



**BEUCITIZEN**  
BARRIERS TOWARDS EU CITIZENSHIP

The capacity of the consumer to process information and make informed  
choices in the digital internal market  
National experiences in the (cross-border) online purchase of goods and services by  
consumers

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## INTRODUCTION

If we assume that market integration serves the interest of citizens in their capacity as consumers and optimizes consumer welfare, then the EU rules on free movement and competition could, according to Weatherill, be seen as a form of consumer policy.<sup>1</sup> Since national consumer protection law may impede free movement, which in itself is thus designed to advance the consumer interest, the European Court of Justice (hereafter: ECJ or Court), has developed its own notion of consumer interest.<sup>2</sup> This notion relates to the consumer's capacity to process information and make informed choices about available products and services, which is crucial for the market integration process. According to the case law of Court the consumer is considered an individual who can, if provided with the necessary information, make his own choices and defend his own interests. In *GB-INNO-BM* the Court held that "Article 28 (now Article 34 TFEU) cannot be interpreted as meaning that national legislation which denies the consumer access to certain kinds of information may be justified by mandatory requirements concerning consumer protection".<sup>3</sup> This is also referred to as the notion of 'reasonably circumspect consumer' considering the Court's perception "that most consumers are sufficiently robust and well-informed to take care of themselves in the market place".<sup>4</sup>

Deliverable 5.4 looks into the rights of consumers in the Digital Single Market and into consumers' experiences in a number of Member States in the (cross-border) online purchase of goods and services. This Deliverable thus contributes to gaining more knowledge about the capacity of consumers to process information and make informed choices in the field of the digital single market. As this case study builds upon previous research carried out in the context of Work Package 5 and particularly on Deliverable 5.2, it does not, contrary to what is stated in the Description of Work (DoW) deal with the energy market. Deliverable 5.2 focussed on the following three implementation-items:

- 1) Access of economic actors to the market
- 2) The protection of economic rights of consumers
- 3) The protection of citizens' rights in the digital era

Deliverable 5.4 deepens the analysis carried out in Deliverable 5.2 with respect to the second two implementation items., These dealt with general implementation issues relating to the Consumer rights Directive 2011/83/EU and the protection of personal data of consumers.

As was stated in Deliverable 5.2 in respect of the Digital Single Market Commissioner Ansip explicitly mentions, among others: breaking down national silos in (...) copyright and data protection legislation (...); helping build the framework conditions for protecting citizens online, including fighting against cybercrime, and simplifying consumer rules for online shopping<sup>5</sup>. Deliverable 5.2 focused on the

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<sup>1</sup> S Weatherill, '27 – Consumer Policy' in P Craig and G De Búrca (eds), *The Evolution of EU Law – Second Edition* (Oxford, Oxford University Press, 2011) 838.

<sup>2</sup> Weatherill, 'EC' (1997) 41; see for the notion of consumer in Community law: K Mortelmans and S Watson, 'The notion of the consumer in community law: a lottery?' (1995) *Tijdschrift voor Consumentenrecht* 229-246; S Weatherill, 'Recent case law concerning the free movement of goods: mapping the frontiers of market deregulation' (1999) 36 *CML Rev* 51-85.

<sup>3</sup> Case C-362/88 *GB-INNO-BM v Confédération du commerce luxembourgeois (GB-INNO-BM)* [1990] ECR I-667, para 18. In his opinion AG Lenz emphasized the importance of information - in the form of advertisements - for consumers: 'Information should only be withheld from the consumer for his own protection for *convincing* reasons. After all, it must be assumed that any accurate information can only be useful to the consumer' (para 34).

<sup>4</sup> S Weatherill and P Beaumont, *'EU Law'* (London, Longman, 1999) 699-702.

<sup>5</sup> [http://ec.europa.eu/commission/2014-2019/ansip\\_en](http://ec.europa.eu/commission/2014-2019/ansip_en)

protection of online citizens. Rapid technological developments in the field of the Internet have considerably increased the possibilities for citizens to do business, also cross-border, to provide and receive information via the Internet and to process and store data. The positive effects of these developments can hardly be denied. But at the same time there are growing concerns about the protection of citizens' personal data and privacy in the digital society, not only as a result of the state seeking to collect personal data in its fight against crime and terrorism, but also of the increasing ability and desire of companies using these data for business purposes.

Trust is essential for the development of the Digital Single Market and the abolishment of barriers for citizens to sell and purchase goods and services cross-border. A number of measures have been adopted at EU level to enhance the internal market and to protect citizens' privacy and data.<sup>6</sup> Within the European Union, data protection flows essentially from Directive 95/46/EC and Directive 2002/58/EC<sup>7</sup>. In addition, a number of Articles of the Charter of Fundamental Rights of the European Union are directly or indirectly relevant for data protection.

This Deliverable specifically focuses on the remaining challenges for consumers to effectively use these rights, to effectively process information and to make informed choices in the digital internal market. The main question is how the barriers to exercising consumer rights can be overcome so as to further enhance and develop the Digital Single Market. This research paper combines the insights provided by the country reports covering Belgium, Spain, Denmark, Hungary and the Netherlands, with regard to (*digital*) *consumer rights*. The number of countries has been established on the basis of the existing expertise within WP5 and the division of work amongst the different case studies carried out in WP5.

The research methodology used in this case study is partly the so-called 'black letter law' approach, which refers to a comprehensive legal analysis of legislation and case law that has been carried out, partly desk research, collecting, analysing and interpreting all other relevant information available in print or published on the Internet.

For present purposes, the term digital consumer rights covers both rights specifically dealt with in e-commerce Directive 2000/31/EC and the digital dimension of consumer rights within the meaning of Consumer rights Directive 2011/83/EU.

The digital age and the Internet offer specific challenges for consumers as well as possibilities for the EU Single Market by promoting cross-border sales and use of services. According to the Commission in its Single Market Act "the development of the digital single market is hindered by lack of consumer confidence, the prime causes of which are payment security and enforcement of consumer rights in cross-border transactions, particularly with regard to product safety and counterfeiting".<sup>8</sup> As will be seen in this report, Member States support information requirements for traders and more guidance for consumers in seeking to overcome persistent barriers for consumers to purchase goods and services online, in creating more consumer confidence and in stimulating the (cross-border) sale of goods and services. The Netherlands Consumer and Market Authority (ACM), for instance, specifically

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<sup>6</sup> <[http://ec.europa.eu/justice/data-protection/law/index\\_en.htm](http://ec.europa.eu/justice/data-protection/law/index_en.htm)> accessed 25 June 2015.

<sup>7</sup> Directive 95/46/EC of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L 23/11 resp. Directive 2002/58/EC of the European Parliament and the Council of 12 July 2002 concerning the processing of personal data and on the protection of privacy in the electronic communications sector [2002] OJ L 201/37.

<sup>8</sup> Commission Communication (n 111) 12. This part does not explicitly return in the Single Market Act II, Commission, 'Single Market Act II: Together for new growth' (Communication) COM (2012) 573 final.

endorses the idea of 'consumer empowerment', which is strongly linked to the above-mentioned basic notion of the consumer in EU law.<sup>9</sup>

The question is whether this approach meets the current challenges that European consumer policy face, where consumer behaviour and their impact on the market have considerably changed. Due to economic and technological developments and due to developments in *for instance* behaviour economics, the informed and rational consumer hypothesis has been challenged: consumers are in their opinion all vulnerable as they struggle to make rational decisions; they are irrational and sometimes uneducated.<sup>10</sup> This may also be true for the field of e-commerce and the digital Single Market, where mistrust, safety concerns, questions relating to data protection and an image of insecurity are important and persistent concerns for consumers. If consumer empowerment, through the imposition of far-reaching information requirements, may appear to be insufficient, particularly to protect the more vulnerable consumers, barriers will continue to exist. And this will hamper the further development of the Digital Single Market and the cross-border online sale and purchase of goods and services.

In the questionnaire, which constitutes the basis for this Deliverable, participants in Work Package 5 have been asked to focus on three themes:

- Theme I: Implementation of the e-commerce Directive 2000/31/EC and the digital dimension of consumer rights within the meaning of Consumer rights Directive 2011/83/EU;
- Theme II: National experiences in online purchase of goods and services, focusing on general trends in the purchase of goods and services;
- Theme III: National experiences in the *cross-border* online purchase of goods and services, focusing on the *cross-border* online purchase of goods and services.

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<sup>9</sup> See also S. de Vries, 'Consumer Protection and the EU Single Market Rules: the Search for the Paradigm Consumer', *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht Journal of European Consumer and Market Law* (2012) 4:228 - 242

<sup>10</sup> I Benöhr, *EU Consumer Law and Human Rights* (Oxford, Oxford University Press, 2013) 84.

## 1. THEME I: IMPLEMENTATION E-COMMERCE DIRECTIVE & E-DIMENSION OF CONSUMER RIGHTS DIRECTIVE

### 1.1 DEALING WITH GENUINE CHALLENGES/BARRIERS TO/FOR THE ACTUAL EXERCISE OF CONSUMER RIGHTS

In considering the various approaches to barriers to the actual exercise of consumer rights in the participating Member States, a widely supported emphasis on information and guidance is apparent in most countries. To this extent, the Belgian government has taken different initiatives aimed at 'educating the consumer' in online commerce. An illustrative example is a website consulting consumers on the relevant legal framework and all their rights in the different stages of an online purchase.<sup>11</sup> Additionally, the Belgian government published a guide on the use of the internet. Similar practices are displayed in Denmark, where the office of Consumer Europe (*Forbruger Europa*), financed by the Danish Competition and Consumer Authority (*Konkurrence- or Forbrugerstyrelsen*), provides for a wealth of easy-accessible information.<sup>12</sup> Such information can range from guidelines on online shopping, on accepted payment methods, to guidelines on complaint procedures. Additionally, the Danish Consumer Ombudsman has issued guidelines on payment methods in online shops.<sup>13</sup> In the Netherlands, the Authority Consumer and Market (*Authoriteit Consument en Markt*) seeks to promote consumer empowerment by informing consumers on their specific rights, and by explaining them how to make well-informed decisions.<sup>14</sup> To this extent, the Authority Consumer and Market operates a website where consumers can pose questions.<sup>15</sup> Regrettably, the website is only available in Dutch.

Besides a comparable importance being attached to informing consumers in the participating Member States, similarities can be found as regards the availability of complaint procedures. In Denmark, the consumers can lodge their complaint to the Danish Consumer Complaints Board in case a supplier is located in that country.<sup>16</sup> In the Netherlands, the abovementioned website also functions as a portal via which consumers can forward any complaint to the Authority Consumer and Market.<sup>17</sup> Moreover, in these countries the authorities are concerned with monitoring of the compliance with consumer rights. In Denmark, the Consumer Ombudsman publishes a yearly report in which it presents its activities in relation to consumer rights, as well as the challenges ahead for consumer protection. In the Netherlands, the Authority Consumer and Market regularly publishes studies on consumer rights and consumer protection.

In contrast to the abovementioned similarities, there is also a notable difference between the Danish and Dutch practices. Where in Denmark the Consumer Ombudsman plays a central role in dealing with the barriers to the actual exercise of consumer rights, in the Netherlands, the Ombudsman does explicitly not deal with consumer rights or consumer protection.

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<sup>11</sup> See <<http://www.infoshopping.be/>>. Last accessed 15 April 2016.

<sup>12</sup> See for Consumer Europe <<http://www.consumereurope.dk/>> and for Danish Competition and Consumer Authority <<http://en.kfst.dk/>>. Last accessed 15 April 2016.

<sup>13</sup> See for Danish Consumer Ombudsman <<http://www.consumerombudsman.dk/>>. Last accessed 15 April 2016.

<sup>14</sup> See for Dutch Authority Consumer and Market <<https://www.acm.nl/en/>>. Last accessed 15 April 2016.

<sup>15</sup> See <<http://www.consuwijzer.nl/>>. Last accessed 15 April 2016.

<sup>16</sup> See for Danish Consumer Complaints Board <<http://en.kfst.dk/consumer/the-consumer-complaints-board/>>. Last accessed 15 April 2016.

<sup>17</sup> See op. cit. n. 12.

## **1.2 SPECIFIC MEASURES TO GIVE FURTHER EFFECT TO THE PRINCIPLE OF NON-DISCRIMINATION**

In considering whether possible measures have been adopted giving further effect to the principle of non-discrimination between national and EU citizens within the participating Member States, notable differences arise. On a preliminary note, it must be submitted that a presumption of non-discrimination appears to exist within all countries. Exemplary, to this extent, is the fact that the Belgian Code of Economic Rights does not distinguish between Belgian and EU consumers, and the fact that the Danish Consumer Complaints Board and Consumer Europe are equally accessible to foreign consumers.<sup>18</sup>

As regards specific measures giving further effect to the principle of non-discrimination, also on other grounds than nationality, however, practices vary greatly amongst the participating Member States. In Belgium and Denmark, for instance, no explicit measures have been adopted. By contrast, in the Netherlands, the Institute for Human Rights (*College voor de Rechten van de Mens*) closely monitors discrimination of consumers.<sup>19</sup> Furthermore, the Dutch Journal for consumer law & trade practices (*Tijdschrift voor consumentenrecht & handelspraktijken*) contains a yearly scholarly contribution by Davidovic and Rodrigues on equal treatment of consumers and the opinions of the Institute for Human Rights. Additionally, the Dutch debate on non-discrimination of ‘consumers in the broadest sense of the word’ has resulted in two particularly interesting developments, which may also be relevant for the subject matter of this Deliverable. The possibility to discriminate consumers on grounds of sexual orientation has been severely limited by two recent legislative changes. For one, the municipalities in the Netherlands are no longer allowed to employ civil servants who, as conscientious objectors, refuse to marry gay couples.<sup>20</sup> Furthermore, special schools, which have a particularly religious status, can no longer refuse homosexual teachers or pupils.<sup>21</sup> ‘Consumers’ seeking access to services in different sectors, whether being provided by the state or not, should not be discriminated on the basis of their sexual orientation.

