

# Client Alert

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12 June 2014

## Consumer Rights and Wrongs: Are You Ready for the New EU Consumer Contracts Rules?

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From 13 June 2014, the consumer rights landscape in Europe will change. The EU Consumer Rights Directive (2011/83/EU) (the “CRD”) was introduced in 2011 with the aim of harmonising and simplifying consumer protection legislation in the EU. Incorporation of the CRD into national laws was required by 13 December 2013, and member states must apply the national laws implementing the Directive from 13 June 2014.

All businesses selling consumer products into the EU are affected by the changes required by the CRD and will need to take steps to ensure compliance with the new rules, if they have not already done so.

In this Alert, we summarise the new EU rules and examine the approach to implementation taken by five EU member states in particular.

The greatest challenge to organisations selling to consumers in the EU has been (and will continue to be) the practical application of the rules, that is, deciding which changes need to be made to existing order processes, website/app design and architecture, policies and terms and conditions. For example, companies are wrangling with issues such as (i) what wording to put on their order button, (ii) what level of detail to include in an order confirmation/receipt, and (iii) what changes need to be made when dealing with a mobile app as opposed to a website.

If organisations fail to comply with the CRD rules, they could find themselves with unenforceable contracts and reputational damage. In addition, they could face other penalties. The CRD gives member states the freedom to determine their own penalties, which may include both fines and criminal convictions. Accordingly, the consequences of non-compliance could be significant, and there may be differences in penalties between EU countries.

Some of the key changes required by the CRD are as follows.

### KEY CHANGES

- *More detailed information requirements.* The CRD sets out the information that a trader must provide to an EU consumer prior to the consumer being bound by the contract. The requirements differ as between:
  - distance contracts (i.e., contracts under an organised distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer);
  - off-premises contracts (i.e., contracts concluded in the simultaneous physical presence of the trader and the consumer, in a place which is not the business premises of the trader such as doorstep sales); and
  - on-premises contracts (i.e., contracts that are neither distance nor off-premises contracts).

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Even with respect to distance contracts, there are differences between which (and how) information is to be provided when dealing with online contracts and when dealing with other distance contracts. There are also different requirements if the contract is concluded through a means of distance communication which allows limited space or time to display the information (e.g., space restrictions on a mobile phone screen, etc.).

- *Confirmation requirements.* The CRD sets out the nature and content of the confirmation that a trader must issue following conclusion of the contract. When the order relates to digital goods, the confirmation should also include a statement that the consumer consented to the download and an acknowledgement that the consumer has accordingly lost the right to withdraw from the contract.
- *Extended cooling-off period.* The CRD extends the period within which consumers can change their minds and withdraw from a distance or off-premises contract (for any reason) from seven working days and seven business days, respectively, to 14 calendar days. For the supply of services, this cooling-off period begins from the day of the conclusion of the contract and, for the supply of goods, from the day on which the consumer receives the goods. This period may be extended for up to 12 months (increased from three months) if the trader fails to inform consumers of their withdrawal right during the sales process. The withdrawal right does not apply in certain circumstances, including when the goods in question are bespoke or personalised or when the consumer has consented to the supply of services prior to the expiry of the cooling off period with the acknowledgement that the consumer will lose the right once the contract has been fully performed. The CRD introduces a template withdrawal form and includes model withdrawal rights wording for traders to include in their terms and conditions. An online retailer will need to make the form available on its website, for example, via a link in the Terms and Conditions. Although the trader must provide the form, consumers can communicate their decision to cancel in any way, whether in writing or otherwise.
- *Reduced refund period.* The trader is required to 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 the trader is informed of the consumer's decision to withdraw from the contract. This is reduced from the previous 30-day period.
- *Automatic termination of ancillary contracts.* If consumers exercise their right of withdrawal, any ancillary contracts, such as insurance or maintenance contracts for goods, will be automatically terminated. The CRD provides that member states must develop their own rules on the termination of such contracts.
- *Acknowledgement of obligation to pay.* The CRD requires traders to ensure that the consumer, when placing an online order, explicitly acknowledges that the order implies an obligation to pay. This requirement addresses circumstances such as when a fraudster tricks consumers into paying for "free services". If placing an order entails clicking a button or a similar function, the button or similar function must be labelled in an easily legible manner only with the words "*order with obligation to pay*" or a corresponding unambiguous formulation indicating that placing the order entails an obligation to pay the trader. If the trader fails to comply with this requirement, the consumer will not be bound by the contract or order. One of the issues that companies have been debating is what wording to place on their button: "*order with obligation to pay*" is clearly unwieldy and less attractive than alternative formulations such as "*Order and Pay*", "*Pay Now*", "*Confirm and Buy*" or just "*Buy*". In fact, UK guidance – see below – refers to a "*Pay now*" button. Although we expect that existing formulations such as "*continue*", "*order*" and "*register*" would no longer be acceptable

