

#### 1.7. *Contracts to which the Directive does not apply*

As explained in previous section, pursuant to the amendment brought by Directive (EU) 2019/2161 to Article 3 of the CRD, the Directive does not apply to contracts where the consumer does not pay a price or, in case of contracts for online digital content or digital services, where the consumer neither pays the price nor provides personal data to the trader.

In addition, Article 3(3) lists specific categories of contracts excluded from the scope of application of the Directive. For example, the Directive does not apply to contracts for financial services, including insurance and investment. Social and healthcare services, gambling, timeshare and related holiday services are also excluded. Passenger transport services and package travel contracts <sup>(33)</sup> are excluded in principle, although specific provisions still apply.

Further explanations are provided below. As a general rule, all exceptions must be interpreted narrowly <sup>(34)</sup>.

##### 1.7.1. *Rental contracts and building contracts*

###### Article 3

3. *This Directive shall not apply to contracts:*

- (e) for the creation, acquisition or transfer of immovable property or of rights in immovable property;*
- (f) for the construction of new buildings, the substantial conversion of existing buildings and for rental of accommodation for residential purposes;*

The exception under point (e) concerns the general category of immovable property, including land, whilst point (f) deals with buildings.

Whereas the rental of accommodation for residential purposes is excluded from the scope of the Directive, the **rental of accommodation for non-residential purposes** is covered. This is also explained in Recital 26: '[...] *Service contracts in particular those related to the construction of annexes to buildings (for example a garage or a veranda) and those related to repair and*

<sup>(32)</sup> In addition to consent, Article 6 of the GDPR provides a number of other legal bases for data processing which can be used depending on the circumstances of the specific case.

<sup>(33)</sup> See Article 27(2) of Directive (EU) 2015/2302 on package travel and linked travel arrangements.

<sup>(34)</sup> See, for example, Case C-215/08, *E. Friz GmbH*, ECLI:EU:C:2010:186, paragraph 32: 'In this connection, it should first be observed that it is settled case-law that derogations from the rules of European Union law for the protection of consumers must be interpreted strictly (see, inter alia, Case C-481/99 *Heininger* [2001] ECR I-9945, paragraph 31)'.

renovation of buildings other than substantial conversion, **should be included in the scope of this Directive, as well as contracts related to the services of a real estate agent and those related to the rental of accommodation for non-residential purposes.**'

— For example, renting a parking space or a party hall is subject to the Directive.

A distinction should be made between construction contracts and service contracts related to the construction. In case C-208/19 NK the Court noted that the exception under Article 3(3)(f) would not apply to a contract between an architect and a consumer, according to which the former is required to prepare the designs for the construction of a new building. Although the design precedes construction works, it is a separate process, and in fact there is no certainty that the building will be constructed at all <sup>(35)</sup>.

Furthermore, based on Article 2(3) and (4) and point (c) of the first paragraph of Article 16, such a contract cannot be regarded as supply of goods made to the consumer's specifications or clearly personalized, within the meaning of the latter provision. Although the designs could be provided in tangible form on paper or as digital content, the subject matter of the contract is an intellectual service – architectural design, and the subsequent delivery has only ancillary function <sup>(36)</sup>.

Following the above logic, the CRD should apply to service agreements which may be related to construction but constitute a separate process with an independent deliverable, such as contracts concluded with geometers, contracts for interior design, landscape planning, etc.

#### 1.7.2. Package travel

##### Article 3

3. This Directive shall not apply to contracts:

(g) on packages as defined in point 2 of Article 3 of Directive (EU) 2015/2302 of the European Parliament and of the Council.

Article 6(7), Article 8(2) and (6) and Articles 19, 21 and 22 of this Directive shall apply *mutatis mutandis* to packages as defined in point 2 of Article 3 of Directive (EU) 2015/2302 in relation to travellers as defined in point 6 of Article 3 of that Directive;

Certain provisions of the Directive apply to **package travel contracts**, as defined by the Package Travel Directive (EU) 2015/2302 of the European Parliament and of the Council <sup>(37)</sup>, namely the regulatory choice of the Member States to set language requirements for contractual information (Article 6(7)); information that traders must provide to consumers directly before concluding a contract by electronic means, including about the consumer's obligation to pay (Article 8(2)); the regulatory choice of the Member States regarding the confirmation of the offer in the case of distance contracts concluded by phone (Article 8(6)); the prohibition of fees for the use of means of payments (Article 19); prohibition of using telephone numbers charged at more than basic rate (Article 21); and the requirement for express consent of consumers for additional payments (Article 22).

It should be noted that the Package Travel Directive also regulates the so-called '**linked travel arrangements**' <sup>(38)</sup>, which comprise at least two different types of travel services purchased for the purpose of the same trip or holiday, but do not constitute a package (within the meaning of that directive) and result from the conclusion of separate contracts with individual travel service providers. The CRD sets out the pre-contractual information requirements and applies to the

<sup>(35)</sup> C-208/19, NK (*Planning for the construction of a new single-family house*), ECLI:EU:C:2020:382, paragraph 43.

<sup>(36)</sup> *Ibid.*, paragraphs 58 – 59.

<sup>(37)</sup> Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC (OJ L 326, 11.12.2015, p. 1).

<sup>(38)</sup> Defined in Article 3(5) of the Package Travel Directive.

individual service contracts comprising a linked travel arrangement, subject to the limitations set in its Article 3(3) and point (l) of the first paragraph of Article 16. For example, with respect to contracts for passenger transport services only the requirements under Article 8(2) and Articles 19, 21 and 22 will apply (see section 1.7.5 below for more information).

### 1.7.3. *Contracts established by a public office-holder*

#### Article 3

3. *This Directive shall not apply to contracts:*

- (i) *which, in accordance with the laws of Member States, are established by a public office-holder who has a statutory obligation to be independent and impartial and who must ensure, by providing comprehensive legal information, that the consumer only concludes the contract on the basis of careful legal consideration and with knowledge of its legal scope;*

The Directive does not identify the public office-holders referred to in this provision. However, it lays down the criteria they must fulfil for the contract to fall outside the Directive's scope. This exception only applies to contracts established by a public office-holder (such as a public notary) who is subject, under national law, to all the conditions under Article 3(3)(i):

— *For example, the exception would not apply to a contract for which a public office-holder, who has the statutory obligation to be independent and impartial, has merely certified the identity of the parties.*

For this exception to be applicable, it does not seem necessary for national law to **require** the contract in question to be concluded through the services of a public office-holder. The exception should also apply if one or both of the parties to the contract **voluntarily request** a public office-holder to establish their contract <sup>(39)</sup>.

### 1.7.4. *Contracts for goods intended for current consumption*

#### Article 3

3. *This Directive shall not apply to contracts:*

- (j) *for the supply of foodstuffs, beverages or other goods intended for current consumption in the household, and which are physically supplied by a trader on frequent and regular rounds to the consumer's home, residence or workplace;*

This exception requires two conditions to be met, namely:

- (a) that the trader delivers the goods on 'frequent and regular rounds', and
- (b) that these goods are for 'current consumption in the household'.

The explicit reference to delivery to the consumer's 'workplace' in this provision suggests that that the actual consumption of the goods does not necessarily need to take place at home.

### 1.7.5. *Passenger transport*

#### Article 3

3. *This Directive shall not apply to contracts:*

- (k) *for passenger transport services, with the exception of Article 8(2) and Articles 19, 21 and 22;*

<sup>(39)</sup> See the different approach in Directive 2008/48/EC on credit agreements for consumers, which in Article 14 on the right of withdrawal refers to agreements that 'by law are required to be concluded' through the services of a notary: '6. Member States may provide that paragraphs 1 to 4 of this Article shall not apply to credit agreements which **by law are required to be concluded through the services** of a notary, provided that the notary confirms that the consumer is guaranteed the rights provided for under Articles 5 and 10.'



Directive (EU) 2019/2161 amended this exception and made Article 21 on the 'basic rate' requirement for post-contractual telephone communications also applicable to passenger transport (see section 9 for further information).

In case C-583/18 *DB Vertrieb*, the Court ruled that this exception does not apply to the sale of **transport discount cards**, which accordingly fall within the scope of the Directive.

The Court qualified the latter as a type of 'service contract' with a special object that is not in itself **directly concerned with enabling the transporting of passengers**. Instead, the contract with an object to entitle the consumer to a price reduction when passenger transport contracts are subsequently concluded and the contract for the purchase of a passenger ticket are two contracts that are legally distinct from one another, so that the former cannot be regarded as a contract inextricably linked to the latter. The purchase of a card conferring upon its holder entitlement to price reductions when transport tickets are purchased does not necessarily entail the subsequent conclusion of a contract whose object is passenger transport itself <sup>(40)</sup>.

#### 1.7.6. Automated sales

##### Article 3

3. This Directive shall not apply to contracts:

(l) concluded by means of automatic vending machines or automated commercial premises;

This exception applies to contracts concluded in the physical presence of the consumer and at the place where the good or service is sold/provided by automated means, such as vending machines, automated fuel stations or parking facilities.

#### 1.7.7. Certain contracts related to electronic communications

##### Article 3

3. This Directive shall not apply to contracts:

(m) concluded with telecommunications operators through public payphones for their use or concluded for the use of one single connection by telephone, internet or fax established by a consumer.

This provision exempts two types of contracts from the scope of the Directive's application.

The first type mentioned in the CRD are **contracts concluded with providers of electronic communications services through public payphones for their use**. The term 'public pay telephone' refers to a telephone available to the general public, for the use of which the means of payment may include coins and/or credit/debit cards and/or pre-payment cards, including cards for use with dialling codes <sup>(41)</sup>.

- Since this exception applies to contracts concluded 'through' public payphones, it should cover the cases in which the contract is concluded by, for example, inserting coins or swiping a credit card in the public payphone, in order to perform a voice call or to get access to a telephone directory or another reference service, offered by the same operator;
- The exception should not apply to contracts concluded with operators of public payphones by, for example, the prior purchase of a pre-paid calling card.

The second part of Article 3(3)(m) concerning **contracts concluded for the use of 'one single connection' established by the consumer** has a broader scope. Unlike the contracts for using public payphones, no party to this kind of contract is specified, which suggests that not only contracts with providers of electronic communications services are covered. Furthermore, nothing is specified concerning the purpose or content of this kind of contract.

<sup>(40)</sup> C-583/18, *DB Vertrieb*, ECLI:EU:C:2020:199, paragraph 35.

<sup>(41)</sup> 'Public pay telephone' was defined in Article 2 of the Universal Service Directive 2002/22/EC, which was repealed by the European Electronic Communications Code (Directive (EU) 2018/1972, the EECC). The EECC does not provide a separate definition for 'public pay telephone', but Recital 235 uses the wording of Article 2 of the Universal Service Directive.

This exception therefore covers, for example:

- A contract for use of a *wireless access point (WAP)* for a single internet session.

In contrast, the exception should not apply to **contracts for electronic communications services** <sup>(42)</sup> covering a certain period and/or volume of usage, for example:

- *Contracts concluded through the prior purchase of a pre-paid SIM card for mobile services or of an access code for multiple use or long term Wi-Fi access services.*

This exception also applies to contracts concluded with the providers of Premium Rate Services (PRS), i.e., services paid for through the consumer's telephone bill <sup>(43)</sup> in cases where the contract **is concluded and simultaneously fully performed by the single call made or an SMS sent by the consumer to the PRS number**, for example:

- *A call made to telephone directory inquiries or tele-voting in a show.*

In contrast, the CRD is applicable to contracts where the voice call or SMS to a PRS number is **a means of concluding and paying for a contract**, which is performed subsequently:

- *For example, contracts concluded through an SMS sent to a provider of parking services.*

In these cases, the trader must inform the consumer about the cost of the voice call or SMS to the PRS number as this cost will constitute the 'price' for the contract concerned, in the meaning of Article 6(1)(e). Moreover, information about the cost using the means of distance communication above the 'basic rate' for concluding a contract is required under Article 6(1)(f) of the Directive. The interpretation of the 'basic rate' concept is further discussed in section 8.

The fact that the Directive does not apply to certain contracts involving PRS by virtue of Article 3(3)(m) does not mean that they are not subject to consumer protection rules. The EU regulatory framework for electronic communications, in particular the European Electronic Communications Code (Directive (EU) 2018/1972 of the European Parliament and of the Council <sup>(44)</sup>), enables Member States and the relevant National Regulatory Authorities to adopt specific measures to protect consumers in relation to PRS. Consequently, a number of Member States have implemented additional safeguards in this area, including, for example, consumption limits, an obligation to announce the price at the start of the call, etc.

### 1.8. Possible exemption of low value off-premises contracts

Article 3(4) allows Member States not to apply the Directive to off-premises contracts, for which the payment to be made by the consumer does not exceed EUR 50 or a lower value as defined under national law. If a Member State chooses to use this regulatory choice, there is a risk that the Directive gets circumvented by traders who may decide to artificially split a single contract above the set threshold into several contracts. As explained in Recital 28: '[...] Where two or more contracts with related subjects are concluded at the same time by the consumer, the total cost thereof should be taken into account for the purpose of applying this threshold.' This principle would apply to:

- *For example, selling each book of a trilogy under three separate contracts or selling a pair of earrings under two separate contracts at the same time.*

For long-term contracts (subscriptions), the relevant amount for the application of this exception is the total amount that the consumer commits to pay when concluding the contract. i.e. the total amount of monthly instalments or charges over the agreed contractual period, including any 'free' periods.

<sup>(42)</sup> See also the sectoral legislation, in particular the EEC that includes provisions on electronic communications services contracts, e.g. Articles 102–107.

<sup>(43)</sup> These may be certain 'Value-Added Services' or 'Special Rate Services'. Under the Commission's Proposal of 24.2.2021 for a Roaming Regulation (Proposal for a Regulation of the European Parliament and of the Council on roaming on public mobile communications networks within the Union, COM/2011/0402 final – 2011/0187 (COD)), Value-Added Services (VAS) are to be understood as those provided with the use of, for example, premium-rate numbers, freephone numbers or shared cost numbers, and are subject to particular pricing conditions at national level (see Recital 36 of that proposal). Therefore, PRS are only one category of VAS, which is a broader concept covering also hotlines/helplines calling which is free of charge for consumer.

<sup>(44)</sup> Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (OJ L 321, 17.12.2018, p. 36).

## 1.9. Rules for public auctions

The Directive applies to auctions, subject to specific rules regarding ‘public auction’, defined under Article 2(13) as ‘*a method of sale where goods or services are offered by the trader to consumers, **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*’.

For public auctions, Article 6(3) makes it possible to replace the identity, contact details and geographical address of the establishment and place of business of the trader selling the goods or services with those of the auctioneer. Furthermore, there is no right of withdrawal from contracts concluded at a public auction pursuant to the exception in point (k) of the first paragraph of Article 16.

A public auction should give consumers the possibility to attend in person, even if it is also possible to make bids online or by telephone. In contrast, online auctions without the possibility to attend in person should not be considered public auctions.

Recital 24 specifies that ‘[...] *the use of online platforms for auction purposes which are at the disposal of consumers and traders should not be considered as a public auction within the meaning of this Directive.*’ Accordingly, online auctions should be fully subject to the Directive regarding, e.g., the pre-contractual information to be provided before the consumer is bound by the contract (the bid) and the right of withdrawal.

— *An example of the limits of the above exception is an online platform that offers for sale to consumers various items, such as vehicle parts, small machines, tools, electronics and furniture. Even though transactions may be concluded in the form of an auction in which the selling price of the goods is determined on the basis of bids made on top of a starting price, this would not qualify as a ‘public auction’. Thus, consumers would retain the right to withdraw a bid once made within the terms prescribed by the CRD.*

## 2. Off-premises contracts

### 2.1. Contracts concluded outside the trader’s business premises

Off-premises contracts are defined in Article 2(8) as follows:

#### Article 2

- (8) ‘off-premises contract’ means any contract between the trader and the consumer:
- (a) concluded in the simultaneous physical presence of the trader and the consumer, in a place which is not the business premises of the trader;
  - (b) for which an offer was made by the consumer in the same circumstances as referred to in point (a); [...]

Business premises are defined in Article 2(9) as follows:

#### Article 2

- (9) ‘business premises’ means:
- (a) any immovable retail premises where the trader carries out his activity on a permanent basis; or
  - (b) any movable retail premises where the trader carries out his activity on a usual basis;

Recital 22 provides several examples of what should be regarded as ‘business premises’. On the one hand, the concept would cover ‘**shops, stalls or lorries, as well as market stalls and fair stands**, when they serve as a **permanent or usual place of business for the trader**’.

Similarly, **retail premises** where the trader carries out his **activity on a seasonal basis**, for instance during the tourist season at a ski or beach resort, should be considered as business premises as the trader carries out his activity in those premises on a usual basis.

On the other hand, **spaces accessible to the public**, such as streets, shopping malls, beaches, sports facilities and public transport, **which the trader uses on an exceptional basis** for his business activities are not business premises. **Private homes or (consumers’) workplaces** also should not be regarded as business premises.

Contracts concluded during the trader's visit to the consumer's home or place of work are off-premises contracts **irrespective of whether the visit was requested by the consumer or not**. Such off-premises contract can be preceded by preparatory steps:

- For example, a visit of the trader's representative (technician) to the consumer's residence to sell and install at the same time a piece of equipment or device will be an off-premises service contract, regardless of the fact that the consumer had previously requested (booked) such a visit after a personal visit to the trader's shop.
- In contrast, if the contract was actually concluded during the customer's visit to the shop or by distance means of communication, the subsequent visit of the technician to install the necessary equipment at the consumer's residence would not change the qualification of the contract into off-premises contract.

In case C-485/17 *Verbraucherzentrale Berlin* <sup>(45)</sup> the Court confirmed that the expression '**on a usual basis**' within the meaning of Article 2(9)(b) must be understood as referring to the fact that the activity at issue being carried out on the premises in question is a '**normal activity**'. The application of this concept requires a case-by-case assessment, taking into account in particular the type of goods or services sold and the commercial practice of the specific trader.

More specifically the Court addressed the situation of a stand run by a trader at a trade fair, at which they carry out their activity for a few days each year. It ruled that such a stand **constitutes 'business premises' if**, in the light of all the factual circumstances surrounding that activity, in particular the appearance of the stand and the information relayed on the premises of the fair itself, a reasonably well-informed and reasonably observant and circumspect **consumer could reasonably assume that the trader is carrying out its activity there and will solicit him or her in order to conclude a contract** <sup>(46)</sup>.

Furthermore, the Court acknowledged the continued relevance of its earlier conclusions in case C-423/97 *Travel-Vac, S.L.* on the interpretation of the former Council Directive 85/577/EEC. In that judgment, the Court specifically stated that:

*'As regards the question whether the contract was concluded away from the trader's business premises, it must be observed that this concept refers to premises in which the trader usually carries on his business and **which are clearly identified as premises for sales to the public.**'* <sup>(47)</sup>.

Accordingly, if the trader uses premises for selling goods and services that are not 'normally used' for such purpose and that are not clearly identified as premises for selling to the public, the contracts concluded with consumers are likely to be off-premises contracts.

- For example, sale of goods during events (conventions, seminars, parties, etc.) organised at restaurants, cafes or hotels rented for the purpose of the respective event are likely to be off-premises contract.

The classification of a contract as off-premises contract depends on the circumstances of the conclusion of the contract. A trader will be aware of the nature of his activity and should act according to the rules governing either on-premises or off-premises contracts. Any disputes as to whether, for example, the right of withdrawal was applicable because the contract should have been considered an off-premises contract, will have to be assessed on a case-by-case basis.

## 2.2. **Contracts concluded after addressing the consumer outside the business premises**

### Article 2

(8) 'off-premises contract' means any contract between the trader and the consumer: [...]

- (c) concluded on the business premises of the trader or through any means of distance communication immediately after the consumer was personally and individually addressed in a place which is not the business premises of the trader in the simultaneous physical presence of the trader and the consumer; or [...]

<sup>(45)</sup> C-485/17, *Verbraucherzentrale Berlin*, ECLI:EU:C:2018:642.

<sup>(46)</sup> *Ibid.*, paragraph 46.

<sup>(47)</sup> C-423/97, *Travel-Vac, S.L.*, ECLI:EU:C:1999:197, paragraph 37.

Subparagraph (c) of Article 2(8) provides another example of off-premises contracts. The terms ‘personally and individually addressed’ in this provision should apply to offers and similar commercial communications (regardless of their legal classification) that are formalised into a contract immediately afterwards on the trader’s business premises or through any means of distance communication.

For this provision to apply, the trader’s offer should be addressed to a particular consumer, for example:

- *The trader’s representative approaches the particular consumer in the street with an offer for a subscription to a monthly magazine and the contract is immediately signed on the trader’s nearby business premises.*
- *In contrast, the mere distribution of advertising leaflets in the street near the trader’s premises without individual targeting of individual consumers would not count as ‘personally and individually’ addressing the consumer for the purposes of this provision.*

In addition, for this provision to apply, the contract should be concluded immediately. The contract would not be immediately concluded if the consumer leaves the trader’s premises after having been invited to them, and returns at his own initiative later, for example, the following day after having considered the offer.

In case C-465/19 B & L Elektrogeräte GmbH the Court ruled that the **aisle common to the various stands present in an exhibition hall**, in which the trader’s stand (which itself was recognised as ‘business premises’) is located, **cannot be considered to be ‘business premises’**, in so far as that aisle provided access to all the traders’ stands in that hall. Therefore, where a trader addresses a customer in such common space of the fair, as a result of which a contract is concluded at a stand run by the trader immediately thereafter, this is an ‘off-premises contract’ within the meaning of Article 2(8) of CRD <sup>(48)</sup>.

### 2.3. **Contracts concluded during an excursion organised by the trader**

#### Article 2

- (8) ‘off-premises contract’ means any contract between the trader and the consumer: [...]
- (d) concluded during an excursion organised by the trader with the aim or effect of promoting and selling goods or services to the consumer;

Subparagraph (d) of Article 2(8) of the Directive defines off-premises contracts as contracts concluded during an excursion organised by the trader **irrespective of whether such contracts are concluded away from, or on a trader’s business premises.**

Furthermore, the Directive specifies that it covers both excursions with the ‘aim’ and ‘effect’ of promoting and selling products to the consumer, i.e., **it should not matter whether the consumer is informed beforehand about the intended sale of products during the excursion.**

The notion of ‘excursion’ includes journeys that involve sightseeing or other leisure-related activities, or journeys to locations such as restaurants, cafes or hotels where an off-premises selling event is organized. In applying this notion, it should not matter whether the trader selling the products during an excursion organises the transport himself or has made arrangements with a transport company:

- *For example, if a trader has made arrangements with the organiser of the excursion to make sure that, during their excursion, tourists are also brought to his shop, the contracts concluded at the shop are likely to be off-premises contracts notwithstanding the fact that the shop in question is that trader’s business premises.*
- *In contrast, a shuttle bus service organised by a shopping centre with the sole purpose of bringing the potential customers to the shopping centre is merely ancillary to the main purpose of the activity (i.e. to sell the goods and services) and should not be considered an ‘excursion’ for the purposes of Article 2(8).*

<sup>(48)</sup> C-465/19, B & L Elektrogeräte GmbH, ECLI:EU:C:2019:1091, paragraphs 29 and 34.

### 3. Consumer information

#### 3.1. General requirements

##### 3.1.1. Introduction

Pre-contractual information requirements are set out in Articles 5 to 8 of the Directive. They are defined separately for on-premises contracts in Article 5(1) and for off-premises and distance contracts in Article 6(1). The requirements for off-premises and distance contracts are more extensive and build on those provided for on-premises contracts. Additional specific information requirements for contract concluded on online marketplaces are set out in Article 6a that was added to the CRD by Directive (EU) 2019/2161.

The information requirements concerning **the right of withdrawal** under Article 6(1)(h)–(k) are addressed separately in section 5.

##### 3.1.2. Clarity of the information and link to the UCPD

Article 7 of the UCPD prohibits misleading omissions, i.e. commercial practices that omit or provide in an unclear, unintelligible, ambiguous or untimely manner **material information** that the average consumer needs to take an informed transactional decision' when such practice causes the average consumer to take a transactional decision that they would not have taken otherwise. Article 7(4) lays down information requirements for the 'invitation to purchase', which is commercial communication that includes information about the product's characteristics and price, therefore covering also the pre-contractual stage of the transaction.

The CRD regulates the pre-contractual stage in greater detail than the UCPD. Articles 5 and 6 of the CRD cover all the information requirements laid down in Article 7(4) of the UCPD <sup>(49)</sup>. Therefore, when providing pre-contractual information in accordance with the CRD, a trader will also comply with the specific information requirements for the invitation to purchase under Article 7(4) of the UCPD. This is without prejudice to the application of other transparency and fairness requirements under the UCPD.

Both Article 5(1) and 6(1) of the CRD require information to be provided in a '*clear and comprehensible manner*'. Recital 34 specifies that, in providing pre-contractual information, '*[...] 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. However, taking into account such specific needs should not lead to different levels of consumer protection.*'

In addition, under the general rules of Article 7(2) of the UCPD, traders must ensure that the information is intelligible and timely, i.e. the method and the moment at which the relevant pre-contractual information is provided must allow the average consumer to take an informed transactional decision.

For **off-premises contracts** Article 7(1) of the CRD additionally requires the pre-contractual information to be '*legible and in plain, intelligible language*' and for **distance contracts** Article 8(1) of the CRD requires information to be made 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 shall be legible.*'

**It is not sufficient to provide the mandatory pre-contractual information merely as part of the general terms and conditions** that the consumer may have to accept before moving on in the transaction process <sup>(50)</sup>. The requirement to provide information in a 'clear and comprehensible manner' means that the individual elements of the mandatory information must be brought to the attention of the consumer.

In the online context, traders must make the mandatory information easily accessible and prominently visible to consumers. Due to its volume, it might not be possible to provide the mandatory consumer information in a 'clear and comprehensible' manner on a single page. Excessively long pages, where consumers would have to scroll down extensively in order to read all content, should be avoided.

<sup>(49)</sup> Under Article 7(4) UCPD, an invitation to purchase must contain, if not already apparent from the context, information about: the main characteristics of the product to an extent appropriate to the medium and the product; the address and identity of the trader; the price including taxes; arrangements for payment, delivery, and performance if they depart from the requirements of professional diligence; and, where applicable, existence of the right of withdrawal.

<sup>(50)</sup> Case C-536/20, *Tiketa*, pending at the time of publication, deals with whether the requirements of CRD can be met, in the case of a contract concluded on a ticketing platform (i.e. online marketplace), by accepting the general terms and conditions.

Instead, the various elements of pre-contractual information should be provided **when they are most relevant during the process of concluding the contract** as the consumer moves from one page of the online interface to another. Where needed, information on specific subjects should be layered, with a prominent pointer on the front page leading to the linked page that provides all the details on the respective subject <sup>(51)</sup>.

Additional presentation requirements for distance contracts concluded by electronic means are set out in Article 8(2) of the Directive, as further discussed in section 4.2.4.