## **1.3 THE E-COMMERCE DIRECTIVE**

### *1.3.1 IMPLEMENTATION OF THE E-COMMERCE DIRECTIVE INTO NATIONAL LAW*

Regarding the implementation of the e-commerce Directive, it must be noted that Belgium, Denmark, Hungary and Spain, on the one hand, opted for transposition by introduction of new substantive laws, while the Netherlands, on the other hand, opted to implement the Directive completely by amending previously existing laws.

In Belgium, for instance, the e-commerce Directive was initially implemented by the Law of 11 March 2003 on certain legal aspects of information society services. Since that law expired on 31 May 2014, the Directive has been implemented by the Law of 15 December 2013 inserting the Book XII on the Right of electronic economy in the Commercial Code, with inclusion of definitions specific to SGB XII and enforcement provisions of the law in Book XII, in Books I and XV of the Code of economic law (*Loi du 15 Decembre 2013 portant insertion du Livre XII, “Droit de l’économie électronique” dans le Code*

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<sup>18</sup> See Belgian Code of Economic Rights

<[http://economie.fgov.be/fr/modules/publications/general/code\\_de\\_droit\\_economique.jsp/](http://economie.fgov.be/fr/modules/publications/general/code_de_droit_economique.jsp/)>. Last accessed 15 April 2016.

<sup>19</sup> See for Institute for Human Rights <<https://www.mensenrechten.nl/>>. Last accessed 15 April 2016.

<sup>20</sup> See Dutch Bulletin of Acts and Decrees 2014, 260 <<https://zoek.officielebekendmakingen.nl/stb-2014-260.html>>. Last accessed 20 April 2016.

<sup>21</sup> See Dutch Bulletin of Acts and Decrees 2015, 200. Available at: <<https://zoek.officielebekendmakingen.nl/stb-2015-200.html>>. Last accessed 20 April 2016.



*de droit économique, portant insertion des définitions propres au Livre XII et dispositions d'application de la loi propres au Livre XII, dans les Livres I et XV du Code du droit économique).*

In Denmark, the e-commerce Directive was implemented by means of act on services in the information society, including certain aspects of electronic commerce, commonly known as the 'e-commerce act' (*e-handelsloven*). As the act does not include any specific rules on marketing, the general Danish rules on marketing, fair commercial practices, and the ban against misleading information and marketing directed to children are also applicable. Finally, it is relevant to highlight that Articles 9 and 15 of the Directive were not implemented as independent sections of the Danish e-commerce act. In light of the obligations set out in Article 9, Denmark aimed to ensure that their legal system allows contracts to be concluded by electronic means by setting up a modernisation of the existing regulatory basis. To this extent, each ministry had to review its legal frameworks for formal requirements which rendered the use of digital communications difficult. Regarding the prohibition on general obligations to monitor set out in Article 15, it is assumed that the rationale behind that provision is applicable in a Danish context as well.<sup>22</sup>

In Hungary, the e-commerce Directive was implemented by two separate instruments. First, Act V of 2013 (*2013. Évi V. törvény a Polgári Törvénykönyvről*) of the Hungarian Civil Code provides for general rules and obligations on contracting via electronic means. Second, Act No. CVIII. of 2001 on Certain Aspects of Electronic Commerce and Information Society Services (*2001. évi CVIII. törvény az elektronikus kereskedelmi szolgáltatások, valamint az információs társadalommal összefüggő szolgáltatások egyes kérdéseiről*) also known as the 'Act on e-commerce' provides for specific rules implementing the Directive.

In Spain, the legal framework on online consumer contracts consists of a set of legislation that came directly from European directives. The main regulations for e-commerce are: Organic Law 3/2014 of 27 March on Consumers and Users Rights, which is affecting on e-commerce (*Ley General para la Defensa de los Derechos de los Consumidores y Usuarios, Ley 3/2014, que afecta directamente a las transacciones electrónicas*); Law 34/2002 of 11 July on Information Society Services which regulates Internet commercial transactions (*Ley 34/2002 de 11 de julio de Servicios de la Sociedad de la Información y del Comercio Electrónico*) commonly referred to as LSSI; Organic Law 15/1999 of 13 December related to Personal Data Protection (*Ley Orgánica 15/1999, de 13 de diciembre de Protección de Datos de Carácter Personal*); Legislative Royal Decree 1/2007 of 16 November related to Consumers and Users Defense and other complementary laws (*Real Decreto Legislativo 1/2007, de 16 de noviembre, por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias*); Law 29/2006 of 26 July on medical devices and medicine rational use and guarantees (*Ley 29/2006, de 26 de julio, de garantías y uso racional de los medicamentos y productos sanitarios*); Law 42/2010 of 30 December on tobacco medical measures and tobacco medical products retail, wholesale, consumption and marketing regulation (*Ley 42/2010, de 30 de diciembre, de medidas sanitarias frente al tabaquismo y reguladora de la venta, el suministro, el consumo y la publicidad de los productos del tabaco*); and Law 13/2011 of 27 May related to gambling (*Ley 13/2011, de 27 de mayo, de regulación del juego*).

By contrast, in the Netherlands the e-commerce Directive has been implemented by means of the Amending act directive concerning electronic commerce (*Aanpassingswet richtlijn inzake elektronische handel*).<sup>23</sup> The Amending act entered into force on 30 June 2004, whereas the Directive

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<sup>22</sup> Bryde Andersen, M. (2005), *IT-retten*. 2. udgave, Gads Forlag, København, p. 736.

<sup>23</sup> See for Dutch Bulletin of Acts and Decrees 2004, 210. Available at: <<https://zoek.officielebekendmakingen.nl/stb-2004-210>>. Last accessed 20 April 2016.

had to be implemented by 19 January 2002. The act amended the Civil Code (*Burgerlijk Wetboek*), the Civil Procedural Code (*Wetboek Burgerlijk Procesrecht*), the Law on Economic Crimes (*Wet Economische Delicten*) and the Criminal Code (*Wetboek van Strafrecht*). The country-of-origin principle enshrined in Article 3 of the Directive has not been included in the Civil Code, as it has broader and more far-reaching consequences beyond the scope of e-commerce, but in the Amending act instead.<sup>24</sup>

### 1.3.2 CHALLENGES

As regards specific challenging issues that have arisen through or since the implementation of the e-commerce Directive, various observations can be made for the participating Member States.

In Belgium, the government has tasked itself with numerous challenges regarding e-commerce.<sup>25</sup> For instance, Belgian retailers face certain structural disadvantages vis-à-vis foreign companies, forming an impediment for them to enter into and develop e-commerce. In order to eliminate these disadvantages, the Belgian government intends to create in collaboration with representatives of different sectorial organizations, an independent platform for electronic e-commerce. To this extent, the legislation on night work in shipment logistics must be reviewed in order to make it more competitive with the neighbouring Member States. Moreover, there is a need for more reliable payment platforms acceptable for domestic retailers. The Belgian government proposes to improve online safety through a better monitoring of complaints regarding hacking, phishing and fraud on credit cards and others. Furthermore, additional attention will be paid to the feasibility of a system covering the alternative dispute resolution (ADR) measures available to consumers. Finally, the Belgian government sees the need to make citizens more familiar with the internet. To this extent, for example, it has launched initiatives called 'Internet for all' or 'Start2Surf', provided schools, hospitals and public libraries with a reduced cost of internet access, and helped low-income families to acquire PC's at reduced prices.<sup>26</sup>

In Denmark, the implementation of the Directive by the e-commerce act has received some critique in literature. It has been said that the Danish act does not distance itself too much from the original text of the Directive. While this does not necessarily have to be problematic, some authors argue that the implementation has in fact been so literal that it has resulted in a linguistically 'ungraceful' act which has not clarified any ambiguities as to the application of the rules of the Directive.<sup>27</sup> To give an example of such unresolved ambiguity, the notion of information society service (*informationssamfundstjenester*), which was up until that point in time unknown in the Danish legal order, was defined as 'any service, which has a commercial purpose and which is delivered online (electronically or over a certain distance) after an individual request from a service beneficiary'.

In Hungary, at the time of implementation a large part of the population was unskilled in the use of internet. Less than 40% of the population used the internet on a daily basis. It was therefore important to raise awareness of the dangers inherent to e-commerce, which proved a challenge.

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<sup>24</sup> See Explanatory Memorandum: Parliamentary Papers II 2001/02, 28 197, nr. 3, p. 68. Available at: <<https://zoek.officielebekendmakingen.nl/kst-28197-3.html>>. Last accessed 20 April 2016.

<sup>25</sup> See Belgian Federal Plan for SME (*Plan Fédéral pour les PME*) of 20 February 2015, *Note au Conseil des Ministres*. Available at: <<http://borsus.belgium.be/sites/default/files/articles/Plan%20PME.pdf>>. Last accessed 3 May 2016.

<sup>26</sup> Vandendriessche, G., 'Belgium' in: Bond, R. (edit.) (2011), *E-commerce in 24 jurisdictions worldwide*, London: Getting the Deal Through, p. 15.

<sup>27</sup> Plesner Mathiasen, J. et. al. (eds.) (2004), *E-Handelsloven med kommentarer*. Jurist-og Økonomforbundets Forlag, p. 9.

Currently, within the context of e-commerce, one of the challenges that Hungarian consumers are facing is the difficult access to justice schemes and ADR mechanisms.

The Netherlands, as was discussed above, had failed to implement the e-commerce Directive in a timely fashion. Moreover, prior to implementation Dutch law lacked the information requirements prescribed by the Directive. As a result, conform interpretation of the Directive proved difficult for contracts which had been concluded after the date for implementation had passed but before the Amending act had entered into force.<sup>28</sup> However, the provisions have since proven their value in civil litigation. Contracts concluded after 30 June 2004 have repeatedly been declared void when the seller had failed to provide the information required by the e-commerce Directive.<sup>29</sup> The Amending act directive concerning electronic commerce has also played a role in the public enforcement of consumer protection legislation. In 2013, for example, the court of last instance for certain administrative procedures (*College van Beroep voor het bedrijfsleven*, CbB) upheld a fine imposed by the ACM. The court considered that article 6:227b of the Civil Code, implementing article 10 of Directive 2000/31, was applicable in situations in which a free test product is ordered through a website. Moreover, taking the explanatory memorandum accompanying the implementing legislation of the e-commerce Directive in account, the court considered that merely presenting a name and Chamber of Commerce number (*KvK nummer*) was insufficient. The company's failure to provide the required information could not be remedied by the fact that it had provided it to the consumer after the contract had been concluded.<sup>30</sup> Similar fining decisions were upheld as well. For example, the CbB considered in 2015 that a Chamber of Commerce and VAT (*BTW*) number accessible via two clicks from the landing page were insufficiently accessible.<sup>31</sup> A failure to provide contact details has led to fines as well; for example, an airline was fined €60.000 for failing to provide an email address (or equivalent substitute) on its website. This online complaint form the company offered was deemed to be inadequate, as it provided limited possibilities for submitting comments and resulted in a 'no reply mail'.<sup>32</sup> The fine, which was close to the maximum of €72.000, was upheld due to long duration and the manifest and severe nature of the breach. Finally, the fact that the Directive is not applicable to gambling services has been repeatedly emphasized in Dutch case law.<sup>33</sup>

In Spain, a 2013 report by the Ministry of Tourism, Industry and Energy indicated that 72% of the e-commerce users had problems with the purchase of their items. The most common submitted complaints were: receiving defective products, delays in delivery, lack of match between the online offer and the sold products or services, having problems with payment methods, problems to obtain a deal or discount, and not receiving the parcel at all. Moreover, one of the main problems in Spain concerns specifically the obligations of traders and consumers in case of withdrawal, which is the result of gaps in the related legal instruments. In practice, the paid sum was not always returned in a timely fashion following the withdrawal. Additionally, Spanish online shops still make the consumer pay for the withdrawal. These issues have not been solved by implementation of the Directive. Furthermore, transaction security remains an issue in Spain, as possibilities for fraud and cybercrime

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<sup>28</sup> Court of appeal of Utrecht (18 January 2015), ECLI:NL:RBUTR:2006:BA2888 par. 4.1.

<sup>29</sup> See e.g. Court of first instance Rotterdam (19 January 2006), ECLI:NL:RBROT:2006:AU9939; Court of first instance Groningen (17 May 2006), ECLI:NL:RBGRO:2006:AY6081; and Court of first instance Arnhem (26 June 2006), ECLI:NL:RBARN:2006:AY4958.

<sup>30</sup> CbB (4 April 2013), ECLI:NL:CBB:2013:BZ7807 par 3.3.

<sup>31</sup> CbB (25 August 2015) ECLI:NL:CBB:2015:285, par. 5.8.

<sup>32</sup> Court of first instance Rotterdam (19 March 2015), ECLI:NL:RBROT:2015:1868, par. 7.3.3.