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because they do not include any reference to payment, we will have to wait and see which of these alternative formulations are ultimately deemed acceptable.

- *Increased cost transparency.* The trader must (i) ensure that the total cost of a product or service is disclosed prior to the conclusion of the contract, including VAT and any additional charges; (ii) inform the consumer in advance if it wants the consumer to bear the direct cost of returning goods; and (iii) not charge the consumer more than its actual costs for the use of credit cards or other payment methods, nor charge the consumer more than the basic rate for helpline telephone calls.
- *Banning pre-ticked boxes.* The trader must seek the express consent of the consumer for any extra payment in addition to the remuneration agreed upon for the trader's main contractual obligation. The trader cannot rely on pre-ticked boxes or other default options which the consumer is required to reject in order to avoid the additional payment. If the trader fails to comply with this requirement, the consumer will be entitled to the reimbursement of such payments.
- *Delivery period.* Unless the parties agree otherwise, the trader must deliver the goods to the consumer without undue delay and, in any event, no later than 30 days from the conclusion of the contract.
- *Digital content.* The CRD includes within its scope a new category of contracts for the supply of "digital content", meaning data which are produced and supplied in digital form, such as computer programs, applications, games, music, videos or texts, irrespective of whether they are accessed through downloading or streaming, from a tangible medium or through any other means. In respect of these contracts:
  - Consumers have the right to withdraw unless they have consented to the download and have acknowledged that by downloading the content they will lose their right to withdraw.
  - The trader must inform the consumer about the functionality and the relevant interoperability of the digital content, including (i) the ways in which the digital content can be used (e.g., for the tracking of consumer behaviour), (ii) the absence or presence of any technical restrictions such as protection via Digital Rights Management or region coding, and (iii) the standard hardware and software environment with which the digital content is compatible (e.g., the operating system, the necessary version and certain hardware features).

The CRD is being implemented across Europe, with varying degrees of preparedness. Here is a flavour.

## IMPLEMENTATION IN THE UK

In the UK, the bulk of the CRD is being implemented into law via the Consumer Contracts (Information, Cancellation and Additional Payments) Regulations 2013 (the "CCRs"). The CCRs have given rise to some confusion because the CRD was originally intended to be implemented by the Consumer Rights Bill (the "Bill"). However, the Bill has been delayed and is still going through the UK parliament. To meet the deadline for the implementation of the CRD, the UK government has therefore had to put in place the CCRs. When the Bill comes into force as an Act, the UK government will then repeal the provisions of the CCRs and the equivalent provisions of the Act will apply instead.

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The CCRs replace the current UK legislation on distance selling, as set out in the Consumer Protection (Distance Selling) Regulations 2000, and UK legislation on doorstep sales, as set out in the Cancellation of Contracts made in a Consumer's Home or Place of Work etc. Regulations 2008. The UK Department for Business, Innovation and Skills has published guidance on the new rules, but it's fairly high level and so companies will need to do most of the work themselves in terms of interpreting the rules in the context of their business.