### 3.1.3. Information 'already apparent from the context'

For **on-premises contracts**, Article 5 allows traders not to provide information that is '*already apparent from the context*'.

The concept of information '*already apparent from the context*' is also used in Article 7(2) of the UCPD <sup>(52)</sup>. For example, trader's geographical address and identity could be considered as 'obvious or apparent from the context', as the consumers would normally know the address of a shop or restaurant that they are in.

### 3.1.4. Information requirements in other EU legislation

The Directive is of cross-cutting nature. It complements the product and sector-specific consumer protection rules, in particular with respect to information requirements.

Pursuant to its Article 3(2) <sup>(53)</sup>, the CRD does not affect the application of information requirements under other sector specific EU legislation. This includes the General Data Protection Regulation (EU) 2016/679 and the ePrivacy Directive 2002/58/EC of the European Parliament and of the Council <sup>(54)</sup>, which are particularly relevant in online sales for issues such as information about data processing and data subjects' consent to the processing of their personal data, where required.

Furthermore, additional information requirements for electronic communications services are set out in the European Electronic Communications Code ('EECC', Directive (EU) 2018/1972) and in the Commission Implementing Regulation (EU) 2019/2243 <sup>(55)</sup> on the contract summary template.

Article 102(1) of the EECC specifies the information, by reference to Articles 5 and 6 of the CRD and Annex VIII of the EECC, that providers of publicly available electronic communications services should provide before a consumer is bound by a contract or any corresponding offer. The providers of publicly available electronic communications are also obliged to provide consumers with a concise and easily readable contract summary (Article 102(3) of the EECC and Implementing Regulation (EU) 2019/2243). However, the mere **provision of the contract summary does not fully satisfy all the pre-contractual information obligations**, as provided in Article 102(1) and Annex VIII of the EECC.

<sup>(51)</sup> In July 2019, EU business organisations published a self-regulatory initiative '*Recommendations for a better presentation of information to consumers*'. It deals with the presentation of both mandatory consumer information and trader's terms and conditions. In particular, it proposes a model ('Consumer journey') for providing consumer information at different stages of the transaction, including via graphical elements. Available at: [https://ec.europa.eu/info/sites/info/files/sr\\_information\\_presentation.pdf](https://ec.europa.eu/info/sites/info/files/sr_information_presentation.pdf).

<sup>(52)</sup> See section 2.9 of the UCPD guidance.

<sup>(53)</sup> Article 3(2) read as follows: '*If any provision of this Directive conflicts with a provision of another Union act governing specific sectors, the provision of that other Union act shall prevail and shall apply to those specific sectors*'.

<sup>(54)</sup> Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 31.7.2002, p. 37).

<sup>(55)</sup> Commission Implementing Regulation (EU) 2019/2243 of 17 December 2019 establishing a template for the contract summary to be used by providers of publicly available electronic communications services pursuant to Directive (EU) 2018/1972 of the European Parliament and of the Council (OJ L 336, 30.12.2019, p. 274).

Additional information requirements are also set out in the Audiovisual Media Services Directive 2010/13/EU of the European Parliament and of the Council <sup>(56)</sup>, Directive 2009/72/EC of the European Parliament and of the Council <sup>(57)</sup> for electricity, Directive 2009/73/EC of the European Parliament and of the Council <sup>(58)</sup> for natural gas etc. <sup>(59)</sup>.

Article 6(8) of the CRD addresses specifically the relationship between the information requirements laid down in this Directive and **those contained in the Services Directive 2006/123/EC of the European Parliament and of the Council <sup>(60)</sup> and the eCommerce Directive 2000/31/EC of the European Parliament and of the Council <sup>(61)</sup>. First, it specifies that information requirements in these three instruments are complementary. Second, it clarifies that if a provision of these two directives on the 'content and the manner in which the information is to be provided' conflicts with a provision of the CRD, the latter shall prevail <sup>(62)</sup>.**

### 3.1.5. Imposition of additional information requirements

According to Article 4 of the CRD: *'Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive'*.

One of the derogations from this full harmonisation approach is Article 5(4), which allows Member States to adopt or maintain additional pre-contractual information requirements for **on-premises contracts**.

While the information requirements for off-premises and distance contracts are, in principle, exhaustive, at the same time, in accordance with Article 6(8) and Recital 12 of the Directive, **Member States can impose additional information requirements in accordance with the Services Directive 2006/123/EC and the eCommerce Directive 2000/31/EC**.

The relevant provision of the eCommerce Directive in this respect is Article 5, which requires Member States to ensure that the service provider renders easily, directly and permanently accessible to the recipients of the service and competent authorities at least the information stipulated in that Article. Article 10 of the eCommerce Directive sets out further information requirements regarding the procedure for concluding the contract.

As regards the Services Directive, its Article 22(1) to (4) sets specific requirements for information that providers must make available to service recipients, as well as requirement for clear, unambiguous, and timely communication of that information. Article 22(5) further stipulates that it *'does not prevent Member States from imposing additional information requirements applicable to providers established in their territory'*.

Imposing additional information requirements in accordance with Article 6(8) of the CRD is one of the regulatory choices, about which the Member States must inform the Commission in accordance with Article 29. The Commission publishes this information online <sup>(63)</sup>.

<sup>(56)</sup> Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (OJ L 95, 15.4.2010, p. 1).

<sup>(57)</sup> Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ L 211, 14.8.2009, p. 55).

<sup>(58)</sup> Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ L 211, 14.8.2009, p. 94).

<sup>(59)</sup> See section 1.2 of the UCPD Guidance for a more complete list of sector and product-specific legislation.

<sup>(60)</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ L 376, 27.12.2006, p. 36).

<sup>(61)</sup> 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 ('Directive on electronic commerce') (OJ L 178, 17.7.2000, p. 1).

<sup>(62)</sup> Cf. Articles 5 and 10 of the e-Commerce Directive. The Commission's proposal for a Regulation on Digital Services Act (COM/2020/825 of 15 December 2020) envisages replacing some of the provisions of the e-Commerce Directive (Articles 12–15) without proposing to amend its Article 5 on information requirements.

<sup>(63)</sup> [https://ec.europa.eu/info/law/law-topic/consumers/consumer-contract-law/consumer-rights-directive/regulatory-choices-under-article-29-crd\\_en](https://ec.europa.eu/info/law/law-topic/consumers/consumer-contract-law/consumer-rights-directive/regulatory-choices-under-article-29-crd_en)



### 3.1.6. Exemption of 'day-to-day' transactions

Article 5(3) allows Member States not to apply the pre-contractual information requirements under Article 5(1) to on-premises contracts **which involve day-to-day transactions and which are performed immediately at the time of their conclusion.**

By their nature, these transactions are likely to be for low cost items. One obvious example is the purchase of foodstuffs and beverages intended for immediate consumption – e.g. snacks, take away meals, etc.

Furthermore, Article 5(3) may also apply to certain services and not only to goods. In that context, the second criterion mentioned in Article 5(3), i.e., the requirement for the contract to be performed immediately at the time of its conclusion, is of particular importance.

— *Examples of such possible day-to-day services are: shoe cleaning services provided on the street, and cinema services where the ticket is purchased (i.e., where the contract is concluded) immediately before the film is watched.*

### 3.1.7. The binding nature of pre-contractual information

Article 6(5) states the following with regard to the binding nature of pre-contractual information to be provided under Article 6(1): '5. *The information referred to in paragraph 1 shall form an integral part of the distance or off-premises contract and shall not be altered unless the contracting parties expressly agree otherwise.*'

Accordingly, the information provided on the trader's website should be binding on the parties and, if the trader wishes to alter any of its elements, they should obtain the consumer's express consent:

- *For example, the parties could expressly agree, by exchanging e-mails, on a different time of delivery of the goods than the one specified on the trader's website;*
- *However, a provision in the general terms and conditions stating that the trader may derogate from the information provided on the website would not comply with the requirement for express agreement of the parties.*

Article 6(5) would not apply to changes to the terms of the contract after its conclusion. When such changes are based on the terms of the contract, the Unfair Contract Terms Directive <sup>(64)</sup> will be relevant.

### 3.1.8. Additional language requirements

Under Article 6(7) Member States may impose language requirements regarding the **contractual information** in off-premises/distance contracts <sup>(65)</sup>.

If this regulatory choice has been exercised, the relevant requirements, for example, to provide the information in the official language of the Member State concerned would apply to cross-border traders, subject to the provisions of Regulation (EC) No 593/2008 of the European Parliament and of the Council <sup>(66)</sup> on the law applicable to contractual obligations (Rome I Regulation). Its Article 6 provides that, if the trader carries out its activities in the country of the consumer's habitual residence or if **it directs such activities** to that country or to several countries including that country, the law applicable to the contract is that of the country in which the consumer is habitually resident.

If the parties have chosen a different law, that choice cannot deprive the consumer of the protection afforded by the mandatory provisions of the consumer's country of residence. Therefore, also in this situation, if the trader directs its activity to consumers in a Member State that has imposed language requirements under Article 6(7) of the CRD, the trader has to provide consumers with contractual information in the language required by that Member State, if that language obligation is considered as mandatory 'contractual obligation' in accordance with the national law.

<sup>(64)</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21.4.1993, p. 29).

<sup>(65)</sup> Member States' notifications of this regulatory choice are available at: [https://ec.europa.eu/info/law/law-topic/consumers/consumer-contract-law/consumer-rights-directive/regulatory-choices-under-article-29-crd\\_en](https://ec.europa.eu/info/law/law-topic/consumers/consumer-contract-law/consumer-rights-directive/regulatory-choices-under-article-29-crd_en)

<sup>(66)</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ L 177, 4.7.2008, p. 6).

The concept of ‘directing’ one’s commercial or professional activities to the country of the consumer was addressed by the CJEU in joined cases C-585/08 and C-144/09 *Peter Pammer and Hotel Alpenhof GmbH*. This judgment sets out a number of criteria for establishing whether a website is ‘directed’ at a specific Member State, such as the use of different languages or currencies on the website <sup>(67)</sup>.

It should be noted that this regulatory option under the CRD is complementary to sector- and product-specific Union laws, which enable Member States to set language requirements concerning the warnings or instructions regarding, for example, toys <sup>(68)</sup> or radio equipment <sup>(69)</sup>. In addition, Directive (EU) 2019/771 of the European Parliament and of the Council <sup>(70)</sup> enables setting language requirements regarding commercial guarantees for goods.

### 3.1.9. *Burden of proof*

Since the trader’s failure to provide specific information required by the Directive leads to various sanctions provided under the Directive (in addition to sanctions that may apply under national laws), Article 6(9) contains a very important provision, which stipulates that with respect to distance and off-premises contracts ‘As regards compliance with the information requirements laid down in this Chapter, the burden of proof shall be on the trader’.

Without excluding the possibility of proving facts by other means, the trader’s case would clearly become weaker if the required information is missing from the confirmation of the contract on a durable medium, which under Articles 7(1)–(2) or 8(7) (discussed in section 4.4) always has to include the information provided for in Article 6(1), unless already provided on a durable medium.

## 3.2. **Common requirements for on-premises and distance/off-premises contracts**

### 3.2.1. *Main characteristics*

Article 5(1)(a) and 6(1)(a)

*‘the main characteristics of the goods or services, to the extent appropriate to the medium and to the goods or services’*

Although this information requirement expressly refers to ‘goods and services’, by virtue of Article 5(2) and 6(2) it also applies to public utilities and online digital content.

The same obligation is imposed by Article 7(4) of the UCPD that lays down the information requirements for the ‘invitation to purchase’. Accordingly, for choosing the main characteristics to be communicated to the consumer, the traders should apply the same approach as for the purposes of the UCPD, i.e. inform about those characteristics that consumers need to make an informed purchasing decisions. Information about the main characteristics for goods may be available from their packaging or labelling that the consumer can consult. More complex goods may require the communication of additional information to establish their main characteristics.

<sup>(67)</sup> See C-585/08 and C-144/09, *Peter Pammer and Hotel Alpenhof GmbH*, ECLI:EU:C:2010:740, paragraphs 92 and 93 in particular.

<sup>(68)</sup> Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys (OJ L 170, 30.6.2009, p. 1), requires that manufacturers and importers ensure that **the toy is accompanied by instructions and safety information** in a language or languages easily understood by consumers, as determined by the Member State concerned.

<sup>(69)</sup> Directive 2014/53/EU of the European Parliament and of the Council of 16 April 2014 on the harmonisation of the laws of the Member States relating to the making available on the market of radio equipment and repealing Directive 1999/5/EC (OJ L 153, 22.5.2014, p. 62). It requires **radio equipment to be accompanied by instructions and safety information in a language, which can be easily understood by consumers and other end-users, as determined by the Member State concerned**. Moreover, it requires that the EU declaration of conformity or the simplified EU declaration of conformity accompanies the radio equipment, and both of them have to be translated into the language or languages required by the Member State in which the radio equipment is placed or made available on the market.

<sup>(70)</sup> Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC (OJ L 136, 22.5.2019, p. 28). It allows Member States to lay down rules on the language or languages in which the commercial guarantee statement is to be made available to the consumer.

In particular, all product **characteristics and restrictive conditions that the average consumer will not normally expect** from the given category or kind of good or service must be communicated to consumers, as those are especially likely to affect their transactional decisions <sup>(71)</sup>.

For all contracts where the consumer provides personal data, irrespective of whether payment is involved or not, **the trader must inform the consumer about the purposes of processing** at the time when the personal data are obtained.

### 3.2.2. Trader's identity and contact details

#### Article 5(1)

(b) *the identity of the trader, such as his trading name, the geographical address at which he is established and his telephone number;*

#### Article 6(1)

(b) *the identity of the trader, such as his trading name;*

(c) *the geographical address at which the trader is established as well as the trader's telephone number and email address; in addition, where the trader provides other means of online communication which guarantee that the consumer can keep any written correspondence, including the date and time of such correspondence, with the trader on a durable medium, the information shall also include details of those other means; all those means of communication provided by the trader shall enable the consumer to contact the trader quickly and communicate with him efficiently; where applicable, the trader shall also provide the geographical address and identity of the trader on whose behalf he is acting;*

(d) *if different from the address provided in accordance with point (c), the geographical address of the place of business of the trader, and, where applicable, that of the trader on whose behalf he is acting, where the consumer can address any complaints;*

#### 3.2.2.1. Trader's identity

In addition to the CRD provisions, Article 7(4)(b) of the UCPD stipulates that the information about the geographical address and identity of the trader is considered as material information in the case of an invitation to purchase. With respect to **on-premises contracts**, such information may be apparent from the context (see also section 3.1.3).

In off-premises/distance contracts, the CRD requires the **trader, who acts on behalf of another trader**, to indicate also the identity and geographical address of that latter trader. Also online marketplaces, even where they are mere intermediaries and not 'acting on behalf' of another trader, must take steps to ensure that the **consumer is duly informed about the identity of the actual trader offering the goods or services concerned**, on the basis of the information provided by the trader itself. In fact, if the failure by the marketplace to inform about the identity of the actual trader creates the impression that the marketplace is the actual trader, this may result in the liability of the marketplace for the obligations of the trader.

In case C-149/15 *Wathelet* <sup>(72)</sup> the Court dealt with the responsibility of an off-line intermediary (car garage) for the conformity of the goods sold to consumers under the former Consumer Sales of Goods Directive 1999/44/EC of the European Parliament and of the Council <sup>(73)</sup>. The Court stated that, whilst Directive 1999/44/EC does not address the issue of liability of intermediaries vis-a-vis consumers, 'it does not in itself preclude the possibility that **the concept of 'seller', within the meaning of Article 1(2)(c) of Directive 1999/44/EC, can be interpreted as covering a trader who acts on behalf of a private individual where, from the point of view of the consumer, he presents himself as the seller of consumer goods under a contract in the course of his trade, business or profession. That trader could create confusion in the mind of the consumer by giving him the false impression that he is acting as the seller-owner of the goods'** <sup>(74)</sup>.

<sup>(71)</sup> See also section 2.9.5 of the UCPD guidance about 'material information' in invitations to purchase – Article 7(4).

<sup>(72)</sup> C-149/15, *Wathelet*, ECLI:EU:C:2016:840.

<sup>(73)</sup> 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 171, 7.7.1999, p. 12).

<sup>(74)</sup> *Ibid.*, paragraphs 33 – 34.

The Court also stated that ‘*The degree of participation and the amount of effort employed by the intermediary in the sale, the circumstances in which the goods were presented to the consumer and the latter’s behaviour may, in particular, be relevant in that regard in order to **determine whether the consumer could have understood that the intermediary was acting on behalf of a private individual***’<sup>(75)</sup>.

These Court’s conclusions concerning the liability of the offline intermediary for the conformity of goods could also be relevant for **other intermediaries and other obligations of traders under EU law**, including in an online context. In particular, online marketplaces could be found **liable for the trader’s obligations** regarding pre-contractual information or contractual performance under the CRD **where, from the point of view of the consumer, they present themselves as traders under the (proposed) contract**.

In case C-149/15 *Wathelet*, the Court stressed that ‘*it is essential that consumers are aware of the identity of the seller, and in particular whether he is acting as a private individual or as a trader, so that **they are able to benefit from the protection conferred on them by the directive***.’<sup>(76)</sup> However, even where the actual supplier is also a trader and the consumer would not be deprived of his or her rights, the consumer may not have concluded the contract if the identity of the actual trader was known. In particular, the consumer could have concerns about, for example, the reliability of such trader and the possibility of enforcing consumer rights towards it.

A failure to provide information on the trader’s identity, or the provision of incorrect data, would constitute a breach of the CRD. It could also constitute a misleading practice under the UCPD, to the extent that it affects the consumer’s transactional decision. There are also sectoral provisions in EU law that strengthen this requirement. For example, in the case of online sale of medicinal products<sup>(77)</sup> blurring the distinction between marketplace and retailer is strictly prohibited. A marketplace offering medicinal products on the EU market should ensure that consumers can verify that the trader has the relevant authorisations and is operating in compliance with the law<sup>(78)</sup>.

The mode of performance of the contract involving a third party trader does not affect the rights and obligations regarding the contract ensuing from the CRD. For example, in the ‘dropshipping’ business model the trader does not keep in stock certain goods that it sells but instead, when ordered by a consumer, the trader purchases them from a third party and has them shipped directly to the customer.

However, if the trader only processes the order as an intermediary and then forwards it to another trader for fulfilment in that second trader’s own name, then as per the *Wathelet* case, the first trader could be held liable towards the consumer where, from the point of view of the consumer, that trader presents himself as the seller of consumer goods under the contract. In order to avoid such liability the trader must clearly inform the consumer that it acts as an intermediary and provide information about the identity of the actual seller in a prominent manner<sup>(79)</sup>.

In this respect it should be noted that Article 6a(b), introduced by Directive (EU) 2019/2161, contains a specific additional requirement for the providers of online marketplaces to inform consumers about **the status of the third party** offering the goods, services or the digital content on the basis of the information provided by the third party (see section 3.4.2).

### 3.2.2.2. Means of communication

As regards distance and off-premises contracts, Article 6(1)(c), as amended by Directive (EU) 2019/2161, requires the trader to provide the consumer with information about the following means of communication as part of the pre-contractual information:

— The trader’s geographical address, telephone number and email address; and

<sup>(75)</sup> *Ibid.*, paragraph 44.

<sup>(76)</sup> *Ibid.*, paragraph 37.

<sup>(77)</sup> Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (OJ L 311, 28.11.2001, p. 67) requires that only authorized (or entitled on a basis of national law) pharmacy retailer may sell medicinal products online. The retailer has to display on their webpage the EU logo that allows to verify that the entity is legally operating.

<sup>(78)</sup> See Article 85c of Directive 2001/83/EC.

<sup>(79)</sup> The principle is also explicitly stated with regard to on-line intermediaries in Article 5(3) of the DSA proposal. Further guidance on the concept of ‘trader’ can be expected in the pending case C-536/20 *Tiketa*, which deals with the question of whether an online intermediary (ticketing platform) can be held jointly liable with the trader actually providing the service, especially if the intermediary has failed to provide clear information that it is acting merely as an intermediary.

- Where available, other online means of written communication, which allow keeping the content and date and time of the correspondence on a durable medium.

'Durable medium' is defined in Art 2(10) CRD as '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' (see also section 4.4).

For example, as far as messaging applications are concerned, some of them allow the sender, such as the trader in the B2C context, to delete, also from the recipient's device, either by default or manually, the messages that it has sent within a certain (short) timeframe after their delivery. Accordingly, these means of communication do not effectively enable the consumer to store the message received. The recipient might be able to save or back up his/her messages but this would require additional technical skills and knowledge that cannot be expected from the average consumer. Accordingly, an individual assessment for each messaging application will be needed to establish whether it complies with the set criteria, also taking into account the continuous development of these applications.

The Court specifically noted in case C-649/17 *Amazon EU* that the possibility, for consumers, to contact traders quickly and to communicate with them efficiently is of fundamental importance for ensuring and effectively implementing consumer rights<sup>(80)</sup>. Consequently, any means of communication used by the trader must be capable of satisfying the criteria of direct and effective communication.

In that decision the Court confirmed that Article 6(1)(c) **does not prohibit the use by the trader of other means of communication that ensure direct and effective communication**, in addition to those listed in the provision<sup>(81)</sup>.

This interpretation remains relevant also after the amendments introduced by Directive (EU) 2019/2161. Whilst the trader must inform the consumer, before the conclusion of the contract, about the means of communication listed and complying with the criteria set out in Article 6(1)(c), **the trader is not prevented from making available also alternative means of communication**. These can be, for example, automated voice assistants or means of online written communication (chatbots) that do not have the features specified in Article 6(1)(c). The general rules of the UCPD will apply to such additional means. In particular, traders should clearly and timely inform consumers whether these alternative means allow consumers to keep track of the written correspondence, including of the date and time.

The trader must also ensure that any online means of communication, of which the consumer has been informed prior to the conclusion of the contract (and in the contract confirmation) in accordance with Article 6(1)(c), are easily accessible on the trader's interface. Any additional means of communication should not be presented and promoted in a way that makes it difficult for consumers to access and use the means of communication provided in accordance with Article 6(1)(c).

The purpose of providing means of communication is to enable the consumer to contact the trader quickly and efficiently. This implies that arrangements should be made to ensure, for example, that telephone calls are answered during office hours and that email communications are answered promptly.

### 3.2.2.3. Place of establishment

The concept of 'establishment' in this information requirement is the same as the one used, for example, in the Services Directive 2006/123/EC where it is defined (Article 4) as '*the actual pursuit of an economic activity, as referred to in Article 43 of the Treaty, by the provider for an indefinite period and through a stable infrastructure from where the business of providing services is actually carried out*'. Recital 37 of that Directive explains that '[...] Where a provider has several places of establishment, it is important to determine the place of establishment from which the actual service concerned is provided [...]'].

The same approach can be used to determine the place whose geographical address should be provided under this Directive. Since the information about the 'geographical' address is required, it should refer to a physical location:

- For example, it is not sufficient to merely provide the PO Box number as the trader's address.

<sup>(80)</sup> C-649/17, *Amazon EU*, ECLI:EU:C:2019:576, paragraph 41.

<sup>(81)</sup> *Ibid.*, paragraph 52.

### 3.2.2.4. Place of business

The 'place of business' should mean the place where the essential decisions concerning the trader's general management are taken and where the functions of its central administration are carried out. This conclusion follows, for example, from the judgment of the Court in C-73/06 *Planzer*:

*'Determination of a company's place of business requires a series of factors to be taken into consideration foremost amongst which are its registered office the place of its central administration the place where its directors meet and the place usually identical where the general policy of that company is determined. Other factors such as the place of residence of the main directors the place where general meetings are held the place where administrative and accounting documents are kept and the place where the company's financial and particularly banking transactions mainly take place may also need to be taken into account.'* <sup>(82)</sup>.

### 3.2.3. Price

#### Article 5(1)

- (c) *the total price of the goods or services inclusive of taxes, or where the nature of the goods or services is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated, as well as, where applicable, all additional freight, delivery or postal charges or, where those charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable;*

#### Article 6(1)

- (e) *the total price of the goods or services inclusive of taxes, or where the nature of the goods or services is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated, as well as, where applicable, all additional freight, delivery or postal charges and any other costs or, where those charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable. **In the case of a contract of indeterminate duration or a contract containing a subscription, the total price shall include the total costs per billing period. Where such contracts are charged at a fixed rate, the total price shall also mean the total monthly costs. Where the total costs cannot be reasonably calculated in advance, the manner in which the price is to be calculated shall be provided;***

The underlined parts of Article 6(1)(e) represent the additional requirements for pricing information applicable only to distance/off-premises contracts compared to those in Article 5(1)(c) for on-premises contracts. In particular, for distance/off-premises contracts specific information is required for **subscriptions and contracts of indeterminate duration**.

If the product (or one of the products) provided under a contract of indeterminate duration or under a subscription is charged at a fixed rate, information about the total cost per billing period **and** about the total monthly costs should be provided.

— *For example, internet or audiovisual media services subscriptions are typically charged at a fixed rate per month/bi-monthly/quarterly irrespective of usage. Therefore, the monthly cost and, if the billing period is different, the costs per billing period would have to be provided to the consumer who wishes to conclude a subscription online or off-premises.*

If a contract covers or includes a product for which the total cost cannot be calculated in advance, the trader should inform the consumer of the way, in which these variable costs are calculated:

— *For example, for voice telephony services whose cost depends on actual usage, the trader should refer the consumer to a detailed price list for telephone calls* <sup>(83)</sup>.

<sup>(82)</sup> C-73/06, *Planzer*, ECLI:EU:C:2007:397, paragraph 61.

<sup>(83)</sup> For electronic communications services, see also Art. 102(1) and Annex VIII of Directive 2018/1972 (European Electronic Communications Code), as well as the contract summary template and its details on price for electronic communications services as provided for in the Implementing Regulation (EU) 2019/2243.

Under Article 6(6) for off-premises and distance contracts, the consumers do not have to bear any additional charges or costs of which they have not been informed by the trader. This reflects the obligation of the trader to inform the consumer of the full price, including all applicable taxes, duties, and additional charges, in particular any import VAT, customs duties, customs clearance etc. applicable to purchases from non-EU traders <sup>(84)</sup>.

Where the digital content or service includes **optional additional and built-in purchases**, the consumer should be duly informed that such additional purchasing options may be offered, before acquiring the digital product. This requirement could apply, for example, to:

- *apps that include in-app purchases, such as add-ons or extra levels in a video game;*
- *subscriptions to audiovisual content services that include optional pay-per-view content (movies) offered for additional payment.*

#### 3.2.4. Delivery and performance of the contract

##### Article 5(1)

*(d) where applicable, the arrangements for payment, delivery, performance, the time by which the trader undertakes to deliver the goods or to perform the service, and the trader's complaint handling policy;*

##### Article 6(1)

*(g) the arrangements for payment, delivery, performance, the time by which the trader undertakes to deliver the goods or to perform the service and, where applicable, the trader's complaint handling policy;*

This information requirement is similar for on-premises and off-premises/distance contracts with the exception that for **on-premises contracts**, all the relevant information should be provided only 'where applicable', whereas for **off-premises/distance contracts** it should be provided in all cases, except for information on the trader's complaint handling policy, which is only required 'where applicable'.