<sup>33</sup> See e.g. Court of appeals Amsterdam (12 September 2013), ECLI:NL:GHAMS:2013:3141, par. 4.5.8.3; court of first instance Arnhem (2 June 2004), ECLI:NL:RBARN:2004:AP0418, par. 4.14; and Supreme Court (13 June 2008), ECLI:NL:HR:2008:BC8970, par. 4.7.

continue to exist. Accordingly, consumers have concerns about the safety of their banking data during an online transaction. To this extent, the use of data collection also constitutes a challenging issue when it comes to e-commerce. In July 2015, for example, Spanish consumers were confronted with the worrisome consequences of the data breach at Ashley Madison, an online dating network for married people. After their personal data was made public by hackers, some consumers were blackmailed. These events highlight important privacy concerns in relation to e-commerce. All in all, an image of insecurity persists to surround e-commerce when compared to regular shopping in Spain.

In recapitulation, some similarities have been distinguished. For one, the manner of implementation of the Directive has been criticized in both Denmark and the Netherlands. While the Directive was not implemented on time in the Netherlands, the rather literal transposition in Denmark failed to alleviate some ambiguities left by the wording of the Directive. To this extent, it can also be noted that the Dutch judiciary was called upon frequently to give its interpretation of the resulting legislation on e-commerce. Clarification on the scope of the Directive was still needed in both countries. Furthermore, the improvement of online safety and related concerns regarding for cybersecurity constitute persisting issues in both Belgium and Spain. Moreover, similarities can be distinguished when comparing Belgium and Hungary. Both countries have emphasized the necessity of raising internet awareness amongst their citizens, and feel the need to improve or expand (access to) their systems of ADR. Finally, the Belgium case provides for a remarkable contrast, where present legislation on night work in shipment logistics constitutes a major challenge to e-commerce as such.

## 2. THEME II: NATIONAL EXPERIENCES IN ONLINE PURCHASE OF GOODS AND SERVICES

### 2.1 THE TYPES OF PRODUCTS OR SERVICES THAT CONSUMERS BUY ONLINE

In Belgium, e-commerce has experienced a steady growth since 2011. Even though Belgian retailers entered into the e-commerce later than its neighbouring countries (i.e. France, Luxemburg and the Netherlands), Belgian consumers have been very active when it comes to online shopping. Illustrative to this extent is the fact that, while in 2011 a mere 52% of the entire population had ever made an online purchase, this number has risen to 61% in 2014.<sup>34</sup> In the same vein, the amount spent by Belgian consumers through online purchases has increased with more than 10% between 2011 and 2014.<sup>35</sup> In 2014, the most popular products and services for online purchase in Belgium were: clothing and shoes (49% of the interviewees); hotel / overnight stays (40%); books (32%); event tickets (31%); and boat, plane or train tickets (29%).<sup>36</sup> The tendency regarding the products that Belgian consumers purchase online has been more or less the same over the past years.

In Denmark, 24% of the consumer purchases took place online during 2015.<sup>37</sup> Moreover, total consumption through online purchases has increased with 14% since 2014.<sup>38</sup> In 2015, the most popular products and services for online purchase in Denmark were: clothes, shoes, and jewellery (19% of all online transactions); travels and cultural events (14%); films, music, books, games, and toys (14%); IT, telephones, and cameras (11%); and home, garden and flowers / plants (8%).<sup>39</sup>

In Hungary, during 2015 the most popular categories of products for online purchase were: books, music, and film (70% of the interviewees had already made an online purchase, or would do so in the future); clothes and accessories (60%); cinema, theatre, or concert tickets (53%); travel and accommodation (51%); and consumer electric equipment (50%).<sup>40</sup>

In the Netherlands, the online purchase of goods and services increased by 6% with a value of €13.5 billion during 2014.<sup>41</sup> The online purchase of products increased sharply by 17%, whereas the online purchase of services remains the same. According to figures published by the Central Bureau for Statistics (*Centraal Bureau voor de Statistiek*, CBS) there are more than 10 million online shoppers in the Netherlands.<sup>42</sup> In 2014, the most popular categories of products for online purchase were: trips, holidays, and accommodations (66% of frequent e-shoppers had purchased this item during 2014);

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<sup>34</sup> Van Bastelaere, P. (2015), 'E-commerce in Belgium', *Comeos for commerce and services*, p.7. Available at: <<http://www.febelgra.be/upload/editor/docs/Diensten/kennisdatabank/technisch/w2p.pro/Comeos-lowres.pdf>>. Last accessed 31 May 2016.

<sup>35</sup> *Ibid.*, p.8.

<sup>36</sup> Vanderberghe, P. (edit.)(2014), 'E-commerce Belgium 2014', *Comeos for commerce and services*, p. 37. Available at: <<http://www.webwinkelstarten.be/images/webshopbestanden/E-commerce-2014.pdf>>. Last accessed 31 May 2016.

<sup>37</sup> Association for Danish Internet Trade (FDIH, *Foreningen for Dansk Internet Handel*), '2015 e-commerce analysis', p. 3. Available at: <<http://www.fdi.dk/analyser/fdih-e-handelsanalyse/om-e-handelsanalysen>>. Last accessed 31 May 2016.

<sup>38</sup> *Ibid.*, p. 8.

<sup>39</sup> *Ibid.*, p. 12.

<sup>40</sup> Gemius, 'E-commerce Report 2015'. Available at: <<http://brandtrend.hu/media/2015/03/Gemius-eCommerce-Report-2015.pdf>>. Last accessed 31 May 2016.

<sup>41</sup> See <[www.thuiswinkel.org](http://www.thuiswinkel.org)>. Last accessed 31 May 2016.

<sup>42</sup> See <<http://www.cbs.nl/en-GB/menu/themas/vrije-tijd-cultuur/publicaties/artikelen/archief/2015/ruim-10-miljoen-online-shoppers.htm>>. Last accessed 31 May 2016.

clothes, and sport equipment (66%); tickets for events (56%); literature (47%); and household articles (39%).<sup>43</sup>

In Spain, the most popular categories of products are: tourism and travel tickets (47% of all interviewees); hospitality bookings (42%); show tickets (33%); clothes, fashion accessories and sport products (26%); and smartphones and tablets (16%).<sup>44</sup>

In conclusion, a steady increase in online purchases appears present in most participating countries. Moreover, there are various similarities concerning the popular categories of products and services. Clothes and accessories appear to be amongst the most popular products for online purchase in all countries, with the exception of Spain. Travel and accommodation purchases also rank high in all countries. Another remarkable exception is the exclusion of literature, films and music in Spain.

## **2.2 THE PROBLEMS CONSUMERS ENCOUNTER**

In Belgium, the main problem that consumers encounter while purchasing online, are the more competitive prices and the wider offer of goods and services available in foreign web shops.<sup>45</sup> The cause thereof is twofold. On the one hand, the fact that Belgian retailers were belated in grasping the internet and online platform to sell their products pushed the Belgian online consumer to seek within the neighbouring countries for online retailers to satisfy their needs.<sup>46</sup> On the other hand, the Belgian Labour Law of 16 March 1971 prohibits, in its article 35, the work during the night. As the logistic sector is not excluded from the scope of that article, Belgian (online) retailers are not allowed to have any activity during the night. This prohibition affects the online orders in the sense that it makes it more difficult to deliver the goods to the consumer on time. The Federal Plan for SME, as approved in the first quarter of 2015, will allow for night work to remedy these problems.<sup>47</sup> Another problem that the Belgian consumers face is the recent tax shift leading to an increase in some consumption taxes.<sup>48</sup> Finally, it can be submitted that the use of abusive clauses in the terms and conditions of companies has constituted a problem encountered by Belgian e-consumers. Consumer associations Test-Achats and Test-Aankoop have previously addressed this problem.<sup>49</sup> In 2009, the associations initiated independent proceedings against three major airline operators: Ryanair, Easyjet, and Brussels Airlines.<sup>50</sup> The Commercial Court of Namur ruled similarly in all three cases: a lack of transparency and accessibility of the contract terms and of the websites constituted an infringement of the Belgian Law on commercial practice and information and protection of consumers of 14 July 1991. While Ryanair conformed with the judgment by altering its terms and conditions, and website, Easyjet and Brussels

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<sup>43</sup> Idem.

<sup>44</sup> ONTSI (2015). Available at:

<[http://www.ontsi.red.es/ontsi/sites/default/files/informe\\_b2c\\_2014\\_edicion\\_2015.pdf](http://www.ontsi.red.es/ontsi/sites/default/files/informe_b2c_2014_edicion_2015.pdf)>. Last accessed 31 May 2016.

<sup>45</sup> Ecommerce Foundation, 'European B2C E-commerce Report 2015: Facts, Figures, Infographics & Trends of 2014 and the 2015 Forecast of the European B2C E-commerce Market Goods and Services'. Available at: <<https://www.ecommerce-europe.eu/facts-figures/free-light-reports>>. Last accessed 31 May 2016.

<sup>46</sup> Idem.

<sup>47</sup> Cf. op. cit. n. 22.

<sup>48</sup> See <<http://www.comeos.be/printpdf.asp?id=12932&lng=fr&tt=1>>. Last accessed 31 May 2016.

<sup>49</sup> See for Test-Achats <<http://www.test-achats.be>> and for Test-Aankoop <<http://www.test-aankoop.be>>. Last accessed 1 June 2016.

<sup>50</sup> Commercial Court of Namur (10 March 2010), Test-Achats vs. Ryanair; Commercial Court of Namur (10 March 2010), Test-Achats vs. Easy Jet-DIP; Commercial Court of Namur (10 March 2010), Test-Achats vs. Brussels Airlines.

Airlines chose to appeal the decision before the Court of Appeal of Liege.<sup>51</sup> Both rulings on appeal proved predominantly in favour of the consumer association. Subsequently, similar proceedings were brought before national courts in France, Portugal, and Spain.

In Denmark, more than one in three consumers has experienced interruption of an online purchase within the last six months.<sup>52</sup> The most common reasons for such interruption were: unclear conditions (35% of the respondents has experienced this); technical problems (25%); insufficient information (23%); mistrust (22%); extensive registration (20%); the payment process (20%); absence of preferred payment method (15%); and absence of the possibility to pick up the product in a physical store (5%).<sup>53</sup> Moreover, extra delivery costs may have an impact on the decision to make a purchase online.<sup>54</sup>

In Hungary, one of the most common problems generally encountered by online consumers is unfair commercial practice.<sup>55</sup> Misleading information regarding the relevant characteristics (e.g. availability, time and cost of delivery, warranty, etc.) of the product or service is a recurring problem. Moreover, the information requirements are not always met. In relation thereto, it often happens that the web shop proprietor changes behind the scenes whilst the shop itself remains unchanged. This occurrence can bring about uncertainty for the consumer, especially in relation to the exercise of a withdrawal, or warranty and guarantee rights. Furthermore, the information provided by the online retailer on the right to withdraw does often not meet the standards set by law. In 2014, the Hungarian Consumer Protection Authority found that 76 out of the 162 investigated web shops failed to meet the requirements. A final problem often encountered by online consumers in Hungary is the fact that the delivered product is either deficient or different from the one that was ordered.

In the Netherlands, a study indicated that in 2012 approximately 4,5 million consumers were not aware how to check the reliability of web shops. Furthermore, the study showed that most problems consumers encountered concerned the delivery of the product (i.e. the product was not delivered in time or not at all). In response, ConsuWijzer therefore developed an 'Online Shopscan' offering consumers the possibility to quickly check the shop before they purchase a good or service.<sup>56</sup> An additional problem consists in the fact that web shops were insufficiently aware of the relevant legislation. A study published in the legal journal for internet law (*Tijdschrift voor internetrecht*) showed that 47% of web shop proprietors had not discussed compliance with the legal requirements with an external party during the development of their web shop.<sup>57</sup>

In Spain, one of the main problems consumers encounter when purchasing online is the applicability of another jurisdiction than the Spanish one.<sup>58</sup> Moreover, it is deemed problematic that web shops have the right to cancel an order in a unilateral manner and do not have any responsibility when there is a mistake with the product price or conditions. Furthermore, Spanish online consumers

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<sup>51</sup> Court of Appeal of Liege (23 April 2013), *Test-Achats vs. Easyjet*; Court of Appeal of Liege (30 January 2014), *Test-Achats vs. Brussels Airlines*.

<sup>52</sup> DIBS, 'Årlige Rapport on e-handel, mobil handel og online betaling', *Dansk E-Handel 2015*, p. 38.

<sup>53</sup> *Idem*.

<sup>54</sup> See <<https://yougov.dk/news/2015/06/16/fragtomkostninger-far-hver-fjerde-til-droppe-et-ko/>>. Last accessed 4 May 2016.

<sup>55</sup> Consumer Protection Authority, 'Annual Report 2014 on e-commerce traders', SEF-2217/2014.

<sup>56</sup> See <<http://www.consuwijzer.nl/shopscan/>>. Last accessed 4 May 2016.

<sup>57</sup> Mulder, T. & Paapst, M. (2015), 'Wie draagt er zorg voor dat een webshop bij oplevering voldoet aan de wetgeving', *Tijdschrift voor internetrecht* 2015, pp. 92-93.