## GERMANY

Germany has passed a bill on the implementation of the EU Consumer Rights Directive (the "Bill"). This Bill will enter into force on 13 June 2014. With this Bill, the relevant provisions on consumer contracts of (i) the German Civil Code (*Buergerliches Gesetzbuch*), Sec.312 et seq., Sec.355 et seq., Sec.443 et seq.; (ii) the Introductory Law to the German Civil Code (*Einfuehrungsgesetz zum Buergerlichen Gesetzbuch*), Art.46B para.3, Art.246 et seq.; (iii) the distance Learning Protection Code (*Fernunterrichtsschutzgesetz*), Sec.3, Sec.4; and (iv) Price Indication Regulation (*Preisangabenverordnung*) will be modified in accordance with the CRD.

The new provisions apply to all consumer contracts concluded from 13 June 2014. With regard to distance contracts with consumers concluded before 13 June 2014, the provisions in force at that date apply. However, if consumers were not correctly notified about their withdrawal right pursuant to the applicable provisions and the withdrawal right has therefore not yet expired, such withdrawal right will expire as follows: (i) delivery of goods: 12 months and 14 days after the receipt of the goods, however, not before end of 27 June 2015; (ii) recurring deliveries of similar goods: 12 months and 14 days after the receipt of the first good, however, not before end of 27 June 2015; and (iii) provision of services: upon 27 June 2015. With regard to doorstep contracts with consumers concluded before 13 June 2014 under which consumers were not correctly notified about their withdrawal right pursuant to the applicable provisions and the withdrawal right has therefore not yet expired, such withdrawal right will expire 12 months and 14 days after the full performance of both parties' obligations under such contract, however, not before end of 27 June 2015. This does not apply to distance and doorstep contracts for financial services.

## FRANCE

In February 2014, the French parliament adopted a Consumer Law which implements the CRD in a way that is very close to its original wording. The Consumer Law involved changes to the French Consumer Code.

However, some provisions relating to consumers' right of withdrawal were strongly debated and the way in which Article 13 of the CRD was finally implemented is one example of a provision that is specific to France. French merchants criticized the proposed provisions implementing Article 13 of the CRD on the obligations of a trader in the event of a withdrawal and, as a result, various amendments were submitted to the French parliament in order to soften its implications. According to Article 13 of the CRD, the trader is required to reimburse all payments received from the consumer, including the costs of delivery, without undue delay – and in any event not later than 14 days from the day on which the trader is informed of the consumer's decision to withdraw from the contract. These provisions were implemented into article L121-21 of the French Consumer Code. While initially, the Bill set out high sanctions for merchants who do not reimburse those costs in time (10% of the amount of the order until 30 days of delay, 20% for a delay of between 30 and 60 days, and 50% of the amount after 60 days), the final Act retains penalties which are a lot lower. Accordingly, merchants have more time to reimburse the costs, and they may even wait to receive the product before repaying those costs.

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## NETHERLANDS

In the Netherlands, the majority of the new CRD rules were implemented into a new Section 2B of Title 5 of Book 6 Dutch Civil Code (DCC), entitled “Provisions for contracts between traders and consumers”. In addition, a portion of the rules was implemented in Title 1 of Book 7 DCC. The old rules in (i) Section 9A of Title 1 of Book 7 DCC, entitled “distance contracts”, (ii) the Door-to-Door Sales Act (*Colportagewet*), as well as (iii) Section 4.2.5 of the Act on Financial Supervision (*Wet op het financieel toezicht*) in relation to distance contracts for financial services, are repealed by entry into force of the new provisions. The new provisions enter into force on 13 June 2014.

## POLAND

Poland has not managed to implement the CRD on time. The implementing law – the Consumers’ Rights Law (the “CRL”) – was only adopted on 30 May 2014. The CRL now needs to be signed into law by the Polish president and will then be officially published. It will then become effective six months after its official publication. This means the CRL will not be law before December 2014 and long after the 13 June 2014 deadline.

## CONCLUSION

Many traders in the EU do not currently comply with the new requirements. Accordingly, traders will need to review their existing processes, website/app design and architecture, policies, and terms and conditions and make the necessary changes ahead of the deadline. These changes are likely to include rewriting the text on their order button, altering the layout and content of order pages and order confirmations, and amending their terms and conditions. Companies will also need to ensure that their employees are trained in the new rules and policies. In this social media age, news of bad customer service spreads fast. Companies need to take steps now to make sure it’s not their organization trending on Twitter – for all of the wrong reasons.

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