This information requirement is similar to the one under Article 7(4)(d) of the UCPD. However, under the UCPD information about the terms of payment, delivery and performance must be provided in the invitation to purchase only when it is to the consumer's disadvantage when compared to diligent market practices.

The trader would also satisfy the requirements of Article 5(1)(d) or 6(1)(g) regarding the time of delivery or performance if it indicates a **period (such as '10 days' or 'two weeks') from the conclusion of the contract** (placing of the order by the consumer). The trader does not necessarily have to indicate a specific calendar date, as this may not always be practically feasible.

For **on-premises contracts**, the obligation to inform about the time by which the trader undertakes to deliver the goods or to perform the service does not apply if the **delivery or performance takes place immediately**.

For **on-premises sales contracts**, the requirement to indicate the time of delivery 'where applicable' should be interpreted also in light of Article 18. Namely, the trader should not have to inform about the time of delivery of goods if intending to deliver them within the **default time limit of 30 days specified in Article 18**. Of course, this does not prevent the trader from communicating to the consumer a different time for delivery or the trader and consumer from agreeing on a different date. The agreed date would then constitute the 'agreed' time of delivery, as referred to in Article 18 (see also section 6 on delivery).

Article 7 of Regulation (EU) 2018/644 of the European Parliament and of the Council <sup>(85)</sup> on **cross-border parcel delivery** services requires all traders concluding sales contracts with consumers that include the sending of cross-border parcels to make available at the pre-contractual stage, where possible and applicable, information about the cross-border delivery options in relation to the specific sales contract and charges payable by consumers for the cross-border parcel delivery, as well as, where applicable, their own complaints handling policies.

<sup>(84)</sup> For information on buying goods online coming from a non-European Union country, please see: [https://ec.europa.eu/taxation\\_customs/buying-goods-online-coming-non-european-union-country\\_en](https://ec.europa.eu/taxation_customs/buying-goods-online-coming-non-european-union-country_en).

<sup>(85)</sup> Regulation (EU) 2018/644 of the European Parliament and of the Council of 18 April 2018 on cross-border parcel delivery services (OJ L 112, 2.5.2018, p. 19).

As regards **online digital content and services**, it should be noted that, pursuant to Article 5(1) of the Digital Content Directive, the trader must supply them to the consumer **without undue delay** after the conclusion of the contract, unless agreed otherwise. However, in accordance with Article 7(3) and Article 8(8) CRD regarding contracts for (digital) services (see section 5.6) and point (m) of the first paragraph of Article 16 CRD regarding contracts for online digital content (see section 5.7), the supplier should acquire the **consumer's prior express request/consent** for the supply of a digital service or online digital content before the expiry of the right of withdrawal. Otherwise, the consumer could still withdraw from the respective contracts and would be entitled not to pay (or to claim reimbursement) for the digital service or online digital content received in accordance with Article 14(4) CRD (see section 5.8).

Furthermore, Article 5(2) of the Digital Content Directive clarifies that the trader has complied with the obligation to supply when:

- (a) the digital content or any means suitable for accessing or downloading the digital content is made available or accessible to the consumer, or to a physical or virtual facility chosen by the consumer for that purpose;
- (b) the digital service is made accessible to the consumer or to a physical or virtual facility chosen by the consumer for that purpose.

### 3.2.5. Arrangements for payment

Examples of **arrangements for payment** that should be particularly clearly explained to the consumer are:

- *Payment via the consumer's telephone bill;*
- *In subscription contracts, such as for online video games, the arrangement whereby the trader uses the information about the means of payment (such as credit card details) provided by the consumer at the time of initial subscription also for billing subsequent purchases without prompting the consumer to re-enter this information.*

Payments are subject to Directive (EU) 2015/2366 of the European Parliament and of the Council <sup>(86)</sup> on payment services (see also section 8 concerning Article 19 on the fees for the use of means of payment). Its Article 64(1) states that '*Member States shall ensure that a payment transaction is considered to be authorised only if the payer has given consent to execute the payment transaction. A payment transaction may be authorised by the payer prior to or, if agreed between the payer and the payment service provider, after the execution of the payment transaction*'.

Furthermore, consumers should be clearly informed, up-front and in a prominent manner, about the **payment arrangements** for these additional purchases before signing up to the main digital product in which they are offered.

The default setting for payments should not allow the additional purchases to be made without the consumer's explicit consent (e.g. via a password or other appropriate means). Regarding in-app purchases, when the system provides for time slots for the validity of authentication (e.g. a 15 minutes slot), traders should not automatically apply default settings, but rather request the consumer's explicit consent also in relation to the applicable duration of the validity <sup>(87)</sup>.

### 3.2.6. Guarantees and after-sales services

#### Article 5(1)

(e) *in addition to a reminder of the existence of the legal guarantee of conformity for goods, digital content and digital services, the existence and the conditions of after-sales services and commercial guarantees, where applicable;*

#### Article 6(1)

(l) *a reminder of the existence of a legal guarantee of conformity for goods, digital content and digital services;*

(m) *where applicable, the existence and the conditions of after sale customer assistance, after-sales services and commercial guarantees;*

<sup>(86)</sup> Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC (OJ L 337, 23.12.2015, p. 35).

<sup>(87)</sup> See IP/14/187 of 27/02/2014 and the Common Position of the national consumer enforcement authorities on consumer protection in relation to 'in-app purchases' for on-line games, available at: [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_14\\_187](https://ec.europa.eu/commission/presscorner/detail/en/IP_14_187) and [https://ec.europa.eu/info/sites/default/files/common-position\\_of\\_national\\_authorities\\_within\\_cpc\\_2013\\_en\\_0.pdf](https://ec.europa.eu/info/sites/default/files/common-position_of_national_authorities_within_cpc_2013_en_0.pdf).



Although presented slightly differently, the on-premises and off-premises/distance contracts are subject to practically identical requirements regarding information on the **legal guarantee and possible after-sales services**.

The substantive rules on the **legal guarantee** are laid down in Article 10 of the Sale of Goods Directive ('SGD') and Article 11 of the Digital Content Directive ('DCD'). These rules provide for:

- In case of **goods**, the seller's liability for the lack of conformity (defect) that existed at the time of delivery and become apparent within two years from the delivery (or a longer liability period as applicable under relevant national law);
- In case of **digital content or digital service**, the supplier's liability for the lack of conformity that existed at the time of supply and become apparent within two years from the supply (or a longer liability period as applicable under relevant national law) when they are supplied in a single act of supply, or within the contractual supply period in the case of digital content or digital service which is supplied continuously.

Article 6(1)(l) CRD uses the term 'reminder of the existence', thus it is not necessary to provide detailed information about the legal guarantee. However, to comply with the information requirements, the trader must at least inform the consumers that there is a legal guarantee and indicate its duration.

In principle, the SGD and the DCD fully harmonise the rules within their scope. Only in some aspects, Member States can provide for stronger consumer protection, in particular, longer liability periods <sup>(88)</sup>.

Traders, in particular cross-border online traders, may target with their offers the markets of several Member States without customising the information for each targeted market. Therefore, to cover the potential differences in national legal requirements, these traders should also acknowledge the possible stronger rules that may exist in different Member States that they target. Specifically, they should refer to the fact that **two years is the minimum duration of the legal guarantee and that national law of the consumer's country of residence may provide for stronger consumer rights**.

Beside the reminder of the legal guarantee, the trader supplying the goods or services must also provide information on any **after sales benefits** that are voluntarily provided by the supplier of the goods or services or other traders concerned, such as the manufacturer of the goods.

Information about the existence and the conditions of **after sale customer assistance, after-sales services and/or commercial guarantees** must only be provided if such additional benefits are actually offered.

**Commercial guarantee** is broadly defined in Article 2(14) of the Directive as undertaking to reimburse the price paid or to replace, repair or service goods when they are not in conformity or do not meet other requirements. There are no definitions for the other forms of benefits. In practice, the same type of benefit could be marketed under different names by different traders.

The SGD makes the commercial guarantee, which can be provided by the seller or another party such as the manufacturer, legally binding on the issuer of the guarantee. Notwithstanding this, the consumer rights under the commercial guarantee are set contractually and will therefore vary from one trader to another or even for different goods offered by the same trader <sup>(89)</sup>. Where, in accordance with Article 17 of the SGD, the producer issues a **'commercial guarantee of durability'** for a certain period of time, the consumer is entitled to repair and replacement as established in the SGD.

The information about these after-sales benefits should in particular explain where the respective service will be carried out and who bears the cost of transport (if applicable). Wrong or deceptive information about after-sales benefits can amount to misleading practice under the UCPD. The UCPD prohibits 'presenting rights given to consumers in law as a distinctive feature of the trader's offer' (see Article 6(1)(g) and point 10 of Annex I) <sup>(90)</sup>.

<sup>(88)</sup> See, for example, the second subparagraph of Article 11(2) of the SGD.

<sup>(89)</sup> Pursuant to Art. 17(1) Sales of Goods Directive, any commercial guarantee shall be binding on the guarantor under the conditions laid down in the commercial guarantee statement and associated advertising available at the time, or before the conclusion, of the contract.

<sup>(90)</sup> The extent to which the trader must inform the consumer about the commercial guarantee provided by a third party (manufacturer) is the subject of a pending case C-179/21, *Victorinox*.

### 3.2.7. Duration and termination of the contract

Article 5(1)(f) and 6(1)(o)

*the duration of the contract, where applicable, or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract;*

Article 6(1)

*(p) where applicable, the minimum duration of the consumer's obligations under the contract;*

Information about the conditions for terminating a contract of indeterminate duration or a contract that is extended automatically (required for both on-premises and off-premises/distance contracts) should in particular include information about:

- Applicable charges;
- Termination procedures, in particular the prior notice period and the means by which the termination should be notified (e.g., email or postal address).

For **distance and off-premises contracts** Article 6(1)(p) additionally requires information about the minimum duration of the consumer's obligations, i.e., the minimum time period for which the consumer is expected to pay on the basis of the terms and conditions offered by the trader:

- *For example, a mobile telephony contract of 24 months may include a minimum duration of 6 months that must be paid for in case of early termination <sup>(91)</sup>.*

Any such minimum period during which terminating the contract is not allowed, should also be treated as one of the **major conditions for terminating the contract** of indeterminate duration or an automatically extended contract in the sense of Article 5(1)(f). Therefore, information about the minimum duration should be provided also for contracts of indeterminate duration and automatically extended contracts, which are concluded on-premises and are subject to Article 5(1)(f).

The Directive only sets out information requirements regarding the termination and extension of contracts. The assessment of the fairness of the respective contractual clauses is subject to the Unfair Contract Terms Directive 93/13/EEC <sup>(92)</sup>. Specific rules on duration, prolongation and termination of contracts may be set in the relevant EU sector specific legislation <sup>(93)</sup>.

### 3.2.8. Functionality, compatibility and interoperability

In accordance with the amendments introduced by Directive (EU) 2019/2161, traders offering goods with digital elements ('smart' devices), digital content and digital services have to inform the consumer also about their **functionality, compatibility and interoperability**. The respective requirements are set out in identical terms in Article 6(1)(r) and (s) for off-premises and distance contracts and in Article 5(1)(g) and (h) for on-premises contracts.

Article 5(1)(g) and Article 6(1)(r)

*where applicable, the functionality, including applicable technical protection measures, of goods with digital elements, digital content and digital services;*

Article 5(1)(h) and Article 6(1)(s)

*where applicable, any relevant compatibility and interoperability of goods with digital elements, digital content and digital services that the trader is aware of or can reasonably be expected to have been aware of;*

The notions of functionality, compatibility and interoperability are defined in Article 2 of the Digital Content Directive ('DCD').

<sup>(91)</sup> See Articles 105(1) and 107 of the EEC.

<sup>(92)</sup> See also Commission Notice 'Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts' (OJ C 323, 27.9.2019, p. 4).

<sup>(93)</sup> For example, in Articles 105 and 107 of Directive (EU) 2018/1972 (European Electronic Communications Code) as regards electronic communications services.

'Goods with digital elements' (i.e. 'smart' devices) are a sub-category in the updated definition of 'goods' in the Sale of Goods Directive ("SGD"), which also applies in the context of the CRD. Recital 14 of the SGD explains that 'goods with digital elements' incorporate or are inter-connected with digital content or digital service in such a way that the absence of that digital content or digital service would prevent the goods from performing their functions. Digital content that is incorporated in or inter-connected with a good can be any data which are produced and supplied in digital form, such as operating systems, applications and any other software. Digital content can be pre-installed at the moment of the conclusion of the sales contract or, where that contract so provides, can be installed subsequently. Digital services inter-connected with a good can include services which allow the creation, processing or storage of data in digital form, or access thereto, such as software-as-a-service offered in the cloud computing environment, the continuous supply of traffic data in a navigation system, or the continuous supply of individually adapted training plans in the case of a smart watch.

The trader should assess the need to provide information about the features of the goods with digital elements, digital content or digital service according to their particular characteristics. The following indicative and non-exhaustive list of elements, covering also **aspects of functionality, compatibility and interoperability**, may be used as a checklist when deciding what information is to be provided about a specific good with digital elements, digital content or digital service (see also section 3.2.1 regarding information about the main characteristics):

- (1) The language(s) of the interface of the goods with digital elements, digital content or service, and, if different, the language(s) of any user instructions for their operation;
- (2) The method of providing the digital content or service: e.g. streaming, online, one-off downloading, access to download for a specified time;
- (3) For video or audio files: the playing duration of the content;
- (4) For downloadable files: the file type and size;
- (5) Whether there is a commitment or no commitment by the trader or a third party to maintain or update the goods with digital elements, digital content or service;
- (6) Conditions not directly linked to interoperability, such as:
  - (a) tracking and/or personalisation;
  - (b) the need for an internet connection and its technical requirements (such as minimum download and upload speed);
  - (c) the need for other users to have specific software installed (e.g. for communication software).
- (7) Limitations on the use, such as:
  - (a) limits on the number of times, or the length of time in which a digital content or service can be watched, read or used;
  - (b) limits on the reuse for purposes such as private copies;
  - (c) restrictions based on the location of the consumer's device;
  - (d) any functionalities that are conditional on additional purchases, such as paid content, club memberships or additional hardware or software.
- (8) Devices that the digital content or service can be used with and, where applicable, the necessary operating system and additional software, including the version number, and hardware, such as processor speed and graphics card features.
- (9) Any specifics related to the 'Internet of Things' functionalities of the goods with digital elements.

### 3.3. **Additional requirements for off-premises and distance contracts**

#### 3.3.1. *Personalised price*

Article 6(1)

(e) *where applicable, that the price was personalised on the basis of automated decision-making;*

This information requirement introduced by Directive (EU) 2019/2161 applies to distance and off-premises contracts. In practice, it will be relevant only for contracts concluded online that enable the use of automated decision making and profiling of consumer behaviour to personalise the price for specific consumers or specific categories of consumers.

Where such techniques are used to personalise the price, consumers should be clearly and prominently informed, so that they can take into account the potential risks in their purchasing decision.

As explained in Recital 45 of Directive (EU) 2019/2161, *'this information requirement should not apply to techniques such as 'dynamic' or 'real-time' pricing that involve changing the price in a highly flexible and quick manner in response to market demands when those techniques do not involve personalisation based on automated decision-making.*

Dynamic pricing refers to prices change due to variables that are not customer-related, such as time of day, the available supply, competitors' prices. When dynamic pricing is used without price personalisation, different consumers or groups of consumers should see the same price if they are shopping for the same product at the same time, regardless of their profile and individual features.

Price differences due to variations in taxes or applicable charges (e.g. difference in VAT rates among Member States) also do not represent personalised pricing. Similarly, price reductions that are applied generally and do not target a specific individual or group selected by automated profiling also do not fall in the category of personalised pricing.

Personalised pricing is about customisation. Traders gather data about individual consumers using automated decision-making to profile consumers' behaviour. Data about the search history or computing device are some elements that could be used in order to determine the consumer's profile.

For example, an online trader could increase the price when it notes increased website traffic as a form of dynamic pricing. However, the consumer's 'number of clicks' on a particular web page can also be used by the algorithm to profile that consumer's behaviour and personalise the price for that consumer.

The CRD requirement is limited to information about the fact of personalisation. This is an additional information requirement that should be complied with at the time of offering a personalised price. It is *'without prejudice to Regulation (EU) 2016/679, which provides, inter alia, for the right of the individual not to be subjected to automated individual decision-making, including profiling'* (Recital 45 of Directive (EU) 2019/2161). Personalised pricing may fall under the specific rules on automated decision-making in Article 22 of the GDPR <sup>(94)</sup>. Other GDPR requirements relevant in this context include the requirement for a legal basis under Article 6, as well as the information obligations under Articles 12 to 14.

Provision of information about automated decision making in the privacy policy of the trader will not be sufficient for compliance with the pre-contractual information requirements about the price personalisation under the CRD. Information about the price personalisation should be provided before each transaction, not simply as part of the general information about processing of personal data by the trader.

#### 3.3.2. *Cost of using distance means of communication*

Article 6(1)

(f) *the cost of using the means of distance communication for the conclusion of the contract where that cost is calculated other than at the basic rate;*

<sup>(94)</sup> For further guidance, see Article 29 Data Protection Working Party: Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation (EU) 2016/679.

This information requirement would in particular apply in cases where the trader advertises a Premium Rate Services (PRS) number that the consumer must call in order to conclude the contract for the offered goods or services.

### 3.3.3. Deposits and financial guarantees

#### Article 6(1)

(q) where applicable, the existence and the conditions of deposits or other financial guarantees to be paid or provided by the consumer at the request of the trader;

Deposits and financial guarantees are typical in rental contracts involving putting an object of value at the consumer's disposal, such as car rental. As explained in Recital 33: *'The trader should be obliged to inform the consumer in advance of any arrangement resulting in the consumer paying a deposit to the trader, including an arrangement whereby an amount is blocked on the consumer's credit or debit card.'*

— For example, the information on the conditions of the guarantee should in particular explain whether the amount in question will be blocked or debited from the consumer's account and when and under what conditions it will be unblocked or reimbursed to the consumer.

### 3.3.4. Out-of-court redress mechanisms

#### Article 6(1)

(t) where applicable, the possibility of having recourse to an out-of-court complaint and redress mechanism, to which the trader is subject, and the methods for having access to it.

The above information requirement refers to any out-of-court complaint and redress mechanism to which the trader is subject, including mechanisms, which are within the scope of Directive 2013/11/EU of the European Parliament and of the Council <sup>(95)</sup> on alternative dispute resolution for consumer disputes ('Directive on consumer ADR').

The Directive on consumer ADR ensures that EU residents have access to out-of-court dispute resolution mechanisms for resolving their disputes with traders established in the EU. It provides for specific quality requirements for the alternative dispute resolution entities and procedures. Only alternative dispute resolution bodies that have been assessed by the Member States against these requirements and have been communicated to the Commission are recognised as 'ADR entities' under the Directive on consumer ADR.

The Directive on consumer ADR applies to domestic and cross-border disputes concerning contractual obligations stemming from sales contracts or service contracts, no matter what product or service a consumer purchased (only disputes regarding health and higher education are excluded <sup>(96)</sup>), whether the product or service was purchased online or offline and whether the trader is established in the consumer's Member State or in another Member State.

Consequently, where the out-of-court mechanism about which the trader informs the consumer under Article 6(1)(t) CRD is an 'ADR entity' as defined by Article 4(1)(h) of the Directive on consumer ADR, the trader must also comply with the requirements set out by Article 13 of that Directive. It requires traders to inform about the ADR entity/ies by which they are covered when those traders commit to or are obliged to use alternative dispute resolution to resolve disputes with consumers. That information must include the websites address of the relevant ADR entities. According to Article 13(2) of the Directive on consumer ADR, the information shall be provided in a clear, comprehensible and easily accessible way on the trader's website where one exists, and, if applicable, in the general terms and conditions of sales or service contracts between the trader and a consumer.

<sup>(95)</sup> Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) (OJ L 165, 18.6.2013, p. 63).

<sup>(96)</sup> See Article 2(2) of the Directive on consumer ADR for exceptions to its scope of application.

The Court explained in that respect that under Article 13(2) of the Directive on consumer ADR and Article 6(1)(t) of the CRD, it is not sufficient that the consumer receives the information about alternative dispute resolution simply at the time the contract is concluded with the trader, whether in the general terms and conditions of the contract or in a separate document from those general terms and conditions. Instead, the consumer must receive that information in good time before the contract is concluded and not simply at the stage of concluding the contract <sup>(97)</sup>.

In addition, Article 14(1) of Regulation (EU) No 524/2013 of the European Parliament and of the Council <sup>(98)</sup> on online dispute resolution for consumer disputes (Regulation on consumer ODR) requires traders established within the Union engaging in online sales or service contracts, and online marketplaces established within the Union, to provide on their websites an electronic link to the ODR platform <sup>(99)</sup>.

### 3.4. Additional requirements for online marketplaces

Directive (EU) 2019/2161 amends both the CRD and the UCPD by introducing information obligations for '**online marketplaces**'. Online marketplaces are defined in Article 2(17) of the CRD <sup>(100)</sup>.

#### Article 2

(17) 'online marketplace' means a service using software, including a website, part of a website or an application, operated by or on behalf of a trader which allows consumers to conclude distance contracts with other traders or consumers;

Directive (EU) 2019/2161 has added to the CRD a new Article 6a 'Additional specific information requirements for contracts concluded on online marketplaces'.

Article 6a starts with a general clause that sets out requirements regarding the accessibility of the information to be provided by the online marketplace – these formal requirements correspond to the existing ones in Article 6(1) and 8(1) for all distance contracts:

#### Article 6a

1. Before a consumer is bound by a distance contract, or any corresponding offer, on an online marketplace, the provider of the online marketplace shall, without prejudice to Directive 2005/29/EC, provide the consumer with the following information in a clear and comprehensible manner and in a way appropriate to the means of distance communication:

The specific information obligations are provided in Article 6a(1). Point (a) requires transparency of ranking parameters, while the obligations in points (b), (c) and (d) require information about status of the other contracting party, the applicability of consumer rights and who is responsible for the performance of the contract.

#### 3.4.1. Ranking criteria

#### Article 6a(1)

(a) general information, made available in a specific section of the online interface that is directly and easily accessible from the page where the offers are presented, on the main parameters determining ranking, as defined in point (m) of Article 2(1) of Directive 2005/29/EC, of offers presented to the consumer as a result of the search query and the relative importance of those parameters as opposed to other parameters;

<sup>(97)</sup> C-380/19 *Bundesverband der Verbraucherzentralen und Verbraucherverbände*, ECLI:EU:C:2020:498, paragraphs 34 – 35.

<sup>(98)</sup> Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) (OJ L 165, 18.6.2013, p. 1).

<sup>(99)</sup> <https://ec.europa.eu/consumers/odr/main/index.cfm?event=main.home2.showlng=EN>

<sup>(100)</sup> The Commission's Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector, COM(2020) 842 final of 15 December 2020, 2020/0374(COD), (Digital Markets Act) provides for additional obligations on certain marketplaces which are operated by so-called gatekeepers.

Directive (EU) 2019/2161 added a similar information obligation also to the UCPD, as a new paragraph 4a in Article 7 on misleading omissions. It also added a new point 11a to Annex I 'blacklist' of the UCPD prohibiting undisclosed advertising and paid promotion in search results.

The obligation in the CRD applies to online marketplaces enabling direct conclusion of consumer contracts with third parties (both B2C and C2C contracts). In contrast, it does not apply to price comparison tools and online search engines, when they are not acting as online marketplaces – these intermediaries are only subject to the UCPD requirements.

Ranking is defined in Article 2(m) of the UCPD as *'the relative prominence given to products, as presented, organised or communicated by the trader, irrespective of the technological means used for such presentation, organisation or communication'*. The same definition applies also in the context of the CRD.

Recital 19 of Directive (EU) 2019/2161 further explains it as *'...including resulting from the use of algorithmic sequencing, rating or review mechanisms, visual highlights, or other saliency tools, or combinations thereof'*.

The obligation to inform about the ranking parameters arises when the marketplace provides, following a consumer's search query, search results referring to products offered by different traders or consumers hosted on the marketplace. In contrast, **it does not apply to the default organisation of the online interface that is displayed to the consumer and that is not the result of a specific search query on that online interface.**

As regards the content of the information, the marketplace must provide 'general' information about the main parameters determining the ranking of products and about the 'relative importance' of those parameters as opposed to other parameters.

According to Recital 22 of Directive (EU) 2019/2161 *'Parameters determining the ranking mean any general criteria, processes, specific signals incorporated into algorithms or other adjustment or demotion mechanisms used in connection with the ranking.'*

Information on ranking is without prejudice to Directive (EU) 2016/943 of the European Parliament and of the Council <sup>(101)</sup> on trade secrets. As explained in the parallel ranking transparency obligation for all online platforms and online search engines laid down in Article 5 of Regulation (EU) 2019/1150 of the European Parliament and of the Council <sup>(102)</sup> (the 'P2B Regulation'), this means that a consideration of the commercial interests of the relevant providers should never lead to a refusal to disclose the main parameters determining ranking. At the same time, neither Directive (EU) 2016/943 nor the P2B Regulation requires disclosure of the detailed functioning of the ranking mechanisms of the relevant providers, including their algorithms <sup>(103)</sup>. The same approach applies to the information requirement under the CRD.

The description of the default ranking parameters can remain at a general level and does not have to be presented in a customised manner for each individual search query <sup>(104)</sup>. In addition to the general requirements as to its accessibility, the information about ranking parameters must be made available in a specific section of the online interface that is directly and easily accessible from the page where the offers are presented <sup>(105)</sup>.

The information obligation also applies where a trader enables searches on an online interface by **voice commands** (via **'digital assistants'**), rather than through typing. Also in this case, the information must be made available for consultation on the trader's website/application on 'a specific section of the online interface'.

The rules on ranking transparency towards consumers (in the CRD and the UCPD) define 'ranking' in materially similar terms as the P2B Regulation. The P2B Regulation requires platforms to inform their business users through information in the platform's business-to-business Terms and Conditions, or make information available in the pre-contractual stage.

<sup>(101)</sup> Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (OJ L 157, 15.6.2016, p. 1).

<sup>(102)</sup> Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (OJ L 186, 11.7.2019, p. 57).

<sup>(103)</sup> See Recital 23 of Directive (EU) 2019/2161 and Recital 27 of the P2B Regulation.

<sup>(104)</sup> See Recital 23 of Directive (EU) 2019/2161.

<sup>(105)</sup> See Article 7(4a) UCPD.

Although the respective information requirements are similar, their ‘audiences’ are different. For this reason, the CRD (and the UCPD) only require ‘general’ information about the main ranking parameters and their relative importance. This difference from the P2B Regulation reflects the information needs of **consumers who require concise information that is easy to understand**. For the same reason, the CRD (and UCPD) rules also do not require an explanation of the ‘reasons’ for the relative importance of the main ranking parameters that is required by the P2B regulation.