<sup>58</sup> OCU (2016). Available at: <<http://www.ocu.org/tecnologia/internet-telefonía/noticias/satisfaccion-online>>. Last accessed 31 May 2016.

experience significant uncertainty when it comes to the return of the payed sum after a withdrawal, or changing the purchased product. To this extent, another obstacle is the fact that firms generally do not allow returning when the consumer has opened the parcel. It should also be noted that some web shops still charge for the shipping in case of a withdrawal, while this is not allowed according to the law. Another problem encountered by Spanish online consumers is high shipping costs. Spanish online consumers often lack the possibility to contact an employee of the web shop in case of doubt before purchasing one of its products or services, and after sales service is often insufficient in similar vain. Another recurring issue is that the delivered product is deficient or different from the one ordered.

In considering the problems that online consumers encounter in general terms, many similarities between the participating countries can be distilled. For one, the mistrust in web shops and/or their proprietors appears a pressing issue in Denmark, Hungary and the Netherlands. Moreover, consumers from both Denmark and Hungary are often facing a lack of information on the retailer they are dealing with. To this extent, an impossibility to contact the retailer constitutes a problem for the Spanish online consumers in particular. Similar problems in relation to the delivery of products appear existent in Hungary, the Netherlands and Spain.

### **2.3 GENERAL INFORMATION THE SUPPLIER MUST OFFER ON HIS WEBSITE**

In Belgium, in accordance with article XII.6 of the Belgian Code of Economic Rights, suppliers are at least required to indicate in a clear, direct and permanent manner: the name of the company; the geographical address in which the supplier is established; the contact information, including an e-mail address, which allows the visitors to contact the supplier and to communicate in a direct and effective manner; the business number if applicable; and the particulars of the authority competent for surveillance, if the activity is subjected to an authorization scheme. In case the activity is a regulated profession, it will additionally be required to provide for: the trade association or professional organization to which the provider is registered; the professional title and the state in which it was granted; a reference to the applicable professional rules and the means to access them. Moreover, the information provided must be available to all visitors of the web page, not only the consumer that actually concludes an online purchase.

In Denmark, article 7 of the e-commerce act has as a goal to make the supplier's identity and contact information visible and accessible. To this end, the supplier must at least provide the following information in a well-arranged and easily accessible fashion, for as long as the services or goods are offered online: the supplier's name; the physical address, where the supplier is established; an e-mail address and possibly the postal address and other information on the supplier, that can make it possible to contact and communicate with the supplier; the Danish business registration number (CVR number), if the supplier is registered in the central business registry (*Det Centrale Virksomhedsregister*); and affiliation to possible approval schemes, including the relevant authorities for approval. In relation to the requirement of providing the consumer with adequate contact details, the Consumer Ombudsman has previously urged a company to rectify its practices after the information provided proved insufficient for the consumer to establish contact.<sup>59</sup> In older cases, the Consumer Ombudsman had emphasized that the contact details must be capable of allowing the consumer to establish direct contact with the supplier.<sup>60</sup> Accordingly, a contact form cannot substitute an e-mail address.

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<sup>59</sup> Consumer Ombudsman (2011), cases 10/08288 and 11/01446.

<sup>60</sup> Consumer Ombudsman (2008), cases 08/04270 and 08/06576.



In Hungary, a supplier must provide on the web page at least the following information in a direct, continuous, and easily accessible manner: identification data of the supplier (i.e. name, seat, contact information and e-mail address); the court's registration number; the VAT number; webhost data; and customer service data.

In the Netherlands, the following information should be provided in a clear and understandable language: information about the company (i.e. name, the address, the address where the complaint should be sent to, telephone or fax number, or e-mail address); and in case the company acts on behalf of another company, the name and address of said company.

In Spain, a supplier must provide on the web page at least the following information in a direct, continuous, and easily accessible manner: identification data of the web-trader (name, address and e-mail address); the Central Mercantile Register (*Registro Mercantil*) registration number; the VAT number; administrative permission if applicable; and information about the seller in case of marketplaces.

When comparing the different general informational requirements, it becomes clear that all countries demand a certain core of information to be provided by the supplier. At the very least the supplier is to provide for its name, address and some sort of contact information. Moreover, it is apparent that Belgium has rather extensive general informational requirements compared to the other countries under investigation.

#### **2.4 SPECIFIC INFORMATION AVAILABLE BEFORE, DURING AND AFTER THE ONLINE PURCHASE**

In Belgium, a distinction is made between the information that has to be provided at the time the distance contract is offered to the consumer (i.e. the pre-contractual information), and the information that has to be provided at the moment of the confirmation or conclusion of the distance contract.<sup>61</sup>

In the first place, Title II of Book VI of the Belgian Code of Economic Right, transposing the principle of information of market, holds a general obligation of pre-contractual information to consumers. To this extent, article VI.45 establishes that before the consumer will be bound by a distance contract, the company must provide, in a clear and understandable way, the following information: the main characteristics of the good or service; the identity of the company, including business number and name; the geographic address where the business is established or where the Commercial office is established, and its telephone number, fax number and e-mail address; where applicable, the geographical address and identity of the company on whose behalf it is acting; the total price of the goods or services, including taxes, indicated in euros and presented in an unequivocal way; the costs of using the distance communication techniques for the conclusion of the contract when those costs are calculated on another basis than the basic rate; the arrangements for payment, delivery and execution; whether or not, or under which circumstances a right of withdrawal exists, the conditions, the time limit and the procedure for exercising that right as well as any potential additional costs related to the withdrawal; information on the existence of legal guarantees for the goods or services provided; information on the existence of after-sale commercial guarantees or services, and the conditions to benefit from them; the existence of relevant codes of conduct and how to access them; where applicable, the contract period; where applicable, whether the contract is permanent, or whether automatic renewal or termination of the contract terms exists; where applicable, the minimum duration of the consumer's obligations under the contract; where applicable, the existence

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<sup>61</sup> Sttennot, R. (2014), 'Distance Selling' in: Straetmans, G. & Stuyk, J. (eds.), *Commercial Practices*, Brussels: Lancier 2014, pp. 145 et seq.

of a bond or any other financial guarantee to be paid or provided by the consumer, and the conditions related thereto; the functionality of any digital content, including relevant protective measures, applicable legislation; and its interoperability with hardware and software to the extent that the supplier reasonably should know; and the possibility of an extrajudicial complaints procedure to which the company is subjected, as well as how the consumer may access it. Moreover, in case the activity is subjected to value added tax, the relevant identification number must also be provided. When the proprietor makes any reference to prices, this information must be indicated in a clear and unambiguous manner, and include whether taxes and delivery charges have been taken into account. It must be recalled that this pre-contractual information is considered a constituent part of the contract and, consequently, cannot be modified unless it is done by agreement between both of the contractual parties. All required pre-contractual information must be available in intelligible and plain language, comprehensible to all consumers, and must remain available to them while proceeding with the conclusion of the distance contract. For the conclusion of an online transaction in particular, article VI.46 holds emphasizes that the minimum obligations for the consumer must be clear. This may be done by implementing a button reading 'order with obligation to pay' or a similar phrase.

After the order is placed on the website, the provider is obliged to send the consumer, without undue delay, an acknowledgement with a summary of the order. This summary may either be presented through a web page appearing at the end of the order process, or an e-mail. The confirmation has to include all the pre-contractual information mentioned above.

During the online transaction, article XII.7 of the Belgian Code of Economic Right reinforces the abovementioned information requirements by posing additional requirements. Before the service or good is delivered, the company must provide the following information in a clear, understandable and unambiguous way: the language offered for the conclusion of the contract; the different technical steps that will follow the conclusion of the contract; the technical means for identifying and correcting any errors in the entry of data before the order is processed; and whether or not a record of the concluded contract will be kept by the service provider and whether or not it will be available to the consumer. Moreover, the terms and conditions of the contract must be provided in a way that allows the consumer to store them.

In Denmark, according to article 8 of the e-commerce act, the supplier must indicate a price in a clear and unmistakable way. It has to be evident to which extent the price includes fees and delivery costs. The duty to inform about the price stems from article 13 of the Marketing Practices Act, which holds that a trader/businessman has to clearly indicate the price when supplying a service or good, and that also applies when they are offered electronically.<sup>62</sup> This information on the total price of the good, including any fees and delivery costs must be provided before the online purchase. Moreover, article 12a of the Marketing Practices Act states that a supplier must provide the following information when inviting the consumer to a purchase: the main characteristics and features of the product or services offered; the supplier's name and physical address; information about payment, delivery, and completion of the agreement, if these differ from the general procedures in the relevant sector of trade; the supplier's practice in case of complaints, if these differ from the general procedures in the relevant sector of trade; information about the right to withdraw, the right to cancellation of an order, or the right to return an item; and the total price of the order including fees and taxes. The Consumer Complaints Board emphasized the importance of the requirement of adequately informing consumers about the main characteristics and features of a product, when it ruled in favour of a consumer who wanted to annul its contract after expiration of the period of withdrawal, because the anthracite-grey coloured lamp he had ordered turned out to be satin

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<sup>62</sup> See, to that extent: Udsen, H. (2015), *IT-retten*. 2. udgave, Ex Tuto Publishing A/S, København, p. 395.

coloured after delivery.<sup>63</sup> After an online order has been received, the supplier is obliged to send a confirmation of the order to the consumer without unreasonable delay, according to article 12 of the e-commerce act.

In Hungary, article 6:82 of the Civil Code holds that, prior the placement of an online order, the supplier must have indicated in a clear, comprehensible and unambiguous manner the following information: the different technical steps to follow to conclude the contract; whether or not the concluded contract will be filed by the service provider and whether it will be accessible to the consumer; the technical means for identifying and correcting input errors prior to the placing of the order; the languages offered for the conclusion of the contract; the available and applied codes of conduct; and the contract terms and general conditions provided must be made available in a way that allows the consumer to store and reproduce them.

In the Netherlands, besides the general informational requirements discussed above, the following information must be provided to the consumer in a clear and understandable language before the purchase: the main characteristics of the product or service; the total price which the consumer has to pay; the type of agreement (e.g. an agreement for an (in)definite period, or a subscription which entails that the seller should inform about the exact amount the consumer must pay per period); if the total costs are unknown beforehand, the seller must explain how the price is being calculated; information on whether the consumer must pay a deposit or another type of financial guarantee; and the delivery time. In case of a digital product, the following information must be provided: the security of the product (e.g. in the case it is prohibited to copy the product); and the apparatus as well as the software that is needed to be able to use the product. In relation to the ordering of a product, information must be provided on the payment, delivery and on how the services will be exercised. In case there is time to reconsider the purchase, the supplier must inform the consumer about the duration of the time to reconsider, the possibility to use this time, the conditions attached to the reconsideration, whether the consumer must pay for sending back the product, as well as the form that must be filled out if the consumer wishes to reconsider.<sup>64</sup> In case there is no time to reconsider the purchase, the consumer must also be made aware of that fact. The following information regarding after-sale services and guarantees must be provided: the consumer's legal rights in case product is defective; the way in which the consumers complaints are dealt with; any special services offered by the supplier; any guarantee on the product offered by the supplier; any applicable codes of conduct as well as where the consumer can consult these; in case the supplier is member of a disputes committee, or any other procedure that can be followed in case of a complaint, the supplier must inform the consumer thereof. The following additional information must be provided in case of an online purchase: the supplier must inform the consumer about the different payment methods at the beginning of the process of ordering; and information on possible restrictions on delivery for certain towns or areas. Consumers must receive an overview of the most important information (e.g. regarding the price and characteristics of the product) just before the order is placed. Once the consumer has pushed the order button, the agreement has been concluded, which includes a payment obligation. At risk of having the agreement annulled, the supplier must give a clear indication of this obligation on or near the order button.

In Spain, according to article 60 of the Organic Law 3/2014 of 27 March on Consumers and Users Rights, which is affecting on e-commerce (*Ley General para la Defensa de los Derechos de los Consumidores y Usuarios, Ley 3/2014, que afecta directamente a las transacciones electrónicas*), the following information must be provided prior to the conclusion of the contract: the main features of

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<sup>63</sup> Consumer Complaints Board (14 October 2010), case 10/00309.

<sup>64</sup> See op. cit. n. 12.

the good or service; the different technical steps to follow to conclude the contract; whether or not the concluded contract will be filed by the supplier and whether or not it will be accessible to the consumer; the final prices including taxes; available payment methods, ways of delivery and execution; delivery date; conditions attached to any guarantee; the duration of the contract; the language or languages in which the contract can be concluded; information on possible withdrawal as well as the forms required to be filled out in relation thereto; any deposits needed to be paid by the consumer; information about digital contents and related protection measures; the interoperability of digital contents, meaning the devices and version of operating systems required to use the digital content; and the procedures to be followed when the consumer wants to complain as well as the applicable system of extrajudicial conflict resolution.

To sum up, at least at its core, the specific informational requirements for webshop proprietors before, during, and after the conclusion of an online transaction are comparable in the participating Member States. While Belgium and the Netherlands may appear to impose a bigger amount of requirements, all countries seem to emphasize on informing the consumer prior to the purchase. Exemplary, to that extent, is a strict requirement to inform the consumers about the arising obligation to pay in Belgium, the Netherlands and Spain. Proprietors may comply with this requirement by including on their website a button that reads “order with obligation to pay” (or a similar phrase). In Denmark, by contrast, the informational requirements resting upon a proprietor may be limited in case his or her practices are in conformity with the procedures generally applicable in the relevant sector of trade.

## **2.5 THE “CLICK” THAT MAKES THE PURCHASING AGREEMENT FINAL**

Under Belgian law, an order from a consumer means by itself an acceptance of the offer made by the online service provider, thus concluding the contract at the time this order is received by the latter. Considering that at this point the consumer has accepted the company’s terms and conditions, the Belgian Courts do not object to this kind of agreement, unless its validity or contents is disputed.<sup>65</sup> Articles VI. 47 to VI. 53 of the Belgian Code of Economic Right regulate the right of withdrawal. In accordance with article VI. 47.1, the consumer has in principle a period of fourteen calendar days to withdraw from the distance contract, without paying any penalty and without being under the obligation to provide a reason for doing so. The only costs that the consumer may be charged with, are those related to the returning of the good. Article VI. 48.1, however, holds that the consumer cannot be charged with these costs in case the company has failed to inform the consumer of the right of withdrawal as required by articles VI. 45 and VI. 46. According to article VI. 47.2 of the Belgian Code of Economic Right, the withdrawal period will commence as from the day the consumer, or a third party other than the transporter, has physical possession of the goods. In case of the sale of services, the withdrawal period will commence as from the day after the last day the consumer has profited from the services. By way of derogation, in case of an order of multiple goods being delivered separately or in lots, the withdrawal period commences on the day on which the consumer, or a third party other than the transporter, acquires physical possession over the last good or the last lot. In case the contract stipulates regular delivery of goods over a defined period of time, the withdrawal period will commence on the day the consumer, or a third party other than the transporter, acquires physical possession over the first good. According to article VI. 48, the period for exercising the right of withdrawal will be extended to twelve months, in case the supplier has failed to inform the consumer of that right as required by articles VI. 45 and VI. 46. In that situation, the withdrawal period will commence on the final day of the initial period, and will end either twelve months later or

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<sup>65</sup> Vandendriessche, G., ‘Belgium’ in: Bond, R. (edit.) (2011), *E-commerce in 24 jurisdictions worldwide*, London: Getting the Deal Through, p. 16.

fourteen days after the supplier properly informs the consumer about the right of withdrawal in the meantime. Before expiration of the applicable period, a consumer may exercise the right of withdrawal either by using the withdrawal form set out in Annex 2 of Book VI of the Belgian Code of Economic Right, or by making an unequivocal statement setting out the decision to withdraw from the contract. Additionally, the supplier may provide the online consumers with other possibilities to properly exercise their right of withdrawal. Although the supplier must provide the consumer, without delay and on a durable medium, an acknowledgement of receiving a request to exercise the right of withdrawal, the burden of proof lies with the consumer in this regard. According to article VI. 50.1, within fourteen days after being informed of the decision to exercise the right of withdrawal, the supplier will reimburse without undue delay all payments received from the consumer, including costs of delivery. To this extent, in case of a sale of goods contract, the supplier has a margin of discretion to withhold reimbursement until the goods are recovered or until the consumer has provided evidence of having sent back the goods. Unless the supplier has offered to collect the goods, the consumer must return them within fourteen days after informing the supplier of the decision to exercise the right of withdrawal. Article VI. 53 of the Belgian Code of Economic Right contains various exceptions to the main rules set out above, and holds that exercise of the right of withdrawal by the consumer will not be possible in case of: a service has been fully performed after the consumer has given prior consent to start; the price of goods or services, that are dependable on fluctuations in the financial market beyond the control of the supplier, having changed during the withdrawal period; the supply of goods made to the consumer's specifications; the supply of goods liable to deteriorate or expire rapidly; the supply goods that must be sealed for reasons of protection of health or hygiene, which were unsealed by the consumer after delivery; the supply of goods that are inseparable with other items; the supply of alcoholic beverages; a service contract pertaining to the performance of urgent maintenance of repair work on location; the supply of sealed audio, video, or computer software, that has been unsealed by the consumer after delivery; the provision of a newspaper or a periodical magazine; contracts concluded at public auction; hosting services other than residential, transportation, car rental, catering, or services related to leisure activities, where the contract stipulates the period of execution; the supply of digital content not provided on a tangible medium, after the consumer has given prior consent to start; and, finally, contracts of gambling and lottery services.

According to Danish contract rules, in order to enter into a mutually binding agreement, both parties have to declare their intention and willingness to be bound by the agreement. This leaves room for diverging interpretations in case of an online purchase, taking into account that article 12 of the Danish e-commerce act does expressly state at what exact moment the consumer and supplier enter into a binding agreement. However, where the online purchase is expected to follow a common pattern in which the consumer clicks on an item, continues to the payment page, confirms the purchase, and provides for the payment details, the 'digital declaration of intention' (*digitale viljeserklæring*) making the purchase final is assumed when the consumer clicks for the second time, thus confirming the purchase.<sup>66</sup> The High Court of Eastern Denmark recently rendered judgment in a case regarding third party agreements.<sup>67</sup> It established that such agreements, as a main rule, are concluded between the consumer and the proprietor of the website on which the product or service is provided. Thus, a travel agency was held liable for breach of contract with the consumer after an airline company went bankrupt.

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<sup>66</sup> Op. cit. n. 59, p. 423.

<sup>67</sup> High Court of Eastern Denmark (18 November 2015), case B201900D – HMD, 18 afd. nr. B-2019-14.

In Denmark, according to article 19 of the Consumer Contracts Act, the consumer may exercise the right of withdrawal (*fortrydelsesret*) for a period of fourteen days after receiving the purchased good. In case of (digital) services, the period of fourteen days commences at the time the parties enter into the agreement. The right of withdrawal does not apply in case of: the purchase of flight tickets, package tours, or cultural events; the purchase of perishable goods such as food; the purchase of goods for housekeeping; the purchase of goods made to the consumer's specifications; and the purchase of sealed audio, video, or computer software, that has been unsealed by the consumer after delivery. Although Danish law does not provide for general rules on cancellation (*afbestilling*), suppliers may offer the possibility thereto, also in case of an online purchase. In case the goods have already been delivered, article 24 of the Consumer Contracts Act provides that the consumer must return them to the supplier within fourteen days from the date of delivery. The goods must be returned in the original and undamaged packaging. In this context, however, the Consumer Complaints Board has ruled that the original packaging has to be returned only if the item is normally kept in it after it is taken into use, and only if the packaging has a significant value.<sup>68</sup> Basing its decision on the preparatory works to the Danish law, it held that a consumer could return a computer without enclosing the original box in the shipment. Moreover, if the item has been taken in use, the consumer can incur costs for decrease of value. The Consumer Complaints Board, however, denied a claim of 300 DKK brought by the supplier of a mobile phone, as it found that the phone, albeit used, was returned in the same condition.<sup>69</sup> In Denmark, general contract law provides that, in case a consumer could or should have realized that an offer was priced incorrectly, the supplier may withdraw an order as it may be considered invalid (*ugyldig*).<sup>70</sup> Although no standard deadline exists for this type of situation, it is expected that the supplier informs the consumers as soon as possible.

In Hungary, the purchasing agreement between parties will be binding when the consumer's order is confirmed within forty-eight hours after it has been received by the supplier. In theory, both consumer and supplier can retract from the order before it has been confirmed. However, this possibility proves of little relevance for the practice of e-commerce, as most web stores automatically and instantly confirm the order after it is received. Moreover, one-click-orders are prohibited in Hungary.

In the Netherlands, general contract law provides that an agreement is created by an offer and its acceptance. This requires a concurrence of wills (*wilsovereenstemming*), the existence of which may validly be presumed by a party acting in good faith. In general, this means the consumer will accept the supplier's offer of a specific product by clicking the accept button. Article 6:230v of the Dutch Civil Code requires webshops to ensure that such acceptance is only possible after it has been made clear that acceptance entails an obligation to pay. While a failure to meet this obligation means that the agreement can be annulled by the consumer, it does not prevent its existence. In some cases, courts have found that an agreement was not created despite customers having clicked the 'order' button. For example, the district court of Haarlem concluded in 2011 that an agreement had not been created despite the consumer having clicked a button labelled 'final confirmation' (*definitief boeken*). The consumer, who was practicing with the site to prepare for her Dutch integration test, had been under the impression that she would be led to another page in which she could finalize the agreement. The judge (who had made the same mistake after trying the site himself) considered that it is common practice for webshops to present the finale confirmation button on a page which presents all relevant

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<sup>68</sup> Consumer Complaints Board (26 September 2013), case 12/15737.

<sup>69</sup> Consumer Complaints Board (26 September 2013), case 12/08725.

<sup>70</sup> See, to this extent, e.g.: Consumer Complaints Board (29 November 2013), case 12/15105; Consumer Complaints Board (20 February 2015), case 14/05822; and Consumer Complaints Board (25 June 2012), case 11/08776. In all cases, the Consumer Complaints Board ruled in favour of the supplier.

information. As this webshop had presented the button on the page on which consumers have to enter their contact details, it had created a considerable risk for mistakes.<sup>71</sup> A more recent example concerns a consumer who had registered for a training course online. The district court of Rotterdam ruled that the obligations of the parties were insufficiently specific, since the consumer still had to confirm whether she wished to take the class on weekdays or during the weekend. As a result, the registration did not constitute an acceptance of an offer; it was merely an invitation by the consumer to the online retailer to make a more specific offer.<sup>72</sup> Companies can also successfully argue that an agreement did not come into existence despite the fact that consumers had ordered a product through their webshop. The most well known case in this context concerns the webshop Otto.nl, which mistakenly listed the price of an LCD television as €99 (its normal price being €700-€1300). In 2008, the Court of Appeals of Den Bosch ruled that the 11.490 consumers that had accepted this offer could not reasonably have believed that the offer was genuine. The fact that Otto had automatically sent confirmation emails did not change this outcome, as it merely sent these emails to comply with article 6:227c of the Dutch Civil Code (implementing article 11 of the e-commerce Directive). As a result, no agreements had ever been created.<sup>73</sup> The requirement to inform consumers about their right to withdrawal (14 days) has been subject to case law before the Dutch courts, although these cases do not concern webshops. In 2015 the district court of Rotterdam, for instance, held that the 14 day 'cooling off' period had not yet started because the seller had informed the buyer that the withdrawal period was 8 instead of 14 days.<sup>74</sup> In a similar vein the Court of Appeals of 's-Hertogenbosch ruled that a company should not only inform its consumers during the ordering period of the right to withdrawal but also when they confirm the order.<sup>75</sup>

Research by the Consumentenbond shows that webshops' compliance with the provisions of the civil code regarding the right to withdrawal and the cancellation of the contract (Articles 6:230o and 6:230r) is lacking. In 2015 the organization bought and returned 3 products from 200 webshops. The organization found that 57 webshops failed to reimburse them for all three orders in time and that 79 webshops failed to return the full amount of all three orders. These results were in line with similar research done by the organization in 2013 and 2014.

In Spain, the one-click-order is prohibited. Webshops must spell out in clear and understandable terms how the consumers can identify and correct typing errors before placing an order. This may be done, for instance, by using a button that reads 'compulsory payment purchase'. According to article 71 Organic Law 3/2014 of 27 March on Consumers and Users Rights, which is affecting on e-commerce, the cancellation period is fourteen days for both the consumer and the supplier. In case the supplier cancels the purchase, the sum paid must be returned to the consumer in fourteen days without delay. If the supplier fails to meet this obligation, the consumer can demand for the double of that amount. After cancellation, the consumer has fourteen days to return the item without any costs. In practice, however, it appears that some Spanish webshops are still charging fees for withdrawal shipping.<sup>76</sup>

To sum up, in Belgium, Denmark, and the Netherlands, the decisive criterion in determining whether an online purchase has become final may be perceived as a 'concurrence of wills' of the

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<sup>71</sup> Court of first instance Haarlem, 3 March 2011, ECLI:NL:RBHAA:2011:BP7684

<sup>72</sup> Court of first instance Rotterdam, 28 November 2014, ECLI:NL:RBROT:2014:9590

<sup>73</sup> Court of Appeals Den Bosch, 22 January 2008, ECLI:NL:GHSHE:2008:BC2420

<sup>74</sup> <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBROT:2015:8739>.

<sup>75</sup> Court of Appeal of 's-Hertogenbosch, 18-06-2013, ECLI:NL:GHSHE:2013:2637.

<sup>76</sup> OCU (2015). Available at: <<http://www.ocu.org/tecnologia/internet-telefonía/noticias/devolver-producto-internet>>. Last accessed 31 May 2016.

parties involved. Although the applicable terminology varies in those Member States, the online purchase constitutes a binding agreement after the supplier's offer is accepted by the consumer. In Hungary, by contrast, the agreement is binding after the consumer's order is confirmed by the supplier. In Belgium and the Netherlands, such concurrence of wills explicitly requires that the consumer is aware of the obligation to pay. In Denmark this means that it is generally understood that the second 'click' (i.e. the click confirming the order) finalizes the agreement. In this regard, a comparison may be drawn with Hungary and Spain, where one-click-orders are explicitly prohibited.

The right of withdrawal for e-consumers generally exists for fourteen days after the purchase. The excluded categories of products and services are comparable in Belgium and Denmark. Belgium, however, provides for additional consumer protection by extending the period for withdrawal to up to twelve months in case the supplier fails to comply with the informational requirements on this matter.