Practically speaking, the providers of online intermediation services will be able to use the more detailed information that they provide to their business users under the P2B Regulation as a basis for designing a consumer-oriented explanation of the ranking parameters. The Commission has issued guidelines on ranking transparency pursuant to the P2B regulation <sup>(106)</sup>. These guidelines address several questions that are also indirectly relevant in the application of the rules of the CRD and UCPD on ranking transparency, such as the concept of ‘main parameters’, ‘relative prominence’ and ‘direct and indirect remuneration’.

#### 3.4.2. Status of the other contractual party

##### Article 6a(1)

(b) whether the third party offering the goods, services or digital content is a trader or not, on the basis of the declaration of that third party to the provider of the online marketplace;

A similar requirement regarding the status of the third party supplier is laid down in the new point (f) of Article 7(4) of the UCPD dealing with the invitation to purchase.

The purpose of this information requirement specifically for online marketplaces is to make sure that consumers always know from whom they are buying a good or a service on the online marketplace – a trader or another consumer. An erroneous assumption that the third party supplier is a trader can cause problems for the consumer if something goes wrong with the online purchase (e.g. non-conformity of the goods) and if it then turns out that consumer protection rules, such as the right to withdraw within 14 days or the legal guarantee, actually do not apply to the contract.

Both provisions in the CRD and UCPD specify that the information about the status of the third party supplier should be based on a declaration of that supplier that the online marketplace then transmits to the consumer. Therefore, the online marketplace may rely primarily on the declaration provided by the third party supplier. This approach is in line with the prohibition on imposing general monitoring obligations on online intermediaries under the eCommerce Directive <sup>(107)</sup> to the extent that the relevant provisions of the e-Commerce Directive apply to the online marketplace. At the same time, it is without prejudice to the marketplace’s obligations regarding illegal content, such as acting on the basis of a notice making the platform aware of specific fraudulent offers by traders <sup>(108)</sup>.

It should be stressed that Article 6a(1)(b) sets an information requirement to promote clarity for consumers shopping on online marketplaces. The self-declaration is good indicator of the supplier’s legal status but it does not replace the definition of a ‘trader’ that remains to be applied in accordance with the specified criteria. In this respect, reference should be made to point 22 of the UCPD Annex I ‘blacklist’, which prohibits traders from pretending that they are non-traders. This prohibition applies to any incorrect or inaccurate declaration of being a non-trader under this new information rule.

#### 3.4.3. Information about non-applicability of EU consumer law

Article 6a(1)(c) aims at stimulating traders to declare their status correctly. It requires the provider of the online marketplace to warn consumers that they do not benefit from consumer rights where the third party supplier has declared its status as non-trader.

<sup>(106)</sup> Commission Notice – Guidelines on ranking transparency pursuant to Regulation (EU) 2019/1150 of the European Parliament and of the Council (OJ C 424, 8.12.2020, p. 1).

<sup>(107)</sup> The same rule is provided in the Commission proposal for the Digital Services Act, see: [https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment\\_en](https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en)

<sup>(108)</sup> See Article 14(2) of the eCommerce Directive.



## Article 6a(1)

(c) *where the third party offering the goods, services or digital content is not a trader, that the consumer rights stemming from Union consumer protection law do not apply to the contract;*

Information that EU consumer rights do not apply to the contract must accompany, in a concise and as prominent manner as possible, the information that the third party supplier has declared its status as non-trader. The main purpose of this notification is to warn consumers that they cannot count on the legal protection that they would normally expect, such as right of withdrawal or legal guarantee, so that they would enter into the contract in full knowledge of these limitations.

## 3.4.4. Allocation of responsibilities for the contract

## Article 6a(1)

(d) *where applicable, how the obligations related to the contract are shared between the third party offering the goods, services or digital content and the provider of the online marketplace, such information being without prejudice to any responsibility that the provider of the online marketplace or the third-party trader has in relation to the contract under other Union or national law.*

Consumers using an online marketplace enter into contracts either with the provider of the marketplace or with the third party supplier for the supply of specific products offered on the marketplace. In addition, the consumer also has a (framework) contract with the provider of the online marketplace and the latter has contracts with the suppliers on the marketplace. These contracts regulate the terms of use of the marketplace service for the users, including the services that the marketplace offers to the consumer in relation to their contracts with the suppliers for specific products.

Article 6a(1)(d) seeks to ensure clarity for consumers as to 'how the obligations related to the contract are shared between' the third party supplier and the provider of the marketplace when concluding contracts with third party suppliers on the marketplace. It requires the marketplace to remind the consumer about any responsibilities that the marketplace may have assumed regarding such contracts towards the consumer.

This information about the division of responsibilities between the online marketplace provider and the third party supplier has to be provided on a 'where applicable' basis. Namely, this requirement applies only where there are shared responsibilities towards consumers between the online marketplace and the third party supplier. For example, the online marketplace could assume the responsibility for the delivery of the goods, while the third party supplier remains responsible for the conformity of the goods.

CRD does not regulate how the responsibilities are to be divided between the parties. It is for the online marketplace and the third party trader to agree on their respective responsibilities regarding the contracts concluded on the marketplace, subject to applicable national law, and the marketplace has to inform consumers accordingly.

Recital 27 of Directive (EU) 2019/2161 provides an illustration of how the online marketplace could implement this new information obligation: 'The provider of the online marketplace could indicate that a third-party trader is solely responsible for ensuring consumer rights, or describe its own specific responsibilities where that provider assumes responsibility for certain aspects of the contract, for example, delivery or the exercise of the right of withdrawal.' Recital 27 also mentions that information should be provided in a clear and comprehensible manner and not merely in the standard terms and conditions or similar contractual documents.

## 3.4.5. Possibility to impose additional information requirements

Article 6a(2) allows Member States to impose additional information requirements for online marketplaces, taking into consideration the rules of the eCommerce Directive 2000/31/EC.

**Article 6a**

2. Without prejudice to Directive 2000/31/EC, this Article does not prevent Member States from imposing additional information requirements for providers of online marketplaces. Such provisions shall be proportionate, non-discriminatory and justified on grounds of consumer protection.

Accordingly, this regulatory option is similar to the more general option in Article 6(8), which allows Member States to impose additional information requirements (as discussed in section 3.1.5 above).

**4. Special requirements for distance contracts****4.1. Definition of a distance contract**

Article 2 defines distance contracts as follows: '(7) *'distance contract' means any contract concluded between the trader and the consumer under an organised 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.*

Recital 20 provides further explanations of this concept, including examples of means of distance communication: *'The definition of distance contract should cover all cases where a contract is concluded between the trader and the consumer under an organised distance sales or service-provision scheme, with the exclusive use of one or more means of distance communication (such as mail order, internet, telephone or fax) up to and including the time at which the contract is concluded. That definition should also cover situations where the consumer visits the business premises merely for the purpose of gathering information about the goods or services and subsequently negotiates and concludes the contract at a distance. By contrast, a contract which is negotiated at the business premises of the trader and finally concluded by means of distance communication should not be considered a distance contract. Neither should a contract initiated by means of distance communication, but finally concluded at the business premises of the trader be considered a distance contract. Similarly, the concept of distance contract should not include reservations made by a consumer through a means of distance communications to request the provision of a service from a professional, such as in the case of a consumer phoning to request an appointment with a hairdresser. [...]*

In concluding a distance contract, the parties may also use a **combination of several different means of distance communication** (e.g. website, mobile app, or phone call). The fact that parties meet each other after concluding the distance contract, typically at the time of delivery or payment, should not change the classification of a contract as a distance contract. If the consumer has merely visited the business premises to gather information about the goods or services, the contract that they subsequently negotiate and conclude with the trader at a distance should be considered a distance contract. Although simply taking of an appointment with the trader is not considered a distance contract, a binding reservation made, for example, by telephone of goods to be collected or services to be received at a certain time is likely to constitute a distance contract for the purposes of the Directive.

The Directive only applies to distance contracts concluded under an **organised distance sales or service-provision scheme**. For example, if a trader only exceptionally concludes a contract with a consumer by email or telephone, after being contacted by the consumer, such a contract should not be considered a distance contract under the Directive. However, it is not necessary that the trader puts in place a complex organisation, such as online interface, for distance sales. Also simpler arrangements, such as promoting the use of email or telephone for the conclusion of contracts with consumers would trigger the application of the CRD requirements.

The trader may use an online marketplace for the conclusion of contracts subject to the Directive. As explained in Recital 20: *'[...] The notion of an organised distance sales or service-provision scheme should include those schemes offered by a third party other than the trader but used by the trader, such as an online platform. It should not, however, cover cases where websites merely offer information on the trader, his goods and/or services and his contact details.'*

The application of the CRD does not depend on the technology used by a trader. It is irrelevant if a consumer concludes a 'normal' distance contract over the internet or uses blockchain execution technology <sup>(109)</sup>.

#### 4.2. **Pre-contractual information**

##### 4.2.1. *Information to be presented directly before placing the order*

#### Article 8

2. *If a distance contract to be concluded by electronic means places the consumer under an obligation to pay, the trader shall make the consumer aware in a clear and prominent manner, and directly before the consumer places his order, of the information provided for in points (a), (e), (o) and (p) of Article 6(1).*

Article 8(2) refers to information that must be provided to the consumers directly before concluding contracts by electronic means and involving payment of a price.

The Directive does not define 'electronic means' but, in view of the explanation provided in Recital 39, this term should be interpreted as referring to **contracts concluded through websites and other online interfaces**: *'It is important to ensure for distance contracts concluded through websites that the consumer is able to fully read and understand the main elements of the contract before placing his order. To that end, provision should be made in this Directive for those elements to be displayed in the close vicinity of the confirmation requested for placing the order [...]'*. Furthermore, in view of the definition of 'electronic means' in Directive (EU) 2015/1535 of the European Parliament and of the Council <sup>(110)</sup>, Article 8(2) can also apply to other technologies, such as digital content provided via TV set-top boxes.

Article 8(2) of the CRD should be seen in the context of national rules transposing the provisions of the eCommerce Directive 2000/31/EC on the formation of contracts, which apply if the contract falls under the definition of an 'information society service', i.e., any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

Article 8(9) of the CRD expressly confirms that it is without prejudice to the provisions laid down in Articles 9 and 11 of Directive 2000/31/EC, whereby the trader is required **to allow the consumer to verify the e-order before placing it**.

Accordingly, Article 8(2) of the CRD would in practice apply at the moment at which the consumer is asked to verify the order in line with the e-Commerce Directive, i.e. to check the contents of the shopping basket before clicking on the 'buy' button <sup>(111)</sup>.

<sup>(109)</sup> This principle is also valid for transactions where the so-called 'smart contracts' are used. The term 'smart contract' describes a computer program or a transaction protocol, which is intended to automatically execute, control or document legally relevant events and actions. A consensus definition of 'smart contracts' is yet to be reached. According to the Report on the legal and regulatory framework of blockchains and smart contracts, produced by ConsenSys AG on behalf of the European Union Blockchain Observatory Forum, the term generally means computer code that is stored on a blockchain and that can be accessed by one or more parties ([https://www.eublockchainforum.eu/sites/default/files/reports/report\\_legal\\_v1.0.pdf](https://www.eublockchainforum.eu/sites/default/files/reports/report_legal_v1.0.pdf)). These programs are often self-executing and make use of blockchain properties like tamper-resistance, decentralised processing, and the like. Therefore, whereas a 'smart contract' operates according to the terms of a specific contract which it executes, the term should not be used as a synonym for the contract itself.

<sup>(110)</sup> Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ L 241, 17.9.2015, p. 1). Article 1(b)(ii): **'by electronic means'** means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means.

<sup>(111)</sup> Some traders present other products the consumers 'may like' during the final stage of the ordering process and this can make it difficult for the consumers to review their order, and make sure that everything is correct. Where the presentation could confuse the consumer and prevent the proper understanding of the main elements of the contract before placing the order, such a practice could qualify as misleading under Art. 6 or 7 of the UCPD.

The terms 'directly before' in Article 8(2) should cover, firstly, the **temporal aspect** and should be construed as meaning 'immediately before'. Furthermore, the terms 'prominent manner' in Article 8(2) and 'close vicinity' in Recital 39 suggest stronger requirements on **presenting information** compared to the general requirements under Article 6(1) and 8(1). The information should be presented in a way that the consumer can actually see and read it before placing the order without being obliged to navigate away from the page used to place the order.

The specific pre-contractual information requirements referred to in Article 8(2) are:

- (1) the main characteristics (Article 6(1)(a));
- (2) the total price (Article 6(1)(e));
- (3) the duration of the contract and the conditions for terminating it (Article 6(1)(o));
- (4) where applicable, the minimum duration of the contract (Article 6(1)(p)).

#### 4.2.2. Order confirmation button

##### Article 8

##### 2. [...]

*The trader shall ensure that the consumer, when placing his order, explicitly acknowledges that the order implies an obligation to pay. If placing an order entails activating a button or a similar function, the button or similar function shall 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 subparagraph, the consumer shall not be bound by the contract or order.*

The second subparagraph of Article 8(2) requires that the button used to place the order on the website is clearly labelled. The respective indication (label) must be on the button itself or immediately next to it. It can be designed in different ways as long as it gives a clear message about the obligation to pay <sup>(112)</sup>:

- For example, terms such as 'buy now', 'pay now' or 'confirm purchase' would convey the message required by this provision;
- On the contrary, phrases such as 'register', 'confirm' or 'order now' as well as unnecessarily long phrases that may effectively conceal the message about the obligation to pay, are less likely to meet this requirement;

This requirement applies also if the trader has designed the presentation of pre-contractual information to the consumer in accordance with Article 8(4).

#### 4.2.3. Information on delivery restrictions and means of payments

##### Article 8

3. *Trading websites shall indicate clearly and legibly at the latest at the beginning of the ordering process whether any delivery restrictions apply and which means of payment are accepted.*

Under Article 8(3), trading websites must inform consumers about delivery restrictions, including geographical ones, by offering easy to understand information, in a clearly visible manner. For example, this information should not solely be mentioned in the trader's general terms and conditions or only on separate web pages that are not clearly labelled and that consumers are therefore not likely to access during their shopping session.

The information on 'delivery restrictions' provided under Article 8(3) must correspond to information about the delivery arrangements provided in accordance with Article 6(g) of the CRD.

<sup>(112)</sup> Further guidance on the interpretation of the 'corresponding unambiguous formulation' can be expected in the pending case C-249/21 *Fuhrmann-2*, which addressed the question of whether such a formulation must be assessed taking into account all the circumstances surrounding an ordering or booking process, in particular the manner in which the ordering process is structured, or solely the language used to label the button/similar function.

Delivery and payment restrictions are subject to the Geo-blocking Regulation (EU) 2018/302 of the European Parliament and of the Council <sup>(113)</sup>. In particular, automatic modification of the information on delivery restrictions on the basis of the geo-localisation of the user could entail a violation of Article 4 of the Geo-blocking Regulation, in particular where it prevents access to the goods in an area normally served by the trader.

— For example, a trader offering delivery in a given Member State according to the applicable general conditions on its international '.com' site must not automatically exclude this delivery option when it detects a consumer connecting from that Member States and for whom a dedicated national website is also available.

As regards the means of payment, Article 5 of the Geo-Blocking Regulation prohibits traders to limit their acceptance on the basis of customer's nationality, place of residence or place of establishment within the EU, such as the place of issue of the bank card.

#### 4.2.4. Contracts concluded over means of distance communication with limited space or time

Article 8(4) deals with means of distance communication allowing limited time or space to display the information:

##### Article 8

4. If the contract is concluded through a means of distance communication which allows limited space or time to display the information, the trader shall provide, on or through that particular means prior to the conclusion of such a contract, at least the pre-contractual information regarding the main characteristics of the goods or services, 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, as referred to, respectively, in points (a), (b), (e), (h) and (o) of Article 6(1) except the model withdrawal form set out in Annex I(B) referred to in point (h). The other information referred to in Article 6(1), including the model withdrawal form, shall be provided by the trader to the consumer in an appropriate way in accordance with paragraph 1 of this Article.;

Accordingly, Article 8(4) includes the same information requirements as Article 8(2), to which it adds information about:

- (1) the identity of the trader as referred to in Article 6(1)(b);
- (2) the right of withdrawal as referred to in Article 6(1)(h), i.e., information about the conditions, time limit and procedures for exercising this right.

Article 8(4) does not include the requirement under Article 6(1)(p) to provide information about 'the minimum duration of the consumer's obligations under the contract'. However, as is explained earlier in section 3.2.7, any such minimum period is also one of the major conditions for terminating a contract of indeterminate duration or an automatically extended contract under Article 6(1)(o). Therefore, in practice, this information element should also be covered by Article 8(4).

Article 8(4) applies to contracts concluded using technologies such as over the **telephone**, via **voice operated shopping assistants**, by **SMS**, or by other means of distance communication which impose technical limits on the amount of information that can be presented to the consumer <sup>(114)</sup>. In such situations, the Directive allows the trader to provide the consumer with a more limited range of information elements before the distance contract is concluded, whilst the other information required by Article 6(1) must be provided by another source in plain and intelligible language. (see also Recital 36, which refers to 'providing a toll free telephone number or a hypertext link to a webpage').

Directive (EU) 2019/2161 amended Article 8(4) of the CRD excluding from the information obligations the obligation to provide the model withdrawal form, set out in Annex I(B). Accordingly, the communication of that form by another source, in plain and intelligible language, suffices <sup>(115)</sup>. After the contract is concluded, complete information should be included in the confirmation of the contract provided on a durable medium according to Article 8(7).

<sup>(113)</sup> Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) No 2017/2394 and Directive 2009/22/E (OJ L 60I, 2.3.2018, p. 1).

<sup>(114)</sup> See also Recital 41 of Directive (EU) 2019/2161.

<sup>(115)</sup> C-430/17, *Walbusch Walter Busch*, ECLI:EU:C:2019:47, paragraph 46.

The Court dealt with the application of Article 8(4) in case C-430/17 *Walbusch Walter Busch*, which was related to distance sales via mail order (purchase order coupon distributed via newspapers and magazines).

The Court decided that the ‘assessment of whether, in a specific case, the means of communication allows limited space or time to display the information, in accordance with Article 8(4), must be carried out **having regard to all of the technical features of the trader’s marketing communication**. In that regard, it is necessary to ascertain whether, taking into account the space and time occupied by the communication and the minimum size of the typeface which is appropriate for the average consumer targeted by that communication, **all the information set out in Article 6(1) of CRD may objectively be displayed** within that communication.

In contrast, *‘the choices made by the trader concerned regarding the development and use of the space and time at its disposal as a result of the means of communication which it decided to use are not relevant for the purposes of that [assessment]’* <sup>(116)</sup>.

In practical terms, *‘the means of distance communication which allows limited space or time’* referred to in Article 8(4) are **those that do not allow for layered provision of information** (via, for example, expandable headings or hyperlinks, directing consumers to a more detailed presentation of the relevant information) – see in this respect section 3.1.1 concerning the provision of consumer information in clear and comprehensible manner.

**Smartphones** do not qualify as *‘means of distance communication which allows limited space or time to display the information’*, since additional information can always be provided also to users of such screens via expanding content trees or additional pages. Where the trader has customised the content and presentation of the online interface for such devices, it can use Article 8(4) and the related case law as guideline for selecting information that should be provided most prominently. In these cases, the trader can focus on the information elements required by Article 8(4), where appropriate in an expandable <sup>(117)</sup> format, and provide the rest of the mandatory information via additional pages.

#### 4.3. **Contracts concluded by telephone**

##### Article 8

5. *Without prejudice to paragraph 4, if the trader makes a telephone call to the consumer with a view to concluding a distance contract, he shall, at the beginning of the conversation with the consumer, disclose his identity and, where applicable, the identity of the person on whose behalf he makes that call, and the commercial purpose of the call.*

Article 8(5) contains a special rule for contracts concluded by telephone requiring that the trader’s identity and the commercial purpose of the call are made clear at the beginning of the conversation. Since this rule is *‘without prejudice to paragraph 4’*, **traders may limit the information provided during the telephone call in accordance with Article 8(4)**.

##### Article 8

6. *Where a distance contract is to be concluded by telephone, Member States may provide that 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. Member States may also provide that such confirmations have to be made on a durable medium.*

Article 8(6) contains another regulatory choice available to Member States. Some Member States have used this regulatory choice in a more limited way, i.e., they applied the respective additional requirements only to contracts concluded by telephone call **initiated** by the trader.

<sup>(116)</sup> Ibid, paragraph 39.

<sup>(117)</sup> Traders could use the ‘tables of contents’ approach using expandable headings. At the top level, consumers could find the main topics, each of which can be expanded by clicking on it, so that the consumers are directed to a more detailed presentation of the relevant information. In this way, the consumers have all the required information in one place, while retaining control over what to review and when.

'Durable medium' in this provision refers to paper and other durable media as explained in Recital 23: '*Durable media should enable the consumer to store the information for as long as it is necessary for him to protect his interests stemming from his relationship with the trader. Such media should include in particular paper, USB sticks, CD-ROMs, DVDs, memory cards or the hard disks of computers as well as e-mails.*' Therefore, Member States may require that both the trader's confirmation of the offer and the consumer's consent be on a durable medium, which is not necessarily on paper and may be, for example, in an email exchange.

#### 4.4. Confirmation of the contract

##### Article 8

7. The trader shall provide the consumer with the confirmation of the contract concluded, on a durable medium 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. That confirmation shall include:

- (a) all the information referred to in Article 6(1) unless the trader has already provided that information to the consumer on a durable medium prior to the conclusion of the distance contract; and
- (b) where applicable, the confirmation of the consumer's prior express consent and acknowledgment in accordance with point (m) of Article 16.

The trader should provide the consumer with a confirmation of the contract including all the information required under Article 6(1) unless this has already been provided on a durable medium, such as in a mail order catalogue, SMS or email, before the contract was concluded.

The definition of a 'durable medium' was examined by the Court in case C-49/11 *Content Services* concerning the Distance Selling Directive 97/7/EC, which also required confirmation of a distance contract on a durable medium in Article 5(1). According to the Court's ruling, a mere provision of information on a website does not constitute durable medium: '*Article 5(1) of 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 must be interpreted as meaning that a **business practice consisting of making the information referred to in that provision accessible to the consumer only via a hyperlink on a website of the undertaking concerned does not meet the requirements of that provision**, since that information is neither 'given' by that undertaking nor 'received' by the consumer, within the meaning of that provision, and **a website such as that at issue in the main proceedings cannot be regarded as a 'durable medium' within the meaning of Article 5(1).***'<sup>(118)</sup>.

At the same time, the Court did not exclude the possibility for certain websites to qualify as durable media if they met the requirements: '*There is nothing in the file to indicate that the seller's website, to which the link sent to the consumer connects, allows that consumer to store information which is personally addressed to him in such a way that he can access it and reproduce it unchanged during an adequate period without the seller being able to amend the content unilaterally.*'<sup>(119)</sup>.

The 'durable medium' concept was further analysed in case C-375/15 *BAWAG*, in relation to the Directive 2007/64/EC of the European Parliament and of the Council<sup>(120)</sup> on payment services which contained a similar definition of 'durable medium'. The Court held that certain websites can be classified as 'durable media', subject to specific conditions:

- the website allows the consumer to store information addressed to her/him personally in such a way that s/he may access it and reproduce it unchanged for an adequate period, **without any unilateral modification of its content by the service provider or by another trader being possible**; and
- if the consumer is obliged to consult that website in order to become aware of the information, **the transmission of that information must be accompanied by active behaviour on the part of the provider aimed at drawing the consumer's attention** to the existence and availability of that information on that website<sup>(121)</sup>.

<sup>(118)</sup> C-49/11, *Content Services Ltd*, ECLI:EU:C:2012:419, paragraph 51.

<sup>(119)</sup> *Ibid.*, paragraph 46.

<sup>(120)</sup> Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC (OJ L 319, 5.12.2007, p. 1).

<sup>(121)</sup> C-375/15, *BAWAG*, ECLI:EU:C:2017:38, paragraphs 43–45.

Accordingly, a customer's private online account with the trader where the trader uploads the information addressed to the consumer and cannot remove and change it unilaterally, could be considered a durable medium for the purposes of the Directive. If such an account is the trader's only way of providing contract confirmation, its **continued accessibility to the consumer** should be ensured for an adequate period also after the consumer's contract with the trader is terminated.

As regards what constitutes 'active behaviour' for drawing attention to new communication, the CJEU confirmed in the BAWAG case that sending an email to the consumer's personal mailbox can be sufficient, on condition that: (i) the respective mailbox is regularly used by the consumer to communicate with other persons and (ii) the parties agreed to use it in the respective service contract entered into between the trader and consumer. The address thus chosen may not, however, be the mailbox assigned to the consumer on the website managed by the trader <sup>(122)</sup>.

The trader should remain subject to the obligation under Article 8(7) to provide the confirmation of the contract on a durable medium also if pre-contractual information was provided to the consumer in accordance with Article 8(4). This obligation can be considered duly performed, inter alia, when, with the agreement of the consumer, the trader sends a confirmation of the contract by email.

As regards the **timing of the confirmation** Article 8(7) requires it to be sent '*within a reasonable time after the conclusion of the distance contract*'. In addition, the confirmation has to be provided at the latest at the time of the delivery of the goods or before the performance of the service begins.

For **services**, there is no requirement to provide the confirmation before the end of the withdrawal period (if the performance of the contract starts after this period ends). However, the requirement for the confirmation to be sent within a 'reasonable time' implies that it should be sent early enough to allow the consumer to exercise the right of withdrawal. Whether a belated confirmation should be regarded as unreasonable in the sense of Article 8(7) would have to be decided on a case-by-case basis.

There is no explicit absolute deadline for the confirmation of contracts for the **supply of public utilities and contracts for online digital content**. By way of analogy, the rules on service contracts should apply to these contracts, i.e., the confirmation should be provided at the latest before the performance of the contract begins. This analogy seems to be reinforced by the common rules under the Directive regarding the calculation of the right of withdrawal period for these contracts in accordance with Article 9(2)(a) and (c).

Contracts for **online digital content** are usually performed immediately, i.e., before the right of withdrawal period expires, and the most common means of confirmation is email. In this context a relevant question to ask is whether the traders concerned have to ensure that the consumer actually receives the confirmation by email before the download or streaming of the digital content begins, or whether it is enough that the trader sends such an email before performance of the contract starts.

It should be noted here that Article 8(7) does not refer to 'reception' of the confirmation by the consumer; instead it requires the trader to 'provide' it. The meaning of the terms 'provide' and 'receive' in the context of the Distance Selling Directive 97/7/EC was considered by the CJEU in case C-49/11 *Content Services*. Article 5(1) of the Distance Selling Directive stated that the consumer must **receive** confirmation in writing or on another durable medium available and accessible to them in good time unless the information has already been **given** to them prior to conclusion of the contract in writing or on another durable medium.