## **2.6 ACCEPTED PAYMENT METHODS**

In Belgium, Book VII chapter 3 of the Belgian Code of Economic Right regulates the methods of payment. If additional costs are charged for use of a particular payment method, these must be communicated to the consumer and be included in the final price. In any case, the additional costs charged cannot be higher than the cost of the good or service purchased. Although Belgian law does not provide for restrictions or limitations of payment methods used for online transactions, financial institutions might in practice apply payment limitations for their clients. The accepted payment methods most frequently used by Belgian consumers are: Bancontact or Mister Cash; credit card; debit card; payment by smartphone; payment by a third party, such as Western Union or Paypal; payment by bank transference, either from a Belgian or EU bank account; or payment by electronic transference.<sup>77</sup>

Danish law does not provide for apparent restrictions on payment methods for online purchases, or monetary limitations per transaction. However, financial institutions can limit the amount that a consumer can spend by credit card within a certain time period. Consumer Europe advises consumers not to use bank transfer or cash as method of payment when making purchases online, as it proves easier to recover sums paid by credit card.<sup>78</sup> Chapter 7 of the Danish Act on Payment Services (implementing Directive 2007/64/EC) regulates transaction fees. Although the supplier may charge additional costs for the use of a particular payment method selected, this fee cannot exceed the amount that the provider of the payment services charges the supplier.<sup>79</sup> If such additional costs are charged, article 83 of the Danish Act on Payment Services holds that the consumer must be informed before the agreement is concluded. Moreover, the Competition and Consumer Authority can control that the fees incurred by the supplier are not unreasonably or disproportionately high.

In Hungary, there are no legal restrictions on payment methods for online transactions. According to the e-Commerce Report 2015, the payment methods preferred by Hungarian consumers are: cash to courier (65%); credit card or debit card (55%); and online bank transference (50%).<sup>80</sup> Interestingly, PayPal or similar payment methods are often not available for domestic online transactions. Although monetary limitations per online transaction are not provided for by Hungarian law, they may be

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<sup>77</sup> See <<http://infoshopping.be/pages/consumer13.asp#quels>>. Last accessed 31 May 2016.

<sup>78</sup> See <<http://www.forbrugereuropa.dk/Faasvar/Koebt-paa-nettet/Sikrest-betaling?tc=3B5202F0C7354C70828D0E77AB258A7D>>. Last accessed 31 May 2016.

<sup>79</sup> Munck Rasmussen, T. & Fogh Knudsen, P. (2011), *E-handel. Praktisk jura for erhvevsdrivende*. Karnov Group, p. 184.

<sup>80</sup> Op. cit. n. 37.



imposed by financial institutions. In practice, service providers frequently charge high additional costs for credit card payments.

In the Netherlands, the following payment methods are frequently used by consumers to conclude their online purchase: online banking (90% the consumers has used this method); credit card (44%); and cash and/or bank transfer (30%).<sup>81</sup> The majority of Dutch online purchases are paid for by use of the online banking tool iDEAL (56%) or credit card (12%). Although used increasingly, PayPal (5%) and AfterPay (2%) make up for merely a small percentage of all online transactions.<sup>82</sup> As iDEAL merely provides a way for consumers to pay through their own bank, transaction limits depend on the financial institution itself. According to article 7:26 of the Dutch Civil Code, webshops can at most require consumers to pay 50% of the total amount in advance. As a result of this, webshops must offer their clients the possibility to pay part of the price after delivery, and may not solely offer payment methods with which only advance payment is possible.<sup>83</sup> Companies cannot depart from this rule in their terms and conditions, as the district court of Utrecht confirmed in 2015.<sup>84</sup> They may, however, require the consumer to pay the full amount upon delivery, and remain free to allow their customers to pay the full amount in advance. Under Dutch law, webshops are allowed to charge customers differently according to the cost of selected payment method. They cannot, however, charge more than the cost actually incurred in order to offer that particular payment method. In the Netherlands, additional fees are mainly charged when the consumer wishes to pay upon delivery (84%). Some webshops (33%) also charge a fee when the consumer wishes to use an *acceptgiro* (a paper bank transfer after the product has been delivered). Between 10-20% of the webshops enforce extra fees when the consumer pays by credit card or PayPal. The differentiated use of extra fees may be explained in two ways. Firstly, different methods of payment entail different costs for the retailer. Allowing a customer to pay upon delivery involves more man hours (and thus higher costs) than an automatic bank transfer. Aside from this financial factor, companies may also wish to incentivize the use of payment methods, which are of particularly beneficial to them. For example, PayPal and various credit cards offer chargeback services, with which their customers can reverse the transaction if the product is delivered. Other methods, like the abovementioned *acceptgiro*, allow the customer to pay after the product has been delivered. Yet other systems, like iDEAL, solely offer a method to pay in advance.<sup>85</sup> Compliance with the rules differs strongly across sectors. Compliance is generally low in food delivery services, ticket retailers and travel services whereas fashion and electronics retailers generally do comply with these rules.<sup>86</sup> The Authority for Consumers and Markets (ACM) recently warned companies that they did not comply with the rules as a result of which the fees charged to consumers were lowered.<sup>87</sup> As the height to the costs incurred by a specific retailer often

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<sup>81</sup> CBS, *ICT Kennis en economie*, 2015, p. 104. Available at: <<https://www.cbs.nl/nl-nl/publicatie/2015/27/ict-kennis-en-economie-2015>>. Last accessed 31 May 2016.

<sup>82</sup> Thuiswinkel, *Aandeel iDEAL bij online aankopen versterkt, AfterPay en PayPal harde groeiers*, 2015. Available at: <<https://www.thuiswinkel.org/nieuws/2894/aandeel-ideal-bij-online-aankopen-versterkt-afterpay-en-paypal-harde-groeiers>>. Last accessed 31 May 2016.

<sup>83</sup> See <<http://www.seoshop.nl/blog/betaling-achteraf-webshop/>>. Last accessed 6 June 2016.

<sup>84</sup> Court of first instance Utrecht (1 April 2015), ECLI:NL:RBMNE:2015:2166.

<sup>85</sup> Currence, *Jaarverslag 2012 De laatste stappen naar Europees betalen*, 2013, pp. 17-18. Available at: <[https://www.thuiswinkel.org/data/uploads/marktonderzoeken/online\\_betalen/Jaarverslag\\_Currence\\_2012.pdf](https://www.thuiswinkel.org/data/uploads/marktonderzoeken/online_betalen/Jaarverslag_Currence_2012.pdf)>. Last accessed 31 May 2016.

<sup>86</sup> Tweede Kamer, vergaderjaar 2015–2016, 34 291, nr. 8, p. 3. Available at: <[https://www.eerstekamer.nl/behandeling/20160211/nota\\_naar\\_aanleiding\\_van\\_het/document3/f=/vk1hn7bmbpzf.pdf](https://www.eerstekamer.nl/behandeling/20160211/nota_naar_aanleiding_van_het/document3/f=/vk1hn7bmbpzf.pdf)>. Last accessed 6 June 2016.

<sup>87</sup> See <<https://www.acm.nl/nl/publicaties/publicatie/15210/Bedrijven-verlagen-kosten-voor-betaling-internetaankopen-na-optreden-ACM/>>. Last accessed 6 June 2016.

depends on the agreement between the retailer and payment service provider, public enforcement is difficult. A law has therefore been proposed to prohibit the charge of extra fees for the use of a particular payment method.<sup>88</sup>

In Spain, there are no general restrictions on payment methods. Regarding the preferred method of payment, studies are inconclusive. On the one hand, a recent study indicated that consumers prefer to use the following payment methods: credit and debit card (62,9%); payment platforms (14,9%); cash through courier or postal systems (9%); prepayment card from the bank (7,2%); bank transference (4,7%); and periodical bank transference (1,3%).<sup>89</sup> Another study, however, indicates that a majority of the Spanish e-consumers (64%) would prefer payment through PayPal, due to its security. Moreover, roughly a third of them would prefer to pay by credit card (35%), while only a small portion prefers to pay cash on delivery (7%).<sup>90</sup>

In conclusion, none of the participating Member States impose legal restrictions or monetary limitations on the payment methods available for online transactions. Monetary limitations are, however, likely to be imposed by the financial institutions involved in the transaction. The methods of payment most favoured by e-consumers vary extensively. A notable exception in comparison to the other countries, however, is that the Hungarian e-consumers prefer to pay by cash to courier, while PayPal is often not available for domestic online transactions.

As regards the possibility for suppliers to charge additional fees for the use of particular payment methods, practices vary amongst the participating Member States. Although such fees may initially be charged in all countries, regulation and practices differ. While in Belgium, for instance, the fees may not exceed the actual price of the good or service purchased, in Denmark, by contrast, the additional fee may not exceed the amount that the payment service provider charges. In the Netherlands, on the one hand, suppliers most often charge an additional fee if the consumer selects to pay upon delivery. In Hungary, on the other hand, suppliers frequently charge high additional fees for payment by credit card.

## **2.7 THE MAIN DISPUTE RESOLUTION MECHANISMS**

In Belgium, disputes solving resolutions are governed by Book XVI and XVII of the Belgian Code of Economic Right, the Belgian Civil Code, and the Belgian Judicial Code. In this regard, it is necessary to distinguish between extrajudicial solutions and the judicial claims. Within the former category, direct complaint to the company, mediation, conciliation, arbitration and the ombudsman are available to consumers. The latter category comprises collective action and judicial actions.

Direct complaints to companies are governed by Title II of Book XVI of the Belgian Code of Economic Right, aiming to transpose both Directive 2013/11/EU and certain provisions of Directive 2006/123/EC. What distinguishes this 'direct complaint service' from other forms of ADR, is the fact that it does not involve a third party.

Furthermore, two types of mediation can be distinguished in Belgium: free and voluntary mediation on the one hand, and judicial mediation on the other. Regarding the former type, it must be noted

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<sup>87</sup> The most recent version is of 7 January 2016. Available at: <<https://www.eerstekamer.nl/9370000/1/j9vvhwbtbnzpbzcc/vk0ihl0ujsy9/f=y.pdf>>. Last accessed 6 June 2016.

<sup>88</sup> See <<https://zoek.officielebekendmakingen.nl/kst-33982-3.html>>, pp. 6 and 7. Last accessed 6 June 2016.

<sup>89</sup> Op. cit. n. 41.

<sup>90</sup> IAB Spain (2015). Available at: <<http://www.iabspain.net/wp-content/uploads/downloads/2015/06/Estudio-e-commerce-2015-IAB-abierta1.pdf>>. Last accessed 31 May 2016.

that participation in a mediation procedure is voluntary per se, and an agreement reached is initially not binding. Parties may, however, request a Court to sanction their agreement, granting it the same legal value as a judgment. BELMED, an online platform launched by the Belgian Federal Public Services of Economy, offers consumers and businesses an opportunity to solve their trade disputes, online and extra-judicially, through the involvement of an independent mediator.<sup>91</sup> The platform also provides information about alternative dispute resolutions in Belgium. Regarding the latter type, Title III of Book XVI of the Belgian Code of Economic Right is of central importance. It establishes the 'Mediation Service to the consumer', an autonomous public service with legal personality, serving as a contact point for dispute solving free of charge.<sup>92</sup> The Mediation Service, being managed and represented by a Steering Committee appointed for a period of two years, pursues the following goals: to inform consumers and companies about their rights and obligations, as well as the various opportunities of ADR for consumer disputes; to receive ADR requests and, if necessary, transfer these to another qualified entity competent in the matter; and, in case no qualified entity is available, to solve ADR requests. The Mediation Service is only available to claims brought by consumers, and it is required that no judicial claim has been brought, or final judgment has been delivered, in the matter.

Alternatively, Belgian consumers and companies may resort to the conciliation procedure to resolve their dispute, as regulated in articles 731 to 734 of the Belgian Judicial Code. The conciliator is a neutral third party taking an active role in resolving a consumer dispute. After hearing both parties, the conciliator provides for a recommendation or solution in the matter. The parties are, however, under no obligation to adhere to the findings of the conciliator.<sup>93</sup> The conciliation procedure can take place either extra-judicially or, in case the stake of the dispute exceeds €2.500, within the framework of an action in Court.

Moreover, consumer disputes may be resolved through the arbitration procedure, as regulated in articles 1676 to 1723 of the Belgian Judicial Code. This procedure can only be instigated upon agreement of both parties. The arbitrator's decision has force of law, and is thus binding upon the parties. Appeal against such decision is in principle not possible. In Belgium, there are six arbitration commissions of relevance to consumers: the travel commission; the movable goods commission; the textile maintenance commission; the used vehicles commission; the insurance commission; and the construction commission<sup>94</sup>.

Consumer disputes may also be settled before the judiciary. To this extent, the following procedures are available in Belgium: the small claims procedure; the ordinary procedure; the injunctions procedure; and the procedure for consumer compensatory collective redress. Through the small claims procedure, regulated by articles 1338 to 1344 of the Belgian Judicial Code, disputes of which the stake does not exceed €1.860 can be resolved. Disputes concerning larger amounts can be solved through the ordinary procedure. The injunctions procedure, regulated in Book XVII of the Belgian Code of Economic Right, allows individual consumers to challenge illegal practice of a company. The consumer compensatory collective redress is regulated by articles 35 to 69 of Book XVII of the Belgian Code of Economic Right. An action for collective redress is admissible in case a representative of a collective of consumers challenges a potential violation by a company of its contractual obligations regarding one the European Regulations or laws, and the use of the action for collective redress appears more efficient than the ordinary procedures. Although the action for collective redress does not preclude a member of the claimants to engage in another form of ADR with the company, a

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<sup>91</sup> See <<http://economie.fgov.be/belmed.jsp>>. Last accessed 31 May 2016.

<sup>92</sup> See <<http://mediationconsommateur.be>>. Last accessed 31 May 2016.

<sup>93</sup> See <<http://www.infoshopping.be/pages/consumer153.asp>>. Last accessed 31 May 2016.

<sup>94</sup> Idem.

satisfactory outcome of that procedure will exclude the member from further participation in the action for collective redress.

In Denmark, the main disputes solving resolutions for consumers who experience a problem with the online purchase from a Danish provider are to refer and appeal to one (or more) of the following instances: the Center for Mediation under the Competition Authority; the Consumer Complaints Board; the Consumer Ombudsman; or the national courts.

The first step for a consumer in a dispute with a supplier is to seek mediation at the Center for Mediation under the Danish Competition and Consumer Authority or, alternatively, at one of the specialized complaints boards.<sup>95</sup> The Center for Mediation is instituted in accordance with Directive 2013/11/EU. Consumers can lodge their complaint against suppliers online, after which the Center for Mediation will mediate between the parties in order to arrive to a solution. The procedure costs 100 DKK (ca. €13,40) in order to be initiated and will normally take place over the phone. If mediation is not successful, the complaint can be forwarded to the Consumer Complaints Board against a fee of 400 DKK (ca. €53,60). With the institution of the Center for Mediation the consumer has been divested of the previously enforced direct access to complain at the Consumer Complaints Board. Decisions by the Consumer Complaints Board of general public importance are available online.

The Consumer Complaints Board is an impartial entity that helps consumers who are unsatisfied with a service or a good purchased in Denmark. Foreign consumers can also complain to the Danish Consumer Complaints Board regarding unfair marketing prices or unsolicited commercial communications originating from a Danish provider. The Board only handles complaints related to purchases ranging between 1.000 DKK (ca. €134) and 100.000 DKK (ca. €13.400). An exception is made for the purchase of clothing and shoes, for which the minimum is set at 650 DKK (ca. €87). If the Consumer Complaints Board rules in favor of the consumer, and the business owner does not comply with the Board's decision within 30 days, the consumer can take the case to court. The Danish Competition and Consumer Authority may assist the consumer in bearing the costs of a possible lawsuit.

Finally, the consumer can complain in relation to unfair or unlawful marketing practices at the Consumer Ombudsman, which is the appointed central enforcement authority and national liaison office under the EU Regulation on consumer protection cooperation.<sup>96</sup>

If the Consumer Complaints Board does not have competence to handle a case, the consumer may bring it before the national courts. To this extent, a small claims procedure is available for claims that do not exceed 50.000 DKK (ca. €6.700).

In Hungary, in the case of dispute, the consumer is required to lodge a complaint to the supplier, as this constitutes a formal precondition for access to other ADR procedures. If the complaint is rejected, the Consumer Protection Act CLV of 1997 provides the consumer with the possibility of starting an arbitration procedure. An important characteristic of this procedure is the mandatory participation of the company against which the complaint was lodged. Should the abovementioned extra-judicial dispute solving resolutions prove ineffective, civil court proceedings, by means of the small claims procedure, remain available to the consumer. Finally, in case a consumer has incurred damage due to breach of regulation by a company, this may be compensated for in the course of public law procedures brought by the Consumer Protection Authority.

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<sup>95</sup> See for the Center for Mediation <<http://www.kfst.dk/Forbrugerforhold/Klageforhold/Center-for-Klageloesning>>. Last accessed 31 May 2016.

<sup>96</sup> Op. cit. n. 10.

In the Netherlands, an easy procedure for settling disputes is provided for by the Dispute Commission for Consumer Affairs (*Stichting Geschillencommissie voor Consumentenzaken*). This commission consists of several smaller dispute settlement commissions for different sectors of the market. This system of (largely voluntary) self regulation was retained during the implementation of the ADR Directive. The two most important commissions with regard to e-commerce are the Thuiswinkel commission (created in 1996) and the Webshop commission (created in 2012). If a webshop is registered at either one of these commissions (which is mandatory for those which are part of the Thuiswinkel association or the Webshop quality label, respectively), the consumer will be able to start a procedure. Such procedures cost €25, do not require the presence of legal counsel, and take around 3 months on average.<sup>97</sup> The resulting advice will be binding on both parties, although the can request a court to annul it.<sup>98</sup> The Thuiswinkel commission handled 266 complaints in 2014, of which 96 led to a verdict and 75 were settled. 44% of the complaints were found to be valid, and the consumers were awarded financial compensation in 18 cases (€480 on average).<sup>99</sup> The Webshop commission handled 59 complaints in 2014, of which 8 led to a verdict and 17 were settled. 4 complaints were found to be valid and in 1 case the consumer was awarded financial compensation (€769).<sup>100</sup> In 2015 a new commission was created, which can adjudicate disputes between consumers and companies which are not registered at either of the aforementioned institutions. The new organization has not handed down judgments in 2015.<sup>101</sup>

Aside from alternative dispute resolution, consumers can start a civil procedure against the proprietor of a webshop. This is also true when the proprietor has outsourced the actual development of his webshop to an independent contractor.<sup>102</sup> Despite the often relatively small financial stake, there are several examples of consumers successfully invoking their rights in this way. Some cases concern the delivery of goods; in several of these cases the company was unable to prove that it had delivered the products.<sup>103</sup> In another, relatively high profile case, a consumer was able to recover €30.000 for music tickets which he has not received. The company's argument that the tickets had been delivered to his neighbor was not accepted, as it had not had the consumer's permission to do so.<sup>104</sup>

Defrauding webshops or other individuals via the internet can fall within the domain of criminal enforcement. However, according to Dutch case-law, merely not delivering or not paying for a product will not constitute fraud.<sup>105</sup> Nevertheless, an individual who pretended to be a genuine buyer and made use of several false names and e-mail addresses was convicted.<sup>106</sup> The same is true for an

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<sup>97</sup> Geschillencommissie, *Jaarverslag geschillencommissie 2014*, 2015, p. 6. Available at: <<https://www.degeschillencommissie.nl/media/2050/jaarverslag-sgc-2014.pdf>>. Last accessed 31 May 2016.

<sup>98</sup> De Jong, H.A.J. & Erents, G.C.J. (2013), 'Online overeenkomsten en meer', *Tijdschrift voor internetrecht* 2013, p. 148.

<sup>99</sup> Op. cit. n. 94, p. 140.

<sup>100</sup> Ibid., p. 175.

<sup>101</sup> Geschillencommissie, *Jaarverslag geschillencommissie 2015*, 2016, p. 34. Available at: <[http://www.doordata.nl/degeschillencommissiejaarverslag2015/download.php?download\\_file=consumentenzaken.pdf](http://www.doordata.nl/degeschillencommissiejaarverslag2015/download.php?download_file=consumentenzaken.pdf)>. Last accessed 6 June 2016.

<sup>102</sup> Op. cit. n. 54, p. 92.

<sup>103</sup> Court of first instance Arnhem (19 March 2012), ECLI:NL:RBARN:2012:BW0233; Court of first instance Den Bosch (7 June 2012), ECLI:RBSHE:2012:BW8396; Court of first instance Utrecht (21 September 2011), ECLI:NL:RBUTR:2011:BS8964.

<sup>104</sup> Court of first instance Rotterdam (3 July 2013), ECLI:NL:RBROT:2013:5313.

<sup>105</sup> Op. cit. n. 95, p. 149; Court of Appeal Den Haag (20 April 2012), ECLI:NL:GHSGR:2012:BW5086; Hoge Raad (15 December 1998), ECLI:NL:HR:1998:ZD1177.

<sup>106</sup> Court of Appeal Den Bosch (11 July 2013), ECLI:NL:GHSHE:2013:3013.

individual who had bought (and resold) goods from several large webshops without paying by making use of several e-mail addresses and false names and addresses. The court noted that such acts damaged the trust in e-commerce.<sup>107</sup> While there is a separate contact point for internet fraud, a separate internet fraud authority will not be instituted in the near future. The minister of Security and Justice has noted, however, that police too often label such situations as a matter more suited for civil litigation.<sup>108</sup> Although it does not appear to be a significant problem (with only 3% of eshoppers in 2011 having paid for goods they did not receive),<sup>109</sup> the owners of fraudulent webshops can also face criminal prosecution. However, in 2014, the Supreme Court held that selling products and accepting payment with the knowledge of being unable to either deliver those products or reimburse the customers could not be considered fraud by reason of false representation.<sup>110</sup> Commentators point out, however, that it is still possible that it is fraud by reason of deceitful acts. The recently proposed computer-crimes law III would criminalize the intentional and habitual failure to deliver products which have been offered for sale.<sup>111</sup>

In Spain, the consumer may lodge a complaint to the supplier by sending a certificated letter, burofax, or e-mail. In case the supplier fails to respond within 30 days, the consumer can notify the European Consumer Centre in Spain. ECC-Spain will attempt to find a solution for the dispute between the consumer and the supplier, in 15 to 30 days. Should the outcome of the proposed solution be unsatisfactory to the consumer, a civil procedure can be brought before court.

In conclusion, the participating Member States display diverging practices when it comes to the main disputes solving resolutions available to e-consumers. While in Belgium, on the one hand, consumers are provided with a variety of available mechanisms, in Hungary and Spain, on the other hand, the options are rather limited. It may also be noticed that while in Belgium and the Netherlands, the consumers and/or suppliers retain some freedom of choice as regards to the mechanism of disputes solving resolution they intend to use, in Denmark, Hungary, and Spain, the contracting parties are subjected to a more fixed trajectory.

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<sup>107</sup> Court of first instance Den Haag (5 June 2013), ECLI:NL:RBDHA:2013:CA1951, para. 6.3.

<sup>108</sup> See <<https://zoek.officielebekendmakingen.nl/h-tk-20152016-10-2.html>>. Last accessed 31 May 2016.

<sup>109</sup> M. Domenie e.a., 'Slachtofferschap van cybercrime in kaart gebracht Hacken, e-fraude, identiteitsfraude en voorschotfraude', Tijdschrift voor Veiligheid 2012, p. 47-56.

<sup>110</sup> Supreme Court (09 December 2014), ECLI:NL:HR:2014:3546, NJ 2015/146 with comment N. Keijzer.

<sup>111</sup> Art. 326d of the Criminal Code; <<https://zoek.officielebekendmakingen.nl/kst-34372-2.pdf>>. Last accessed 6 June 2016.

### 3. THEME III: NATIONAL EXPERIENCES IN THE *CROSS-BORDER* ONLINE PURCHASE OF GOODS AND SERVICES

Overall it can be seen that in the selected Member States there are many similarities as regards the domestic and cross-border online purchase of goods and services by consumers. This part of the report focuses on several particularities of cross-border online activities.

#### **3.1 THE PERCENTAGE OF CONSUMERS PURCHASING GOODS AND SERVICES CROSS-BORDER**

As was stated above under Theme II, Belgians consume more in a cross-border than in a domestic context due to the limited availability of domestic online offers. In 2014 the percentage of Belgian e-consumers shopping cross-border was 34%, after a sharp increase of 9% between 2012 and 2014. This amounts to approximately 2.1 million online shoppers.<sup>112</sup> These shoppers spend on average around 700 € per year. The main reasons for Belgians to shop abroad are the more competitive prices and the wider offer of goods and services available. Another reason is, as stated above, that the Belgian Labor Law prohibits night work, also for online activities (see Theme II). The most popular countries for Belgians to purchase goods and services from are the Netherlands, Germany and France and the most common goods and services purchased abroad are clothing, home decoration, multimedia and hardware, toys, kitchen appliances, airline tickets and accommodations.

In Denmark the percentage of consumers purchasing goods and services in foreign online-stores was 31%.<sup>113</sup> Danish consumers turn to foreign web shops for similar reasons as the Belgians, i.e. better offers and lower prices. A strong reason for most consumers to consult Danish rather than foreign websites is the fact that the information is available in the Danish language.<sup>114</sup>

In the Netherlands there are no unequivocal figures available as to how many consumers purchase goods and services from non-domestic suppliers. The percentage of consumers engaged in cross-border online purchase of goods and services lies somewhere between 20, 32 and 40%, according to several studies carried out by different organizations. The total value of Dutch cross-border E-commerce in 2014 amounted to 390 million euros, half of which was, similarly to the situation in Belgium, generated in the market for airline tickets and accommodations, IT and clothing. A large share of this revenue was generated by Chinese (23%) and German (18%) web shops.<sup>115</sup>

In Spain the percentage of consumers engaged in the cross-border purchase of goods and services is much higher, i.e. 40%, according to figures published in 2015 by SupplySales.<sup>116</sup> The figures also show that there is a deficit in goods purchased by foreign consumers in Spanish web shops and goods purchased by Spanish consumers in foreign web shops. The goods and services most frequently bought abroad by Spanish consumers are: Direct Marketing (13%); music, books, newspapers and paper articles (12%); gambling services (6,2%); clothes (5,5%); airplane tickets (4,5%); and computers and software (4,4%).<sup>117</sup>

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<sup>112</sup> Op. cit. n. 42.

<sup>113</sup> Op. cit. n. 34, pp. 4 and 18.

<sup>114</sup> Danske Medier (2012), *Danskernes brug af internettet*, p. 25.