The Court noted in its judgment that the notions of 'given' and 'received' are different from the term 'provided', which are used in other provisions of the Directive and which the Court regarded as a 'neutral' formulation: '*It should also be noted in that regard that, whereas the European Union legislature opted, in Article 4(1) of Directive 97/7/EC, in the vast majority of the linguistic versions, for a neutral formulation, according to which the consumer is to be 'provided' with the relevant information, it chose, by contrast, a term with greater implications for the business in Article 5(1) of that directive, according to which the consumer must 'receive' confirmation of that information. [...]*' <sup>(123)</sup>.

<sup>(122)</sup> Ibid., paragraphs 51 and 53.

<sup>(123)</sup> C-49/11, *Content Services Ltd*, ECLI:EU:C:2012:419, paragraph 35.



It should also be acknowledged that the trader is not in control of the confirmation e-mail's transmission process. In light of this, the requirements of Article 8(7) are met if the confirmation email is sent **immediately before** the digital content is supplied, i.e., before the streaming or download starts.

## 5. The right of withdrawal

### 5.1. Calculation of the right of withdrawal period

#### 5.1.1. Introduction

#### Article 9

1. Save where the exceptions provided for in Article 16 apply, the consumer shall have a period of 14 days to withdraw from a distance or off-premises contract, without giving any reason, and without incurring any costs other than those provided for in Article 13(2) and Article 14.

1a. Member States may adopt rules in accordance with which the withdrawal period of 14 days referred to in paragraph 1 is extended to 30 days for contracts concluded in the context of unsolicited visits by a trader to a consumer's home or excursions organised by a trader with the aim or effect of promoting or selling products to consumers [...];

Article 9 gives the consumer **14 days to withdraw** from a distance or off-premises contract without giving any reason. For contracts concluded in the context of unsolicited visits by a trader to a consumer's home or excursions organised by a trader with the aim or effect of promoting or selling products to consumers, Member States may extend the withdrawal period of 14 to 30 days. The application of the regulatory choices in case of unsolicited visits or excursions is discussed in section 5.9.

Recital 41 specifies that '[...] all periods contained in this Directive should be understood to be expressed in **calendar days**. Where a period expressed in days 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 the period in question.'

Accordingly, '14 days'/'30 days', in this provision should mean 14 or, respectively, 30 calendar days, starting from the day following the day on which the relevant event occurs (i.e., the conclusion of the contract or delivery of goods):

— For example, if the goods are delivered or the service contract is concluded on 1 March, the last day to exercise the right of withdrawal should be 15 March, or, in the cases provided for in paragraph 1a, 31 March.

Recital 41 points out that Regulation (EEC, Euratom) No 1182/71 of the Council <sup>(124)</sup> applies to the Directive. According to this Regulation (Article 3(3)): 'The periods concerned shall include public holidays, Sundays and Saturdays, save where these are expressly excepted or where the periods are expressed in working days.'

So public holidays, Sundays and Saturdays are **included** in the 14 days/30 days.

However, if the withdrawal period **ends** on one of these days, it should be extended to the next working day because Article 3(4) of Regulation 1182/71 states that: 'Where the last day of a period expressed otherwise than in hours is a public holiday, Sunday or Saturday, the **period shall end with the expiry of the last hour of the following working day**.'

The lists of days designated as public holidays by Member States for the purposes of Regulation 1182/71 are published in the OJ <sup>(125)</sup>.

— For example, if the 14-day right of withdrawal period for a contract concluded with a Romanian consumer ends on 25 December 2021, it should be extended until 27 December because the 25 and 26 December are designated as public holidays in Romania in 2021.

Although traders should accept the consumer's right to withdraw from the contract during the extended withdrawal period, they have no express obligation to inform the consumer that an extension is possible (see also the 'Model instructions on withdrawal' annexed to the Directive).

<sup>(124)</sup> Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits (OJ L 124, 8.6.1971, p. 1).

<sup>(125)</sup> For example, the list for 2021 is available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3AC2020%2F451%2F02qid=1617356863154>.

## 5.1.2. Starting point of the withdrawal period

## Article 9

2. Without prejudice to Article 10, the withdrawal period referred to in paragraph 1 of this Article shall expire after 14 days or, in cases where Member States have adopted rules in accordance with paragraph 1a of this Article, 30 days from:

- (a) in the case of service contracts, the day of the conclusion of the contract;
- (b) in the case of sales contracts, the day on which the consumer or a third party other than the carrier and indicated by the consumer acquires physical possession of the goods or:
  - (i) in the case of multiple goods ordered by the consumer in one order and delivered separately, the day on which the consumer or a third party other than the carrier and indicated by the consumer acquires physical possession of the last good;
  - (ii) in the case of delivery of a good consisting of multiple lots or pieces, the day on which the consumer or a third party other than the carrier and indicated by the consumer acquires physical possession of the last lot or piece;
  - (iii) in the case of contracts for regular delivery of goods during defined period of time, the day on which the consumer or a third party other than the carrier and indicated by the consumer acquires physical possession of the first good;
- (c) in the case of contracts for the supply of water, gas or electricity, where they are not put up for sale in a limited volume or set quantity, of district heating or of digital content which is not supplied on a tangible medium, the day of the conclusion of the contract.

The day from which the 14-day/30-day right of withdrawal period is calculated depends on whether the contract is a sales contract, a service contract, a contract for online digital content or a contract for the supply of public utilities. The Directive provides for two starting points:

- **the day of the conclusion of the contract** – for service contracts, contracts for the supply of public utilities, and contracts for online digital content;
- **the day of taking physical possession of goods (delivery)** – for sales contracts but subject to several special rules for: (1) multiple goods ordered in one order and delivered separately; (2) goods consisting of multiple lots or pieces and delivered separately; and (3) contracts for regular delivery of goods during defined period of time.

For goods that are delivered, the withdrawal period begins the day after they come into physical possession of the consumer or another person indicated by the consumer, other than a carrier (Article 9(2)(b)). This differs from Article 20, which provides for the risk to pass to the consumer as soon as the goods are delivered to the carrier if the carrier was commissioned by the consumer and not offered by the trader.

If there is more than one delivery, the withdrawal period begins the day after delivery of **the last of the goods ordered in a single order but delivered separately** (Article 9(2)(b)(i)). This rule is justified by the consumer's legitimate interest in receiving all parts of a single order before deciding whether to withdraw from the contract, for example, for:

- a main good and accessories, such as a camera and lens, or
- clothing such as a jacket and trousers, which were ordered together and intended to be worn together.

In such cases, a single withdrawal period should apply from the day after delivery of the last item.

As stated in Recital 40: '[...] the consumer should be able to exercise the right to withdraw **before acquiring physical possession of the goods**'. Moreover, nothing prevents the consumer from refusing to take possession of the goods in this case:

- For example, after ordering an item from trader X the consumer finds a better offer for the same item from trader Y; the consumer therefore notifies trader X of the exercise of the right of withdrawal and does not pick up the item at the post office.

## 5.2. Information about the right of withdrawal

Article 6(1) requires traders to provide certain information about the right of withdrawal from off-premises and distance contracts.

### Article 6(1)

- (h) where a right of withdrawal exists, the conditions, time limit and procedures for exercising that right in accordance with Article 11(1), as well as the model withdrawal form set out in Annex I(B);
- (i) where applicable, that the consumer will have to bear the cost of returning the goods in case of withdrawal and, for distance contracts, if the goods, by their nature, cannot normally be returned by post, the cost of returning the goods;
- (j) that, if the consumer exercises the right of withdrawal after having made a request in accordance with Article 7(3) or Article 8(8), the consumer shall be liable to pay the trader reasonable costs in accordance with Article 14(3);
- (k) where a right of withdrawal is not provided for in accordance with Article 16, the information that the consumer will not benefit from a right of withdrawal or, where applicable, the circumstances under which the consumer loses his right of withdrawal; [...]

Under Article 6(1), the information must be clear and comprehensible. Under Article 6(4), the trader may use the model instructions on withdrawal set out in **Annex I(A)** of the Directive to provide the information referred to in points (h), (i) and (j). If the information is filled in correctly and given to the consumer, the trader has met these information requirements.

However, these **model instructions on withdrawal** in Annex I(A) **are not mandatory** and the trader may adjust their wording, for example, using the terms 'I/me' instead of 'we/us' if the trader is an individual entrepreneur or displaying the trader's identity and contact details in the header of the form and referring to these details in the text.

By contrast, if the right of withdrawal under Article 6(1)(h) applies, the trader should always provide the consumer with the **model withdrawal form** set out in Annex I(B), even if the trader **also** gives the consumer the option of filling in and sending a **form on its website** about the right of withdrawal, in line with Article 11(3). Different rules apply regarding the provision of the model withdrawal form when contracts are concluded over means of distance communication with limited space or time in accordance with Article 8(4) – see section 4.2.4.

The additional withdrawal form that the trader may opt to provide on its website in line with Article 11(3) may be **different from the model withdrawal form** set out in Annex I(B) of the CRD. But if the trader wishes to use such online form to collect more information from the consumer, such as the reasons for the withdrawal, any other questions of this kind should be presented separately and it should be possible to send the form without answering them.

When providing information on time limits under Article 6(1)(h) for withdrawal from sales contracts under Article 9 (except for contracts for regular delivery of goods), if the exact mode of delivery (single or multiple) is not known in advance, the trader may inform the consumer that the withdrawal period will expire after 14 days/30 days from the day after the consumer acquires, or a third party indicated by the consumer, other than carrier, acquires **physical possession of the last good or lot of the order**.

Where one of the **exceptions from the right of withdrawal** provided in Article 16 applies, the consumer should be informed about the exception under Article 6(1)(k).

Where one of the **unconditional exceptions applies**, only the information required under Article 6(1)(k) should be provided, not the information about the right of withdrawal under Article 6(1)(h) and (i):

— For example, for goods such as flowers, covered by the exception in point (d) of the first paragraph of Article 16, only the information required by Article 6(1)(k) is relevant, i.e. the trader should inform the consumer that there is no right of withdrawal from the contract because these goods are liable to deteriorate or expire rapidly.

By contrast, for **exceptions which only apply in certain circumstances**, the information required by Article 6(1)(k) should be provided **in addition** to the information required under Article 6(1)(h) and (j):

- For example, when offering contact lenses or a tooth brush, whose packaging constitutes a 'seal' within the meaning of point (e) of the first paragraph of Article 16, the trader should inform the consumer of the conditions, time limits, etc. for withdrawal as required under Article 6(1)(h). The trader should also inform the consumer that, for health protection and hygiene reasons, the consumer loses the right of withdrawal if the packaging of the goods is opened.

Article 6(1)(i) requires the trader to state **the cost of returning the goods** that cannot normally be returned by post:

- For example, this applies to bulky items, such as furniture and large equipment (fridges, washing machines etc.), which are typically delivered door-to-door rather than handed in for dispatch at a post office.

Recital 36 explains that this information requirement is met, for example, if the trader specifies one carrier (for instance the carrier assigned to deliver the good) and one price for returning the goods.

Recital 36 also states that '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**'.

Where the trader offers different delivery methods, the return cost may be estimated based on the cost of the specific delivery method chosen by the consumer:

- For example, if the delivery is arranged to the consumer's street address, then also the cost of return may be based on the cost of collecting the goods at that street address.

The obligation to state the return cost or provide an estimate should not require the trader to provide this information for different possible return scenarios (such as returning in assembled form furniture that was delivered unassembled in a package).

### 5.3. Exercise of the right of withdrawal

Article 11 of the Directive provides that the consumer can withdraw from the contract by either using the model withdrawal form or making any other unequivocal statement. The relevant Recital 44 refers to 'returning the goods with a clear statement': '[...] However, the consumer should remain free to withdraw **in his own words**, provided that his statement setting out his decision to withdraw from the contract to the trader is unequivocal. A letter, a telephone call or returning the goods with a clear statement could meet this requirement, but the burden of proof of having withdrawn within the time limits fixed in the Directive should be on the consumer. For this reason, it is in the interest of the consumer to make use of a durable medium when communicating his withdrawal to the trader.'

Accordingly, it should not be possible to withdraw from the contract by simply returning the goods without any explicit statement to this effect. Refusing delivery or not picking the goods up at the post office would not as such count as valid expressions of withdrawal. In this way, the Directive ensures that the trader would not wrongly consider the return of a package as withdrawal, when it has not been delivered to the customer for some technical reason.

On the other hand, the statement used by the consumer to withdraw from the contract does not necessarily have to refer to the 'right of withdrawal' in legal terms:

- For example, also a statement of 'terminating' or 'retracting' from the contract or using similar words should be considered as sufficiently 'unequivocal' as long as the consumer and the contract in question are identifiable.

Since the consumer bears the burden of proof regarding the exercise of the right of withdrawal, Recital 44 of the CRD highlights the benefits of using a durable medium in case there is any dispute. Furthermore, evidence of having sent the notification would obviously provide an additional safeguard for the consumer to prove his case:

- For example, the consumer could keep a copy of the sent email or of the receipt for registered post.

#### 5.4. *Consequences of the withdrawal concerning the data*

Article 13 of the CRD sets out the obligations of the trader in the event of withdrawal. Directive (EU) 2019/2161 amended that Article by introducing provisions on consequences of the right of withdrawal regarding the handling of data.

Article 13

4. *In respect of personal data of the consumer, the trader shall comply with the obligations applicable under Regulation (EU) 2016/679.*

5. *The trader shall refrain from using any content, other than personal data, which was provided or created by the consumer when using the digital content or digital service supplied by the trader, except where such content:*

- (a) has no utility outside the context of the digital content or digital service supplied by the trader;*
- (b) only relates to the consumer's activity when using the digital content or digital service supplied by the trader;*
- (c) has been aggregated with other data by the trader and cannot be disaggregated or only with disproportionate efforts; or*
- (d) has been generated jointly by the consumer and others, and other consumers are able to continue to make use of the content.*

6. *Except in the situations referred to in point (a), (b) or (c) of paragraph 5, the trader shall, at the request of the consumer, make available to the consumer any content, other than personal data, which was provided or created by the consumer when using the digital content or digital service supplied by the trader.*

7. *The consumer shall be entitled to retrieve that digital content free of charge, without hindrance from the trader, within a reasonable time and in a commonly used and machine-readable format.[...]*

These provisions are identical to Article 16(2)–(4) of the Digital Content Directive ('DCD'). They both address consequences of the contract termination – the CRD addresses the termination of the contract under the right of withdrawal whilst the DCD addresses the termination of the contract due to the lack of conformity.

The General Data Protection Regulation (GDPR) regulates **the consequences of the termination of the contract as regards personal data**. The new provisions of Article 13 of the CRD (and Article 16 of the DCD) address the data that the consumer uploaded or generated through the use of the digital service and **which are not personal data**.

In particular, according to Article 13(6) of the CRD, in response to the consumer's request, the trader has an obligation to provide the data in machine-readable format that is commonly used at the time the contract is terminated following the exercise of the right of withdrawal.

If consumers exercise their right of withdrawal under the CRD (or the contract termination remedy under the DCD), **it is a matter of the GDPR to assess whether the withdrawal from the contract also constitutes the withdrawal of legal basis for the processing of personal data**. In many situations, it is very likely that the declaration of the consumer to exercise the right of withdrawal and to terminate the contract can be interpreted **as including a withdrawal of the legal basis**, including withdrawal of consent to other processing of personal data that was not necessary for the performance of the contract in the meaning of the GDPR. In this situation, the trader/controller has to assess if there is still a valid legal basis for such other processing of those personal data such as, for example, compliance with a legal obligation. In the absence of a valid legal basis, the processing should be discontinued.

In addition, Directive (EU) 2019/2161 added to the CRD specific rules on the **trader's rights and consumer's obligations in the case of withdrawal**. These provisions in Articles 13(8) and 14(2a) are identical to Articles 16(5) and 17(1) of the DCD.

Article 13

8. *In the event of withdrawal from the contract, the trader may prevent any further use of the digital content or digital service by the consumer, in particular by making the digital content or digital service inaccessible to the consumer or disabling the user account of the consumer, without prejudice to paragraph 6.*

Article 14

2a. *In the event of withdrawal from the contract, the consumer shall refrain from using the digital content or digital service and from making it available to third parties.*

### 5.5. **Right of withdrawal in respect of goods**

#### 5.5.1. *Multiple or defective goods*

A consumer may want to **partly withdraw** from a contract for multiple goods if wishing to cancel the purchase of only one or some of them.

Although the Directive does not expressly provide for such a right, it also does not prevent the trader and the consumer from agreeing on a **partial withdrawal** from the contract by returning only an individual good or several goods sold under a single order. In such a situation, where the goods supplied under the same contract include promotional items, the trader should not be obliged to agree to the return of only those items sold at full price.

The situation would be different if the consumer has not agreed to receive a gift that the trader has nevertheless provided. Such a gift may be treated as unsolicited supply of goods and so falls under the rules on inertia selling. Article 27 of the CRD and point 29 of Annex I to the Unfair Commercial Practices Directive 2005/29/EC prohibit '*Demanding immediate or deferred **payment for or the return or safekeeping of products** supplied by the trader, but not solicited by the consumer [...]*'.

If the consumer has been supplied with a faulty good, which is not in conformity with the contract as provided for in the Sale of Goods Directive, the consumer should have the choice, within the right of withdrawal period, of either invoking the remedies under that Directive or withdrawing from the contract.

#### 5.5.2. *Return of the goods*

Article 14

1. *Unless the trader has offered to collect the goods himself, the consumer shall send back the goods or hand them over to the trader or to a person authorised by the trader to receive the goods, without undue delay and in any event not later than 14 days from the day on which he has communicated his decision to withdraw from the contract to the trader in accordance with Article 11. The deadline shall be met if the consumer sends back the goods before the period of 14 days has expired.*

*The consumer shall only bear the direct cost of returning the goods unless the trader has agreed to bear them or the trader failed to inform the consumer that the consumer has to bear them.*

*In the case of off-premises contracts where the goods have been delivered to the consumer's home at the time of the conclusion of the contract, the trader shall at his own expense collect the goods if, by their nature, those goods cannot normally be returned by post.*

Article 14(1) requires the consumer to return the goods to the trader by sending them back within 14 days from the day after the consumer notified the trader of withdrawal from the contract. However, as the consumer is responsible for handling the goods and their diminished value during the right of withdrawal period (see also section 5.5.4), it should be in the consumer's natural interest to return them as soon as possible, rather than wait until the deadline expires.

There is an exception for **off-premises contracts**. If the goods have been delivered to the consumer's home at the time of the conclusion of the contract, **the trader has to collect** at his own expense those goods, which 'cannot normally be returned by post'.

This requirement is, accordingly, an exception from the general rule in Article 6(1)(i) requiring traders to **inform the consumer** about the cost of returning goods which ‘cannot normally be returned by post’ (see section 5.2).

The **direct cost of returning the goods** is paid by the consumer unless the trader has failed to inform the consumer of this requirement under Article 6(1)(i) or has agreed to bear the cost. These two items of information are also included in the Model instructions on withdrawal in Annex I(A), which traders can use to meet their obligation to inform the consumer. The notion of ‘direct cost’ should exclude any administrative, handling or ‘restocking’ cost borne by the trader in connection with the return of the goods.

An offer by the trader to **‘collect the goods himself’** should bind the consumer only if the trader has also offered to **bear the cost**. If that is not the case and the consumer finds a more cost-efficient and still reliable method of return offered by a recognised service provider, the consumer should not be obliged under the Directive to accept the trader’s offer to collect the goods.

### 5.5.3. Reimbursement of the payments received from the consumer

#### Article 13

1. The trader shall reimburse all payments received from the consumer, including, if applicable, the costs of delivery without undue delay and in any event not later than 14 days from the day on which he is informed of the consumer’s decision to withdraw from the contract in accordance with Article 11.

The trader shall carry out the reimbursement referred to in the first subparagraph using the same means of payment as the consumer used for the initial transaction, unless the consumer has expressly agreed otherwise and provided that the consumer does not incur any fees as a result of such reimbursement.

2. Notwithstanding paragraph 1, the trader shall not be required to reimburse the supplementary costs, if the consumer has expressly opted for a type of delivery other than the least expensive type of standard delivery offered by the trader.

3. 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.

Article 13(1) requires the trader to carry out the reimbursement without undue delay and by **no later than 14 days** from the day the consumer informs the trader of the decision to withdraw from the contract.

For sales contracts, under Article 13(3), the trader can only **withhold the reimbursement beyond this deadline** until he has either received the goods or at least evidence has been supplied by the consumer that the goods have been sent back.

If the goods or the evidence are received after the 14-day period expires, the trader should reimburse the consumer without undue delay. What constitutes ‘undue delay’ must be assessed on a case-by-case basis; however, in normal circumstances it should not take more than a few working days to process the refund.

The concept of **‘evidence of having sent back the goods’** is important for the application of Article 13(3). In principle, this ‘evidence’ should be understood as a written statement from an established transport or postal service provider specifying the sender and the recipient.

In principle, this evidence should not necessarily have to involve third party guarantees that the goods in question have been inspected and verified. Such extra services are likely to be expensive and could discourage the consumer from exercising the right of withdrawal, which is specifically precluded by the Directive (see Recital 47: ‘[...] The obligations of the consumer in the event of withdrawal should not discourage the consumer from exercising his right of withdrawal’).

Although Article 14(2) entitles the trader to hold the consumer liable for any diminished value of the goods caused by mishandling during the right of withdrawal period, under Article 13(3) the trader must reimburse the consumer after having received evidence that the goods have been sent back.

If the consumer accepts the trader's offer to collect the goods, or the trader has offered to collect them at his expense, the trader should not be able to invoke the right to withhold the refund under Article 13(3). This should provide an additional incentive to the trader to arrange for the return of the goods as soon as possible.

Article 13(1) specifically requires the trader to use **the same means of payment** for the refund as the consumer used for the initial transaction. In particular, the trader should refund the full amount paid by the consumer in the currency of the payment:

- For example, if the consumer paid by transferring EUR 50 to the trader's bank account, the trader should reimburse the consumer by transferring the same amount back, covering also any fees charged for the latter transfer by the consumer's bank.
- However, the trader should not have to cover any bank fees paid by the consumer for the initial payment.
- If the consumer's bank account is in one currency but the payment and refund are made in a different currency, the trader should not be responsible for any loss arising from the currency exchange performed by the consumer's bank on the refund.

Article 13(1) also allows the trader and the consumer to expressly agree on **a different method**, such as reimbursement by bank cheque instead of transfer or in a currency other than the currency of payment, provided that the consumer does not incur any fees as a result of using a different method:

- For example, if the trader gets the consumer's agreement to accept a refund by bank cheque instead of a bank transfer, the trader should bear any additional costs to the consumer, for example, currency exchange or bank costs, arising from the trader's use of a different payment method.

Recital 46 states regarding the use of **vouchers**: 'The reimbursement should not be made by voucher unless the consumer has used vouchers for the initial transaction or has expressly accepted them'.

#### 5.5.4. Consumer's liability for mishandling of the goods

##### Article 14

2. The consumer shall only be 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 consumer shall in any event not be liable for diminished value of the goods where the trader has failed to provide notice of the right of withdrawal in accordance with point (h) of Article 6(1).[...]

5. Except as provided for in Article 13(2) and in this Article, the consumer shall not incur any liability as a consequence of the exercise of the right of withdrawal.

As explained in Recital 47, the consumers can withdraw from the contract regardless of how the goods have been handled during the withdrawal period: 'Some consumers exercise their right of withdrawal after having used the goods to an extent more than necessary to establish the nature, characteristics and the functioning of the goods. **In this case the consumer should not lose the right to withdraw but should be liable for any diminished value of the goods.**[...]'

However, in these cases Article 14(2) makes the consumer 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'. Recital 47 further explains this obligation: '[...]. In order to establish the nature, characteristics and functioning of the goods, **the consumer should only handle and inspect them in the same manner as he would be allowed to do in a shop.** For example, the consumer should only try on a garment and should not be allowed to wear it. Consequently, the consumer should handle and inspect the goods with due care during the withdrawal period.'

The diminished value of the goods can consist, in particular, of the cleaning and repairs cost and, if the goods can no longer be sold as new, the objectively justified loss of income for the trader when disposing of the returned good as second-hand good.

Whether the consumer's testing of the goods went beyond what was necessary to establish their nature, characteristics and functioning will have to be assessed on a case-by-case basis in the event of a dispute. The comparison with what the consumer can normally do in a brick- and-mortar shop serves as a good point of reference, for example:

- Before purchasing audio/video and recording equipment, the consumer would normally be able to test the image or sound quality;



- Trying on a garment in a shop would not involve the removal of the manufacturer's tags;
- The consumer would not normally be able to practically test household appliances, such as kitchen appliances, the actual use of which unavoidably leaves traces;
- The consumer would not be able to configure software on a computer; hence reasonable costs for any resetting of such equipment would also constitute diminished value.
- The consumer could test perfumes and similar cosmetic products, which can be normally tested in shops, by means of a free tester that the trader could include with the product. That way, the consumers would not need to open the packaging of the product in order to exercise their right to establish their nature and characteristics (certain cosmetic products may be sealed for health protection or hygiene reasons – see section 5.11.4).

It should be kept in mind that 'establishing the functioning' of the goods in this context is different from checking that they are fault-free in every respect. If the goods turn out to be faulty in later use, the consumer is protected by the Sale of Goods Directive (EU) 2019/771.

In principle, the consumer should be able **to open the packaging** to access the content(s) inside if similar goods are normally displayed in shops in unpacked condition. Hence, damage caused to the packaging by merely opening it is not a cause for compensation. **However, any protective films applied to the item should only be removed where strictly necessary to test it.**

Returning the goods without the original packaging <sup>(126)</sup> (e.g. the box containing an electronic device), or with abnormal depreciation of the packaging, could be considered as a depreciation of the goods.

In case C-681/17 *slewo*, the CJEU decided that **mattresses** covered with protective film do not fall under the exception of the right of withdrawal provided in Article 16(e) regarding goods that have been sealed for health protection or hygiene reasons and unsealed by the consumer. The Court considered that mattresses may be equated with garments for which the right to try them on is expressly authorised. Therefore, mattresses with their protective film removed and potentially used by the consumer were deemed suitable for being sold again and used by a new buyer **in so far as the trader is in a position to make mattresses (or garments) suitable for new use by a third party, without prejudice to the requirements of health protection or hygiene**, by means of a treatment such as cleaning or disinfection <sup>(127)</sup>.

At the same time, the Court specifically referred to the existence of a market for second-hand mattresses <sup>(128)</sup>. Even more importantly, the Court also referred to **the consumer's liability for any diminished value of the goods** resulting from handling other than that necessary in order to establish their nature, characteristics and functioning in accordance with Article 14(2).

In light of these findings, such liability can accordingly arise if **it is necessary, for the sake of health protection or hygiene, to clean the mattress (or garment and comparable goods)** in order to sell it again to a new buyer. It can also arise where **such cleaned goods cannot be sold as new goods but only as second hand goods** at a (significantly) lower price. In this respect, the trader must not mislead the new buyer of the cleaned goods as to their specification (new or 'used'), as this is important part of the products characteristics, also in the context of the UCPD.

In relation to the right of withdrawal under the replaced Distance Selling Directive 97/7/EC the Court ruled in case C-489/07 *Pia Messner* <sup>(129)</sup> that a national rule **placing on the consumer the onus of proving** that they did not use those goods during the period for withdrawal in a manner which went beyond what was necessary to permit them to make effective use of his right of withdrawal would adversely affect the efficiency and effectiveness of the right of withdrawal.

According to Article 14(5), the consumer does not incur any liability as a consequence of the exercise of the right of withdrawal, except as provided in the Directive. In this respect, the judgement in the *Messner* case also confirmed that a seller may not claim compensation for the value of the use derived by the consumer from the goods in the interim period before their return to the trader <sup>(130)</sup>.

<sup>(126)</sup> This concerns packaging designed for that product which is part of its marketing presentation. Consumers should be allowed to replace any ubiquitous packaging provided only for the protection of the goods in transit.

<sup>(127)</sup> C-681/17, *slewo*, ECLI:EU:C:2019:255, paragraphs 43–46.

<sup>(128)</sup> *Ibid.*, paragraph 42.

<sup>(129)</sup> C-489/07, *Messner*, ECLI:EU:C:2009:502, paragraph 27.

<sup>(130)</sup> *Ibid.*, paragraphs 22 – 24.

The CRD does not regulate the **enforcement of the consumer's liability** for the diminished value of the goods. In particular, it does not say whether this liability merely implies that the trader may bring legal proceedings against the consumer or that the trader may unilaterally charge the consumer for the damage or reduce the amount of any refund due to the consumer in order to compensate for the purported diminished value of the goods.

These issues are therefore subject to the general contract and procedural laws of Member States, as referred to in Article 3(5). For example, Member States may allow traders to reduce the sum refunded for goods returned in order to cover their diminished value due to mishandling during the right of withdrawal period.

Under Article 14(2), the *'consumer is in any event not liable for diminished value of the goods where the trader has failed to provide notice of the right of withdrawal in accordance with point (h) of Article 6(1).'*

Another consequence of failing to provide this notice under Article 10 of the Directive is that **the withdrawal period is extended by up to 12 months**. This means, that a consumer may withdraw from the contract after some considerable time, during which they have been effectively using the goods without bearing any liability for the resulting tear and wear (see also section 5.3 on the consequences of failure to inform consumers on the right of withdrawal).

Article 6(1)(h) does not contain any specific requirement to inform the consumer about the liability for diminished value of the goods upon exercising the right of return. However, information about the diminished value of the goods is included in the model instructions on withdrawal set out in Annex I(A). Providing this information could be useful for both consumers and traders even where the trader does not follow these model instructions.

#### 5.5.5. Risk when returning the goods to the trader

The Directive does not regulate who bears the risk for **accidental damage or loss during the return of the goods** when the consumer withdraws from the contract. Therefore, this matter is also subject to national laws, which may, for example, provide that the risk during the return of the goods lies with the consumer once it is transferred to him or her upon delivery in accordance with Article 20.

In principle, when returning the goods, the consumer should take reasonable care, for example, by choosing an established transport or postal service provider, to ensure that the goods reach the trader and are not damaged in transit.

Where the consumer has **never taken physical possession of the goods**, e.g. by refusing to take delivery, either without any explicit statement or with a statement to the trader about withdrawal from the contract, the trader would continue bearing the risk of loss or damage since no transfer of risk to the consumer will have taken place according to Article 20.

## 5.6. Right of withdrawal from contracts for services and public utilities

### 5.6.1. Consumer's consent to immediate performance

Article 7(3) and Article 8(8) of the CRD lay down formal requirements applicable when consumers wish to start the performance of off-premises and distance service contracts or contracts for public utilities before the expiry of the right of withdrawal period. The two provisions are presented in identical terms, except that Article 7(3) requires the trader to obtain the consumer's request for immediate performance on a durable medium:

Article 7(3) and Article 8(8)

*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 provided for in Article 9(2), and the contract places the consumer under an obligation to pay, the trader shall require that the consumer make [such] (\*) **an express request** [on a durable medium] (\*) and request the consumer to acknowledge that, once the contract has been fully performed by the trader, the consumer will no longer have the right of withdrawal.*

(\*) indicate additional elements in Article 7(3)

These provisions therefore apply if the consumer wants the service or public utilities to start during the withdrawal period. However, these rules should not prevent the trader from actively proposing that the consumer make such a request. At the same time, the trader is not obliged either to offer this option or to accept the consumer's request.

Article 14(3) allows the consumer to withdraw from the provision of services or public utilities **even after making an express request**. This is also confirmed in Recital 50: *'the consumer should benefit from his right of withdrawal even in case he has asked for the provision of services before the end of the withdrawal period.'*

However, in relation to **service contracts**, under point (a) of the first paragraph of Article 16, the consumer loses the right of withdrawal when the service is fully performed, subject to certain conditions:

Article 16

*'Member States shall not provide for the right of withdrawal set out in Articles 9 to 15 in respect of distance and off-premises contracts as regards the following:*

- (a) *service contracts after the service has been fully performed but, if the contract places the consumer under an obligation to pay, only **if the performance has begun with the consumer's prior express consent and acknowledgement that he will lose his right of withdrawal** once the contract has been fully performed by the trader;*

Articles 7(3) and 8(8) of the CRD were amended by Directive (EU) 2019/2161. The amendment ensured alignment with point (a) of the first paragraph of Article 16. Namely, Article 7(3) and Article 8(8) now contain the same two requirements as point (a) of the first paragraph of Article 16: (1) consumer's request for immediate performance, and (2) consumer's acknowledgement that, once the contract has been fully performed by the trader, the consumer will no longer have the right of withdrawal.

The amendments also clarified that these requirements only apply to paid-for services. This was necessary in the context of the extending the scope of the CRD in the area of digital services under Article 3(1a) <sup>(131)</sup>.

The trader's failure to comply with the requirement to obtain the consumer's request for immediate performance leads to consequences provided in Article 14(4)(a), i.e. consumer's right not to bear the cost of the service or public utilities – see further section 5.8.

The consumer's *'express consent'* in point (a) of the first paragraph of Article 16 should be interpreted as the *'express request'* required under Articles 7(3) and 8(8).

By analogy with the rules on additional payments under Article 22, the terms *'express request/consent'* in this context should be interpreted as implying a **positive action by the consumer**, such as ticking a box on the website. The use of a pre-ticked box or of a clause in the general terms and conditions for this purpose would not satisfy these requirements <sup>(132)</sup>.

The consumer's express consent and acknowledgement **can be acquired before, during, or after the contract is concluded**, as long as it happens before the performance starts. The consumer's request and acknowledgement can be expressed in one go. The requirements of Articles 7(3) and 8(8) and of point (a) of the first paragraph of Article 16 could be fulfilled, for example, by the following formula:

— [...] *I hereby request [immediate performance or performance on/as from specific date during the withdrawal period] of the service contract and acknowledge that I will lose my right of withdrawal from the contract once the service contract is fully performed.*

For off-premises contract subject to Article 7(3), the requirement for *'durable medium'* would be satisfied where the consumer's request and acknowledgement is recorded on an instrument which enables the parties to store the information in a way accessible for future reference and which allows the unchanged reproduction (see section 4.4 for more information). In general, checking a box by the consumer on the order document is sufficient if the request and acknowledgment is adequately reproduced in the copy provided to the consumer.

<sup>(131)</sup> See Recital 42 of Directive (EU) 2019/2161 as regards the need for the alignment.

<sup>(132)</sup> For example, in case C-673/17 *Planet49*, ECLI:EU:C:2019:801, paragraph 65, concerning personal data processing, the Court held that the requirements for consent would not be satisfied where the relevant box has been pre-ticked by the controller.

## 5.6.2. Consumer's compensation obligation

## Article 14

3. Where a consumer exercises the right of withdrawal after having made a request in accordance with Article 7(3) or Article 8(8), the consumer shall 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. The proportionate amount to be paid by the consumer to the trader shall be calculated on the basis of the total price agreed in the contract. If the total price is excessive, the proportionate amount shall be calculated on the basis of the market value of what has been provided.

If the consumer withdraws from the contract during the right of withdrawal period after requesting its immediate performance, Article 14(3) requires the consumer to pay the trader **an amount which is in proportion** to what has been provided on the basis of the total price agreed:

- For example, a consumer who withdraws from a contract for mobile telephone services after using the service for 10 days would have to pay the trader one third of the monthly subscription <sup>(133)</sup> plus the price of any additional services received during that period.

Where the provision of services involves one-off costs to the trader to make them available to the consumer, the trader may include them in the calculation of the compensation:

- For example, the trader may include the cost of installation works at the consumer's place of residence that are carried out as part of a contract for land-line electronic communication services before the consumer withdraws from the contract.

However, the compensation should be based on the **market value** of what has been provided if the total price is excessive. Useful explanations of how to determine the market value are provided in Recital 50, which states: '[...] The calculation of the proportionate amount should be based on the price agreed in the contract unless the consumer demonstrates that the total price is itself disproportionate, in which case the amount to be paid shall be calculated on the basis of the market value of the service provided. The market value should be defined by comparing the price of an equivalent service performed by other traders at the time of the conclusion of the contract. [...]

Recital 14 refers to the application of Member States' rules 'on excessive or extortionate prices', which may be relevant in applying Article 14(3).

In case C-641/19 *PE Digital* the CJEU clarified that when applying Article 14(3) in order to determine the proportionate amount to be paid by the consumer to the trader, where that consumer withdraws from that contract after they have expressly requested that the performance of the service begins during the withdrawal period, it is appropriate, in principle, to take account of the price agreed in the contract for its full duration and **to calculate the amount owed pro rata temporis**.

It is only where the contract expressly provides that: (i) one or more of the services are to be **provided in full from the beginning** of the performance of the contract (ii) for a price which must be **paid separately**, that the full price for such a service should be taken into account in the calculation of the amount owed to the trader under Article 14(3) <sup>(134)</sup>.

The Court further clarified in *PE Digital* that the **test for the excessiveness of the compensation demanded by the trader is market-based**. Pursuant to Article 14(3) of the CRD, read in the light of Recital 50 thereof, in this analysis account should be taken of the price of the service offered by the trader to other consumers under the same conditions and the price of an equivalent service supplied by other traders at the time of the conclusion of the contract <sup>(135)</sup>.

<sup>(133)</sup> See also Article 3(2)(d) of Regulation (EEC, Euratom) No 1182/71, which states 'if a period includes parts of months, the month shall, for the purpose of calculating such parts, be considered as having **thirty days**.'

<sup>(134)</sup> C-641/19 *PE Digital*, ECLI:EU:C:2020:808, paragraphs 29 and 32.

<sup>(135)</sup> *Ibid*, paragraph 37.

Where services **are provided under a sales contract**, Recital 50 states the following: ‘[...] For contracts having as their object both goods and services, the rules provided for in this Directive on the return of goods should apply to the goods aspects and the **compensation regime for services should apply to the services aspects**’.

The compensation regime for services performed during the right of withdrawal period is set out in Article 14(3) and (4)(a) – see also section 5.8.2. So, in situations where the service is provided during the right of withdrawal period from the sales contract (e.g., installation service is provided immediately upon delivery of a goods), the trader should also obtain the **consumer’s express request for the performance of the service** during the right of withdrawal period, if the trader wishes to be compensated for that service in the event that the consumer withdraws from the sales contract:

— For example, a distance or off-premises sales contract may provide for delivery and installation of a household appliance. If the consumer expressly requests the trader to install the appliance immediately upon its delivery, but then decides to withdraw from the contract within the right of withdrawal period (14-days from delivery), the trader would be entitled to compensation for the installation costs (in addition to any compensation for the diminished value of the appliance, if applicable).

**The obligation for the trader to request the consumer to acknowledge** that, once the contract has been fully performed by the trader, the consumer will no longer have the right of withdrawal, which was added to Article 7(3) and 8(8) by Directive (EU) 2019/2161, **is not relevant in the case of services provided under sales contracts**. This obligation concerns only service contracts, as only service contracts are subject to the exception from the right of withdrawal provided in point (a) of the first paragraph of Article 16.

#### 5.7. **Right of withdrawal from contracts for online digital content**

The right of withdrawal from contracts for digital services is discussed in previous section 5.6 dealing with service contracts in general.

The specific restrictions on the right of withdrawal from **contracts for online digital content** are set out in point (m) of the first paragraph of Article 16.

Directive (EU) 2019/2161 amended this provision by adding a third condition that trader must fulfil for consumers to lose the right of withdrawal from the contract. This is in line with the conditions in Article 14(4)(b) that deals with the consequences of not respecting the information/formal requirements.

#### Article 16

Member States shall not provide for the right of withdrawal set out in Articles 9 to 15 in respect of distance and off-premises contracts as regards the following:

[...] (m) contracts for the supply of digital content which is not supplied on a tangible medium if the performance has begun and, if the contract places the consumer under an obligation to pay, where:

- (i) the consumer has provided prior express consent to begin the performance during the right of withdrawal period;
- (ii) the consumer has provided acknowledgement that he thereby loses his right of withdrawal; and
- (iii) the trader has provided confirmation in accordance with Article 7(2) or Article 8(7).

Point (m) of the first paragraph of Article 16 pursues an objective similar to that of the rule in point (i) of the first paragraph of Article 16 exempting sealed tangible data carriers (CDs, DVDs etc.) from the right of withdrawal if the consumer unseals them. This means that in both these cases, unlike that of the withdrawal from the provision of services (see section 5.6), the **consumer has no right to ‘test’ the digital content** during the right of withdrawal period.

Accordingly, the consumer loses the right of withdrawal as soon as the performance of the contract has begun with his or her consent and acknowledgment of the loss of this right if the trader has provided the confirmation of the contract. As provided in Article 7(2) concerning off-premises contracts and Article 8(7) concerning distance contracts, that confirmation must also include confirmation of the consumer’s prior express consent and acknowledgement (see also section 4.4 on the confirmation of the contract).

The performance starts with the downloading or streaming of a video or audio file. If a trader provides a web link to launch streaming or downloading, the consumer would only lose the right of withdrawal after activating that link.

The consumer's express consent and acknowledgement can be acquired before, during, or after the contract is concluded, as long as it happens before performance starts. Article 7(2) and Article 8(7) of the CRD expressly require the confirmation of contract to include the confirmation of the consumer's prior express consent and acknowledgment in accordance with point (m) of the first paragraph of Article 16. Therefore, where the consumer provides consent for immediate performance and acknowledgment after the trader has already sent confirmation of the contract, the trader must provide the consumer with a separate additional confirmation of that consent and acknowledgement before the performance starts.

'Express' consent and acknowledgement for the purposes of point (m) of the first paragraph of Article 16 should be interpreted by analogy to the rules on express consent provided in Article 22 on additional payments for additional services. This means the consumer has to take **positive action**, such as ticking a box on the trader's website. Expression of consent and acknowledgment by means of a pre-ticked box or accepting the general terms and conditions would not satisfy the requirements of point (m) of the first paragraph of Article 16.

The consumer's express consent and acknowledgement can be given in one statement, also conveying information about the exception from the right of withdrawal as required under Article 6(1)(k), for example:

— [...] I hereby consent to immediate performance of the contract and acknowledge that I will lose my right of withdrawal from the contract once the download or streaming of the digital content has begun.

The trader has to comply with the information obligations about the right of withdrawal under Article 6(1)(h). Only in the case of contracts for online digital content that are **performed immediately** where the consumer provides consent and acknowledgement **triggering the start of the performance** of the contract, the trader does not need to provide the information under Article 6(1)(h), including the model withdrawal form set out in Annex I(B).

## 5.8. Consequences of failing to inform about right of withdrawal

Under Article 6(1), the trader must provide the consumer with pre-contractual information in a clear and comprehensible manner. In particular, where the right of withdrawal exists, Article 6(1)(h) requires the trader to make the consumer aware of the conditions, time limit and procedures for exercising that right and the model withdrawal form set out in Annex I(B) <sup>(136)</sup>. Failure to comply with these obligations triggers the consequences under Article 10(1), which provides for an **extension of the right of withdrawal period** for all contracts. If the trader does not provide this information, the withdrawal period is extended by 12 months.

### Article 10

1. If the trader has not provided the consumer with the information on the right of withdrawal as required by point (h) of Article 6(1), the withdrawal period shall expire 12 months from the end of the initial withdrawal period, as determined in accordance with Article 9(2).

Article 10(2) addresses the situation when the trader provides the information required in Article 6(1)(h) with a delay **within 12 months** from the end of the initial withdrawal period calculated under Article 9(2). In this case, the withdrawal period **expires 14 days after the day upon which the consumer receives that information**.

### Article 10

2. If the trader has provided the consumer with the information provided for in paragraph 1 of this Article within 12 months from the day referred to in Article 9(2), the withdrawal period shall expire 14 days or, in cases where Member States have adopted rules in accordance with Article 9(1a), 30 days after the day upon which the consumer receives that information.

<sup>(136)</sup> Subject to specific rules of Article 8(4) – see section 5.2.3.

### 5.8.1. Consequences regarding the goods

In addition to the above-mentioned extension of the withdrawal period, **in case of goods**, Article 14(2) provides that consumers **are not liable for any diminished value of the goods** if the trader has failed to inform them about the right of withdrawal in accordance with Article 6(1)(h).

#### Article 14

2. *The consumer shall only be 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 consumer shall in any event not be liable for diminished value of the goods where the trader has failed to provide notice of the right of withdrawal in accordance with point (h) of Article 6(1).*

As regards customised goods or perishable goods (see sections 5.11.2 and 5.11.3) which are unconditionally **exempted from the right of withdrawal under points (c) and (d) of the first subparagraph of Article 16**, the CRD does not set out the consequences of non-compliance by the trader with the information requirement about the absence of the right of withdrawal in accordance with Article 6(1)(k). However, the failure to inform the consumer about the absence of the right of withdrawal in such a situation could amount to unfair commercial practice (misleading omission) prohibited by the Unfair Commercial Practices Directive 2005/29/EC if it leads the consumer to take transactional decision that he/she would not have taken otherwise.

### 5.8.2. Consequences regarding services and public utilities

**For services (including digital services) and public utilities**, Article 14(4)(a) provides that the consumer bears no cost, i. e. the consumer is entitled either to a refund of the amount paid or not to pay, **if the trader has not provided the required information about the right of withdrawal under Article 6(1)(h) or (j) or if the consumer has not expressly requested that the service starts during the withdrawal period in accordance with Article 7(3) or Article 8(8).**

#### Article 14

4. *The consumer shall bear no cost for:*

- (a) *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, in full or in part, during the withdrawal period, where:*
  - (i) *the trader has failed to provide information in accordance with points (h) or (j) of Article 6(1); or*
  - (ii) *the consumer has not expressly requested performance to begin during the withdrawal period in accordance with Article 7(3) and Article 8(8); [...]*

Accordingly, in these cases, the consumer can withdraw from the service contract or contract for public utilities whose **performance has started and is still ongoing** during the extended period of **12 months** from the end of the initial withdrawal period calculated under Article 9(2) and will **not bear any costs** for the services provided.

If the **trader informs the consumer about the right of withdrawal within 12 months** from the end of the initial withdrawal period calculated under Article 9(2), the consumer can withdraw within 14 days after the day they received the information, **without bearing any costs for the services provided until the moment when they were informed about the right of withdrawal.**

The consumer will not bear any cost for what has been provided also where the provision of services or public utilities **has been completed (fully performed)** before the exercise of the right of withdrawal, including during the extended period under Article 10, except where the trader has complied with the formal requirements of Article 7(3) or 8(8) which results in the consumer's loss of the right of withdrawal in accordance with point (a) of the first paragraph of Article 16 (see section 5.6.1 for more information).

### 5.8.3. Consequences regarding online digital content

As regards contracts for online digital content, if any of the three conditions provided in point (m) of the first paragraph of Article 16 is not fulfilled (see section 5.7), and the consumer exercises the right of withdrawal, Article 14(4)(b) applies and entitles the consumer either not to pay for the content received or be reimbursed for the amounts paid:

#### Article 14

4. The consumer shall bear no cost for:

[...]

(b) the supply, in full or in part, of digital content which is not supplied on a tangible medium where:

- (i) the consumer has not given his prior express consent to the beginning of the performance before the end of the 14-day period referred to in Article 9;
- (ii) the consumer has not acknowledged that he loses his right of withdrawal when giving his consent; or
- (iii) the trader has failed to provide confirmation in accordance with Article 7(2) or Article 8(7).

### 5.9. Termination of the contract following the exercise of the right of withdrawal

#### Article 12

The exercise of the right of withdrawal shall terminate the obligations of the parties:

- (a) to perform the distance or off-premises contract; or
- (b) to conclude the distance or off-premises contract, in cases where an offer was made by the consumer.

Article 12 states that exercise of the right of withdrawal terminates the parties' obligations to perform the contract, in particular the consumer's obligation to pay or to conclude the contract if the consumer has made the offer.

However, under Article 3(2), this rule does not affect other sector-specific EU rules on terminating contracts.

— For example, Directive (EU) 2019/944 of the European Parliament and of the Council <sup>(137)</sup> on the internal market for electricity and Directive 2009/73/EC on the internal market in gas <sup>(138)</sup> provide that if a customer, while respecting contractual conditions, wishes to change supplier, the operator(s) concerned must make the change within three weeks.

So, if a consumer decides to withdraw from a contract for electricity or gas and switch to a new provider, the previous supplier and the consumer may continue to be bound by their contract for up to three weeks, in derogation from the rules in Article 14(3) on compensation for what has been provided until withdrawal.

<sup>(137)</sup> Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (OJ L 158, 14.6.2019, p. 125), Article 12(1): 'Switching supplier or market participant engaged in aggregation shall be carried out within the shortest possible time. Member States shall ensure that a customer wishing to switch suppliers or market participants engaged in aggregation, while respecting contractual conditions, is entitled to such a switch within a maximum of three weeks from the date of the request.[...]'

<sup>(138)</sup> Directive 2009/73/EC, Article 3(6): 'Member States shall ensure that:

- (a) where a customer, while respecting the contractual conditions, wishes to change supplier, the change is effected by the operator(s) concerned within three weeks; and
- (b) customers are entitled to receive all relevant consumption data.'



### 5.10. *Ancillary contracts*

#### Article 15

1. *Without prejudice to Article 15 of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers, if the consumer exercises his right of withdrawal from a distance or an off-premises contract in accordance with Articles 9 to 14 of this Directive, any ancillary contracts shall be automatically terminated, without any costs for the consumer, except as provided for in Article 13(2) and in Article 14 of this Directive.*
2. *The Member States shall lay down detailed rules on the termination of such contracts.*

Article 2(15) defines an ancillary contract as: 'a contract by which the consumer acquires goods or services related to a distance contract or an off-premises contract and where those goods are supplied or those services are provided by the trader or a third party on the basis of an arrangement between that third party and the trader', for example:

- *a delivery, maintenance or installation contract,*
- *an insurance and credit agreement to finance the purchase;*
- *additional commercial guarantee.*

Although generally excluded from the scope of application of the Directive by virtue of Article 3(3)(d), any ancillary insurance and credit contracts would be terminated in accordance with Article 15.

The relationship between the separate linked contracts should be assessed to determine which is the main contract and which is the ancillary one:

- *For example, where, through separate contracts with the same trader, a consumer purchases mobile telephony services and a mobile smartphone that is paid in instalments, invoiced on a monthly basis together with the main subscription price, the service contract should be regarded as the main contract. This should not prevent the consumer from withdrawing separately only from the ancillary sales contract while keeping the service contract.*

Where the ancillary contract is subject to the Directive (for example, a contract for delivery or installation), the consumer should compensate the trader for the cost of what has been provided in accordance with Articles 13(2) and 14.

On the other hand, if the ancillary contract is generally outside the scope of the Directive (such as an insurance or credit contract), the consequences of the termination will be subject to the sector-specific or general contract law rules of the Member States.

The detailed rules on the termination of ancillary contracts are to be laid down by Member States. These may include, for example, the trader's obligation to inform any other relevant trader when it is informed by a consumer of the consumer's decision to withdraw from the main contract.

### 5.11. *Exceptions from the right of withdrawal*

The first paragraph of Article 16 lists 13 contracts/situations in which the consumer has no right of withdrawal or loses this right under certain conditions.

In addition, Directive (EU) 2019/2161 introduced two regulatory choices for Member States in case of contracts concluded in the context of unsolicited visits organised by a trader to a consumer's home or of excursions and in case of repairs specifically requested by the consumer.

The following situations or contracts deserve particular attention here. The exceptions regarding fully performed service contracts and contracts for online digital content are addressed separately in sections 5.6 and 5.7, respectively.

#### 5.11.1. *Goods or services for which the price is dependent on fluctuations in the financial market*

#### Article 16

- (b) *the supply of goods or services for which the price is dependent on fluctuations in the financial market which cannot be controlled by the trader and which may occur within the withdrawal period;*

Recital 43 of Directive (EU) 2019/2161 clarified that contracts for individual deliveries of non-network energy should be excepted from the right of withdrawal under point (b) of the first paragraph of Article 16 as the 'price is dependent on fluctuations in the commodity markets or energy markets which cannot be controlled by the trader and which may occur within the withdrawal period.'

#### 5.11.2. Goods made to the consumer's specifications or clearly personalised

##### Article 16

(c) *the supply of goods made to the consumer's specifications or clearly personalised;*

'Goods made to the consumer's specifications' are defined in Article 2 of the CRD as '*non- prefabricated goods made on the basis of an individual choice of or decision by the consumer*'. Recital 49 of the CRD refers to 'tailor-made curtains' as an example of goods made to the consumer's specifications or which are clearly personalised.

Since this rule is an exception from the more general rule of the CRD giving consumers the right of withdrawal from distance/off-premises contracts, it should be interpreted narrowly.

So, this exception should cover, for example:

- *goods, for which the consumer has provided specifications, such as measurements for furniture or the size of a fabric;*
- *goods, for which the consumer has requested specific personalised features, such as a particular design for a car that is made to order or a specific component for a computer, which has to be individually procured for that particular order and which was not part of the trader's general offer to the public;*
- *address labels with the consumer's contact information.*

Specification/personalisation in this context should be taken to mean that the goods are, in principle, unique and produced according to the individual wishes and requirements stated by the consumer and agreed with the trader.

In contrast, where the consumer simply makes up the goods by picking from the standard (pre-set) options provided by the trader, it should not be possible to speak of either 'specification' or 'personalisation' in the narrow sense of this provision. Thus, the exception would not apply in the following examples:

- *choosing furniture with specific colour or texture by selecting from the manufacturer's catalogue;*
- *car with additional equipment, selected from the manufacturer's catalogue;*
- *a set of furniture on the basis of standard elements.*

Furthermore, the exception does not apply to **service contracts leading to tangible outcomes**. In case C-208/19 NK (*Individual house project*) the Court held that the contract between an architect and a consumer, according to which the former is required to prepare the designs for the construction of a new building, cannot be regarded as falling under Article 16(c) CRD. Although the designs could be provided in tangible form (on paper or digital), the subject matter of the contract is an intellectual service – architectural design, and the subsequent delivery has only ancillary function <sup>(139)</sup>.

This reasoning of the CJEU highlights the importance of the creative process for the occurrence of the tangible result as a decisive factor for the classification of the contract. Similar reasoning could be applied to other intellectual services (e.g. provision of accounting or legal advice, or family event photography) whose results could be presented in tangible form.

In contrast, where the exception applies, the restriction on withdrawal from contracts for the supply of goods made to the consumer's specifications or clearly personalised is absolute and **does not depend on whether the trader has started working on the order or not**. This was confirmed in case C-529/19 *Möbel Kraft*, where the Court observed that this is the only interpretation of Article 16(c) CRD that could ensure legal certainty, which is one of the objectives of the Directive, as noted in Recitals 7 and 40 thereof <sup>(140)</sup>. The existence of the consumer's right of withdrawal would be at issue if it depended

<sup>(139)</sup> C-208/19, NK (*Individual house project*), ECLI:EU:C:2020:382, paragraphs 58 – 59.

<sup>(140)</sup> C-529/19, *Möbel Kraft*, ECLI:EU:C:2020:846, paragraphs 27 – 29.

on the state of progress of the performance of the contract by the trader, a state of progress of which the consumer is not, as a general rule, informed and over which he or she has, a fortiori, no control. Moreover, such interpretation would not be reconcilable with the obligation of the trader to provide clear pre-contractual information.

#### 5.11.3. Goods liable to deteriorate or expire rapidly

##### Article 16

(d) *the supply of goods which are liable to deteriorate or expire rapidly;*

'Liable to deteriorate or expire rapidly' is an objective characteristic of the good concerned. Some of the obvious examples of goods liable to deteriorate or expire rapidly referred to in point (d) are:

- *Foods and beverages with short expiry time limits, including those to be kept refrigerated;*
- *Take-away restaurant deliveries;*
- *Fresh flowers.*

However, in case of subscription **contracts for regular take-away restaurant deliveries**, whilst there would be no right of withdrawal from the actual delivery, the consumer can nevertheless cancel the subscription under the right of withdrawal rules for "regular delivery of goods" in accordance with Article 9(2)(b)(iii), i.e. 14 days from receipt of the first delivery.

**Plants** by their nature they have a limited lifespan during which their features are preserved. In principle, the requirement for active intervention by someone (e.g. delivery company, consumer) in order to preserve their features renders such plants objectively different from other goods (textiles, electronic equipment etc.). Those other goods are not 'liable to deteriorate or expire rapidly' if they are stored in appropriate conditions and the consumer is merely required to refrain from exposing them to abnormal conditions before sending them back, in order to avoid the liability implied by Article 14(2).

Therefore, a case-by-case assessment is needed taking into account the care necessary for the plants to keep their features over a longer period, including in case of return by the consumer. Hence, only where the respective plants are not 'liable to deteriorate or expire rapidly', the right of withdrawal should apply.

#### 5.11.4. Goods sealed for health protection of hygiene reasons

##### Article 16

(e) *the supply of sealed goods which are not suitable for return due to health protection or hygiene reasons and were unsealed after delivery;*

For an item to be exempt from the right of withdrawal under point (e), there should be genuine health protection or hygiene reasons for using a seal, which may consist of protective wrapping or film. This exception could apply, for example, to the following goods if unsealed by the consumer after delivery:

- *Cosmetic products such as lipsticks;*
- *Toothbrushes, shavers and similar personal hygiene items.*

The Court ruled in case C-681/17 *slewo* that this exception does not apply to mattresses. The Court in particular stated that it is the nature of the goods which may justify their packaging being sealed for health protection or hygiene reasons and that, accordingly, the unsealing of the packaging deprives the goods inside of the guarantee in terms of health protection or hygiene <sup>(141)</sup>.

<sup>(141)</sup> C-681/17, *slewo*, ECLI:EU:C:2019:255, paragraph 37.

Accordingly, the exception to the right of withdrawal under point (e) of the first paragraph of Article 16 applies only if, after the packaging has been unsealed, the goods contained therein **are definitively no longer in a saleable condition due to genuine health protection or hygiene reasons**, because the very nature of the goods makes it impossible or excessively difficult, for the trader to take the necessary measures allowing for resale without affecting either of those requirements <sup>(142)</sup>.

#### 5.11.5. Goods that get inseparably mixed with other items

##### Article 16

(f) *the supply of goods which are, after delivery, according to their nature, inseparably mixed with other items;*

Recital 49 of the CRD refers to the supply of ‘fuel’ as an example of goods inseparably mixed with other items.

#### 5.11.6. Contracts with a specific date or period of performance

##### Article 16

(l) *the provision of accommodation other than for residential purpose, transport of goods, car rental services, catering or services related to leisure activities if the contract provides for a specific date or period of performance;*

For this exception to apply, the contract should stipulate ‘a specific date or period of performance’. Again, since this is an exception, it should be interpreted narrowly <sup>(143)</sup>. It should therefore be applied bearing in mind the reasons given in Recital 49: ‘[...] **The granting of a right of withdrawal to the consumer could also be inappropriate in the case of certain services where the conclusion of the contract implies the setting aside of capacity** which, if a right of withdrawal were exercised, the trader may find difficult to fill. This would for example be the case where reservations are made at hotels or concerning holiday cottages or cultural or sporting events.’ Therefore, the restriction on the right of withdrawal under point (l) of the first paragraph of Article 16 should not apply to contracts for leisure activities that do not have a capacity limitation.

Recital 49 gives the following examples where the exception under point (l) of the first paragraph of Article 16 would apply:

- *bookings at hotels and holiday cottages;*
- *cultural or sporting events, as well as theatre performances on a specific date;*
- *catering at a birthday or wedding party on a specific date.*

Similarly, the phrase ‘transport of goods’ should be interpreted broadly. In case C-336/03 *easyCar* concerning the Distance Selling Directive 97/7/EC the CJEU ruled that ‘transport’ also includes making the means of transport available to the consumer <sup>(144)</sup>. According to that interpretation, the rental of trucks for the carriage of goods on a specific date could fall within the scope of the exception provided in point (l) of the first paragraph of Article 16 for the ‘transport of goods’.

Finally, although point (l) of the first paragraph of Article 16 covers contracts for the transport of goods, it would not apply to storage services, even where they are provided on specific dates.

<sup>(142)</sup> *Ibid.*, paragraph 40. See also section 6.5.4 with details on case C-681/17.

<sup>(143)</sup> Further guidance on the right of withdrawal in respect of leisure activities is expected from the pending case C-96/21, *CTS Eventim* dealing with the situation where a trader does not directly provide the consumer with the service related to leisure activities but only resells to the consumer a right of access to such a service.

<sup>(144)</sup> See C-336/03, *easyCar*, ECLI:EU:C:2005:150, paragraphs 26 and 31, in particular.

### 5.11.7. Repairs requested by the consumer

#### Article 16

(h) *contracts where the consumer has specifically requested a visit from the trader for the purpose of carrying out urgent repairs or maintenance. If, on the occasion of such visit, the trader provides services in addition to those specifically requested by the consumer or goods other than replacement parts necessarily used in carrying out the maintenance or in making the repairs, the right of withdrawal shall apply to those additional services or goods;*

The exception from the right of withdrawal provided by point (h) of the first paragraph of Article 16 of CRD covers urgent repairs and maintenance.

For all other repairs that are not ‘urgent’, consumers have the right of withdrawal and traders have to inform them, among other things, about this right. If traders have not provided the consumers with the information on the right of withdrawal or provided it with a delay, Article 10 and Article 14(4)(a) apply. The consumers can exercise their right of withdrawal within the 14 day after the conclusion of the contract. However, in accordance with point (a) of the first paragraph of Article 16 the consumer loses the right of withdrawal when the (repair) service is fully performed. For this limitation to apply, the trader must obtain: (1) consumer’s prior express consent and (2) consumer’s acknowledgement about the loss of the right of withdrawal upon full performance. These two conditions to begin the performance of the service before the lapse of the right of withdrawal period are stipulated in Articles 7(3) for off-premises contracts and 8(8) for distance contracts.

#### Article 16

*In the case of service contracts which place the consumer under an obligation to pay where the consumer has specifically requested a visit from the trader for the purpose of carrying out repairs, Member States may provide that the consumer loses the right of withdrawal after the service has been fully performed provided that the performance has begun with the consumer’s prior express consent.*

This regulatory choice in the third paragraph of Article 16 introduced by Directive (EU) 2019/2161<sup>(145)</sup> gives the possibility to Member States to derogate from the conditions of losing the right of withdrawal under point (a) of the first paragraph of Article 16 by stipulating that, for repairs covered by the third paragraph of Article 16, it suffices for the trader to get the consumer’s prior express consent to start the performance. Accordingly, in this case the trader is not required to acquire also the consumer’s acknowledgement about the loss of the right of withdrawal under Article 7(3) or under Article 8(8).

### 5.12. Regulatory choices in case of unsolicited visits or excursions

#### 5.12.1. Introduction

Directive (EU) 2019/2161 amended both the UCPD and the CRD by allowing Member States to adopt provisions to protect the legitimate interests of consumers with regard to aggressive and misleading marketing or selling practices in the context of unsolicited visits by a trader to a consumer’s home or excursions organised by a trader with the aim or effect of promoting or selling products to consumers, where such provisions are proportionate, non-discriminatory and justified on grounds of consumer protection. The rationale of the provisions is explained in Recitals 54–57 of Directive (EU) 2019/2161 highlighting the principle of subsidiarity and the objective to facilitate enforcement.

The UCPD contains a general provision allowing Member States to adopt proportionate, non-discriminatory and justified national provisions to protect consumers from aggressive or misleading unsolicited visits and/or excursions organized by a trader (for further details see section 1.1 of the Guidance on the UCPD).

<sup>(145)</sup> See Recital 42 of Directive (EU) 2019/2161.

In addition to the general provision of the UCPD, the amended CRD enables Member States to adopt national provisions providing for more favourable rules concerning the right of withdrawal. To this end, in the context of Articles 9(1a), 10(2), 14(4) and 16 of the CRD, Member States may provide for a longer right of withdrawal period of 30 days (instead of 14) or to derogate from several of the existing exceptions from the right of withdrawal in case of unsolicited visits or excursions.

Article 29(1) of the CRD requires Member States to notify the Commission, by 28 November 2021, of national measures derogating from the right of withdrawal and any subsequent amendments, i.e. by means of a specific notification explaining the exact national provisions concerned and not as mere part of the general notification of transposition measures.

#### 5.1.2.2. Extension of the right of withdrawal period

Article 9(1a) provides that Member States may extend the withdrawal period of 14 days to 30 days for contracts concluded in the context of unsolicited visits by a trader to a consumer's home or excursions organised by a trader with the aim or effect of promoting or selling products to consumers.

#### Article 9

1a. Member States may adopt rules in accordance with which the withdrawal period of 14 days referred to in paragraph 1 is extended to 30 days for contracts concluded in the context of unsolicited visits by a trader to a consumer's home or excursions organised by a trader with the aim or effect of promoting or selling products to consumers for the purpose of protecting legitimate interests of consumers with regard to aggressive or misleading marketing or selling practices. Such rules shall be proportionate, non-discriminatory and justified on grounds of consumer protection.

Article 6(4), Article 9(2), Article 10(2) and Article 14(4) that refer to the right of withdrawal period were also amended by Directive (EU) 2019/2161 to reflect the possible extension of this period to 30 days.

#### Article 6(4)

4. The information referred to in points (h), (i) and (j) of paragraph 1 of this Article may be provided by means of the model instructions on withdrawal set out in Annex I(A). The trader shall have fulfilled the information requirements laid down in points (h), (i) and (j) of paragraph 1 of this Article if the trader has supplied these instructions to the consumer, correctly filled in. **The references to the withdrawal period of 14 days in the model instructions on withdrawal set out in Annex I(A) shall be replaced by references to a withdrawal period of 30 days in cases where Member States have adopted rules in accordance with Article 9(1a).**

#### Article 9(2)

2. Without prejudice to Article 10, the withdrawal period referred to in paragraph 1 of this Article shall expire after 14 days **or, in cases where Member States have adopted rules in accordance with paragraph 1a of this Article, 30 days** from:

#### Article 10(2)

2. If the trader has provided the consumer with the information provided for in paragraph 1 of this Article within 12 months from the day referred to in Article 9(2), the withdrawal period shall expire 14 days **or, in cases where Member States have adopted rules in accordance with Article 9(1a), 30 days** after the day upon which the consumer receives that information;

#### Article 14(4)

4. The consumer shall bear no cost for:

(b) the supply, in full or in part, of digital content which is not supplied on a tangible medium where:

(i) the consumer has not given prior express consent to the beginning of the performance before the end of the 14-day **or 30-day period referred to in Article 9**

### 5.1.2.3. Derogations from the exceptions from the right of withdrawal

#### Article 16

Member States may derogate from the exceptions from the right of withdrawal set out in points (a), (b), (c) and (e) of the first paragraph for contracts concluded in the context of unsolicited visits by a trader to a consumer's home or excursions organised by a trader with the aim or effect of promoting or selling products to consumers for the purpose of protecting the legitimate interests of consumers with regard to aggressive or misleading marketing or selling practices. Such provisions shall be proportionate, non-discriminatory and justified on grounds of consumer protection.

In case of contracts concluded in the context of unsolicited visits by a trader to a consumer's home or excursions organised by a trader with the aim or effect of promoting or selling products to consumers, Member States may derogate from the following exceptions from the right of withdrawal:

- service contracts after the service has been fully performed (point (a) of the first paragraph of Article 16);
- the supply of goods or services for which the price is dependent on fluctuations in the financial market which cannot be controlled by the trader and which may occur within the withdrawal period (point (b) of the first paragraph of Article 16);
- the supply of goods made to the consumer's specifications or clearly personalised (point (c) of the first paragraph of Article 16);
- the supply of sealed goods which are not suitable for return due to health protection or hygiene reasons and were unsealed after delivery (point (e) of the first paragraph of Article 16);

The derogation **does not necessarily mean complete non-application of the exception** from the right of withdrawal. It can also consist of a modification of the existing exception to make it more favourable to the consumer whilst ensuring that it is proportionate (also with regard to the legitimate interests of the traders), non-discriminatory and justified on grounds of consumer protection.

## 6. Delivery

#### Article 18

1. Unless the parties have agreed otherwise on the time of delivery, the trader shall deliver the goods by transferring the physical possession or control of the goods to the consumer without undue delay, but not later than 30 days from the conclusion of the contract.

2. Where the trader has failed to fulfil his obligation to deliver the goods at the time agreed upon with the consumer or within the time limit set out in paragraph 1, the consumer shall call upon him to make the delivery within an additional period of time appropriate to the circumstances. If the trader fails to deliver the goods within that additional period of time, the consumer shall be entitled to terminate the contract.

The first subparagraph shall not be applicable to sales contracts where the trader has refused to deliver the goods or where delivery within the agreed delivery period is essential taking into account all the circumstances attending the conclusion of the contract or where the consumer informs the trader, prior to the conclusion of the contract, that delivery by or on a specified date is essential. In those cases, if the trader fails to deliver the goods at the time agreed upon with the consumer or within the time limit set out in paragraph 1, the consumer shall be entitled to terminate the contract immediately.

3. Upon termination of the contract, the trader shall, without undue delay, reimburse all sums paid under the contract.

4. In addition to the termination of the contract in accordance with paragraph 2, the consumer may have recourse to other remedies provided for by national law.

Article 18 only applies to sales contracts, as expressly stated in Article 17(1). The provisions in Article 18 on the time of delivery are linked to the requirement in Article 5(1)(d) and Article 6(1)(g) to indicate the time for delivery of goods.

Under Article 6(1)(g) concerning **distance and off-premises contracts** the trader must inform the consumer of '*the time by which the trader undertakes to deliver the goods*'. For **on-premises contracts** under Article 5(1)(d), this information must be provided 'where applicable'.

Consequently, in **on-premises contracts**, this information does not have to be provided if the goods are delivered or the service performed immediately. For on-premises sales contracts, this information also does not have to be provided if the seller plans to deliver the goods within the 30-day time limit specified in Article 18(1) (see also section 3 on pre-contractual information requirements).

It is important to note that the Directive has no specific rules regarding service contracts if the trader fails to indicate the time for the performance of the services. The consequences of such omission may be regulated in national law.

Under Article 18(2), if the trader does not deliver within this time limit or within the time limit stated to the consumer, the consumer has to agree with the trader on an extension of the delivery period. If the trader still does not deliver before the extension expires, the consumer is entitled to terminate the contract.

However, if the stated delivery period or the default 30-day period is essential (e.g. for delivery of a wedding dress – see Recital 52) and the trader fails to deliver the goods on time, the consumer should be entitled to terminate the contract immediately upon expiry of the initially agreed time limit.

National laws may regulate the way the consumer should notify the trader of termination of the contract (see Recital 52).

Under Article 18(4) national laws may provide the consumer with other remedies, examples of which are given in Recital 53: '*In addition to the consumer's right to terminate the contract where the trader has failed to fulfil his obligations to deliver the goods in accordance with this Directive, the consumer may, in accordance with the applicable national law, have recourse to other remedies, such as granting the trader an additional period of time for delivery, enforcing the performance of the contract, withholding payment, and seeking damages.*'

Under Article 18(3), if the contract is terminated, the trader must refund all sums paid without undue delay. The Directive does not specify a time limit for reimbursement. If there is a dispute between the consumer and the trader about the timing of the refund, the competent national bodies and courts will have to make a case-by-case assessment. In principle, a few working days should suffice for the trader to process the refund.

## 7. Passing of risk

### Article 20

*In contracts where the trader dispatches the goods to the consumer, the risk of loss of or damage to the goods shall pass to the consumer when he or a third party indicated by the consumer and other than the carrier has acquired the physical possession of the goods. However, the risk shall pass to the consumer upon delivery to the carrier if the carrier was commissioned by the consumer to carry the goods and that choice was not offered by the trader, without prejudice to the rights of the consumer against the carrier.*

Under Article 20, the risk also passes to the consumer on delivery to a carrier if the carrier is chosen by the consumer and not offered by the trader.

Regular delivery of goods ordered via e-commerce, mail order etc. often takes place without immediate inspection by the consumer of the goods delivered. Under the Directive, the risk passes to the consumer on taking physical possession of the goods regardless of whether they have been inspected for defects. However, there is a requirement for fault-free delivery under the Sales of Goods Directive (EU) 2019/771. Article 11 of that directive sets out the rules on burden of proof with respect to any lack of conformity.



## 8. Fees for the use of means of payment

### Article 19

*Member States shall prohibit traders from charging consumers, in respect of the use of a given means of payment, fees that exceed the cost borne by the trader for the use of such means.*

### 8.1. Introduction

Article 19 applies to the use of 'means of payment'. Since these terms are not defined in any way, Article 19 should apply to any means of payment, including cash.

It should be noted that 'payment services' as such fall in the category of 'financial services' that are excluded from the scope of the scope of the CRD in accordance with its Article 3(3)(d). As a result, payment service providers are not subject to the requirements of the Directive. The obligation under Article 19 is not addressed to payment services providers but to other traders that enter into contracts with consumers that are covered by the CRD. The provision prohibits those traders from charging consumers, in respect of the use of a given means of payment, fees that exceed the cost normally borne for the use of such means.

The scope of application of Article 19 has been significantly reduced by the revised Payment Services Directive ('PSD2') applicable from 13 January 2018. Article 62(4) of the PSD2 specifically forbids surcharging for:

- payment instruments for which the interchange fees <sup>(146)</sup> are regulated under the Regulation (EU) 2015/751 of the European Parliament and of the Council <sup>(147)</sup> on interchange fees for card-based payment transactions (IFR); this ban concerns payments with consumer debit and credit cards used in more than 95 % of transactions in the EU card market;
- payment services to which the SEPA Regulation (EU) No 260/2012 of the European Parliament and of the Council <sup>(148)</sup> applies, i.e. credit transfers and direct debits in euro;

As a result, Article 19 of the CRD remains relevant only for the 'non-capped' cards, i.e. commercial cards like company cards and cards issued by so-called three party schemes whereby the cards are issued by the scheme itself, which would qualify at the same time as bank, and to payments in cash.

However, it should be noted that Article 62(5) of the PSD2 gives Member States the option to forbid or limit surcharging for the specific payment instruments which are not covered by the IFR, such as the above-mentioned commercial cards and cards issued by three party schemes.

### 8.2. Definition of 'fees'

Article 19 should apply to all kind of fees which are linked to a means of payment, regardless of how they are presented to consumers.

- *For example, fees referred to as **administration, booking or handling fees**, should be covered by Article 19 if they can be avoided by using a specific means of payment.*

Discounts granted to consumers for the use of a certain means of payment, most typically direct debit, should not automatically be considered 'fees' charged for use of other available means of payment, within the meaning of Article 19. This is because the 'discount' may be based on the trader's legitimate interest in encouraging the use of certain means of payment that are more efficient in relation to his business structure <sup>(149)</sup>.

<sup>(146)</sup> Multilateral Interchange Fees (MIFs) are multilaterally agreed fees payable between the Payment Service Providers (PSPs) of the payer/consumer and of the payee/merchant.

<sup>(147)</sup> Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions (OJ L 123, 19.5.2015, p. 1).

<sup>(148)</sup> Regulation (EU) 260/2012 of the European Parliament and of the Council of 14 March 2012 establishing technical and business requirements for credit transfers and direct debits in euro and amending Regulation (EC) No 924/2009 (OJ L 94, 30.3.2012, p. 22).

<sup>(149)</sup> In particular, direct debit allows the trader to predict the cash flow. The discount for using direct debit may therefore be granted not so much for using a specific means of payment but rather to encourage the consumer to pay regularly at a specified date.

However, it cannot be excluded that surcharging, within the meaning of Article 19, might be achieved by giving identical or different discounts to various means of payment whilst leaving, for instance, only 1 or 2 payment methods outside the discount scheme. Each discount scheme would have to be assessed for compatibility with Article 19 on a case-by-case basis.

Article 19 regulates 'fees' charged in respect of the use of a given means of payment. It does not prevent traders from charging different prices for the same goods or services when sold through different sales channels.

— *For example, a higher price might be charged for a concert ticket issued directly at the theatre and a lower price charged at other sales premises.*

### 8.3. Definition of the 'cost' borne by the trader

#### 8.3.1. The Merchant Service Charge and other direct costs

The Directive neither defines nor gives details of the notion of 'cost borne by the trader' referred to in Article 19.

For most traders, the **merchant service charge ('MSC')** is the largest single component of the cost of accepting card payments. The MSC generally includes:

- (1) the interchange fee paid by the trader's bank (the acquirer bank) to the card issuer <sup>(150)</sup>;
- (2) the fees paid by the trader's bank to the scheme (e.g. Visa or MasterCard); and
- (3) the margin retained by the trader's bank to cover costs and profit.

For credit card transactions, the MSC is typically fixed at a percentage of the transaction value, while for debit card transactions it is more commonly, though not universally, a flat rate. The MSC varies considerably depending on turnover, the business sector and other characteristics of the trader.

In addition, **there may be transaction or overhead fees paid by the trader to the acquirer bank or to a payment service intermediary.**

Payment service intermediaries help some retailers accept secure payments and may charge for providing payment functionalities, fraud detection and management services and/or services usually provided by acquirer banks <sup>(151)</sup>.

#### 8.3.2. General costs of running a business

Traders usually bear other business costs, which can be indirectly linked to accepting or processing payments based on the means used. These are mainly administrative costs, equipment installation and set-up fees, and costs deriving from fraud and risk management.

#### 8.3.3. Eligible costs justifying a fee for the use of means of payment

Only **fees which are directly charged to the trader** for the use of a means of payment should be considered as the 'cost' of that means of payment within the meaning of Article 19.

The costs to the trader that can legitimately be taken into account to justify fees to consumers are the **MSC and the transaction or overhead fees paid to intermediaries for some or all of the merchant services usually provided by acquirer banks**. In these cases the intermediary typically deals with the acquirer bank and acts as a point of contact for retailers, charging a mark-up on the acquirer bank's fees for the relevant services.

<sup>(150)</sup> Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on Interchange fees for card-based payment transactions (OJ L 123, 19.5.2015, p. 1) caps interchange fees at 0,2 % of the transaction value for consumer debit cards and at 0,3 % for consumer credit cards. This clearly determines one part of the cost borne by the trader.

<sup>(151)</sup> Payment service intermediaries help some retailers accept secure payments online or in other 'cardholder not present' situations such as through call centres or mail order. Intermediaries may charge for: (i) providing equipment and services needed to accept online and other distance payments, such as payment functionality for retailers' websites; and/or (ii) providing fraud detection and management services (in which some intermediaries specialise); and/or providing some or all of the merchant services usually provided by acquirer banks, up to full transaction processing. In these cases, the intermediary typically deals with the acquirer bank and acts as a point of contact for retailers, charging a mark-up on the acquirer's relevant fees.

It is for the trader to decide whether to sub-contract, for instance, the provision of the following items/services:

- acquiring and maintaining point-of-sale equipment like chip-and-pin devices;
- fraud monitoring and maintaining compliance with Payment Card Industry Data Security Standards (PCI DSS) to help prevent fraud, as required by all the major card networks;
- developing and running infrastructure to handle card payments, such as payment functionality for websites or call centres; and
- staff training.

The costs of payment equipment, fraud detection and management (or similar) services should be regarded instead as general costs of running a business, regardless of whether they are incurred by the trader directly or outsourced. If outsourced, they are generally charged for separately from the main 'overhead fees' or MSC.

The processing of payments and handling cash involves **staff costs** that are difficult to quantify as they are often included in overall administrative costs. The costs deriving from **fraud and risk management** vary significantly between sectors and traders but are generally considered to be falling thanks to the introduction of new electronic payment technologies. Since these costs are inherent to the respective business activity (even where incurred to ensure regulatory compliance), they should also remain excluded from the notion of 'cost in respect of the use of a given means of payment' under Article 19 and should be regarded instead as part of the general cost of running a business.

This argument is particularly valid for businesses that sell goods or provide services online only and that only accept electronic means of payment. For such businesses, the staff costs incurred in processing an electronic payment and costs deriving from fraud or risk management are fundamental elements of their very business model.

Furthermore, from a more practical viewpoint, including in the notion of 'cost' all possible elements that may be associated even indirectly with a means of payment, **would make Article 19 difficult to enforce and would prevent it from having any practical effect ('effet utile')**. This is true given that, for instance, very little information is publicly available about administrative costs and that the exact cost of equipment and/or installation can only be calculated by spreading the amount over an unknown number of transactions. Therefore, traders should recoup such costs via the price of their goods or services rather than by charging consumers additional fees in respect of the use of a means of payment.

#### 8.4. **Payments in foreign cash**

Cash payment in foreign currency is also a 'means of payment' within the meaning of Article 19. Therefore, a trader should not use currency conversion as a method of actually imposing payment surcharges on the consumer that are not justified by the actual costs incurred in offering the option of paying in foreign cash (in particular, the costs borne by the trader to convert the cash received).

- *For example, where a trader operating a restaurant in a remote area accepts, as an exception, a cash payment by a tourist in a foreign currency, the exchange rate applied can be slightly higher than the actual one, to cover the extraordinary cost of the trader's trip to the nearest bank and any fees applied by the bank for the exchange.;*
- *However, applying an excessive exchange rate in the above scenario would infringe Article 19 since the revenues from such a transaction would substantially exceed the extraordinary costs;*
- *By contrast, where accepting foreign cash as means of payment is a standard commercial practice for the trader, only the applicable currency exchange fees are likely to be eligible costs. This will be, for example, a situation of a restaurant located in a resort area that is frequently servicing tourists who pay in foreign cash.*

## 9. Communication by telephone

### Article 21

*Member States shall ensure that where the trader operates a telephone line for the purpose of contacting him by telephone in relation to the contract concluded, the consumer, when contacting the trader is not bound to pay more than the basic rate.*

*The first subparagraph shall be without prejudice to the right of telecommunication services providers to charge for such calls.*

The objective of this provision is to protect consumers against additional charges if they need to call the trader with whom they have concluded a contract, for example, if they have a complaint. Such telephone calls must not require the consumer to pay more than the 'basic rate'. Directive (EU) 2019/2161 amended Article 3(3)(k) of the CRD extending the scope of application of Article 21 to cover also passenger transport services.

Although the CRD does not give an explicit definition of the basic rate, its rationale is to require traders to ensure that the consumers do not pay more than the **pure cost** of the electronic communications service for calls subject to Article 21. This was confirmed by the Court in case C-568/15 noting that the 'basic rate' corresponds to the standard cost of an ordinary call that a consumer would expect to incur and for which a trader is not required to inform the consumer of its amount <sup>(152)</sup>. In other words, call charges must not exceed the cost of a call to a **standard (geographic) landline or mobile telephone numbers**.

Non-geographic numbers that electronic communications service providers normally include in their offers of 'bundles' of minutes at a fixed monthly price, and numbers charged at no more than rates for calls to geographic numbers would also be examples of numbers charged at the basic rate.

In contrast, numbering ranges that are normally subject to **special tariff regime** will likely not comply with the 'basic rate' requirement. Typically, the so-called **Premium Rate Service (PRS) numbers** enable their users (traders) to finance or contribute to the costs of call centres or draw additional revenues from these telephone calls through revenue sharing with telecom operators. In practice, the calls to the PRS telephone numbers are very unlikely to be charged at the 'basic rate'. At the same time, the Court also clarified in Case C-568/15 that, as long as the 'basic rate' rule is respected, it does not matter whether the trader makes profit through such calls <sup>(153)</sup>.

Although Article 21 limits the cost of the telephone calls, the actual price of calling the trader for the purposes covered by Article 21 will continue to vary for different consumers depending on the electronic communications service provider chosen for the call.

The notion of the 'basic rate' for the purposes of the CRD should not be understood as obliging traders to use so called 'free-phone' numbers, which are generally free to the caller. Nor should it be interpreted as obliging the trader to choose a particular telecom provider or to switch from mobile to fixed telephony or vice versa.

Article 21 should not affect the existing differences between the domestic, international and mobile roaming call rates charged by the providers of electronic communications services. So, a consumer calling a seller based in a different Member State may pay more for that call than that trader's domestic customers.

The Court's judgment in case C-332/17 *Starman* <sup>(154)</sup> dealt with the situation where the trader makes available to its consumers, for the purposes covered by Article 21, both a number charged at basic rate and a speed dial number charged at a rate higher than the basic rate when calling from mobile phones. The Court held that, also in such a situation, Article 21 precludes a trader from charging a consumer a higher rate than the basic rate. This applies irrespective of whether the trader has informed the consumer in a comprehensible and easily accessible manner of the existence of an alternative telephone number charged at the basic rate and the consumer has nevertheless voluntarily chosen to use another number for the purposes of Article 21:

<sup>(152)</sup> C-586/15, *Zentrale zur Bekämpfung unlauteren Wettbewerbs Frankfurt am Main*, ECLI:EU:C:2017:154, paragraph 22.

<sup>(153)</sup> *Ibid.*, paragraphs 31 and 32.

<sup>(154)</sup> C-332/17, *Starman*, ECLI:EU:C:2018:721.

*'The first subparagraph of Article 21 of Directive 2011/83/EU [...] must be interpreted as precluding a situation in which, if a trader has made available to all its customers one or more speed dial numbers at a rate higher than the basic rate, consumers who have concluded a contract with the trader in question pay more than the basic rate when contacting that trader by telephone in relation to that contract.'* <sup>(155)</sup>.

Accordingly, even if the consumer has (mistakenly) used the more expensive alternative telephone number rather than the number charged at the 'basic rate', such consumer is still entitled to paying only the 'basic rate' for the call concerned. In order to ensure the exercise the right provided in Article 21 in such a case, the consumer must have access, under national law of the Member State concerned, to appropriate remedies, i.e. possibility to claim compensation for the price paid exceeding the basic rate.

The Court's judgment does not per se prohibit traders from using different types of numbers for purposes other than those covered by Article 21, e.g. for placing reservations. However, when doing so such traders should pay particular attention to ensuring that consumers use the right number, i.e. the number charged at the basic rate when calling for purposes covered by Article 21.

## 10. Additional payments

### Article 22

*Before the consumer is bound by the contract or offer, the trader shall seek the express consent of the consumer to any extra payment in addition to the remuneration agreed upon for the trader's main contractual obligation. If the trader has not obtained the consumer's express consent but has inferred it by using default options which the consumer is required to reject in order to avoid the additional payment, the consumer shall be entitled to reimbursement of this payment.*

By virtue of Article 3(3)(k), the prohibition in Article 22 on using pre-ticked boxes for providing and charging for additional goods/services also applies to passenger transport services. Furthermore, it applies regardless of whether the additional service itself is generally subject to the Directive. Pre-ticked boxes prohibited by Article 22 could concern, for example:

- *as express delivery option or maintenance contract when buying IT equipment;*
- *an insurance contract when buying an air ticket.*

## 11. Enforcement

### 11.1. Public and private enforcement

According to Article 23, Member States must ensure that **adequate and effective means exist** in order to enforce compliance with the provisions of the Directive.

### Article 23

1. *Member States shall ensure that adequate and effective means exist to ensure compliance with this Directive.*
2. *The means referred to in paragraph 1 shall include provisions whereby one or more of the following bodies, as determined by national law, may take action under national law before the courts or before the competent administrative bodies to ensure that the national provisions transposing this Directive are applied:*
  - (a) *public bodies or their representatives;*
  - (b) *consumer organisations having a legitimate interest in protecting consumers;*
  - (c) *professional organisations having a legitimate interest in acting.*

<sup>(155)</sup> Ibid., paragraph 33.

Several provisions of the CRD provide for direct remedies in the event where the trader does not comply with the respective obligations. Specifically, Article 6(6), Article 10, Article 18(2) and Article 22 of the CRD provide for specific remedies for consumers while Article 21 prohibits the trader to ask the consumer to pay more than the 'basic rate' for post-contract telephone queries and Article 27 exempts the consumer from the obligation to provide any consideration in case of inertia selling. As specified in Recital 14 of the CRD, it does not affect national law in the area of contract law for contract law aspects that are not regulated by this Directive, including national law in relation to the general contractual legal remedies. Accordingly, Member States can provide in national law for additional contractual remedies.

Consumers can pursue such remedies through individual actions. Moreover, Directive (EU) 2020/1828 of the European Parliament and of the Council <sup>(156)</sup> on representative actions for the protection of the collective interests of consumers introduced in all Member States the possibility of enforcing also the CRD through **representative actions**. Such actions could be brought by qualified entities, seeking injunctive and redress measures on behalf of the affected consumers <sup>(157)</sup>.

### 11.2. *Application to third country traders*

The application of the CRD to non-EU traders is subject to Regulation (EC) No 864/2007 of the European Parliament and of the Council <sup>(158)</sup> on the law applicable to non-contractual obligations (Rome II) and Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I). Rome I and Rome II are both applicable in civil or commercial disputes. The CRD provides both for non-contractual obligations (in particular, pre-contractual information requirements, prohibition of 'pre-ticked' boxes etc.) and contractual obligations (in particular, the right to withdrawal, rules on delivery of goods and contract confirmation).

**For non-contractual obligations**, in particular the pre-contractual information requirements under the CRD, the applicable law as determined under the Rome II Regulation would be the law of the contract that would apply to it had the contract been concluded <sup>(159)</sup>. Therefore, the same set of criteria is used to determine the applicable law for non-contractual obligations as for contractual obligations in civil and commercial matters under the Rome I Regulation. **This means that the applicable law for both contractual and non-contractual obligations would be identical** unless agreed otherwise between the parties to the contract. The choice of law agreements are however subject to limitations as set in the Rome I and Rome II Regulations.

According to Article 6(1)(b) of the Rome I Regulation, where a consumer concludes a contract with a trader in another country who, by any means, directs his commercial activities to the consumer's country of residence, the law of the country where the consumer has his or her habitual residence generally governs the contract. The concept of 'directing' one's commercial or professional activities to the country of the consumer is further explained in section 3.1.8 of this guidance.

Pursuant to Article 6(2) of the Rome I Regulation, if the contractual parties choose a different law to apply, the choice cannot deprive the consumer of the protection afforded by the legal provisions of the country of consumer's habitual residence that parties cannot derogate from in their contract.

The rights and obligations provided in the CRD constitute such 'mandatory provisions' as Article 25 stipulates that consumers cannot waive the rights conferred on them by the national measures transposing this Directive. Accordingly, whenever a third country trader targets consumers in one or more EU Member State(s) that trader must comply with the CRD requirements, in particular the pre-contractual information requirements and the right to withdraw from a contract.

<sup>(156)</sup> Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (OJ L 409, 4.12.2020, p. 1).

<sup>(157)</sup> See Article 4 of Directive (EU) 2020/1828.

<sup>(158)</sup> Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ L 199, 31.7.2007, p. 40).

<sup>(159)</sup> Article 12(1) of the Rome II Regulation.

### 11.3. Penalties

Article 24 of the CRD deals with penalties for the infringement of the national rules transposing the Directive. Paragraph 1 requires Member States to lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to the CRD. It leaves to Member States to decide on the type of the available penalties and to determine the procedures for the imposition of penalties, as long as they are effective, proportionate and dissuasive.

Rules on penalties are different from and complementary to the above-mentioned rules on individual contractual remedies for the individual consumers affected.

Directive (EU) 2019/2161 added to Article 24 additional requirements. Firstly, it provides a non-exhaustive indicative list of criteria for applying the penalties (paragraph 2). Secondly, it lays down more specific rules (paragraphs 3 and 4) on fines for major cross-border infringements that are subject to coordinated enforcement actions under Regulation (EU) 2017/2394 of the European Parliament and of the Council <sup>(160)</sup> on consumer protection cooperation ('CPC Regulation').

Recital 15 of Directive (EU) 2019/2161 encourages Member States to 'consider enhancing the protection of the general interest of consumers as well as other protected public interests' in the allocation of revenues from fines.

Paragraph 5 requires Member States to notify the Commission of national rules on penalties and any subsequent amendments, i.e. by means of a specific notification explaining the exact national provisions concerned and not merely as part of the general notification of transposition measures.

#### 11.3.1. Criteria for the imposition of penalties

Article 24(2) sets out a list of six non-exhaustive and indicative criteria that Member States' competent authorities and courts should take into account when imposing the penalties. They apply on a 'where appropriate' basis to all infringements, both domestically and in cross-border situations.

#### Article 24

2. Member States shall ensure that the following non-exhaustive and indicative criteria are taken into account for the imposition of penalties, where appropriate:

- (a) the nature, gravity, scale and duration of the infringement;
- (b) any action taken by the trader to mitigate or remedy the damage suffered by consumers;
- (c) any previous infringements by the trader;
- (d) the financial benefits gained or losses avoided by the trader due to the infringement, if the relevant data are available;
- (e) penalties imposed on the trader for the same infringement in other Member States in cross-border cases where information about such penalties is available through the mechanism established by Regulation (EU) 2017/2394 of the European Parliament and of the Council;
- (f) any other aggravating or mitigating factors applicable to the circumstances of the case.

Recital 7 of Directive (EU) 2019/2161 explains some of the criteria. Recital 8 clarifies that they 'might not be relevant in deciding on penalties regarding every infringement, in particular regarding non-serious infringements.' Moreover, 'Member States should also take account of other general principles of law applicable to the imposition of penalties, such as the principle of non bis in idem.'

Intentional nature of the infringement is relevant for the application of the criteria set out in points (a) and (f). However, intention is **not** a necessary condition for the imposition of penalties in case of infringement.

The criterion set out in point (c) covers the relevant trader's same or different past infringements of the CRD.

<sup>(160)</sup> Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004 (OJ L 345, 27.12.2017, p. 1).

The criterion set out in point (e) concerns cases where the same infringement has occurred in several Member States. It only applies where information about penalties imposed by other Member States in respect of the same infringement is available through the cooperation mechanism established under the CPC Regulation.

Depending on the circumstances of the case, the penalty(-ies) imposed on the same trader in other Member State(s) for the same infringement could indicate both greater scale and gravity under point (a) and/or qualify as a 'previous infringement' under point (c). Therefore, penalties imposed for the same infringement in other Member States could be an aggravating factor. The imposition of penalties in other Member States for the same infringement could also be considered in conjunction with other 'aggravating' circumstances covered by the other criteria in point (f) that generally refers to 'any other' aggravating or mitigating circumstances. However, a penalty imposed by another Member State on the same trader for the same infringement can also be relevant for the application of the *non bis in idem* principle in accordance with national law and Article 10(2) of the CPC Regulation <sup>(161)</sup>.

### 11.3.2. Penalties in the context of CPC coordinated enforcement actions

Article 24(3) and (4) provide additional, more prescriptive rules (compared to the general rule in paragraph 1) regarding penalties that must be available under national law for **infringements that are subject to coordinated actions under the CPC Regulation**.

Article 21 of the CPC Regulation requires Member States' competent authorities concerned by the coordinated action **to take enforcement measures, including the imposition of penalties, in an effective, efficient and coordinated manner against the trader responsible for the widespread infringement or the widespread infringement with a Union dimension**. 'Widespread infringements' and 'widespread infringement with a Union dimension' are cross-border infringements defined in Article 3(3) and (4) of the CPC Regulation <sup>(162)</sup>.

For this category of infringements, Article 24(3) requires Member States to provide for **the possibility of imposing fines and the maximum amount of fine must be at least 4 % of the trader's annual turnover**. Accordingly, Member States can set the threshold of the maximum fine also higher than 4 % of the trader's annual turnover. They can also choose to apply the fine based on a larger reference turnover, such as trader's worldwide turnover. Likewise, they can extend the penalties available in the event of CPC coordinated actions to other types of infringements, such as domestic ones.

When information on the trader's annual turnover is not available, for example, in case of recently established companies, Article 24(4) requires Member States to provide for the possibility of imposing **maximum fine of at least than EUR 2 million**. Again, Member States can set the threshold of the maximum fine also higher than EUR 2 million.

This harmonisation of national rules on fines aims to ensure that enforcement measures are possible and coherent in all Member States participating in a CPC coordinated enforcement action.

<sup>(161)</sup> Article 10(2) of the CPC Regulation: 'The implementation and the exercise of powers set out in Article 9 in application of this Regulation shall be proportionate and shall comply with Union and national law, including with applicable procedural safeguards and with the principles of the Charter of Fundamental Rights of the European Union. The investigation and enforcement measures adopted in application of this Regulation shall be appropriate to the nature and the overall actual or potential harm of the infringement of Union laws that protect consumers' interests.'

<sup>(162)</sup> Article 3(3) of the CPC Regulation: "'Widespread infringement" means: (a) any act or omission contrary to Union laws that protect consumers' interests that has done, does or is likely to do harm to the collective interests of consumers residing in at least two Member States other than the Member State in which: (i) the act or omission originated or took place; (ii) the trader responsible for the act or omission is established; or (iii) evidence or assets of the trader pertaining to the act or omission are to be found; or (b) any acts or omissions contrary to Union laws that protect consumers interests that have done, do or are likely to do harm to the collective interests of consumers and that have common features, including the same unlawful practice, the same interest being infringed and that are occurring concurrently, committed by the same trader, in at least three Member States.'

Article 3(4) of the CPC Regulation: "'Widespread infringement with a Union dimension" means a widespread infringement that has done, does or is likely to do harm to the collective interests of consumers in at least two-thirds of the Member States, accounting, together, for at least two-thirds of the population of the Union.'



The imposition of fines in accordance with Article 24(3) and (4) is subject to the common criteria laid down in Article 24(2), including in particular 'the nature, gravity and duration or temporal effects of the infringement'. **The actual fine imposed by the competent authority or court in a specific case can be lower** than the maximum amounts described above, depending on the nature, gravity and other relevant characteristics of the infringement.

Subject to the coordination obligations under the CPC Regulation, the competent authority or court can decide to impose periodic fines (such as daily fines) until the trader stops the infringement. It could also decide to impose the fine conditionally if the trader fails to stop the infringement within the prescribed term despite the injunction to that effect.

The **relevant turnover** to be taken into account for the calculation of the fine is the turnover generated in the Member State imposing the fine. However, Article 24(3) also makes it possible to establish the fine based on the trader's turnover generated **in all Member States concerned by the coordinated action** if the CPC coordination results in a single Member State imposing the fine on behalf of the participating Member States.

Recital 10 of Directive (EU) 2019/2161 clarifies that 'in certain cases, a trader can also be a group of companies'. Accordingly, where the **trader responsible for the infringement is a group of companies**, its combined group turnover in the relevant Member States will be taken into account for the calculation of the fine.

The Directive does not define the reference year for the definition of the annual turnover. Therefore, for establishing the fine, the national authorities may use, for example, the **latest available annual turnover data** at the time of the decision on the penalty (i.e. preceding business year).

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## ANNEX

**List of Court cases mentioned in this Notice  
(ordered by the year of the judgment)**

| Case number and name  | Issue(s)  | Section(s) in the Notice  |
|---|---|---|
| 1999  |   |   |
| C-423/97 – Travel–Vac   | Directive 85/577/EEC – Scope – Time–share contracts – Right of renunciation   | 2.1. Contracts concluded outside the trader’s business premises                           |
| 2005  |   |   |
| C-20/03 – Burmanjer   | Itinerant sale – Conclusion of contracts for subscriptions to periodicals – Prior authorisation   | 1.4. Mixed purpose contracts  |
| 2009  |   |   |
| C-489/07 – Messner  | Directive 97/7/EC – Consumer protection – Distance contracts – Exercise by the consumer of the right of withdrawal – Compensation for use to be paid to the seller  | 5.5.4. Consumer’s liability for mishandling of the goods                                  |
| 2012  |   |   |
| C-49/11 – Content Services  | Directive 97/7/EC – Distance contracts – Consumer information – Information given or received – Durable medium – Meaning – Hyperlink on the website of the supplier – Right of withdrawal   | 4.4. Confirmation of the contract   |
| 2016  |   |   |
| C-149/15 – Wathelet   | Directive 1999/44/EC – Sale of consumer goods and associated guarantees – Scope – Concept of ‘seller’ – Intermediary – Exceptional circumstances  | 3.2.2. Trader’s identity and contact details  |
| 2017  |   |   |
| C-375/15 – BAWAG  | Directive 2007/64/EC – Payment services in the internal market – Framework contracts – Prior general information – Obligation to provide that information on paper or on another durable medium – Information transmitted by means of the electronic mailbox of an online banking website | 4.4. Confirmation of the contract   |
| C-586/15 – Zentrale zur Bekämpfung unlauteren Wettbewerbs Frankfurt am Main | Directive 2011/83/EU – Article 21 – Communication by telephone – Operation of a telephone line by a trader to enable consumers to contact him in relation to a contract concluded – Prohibition on applying a rate higher than the basic rate – Concept of ‘basic rate’                   | 9. Communication by Telephone   |
| 2018  |   |   |
| C-105/17 – Kamenova   | Directive 2005/29/EC – Article 2(b) and (d) – Directive 2011/83/EU – Article 2(2) – Concepts of ‘trader’ and ‘commercial practices’   | 1.1. The definitions of ‘trader’ and ‘consumer’<br>3.4.2. Status of the contractual party |

|                                       |   |  |
|---------------------------------------|---|--|
| C-332/17 – Starman                    | Directive 2011/83/EU – Article 21 – Consumer contracts – Telephone communications – Practice of a telecommunication services provider consisting in offering its customers who have already concluded a contract a speed dial number at a rate higher than the basic rate   | 9. Communication by Telephone  |
| C-485/17 – Verbraucherzentrale Berlin | Directive 2011/83/EU – Article 2(9) – Concept of ‘business premises’ – Criteria – Sales contract concluded on a stand run by a trader at a trade fair   | 2.1. Contracts concluded outside the trader’s business premises  |
| 2019                                  |   |  |
| C-430/17 – Walbusch Walter Busch      | Directive 2011/83/EU – Distance contracts – Article 6(1)(h) – Obligation to provide information on the right of withdrawal – Article 8(4) – Contract concluded through a means of distance communication which allows limited space or time to display the information – Meaning of ‘limited space or time to display the information’ – Brochure inserted in a periodical – Mail order coupon containing a hyperlink referring to information on the right of withdrawal | 4.2.2. Requirements for the order confirmation button<br><br>5.2. Information about the right of withdrawal  |
| C-649/17 – Amazon EU                  | Directive 2011/83/EU – Article 6(1)(c) – Information requirements for distance and off-premises contracts – Obligation, for a trader, to indicate its telephone number and its fax number where they are ‘available’  | 3.1.2. Clarity of the information and link to the UCPD<br>3.2.2. Trader’s identity and contact details<br>5.2. Information about the right of withdrawal |
| C-681/17 – slewo                      | Directive 2011/83/EU – Article 6(1)(k) and Article 16(e) – Distance contract – Right of withdrawal – Exceptions – Concept of ‘sealed goods which are not suitable for return due to health protection or hygiene reasons and which have been unsealed by the consumer after delivery’ – Mattress whose protective seal has been removed by the consumer after delivery  | 5.4.4. Consumer’s liability for mishandling of the goods   |
| C-465/19 – B & L Elektrogeräte        | Directive 2011/83/EU – Article 2(8)(c) and (9) – Off-premises contract – Concept of ‘business premises’ – Contract entered into at a stand at a trade fair immediately after the consumer, who was in a common area of the fair, had been solicited by the trader   | 2.2. Contracts concluded after addressing the consumer outside the business premises   |
| C-673/17 – Planet49                   | Directive 95/46/EC – Directive 2002/58/EC – Regulation (EU) 2016/679 – Processing of personal data and protection of privacy in the electronic communications sector – Cookies – Concept of consent of the data subject – Declaration of consent by means of a pre-ticked checkbox  | 5.6.1. Consumer’s consent to immediate performance   |

## 2020

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|---|---|---|
| C-583/18 – DB Vertrieb GmbH               | Directive 2011/83/EU – Scope – Service contract – Article 2(6) – Contract for passenger transport services – Article 3(3)(k) – Cards conferring entitlement to price reductions when passenger transport contracts are subsequently concluded – Online selling of such cards without informing the consumer about the right of withdrawal   | 1.7.5. Passenger transport  |
| C-208/19 – NK (Individual house project)  | Directive 2011/83/EU – Scope – Article 3(3)(f) – Concept of ‘contracts for the construction of new buildings’ – Article 16(c) – Concept of ‘goods made to the consumer’s specifications or clearly personalised’ – Contract between an architect and a consumer concerning the drawing up of a plan for a new single-family house   | 1.7.1. Rental contracts and building contracts<br>5.11.2. Goods made to the consumer’s specifications or clearly personalised |
| C-266/19 – EIS                            | Directive 2011/83/EU – Article 6(1)(c) and (h), and Article 6(4) – Annex IA – Right of withdrawal – Information to be provided by traders in relation to the conditions, time limit and procedures for exercising the right of withdrawal – Obligation for traders to provide a telephone number ‘where available’ – Scope  | 5.2. Information about the right of withdrawal  |
| C-329/19 – Condominio di Milano, via Meda | Directive 93/13/EEC – Unfair terms in consumer contracts – Article 1(1) – Article 2(b) – Definition of ‘consumer’ – Commonhold of a building  | 1.1. The definitions of ‘trader’ and ‘consumer’   |
| C-380/19 – Deutsche Apotheke              | Directive 2011/83/EU – Alternative dispute resolution – Article 13(1) and (2) – Mandatory information – Accessibility of information  | 3.3.4. Out-of-court redress mechanisms  |
| C-529/19 – Möbel Kraft                    | Directive 2011/83/EU – Article 16(c) – Right of withdrawal – Exceptions – Goods made to the consumer’s specifications or clearly personalised – Goods which the trader has begun to produce   | 5.11.2. Goods made to the consumer’s specifications or clearly personalised   |
| C-641/19 – PE Digital                     | Directive 2011/83/EU – Point 11 of Article 2, Article 14(3) and Article 16(m) – Distance contract – Supply of digital content and digital services – Right of withdrawal – Obligations of the consumer in the event of withdrawal – Determination of the amount to be paid by the consumer for the services provided before the exercise of the right of withdrawal – Exception to the right of withdrawal in the case of the supply of digital content | 1.5. Distinction between digital services and online digital content<br>5.6.2. Consumer’s compensation obligation             |

## 2021

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|-------------------------------|---|-------------------------------|
| C-922/19 – Stichting Waternet | Directive 97/7/EC – Article 9 – Directive 2011/83/EU – Article 27 – Directive 2005/29/EC – Article 5(5) – Annex I, point 29 – Unfair commercial practices – Concept of ‘inertia selling’ – Supply of drinking water | 1.2. The notion of ‘contract’ |
|-------------------------------|---|-------------------------------|

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|-----------------------|--|--|
| C-536/20 – Tiketa     | Directive 2011/83/EU – Article 2(2) – the concept of a trader – Article 8(1) – information requirements                        | 3.1.2. Clarity of the information and link to the UCPD<br>3.2.2. Trader's identity and contact details |
| C-96/21 – CTS Eventim | Directive 2011/83/EU – Article 16(1) – Right of withdrawal cultural event – online intermediary                                | 5.11.6. Contracts with a specific date or period of performance  |
| C-179/21 – Victorinox | Directive 2011/83/EU – Article 6(1)(m) – information on the commercial guarantee   | 3.2.6. Guarantees and after-sales services   |
| C-249/21 – Fuhrmann-2 | Directive 2011/83/EU – Article 8(2), second subparagraph – 'label' of the order confirmation button or of the similar function | 4.2.1. Information to be presented directly before placing the order                                   |