<sup>115</sup> Thuiswinkel (2015). Available at: <<http://www.thuiswinkel.org/bedrijven/nieuws/2721/nederlanders-besteden-in-2014-bijna-14-miljard-online>>. Last accessed 6 June 2016.

<sup>116</sup> SupplySales (2015). Available at: <<http://www.salesupply.es/media/blog/2015/06/05/e-commerce-transfronterizo-en-españa-un-negocio-europeo>>. Last accessed 6 June 2016.

<sup>117</sup> CNMC Data (2015). Available at: <<http://data.cnmc.es/datagraph/index.jsp>>. Last accessed 6 June 2016.

In sharp contrast with the other selected Member States only 16% of the Hungarian consumers purchase goods and services in a non-domestic web shop, according to the Gemius 2015 report.<sup>118</sup> The reasons for this relatively low percentage are not mentioned here, but the fact that a relatively low percentage of Hungarians are familiar with using the Internet, as stated above, might explain the small number of Hungarian consumers, who are actually engaged in cross-border online activities.

### **3.2 AWARENESS OF CONSUMERS**

In Belgium in most cases consumers are not aware where the provider of services or supplier of goods is established, or whether the purchase is carried out via a domestic or foreign web site. A strong indication for consumers is to look at the web address. In Belgian law there is no specific remedy available to tackle this unawareness. But the many institutions involved in the protection of consumer rights have a duty to advise consumers on their rights, including their rights when they shop online.

In Denmark, it is also difficult to ascertain whether consumers are fully aware of where the provider is established. 19% of the consumers indicate that they did not speculate over the nationality of the website with which they traded.<sup>119</sup> Consumers are being informed by the Consumer Europe Office (*Fobruger Europa*) stating that consumer cannot solely rely on the web address to know in which country the provider is established. They will have to carefully examine the website, indicating where the seller is registered.

In the Netherlands the ShopScan, which has been described under Theme II, allows consumers to check whether a store is registered in the Netherlands at the Kamer van Koophandel. It also offers a custom goods search through which consumers can research the product and trustworthiness of the store. Furthermore, according to Dutch law, webshops must make certain identifying information available. If foreign webshops do not comply with this requirement, ACM will ask the competent authority of that Member State to take action. Next to this information available to consumers, Consuwijzer has created a page with some basic advice on practical issues and litigation options for consumers where foreign webshops are involved. The Consumentenbond also provides consumers with some basic information on EU legislation and the fact that these rules do not apply to webshops outside the EU.

Contrary to the situation in Belgium, Denmark or the Netherlands, in Spain no applications, websites or other information exist as to help consumers in distinguishing the establishment of the suppliers or the providers of the website. This is particularly striking since a large number of Spanish consumers are engaged in cross-border online purchase of goods and services. The law in Spain is directed at increasing consumer's awareness through the general informational requirements.

The same goes true for Hungary, where the aims of the law are similar to the Spanish ones. The report indicates that probably 30% of all consumers is aware of whether the provider or supplier is of foreign origin.

### **3.3 REQUIRED INFORMATION BY THE SUPPLIER**

Overall the same rules on the provision of information apply as regards domestic and foreign online webshops. This implies that companies offering goods and services online must provide certain clear and understandable key information about the products and services before the contract will be concluded. This also follows from Directive 2011/83/EU.

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<sup>118</sup> Op. cit. n. 37.

<sup>119</sup> Op. cit. n. 34, p. 19.



The consumers' rights granted by EU legislation normally also apply to the online purchase of goods and services from non-EU companies.

### **3.4 SPECIFIC INFORMATION BEFORE, DURING AND AFTER THE PURCHASE**

#### *WITH REGARD TO DELIVERY AND 'EXTRA' COSTS RELATED TO THE FACT THAT IT ENTAILS CROSS-BORDER ONLINE PURCHASE*

In Belgium consumers shall be clearly informed about the total price, including any delivery or related costs. This acknowledgment will be granted by the company to the consumer by providing a button place in the website that specifically refers to the price and all the costs. In the Dutch and Danish report it is referred to Theme II for the answer to this question.

#### *WITH REGARD TO OTHER ELEMENTS SUCH AS: LANGUAGE IN WHICH THE CONTRACT HAS TO BE CONCLUDED; BUTTON OF THE TERM AND CONDITIONS; LANGUAGE OF THE TERMS AND CONDITIONS*

When it comes to language, in the selected Member States the information must be generally provided in clear and understandable language. The language is free but in Belgium the supplier should specifically communicate to the consumer in which the language the contract shall be drafted.

### **3.5 THE "CLICK" THAT MAKES THE FINAL AGREEMENT BINDING**

The law that governs consumer contracts can be found in article 6 of Regulation 593/2008/EC. As has been stated under Theme II, there are several criteria, which are relevant in establishing whether the agreement is final/binding. As is observed in the Belgian report, in a cross-border setting the role of the online seller is still rather dominant. The point of departure is often that the applicable law will be the law of the nationality of the seller, meaning that once the consumer has accepted the terms and conditions by clicking, he accepts that the applicable law is the law of the seller. The position of the consumer is furthermore relatively weak, as he has very limited possibilities to negotiate the terms and conditions of the contract in an online setting.

Whether national law is applicable to foreign webshops is largely determined by European law, most notably article 6 of the Rome I regulation.<sup>120</sup> This goes true for the Netherlands like for other EU Member States. As an illustration, pursuant to article 10:154 of the Dutch civil code, the rules in the Rome I Regulation are also applicable to contracts, which fall outside its scope. When Dutch law is applicable, the Dutch Point of Single Contact states that it generally does not differentiate between foreign and Dutch service providers.<sup>121</sup> As a result, the same legislative requirements, including the information requirements (see Theme II), will generally apply. In 2010, the district court of Rotterdam thus held that Deutsche Bahn AG had violated its obligation under art. 7:46c of the civil code to provide information on the identity of the retailer. The consumer had ordered a railway pass via [www.bahn.de](http://www.bahn.de), but was unaware that he was not entering into a contract with Deutsche Bahn, but with Fernverkehr AG. Deutsche Bahn therefore did not accept his attempted use of his right of withdrawal, as it was (in their view) directed to the wrong party. Deutsche Bahn argued that the fact that the page where the consumer had to provide his personal details had stated, under the header 'additional services', that Fernverkehr AG would process his personal details. Moreover, the terms and conditions named Fernverkehr AG as their publisher on the first page, and that an email sent by Deutsche Bahn had made it clear that the consumer's creditcard would be charged by Fernverkehr AG. Nevertheless, the district court held that Deutsche Bahn had, while making the offer available on

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<sup>120</sup> See <<https://zoek.officielebekendmakingen.nl/kst-33520-3.pdf>>, pp. 4-5. Last accessed 6 June 2016.

<sup>121</sup> Answers for business, 'Provision of services in the Netherlands: 'cross-border' versus 'establishment''. Available at: <<http://www.answersforbusiness.nl/regulation/crossborder-establishment>>. Last accessed 6 June 2016.

its website, not made it sufficiently clear that Fernverkehr AG would be the contracting party. Therefore, the consumer had validly made use of his right of withdrawal.<sup>122</sup>

Similarly, there is no general requirement that the terms and conditions should be in Dutch. Nevertheless, according to case law the terms and conditions must be in understandable language, i.e. a language, which the consumer can be expected to understand. Factors that influence this determination are the professional nature of both parties, as well as the common language in the sector within which they operate. The language will be presumed to be understandable if it is the same language under which the contract was negotiated.<sup>123</sup>

It is therefore not surprising that all country reports indicate that generally the same criteria as apply in the context of domestic transactions, are applicable to cross-border purchase of goods and services (see Theme II).

### **3.6 ACCEPTED PAYMENT METHODS**

In Belgium as had already been noted, the payment methods considerably vary. Companies will indicate on their website which payment methods they accept. The most common payment method used in cross-border transactions is the credit card. The same goes true for other countries, like Spain and probably also Denmark.

In the Netherlands and Hungary online banking is more popular. iDeal, which redirects consumers to their own bank's webpage, is most commonly used where domestic transactions are concerned and is increasingly used in the field of cross-border transactions. But most common are other forms of online banking, like the use of credit cards or paypal, which, contrary to iDeal, provide for chargeback systems, through which the consumer is able to reverse a transaction if a product fails to arrive or is defective.

### **3.7 DELIVERY IN FOREIGN COUNTRIES AND DELIVERY BY FOREIGN SUPPLIERS**

In Denmark a factual barrier may arise in the delivery of goods to consumers in other Member States since the Danish Postal Service, which is one of the main actors on the Danish logistics market, increased its prices in 2016.

In the Netherlands we see that a majority of the online suppliers solely delivers to domestic addresses (55%), of which 15% delivers to both the Netherlands and Belgium. It is likely that the proximity, the language and the few differences in legislation are important factors that explain the relatively high percentage of delivery to Belgian consumers.

Whether the company offering its services (or goods) on the Internet will actually deliver its goods to consumers outside its home country, should, according to Belgian report and Directive 2011/83/EU, be clearly indicated to consumers. The delivery procedure and the extra costs that the consumer can incur due to the product being purchased abroad, must be clearly described and the relevant information must be available prior to the conclusion of the contract.

When it comes to the question of whether foreign suppliers actually deliver to consumers in other countries, the situation is somewhat different. In Hungary foreign suppliers were often not keen to

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<sup>122</sup> District Court Groningen (25 May 2010), ECLI:NL:RBGRO:2010:BO2533.

<sup>123</sup> A.M.A. Canta, 'Algemene voorwaarden: welke taal moet u gebruiken?'. Available at: <[http://www.cms-dsb.com/Hubbard.FileSystem/files/Publication/f78b0958-7ccd-4807-9b1b-01100a242c2c/Presentation/PublicationAttachment/d4a6da6d-b678-40bf-9cc3-0460c246735f/Ondernemersbrief\\_2009\\_3.pdf](http://www.cms-dsb.com/Hubbard.FileSystem/files/Publication/f78b0958-7ccd-4807-9b1b-01100a242c2c/Presentation/PublicationAttachment/d4a6da6d-b678-40bf-9cc3-0460c246735f/Ondernemersbrief_2009_3.pdf)>. Last accessed 6 June 2016.

deliver their goods to Hungarian consumers, either because of their unwillingness to include Hungarian consumer law into the contract, or because of the presumed unreliability of the Hungarian post. For example, on eBay one can find a clause excluding Hungary from the list of countries to which the goods are delivered.

### **3.8 CONTROL OF NON-DOMESTIC ONLINE SUPPLIERS**

In a number of Member States, non-domestic suppliers can be subject to controls, particularly where non-EU suppliers are concerned. In Belgium and Spain, suppliers from third countries are subject to customs controls by the Belgian Custom. When ordering goods from a supplier established outside the EU the consumer will have to pay import and excise duties. The fact that goods are ordered via the Internet is irrelevant. The taxes imposed relate to the goods imported.

In Denmark for goods purchased through the Internet in other Member States, and delivered in Denmark, consumers will need to pay excise duties, if they organize the delivery themselves, e.g. they pick up the goods by their own car.

### **3.9 THE MAIN DISPUTE RESOLUTION MECHANISMS**

According to the Rome I Regulation,<sup>124</sup> the applicable law to contracts concluded by consumers shall be the law of the country where consumers have their habitual residence, if the company has directed its activities to that country and if the company or professional pursues professional activities in that country. But parties may decide otherwise, provided that the choice of the applicable law does not deprive consumers of the protection, which is afforded to them by provisions that cannot be derogated from.

In Belgium, if Belgian law applies, the dispute resolution mechanism as described under Theme II will be available. The most relevant institution dealing with complaints of Belgian consumers about cross-border purchases of goods and services, is the European Consumer Center of Belgium (EEC Belgium).

In Spain next to court procedures, consumers could use the platform <http://www.econsumer.gov> to seek extra-judicial dispute resolution. But the type of procedure eventually depends on the country wherein the company is established.

In the Netherlands, in legal proceedings it has to be determined first by the courts whether they have jurisdiction (see above), i.e. when the foreign company intends to do business with Dutch consumers. This is shown by, *inter alia*, using the English language, including a Dutch address of the consumer in the contract, delivering the goods to an address in the Netherlands, repeatedly seeking contact with consumers in the Netherlands by sending e-mails or through phoning etc. But Consuwijzer and the Consumentenbond specifically promote extra-judicial dispute resolution through the use of the services provided by the European Consumer Centrum (EEC), similarly to Belgium, which has established the EEC Belgium. The EEC offers free online conciliation services whenever a consumer makes a purchase in another EU Member State. If these services do not lead to a satisfactory result, it refers the consumer to the European small claims procedure, which is established by Regulation No.861/2007. The use of the EEC website is also promoted in Denmark and Hungary, and the small claims procedure is particularly referred to in the Belgian report.

In Hungary, next to the references to the EEC, the Arbitration Board Budapest is entitled to deal with online cross-border consumer complaints.

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## CONCLUDING OBSERVATIONS

### CHANCES

The market for online sale of goods and services is rapidly growing. The sharp increase in consumers purchasing goods and services online in all selected Member States, including from ‘foreign web shops’, offers numerous chances for the Digital Single Market to develop further. The Digital Single Market is one of the top priorities of the European Commission, making the ‘EU's single market fit for the digital age – tearing down regulatory walls and moving from 28 national markets to a single one. This could contribute €415 billion per year to our economy and create hundreds of thousands of new jobs’<sup>125</sup>

In our research we have focused on the position of the consumer and his rights on the Digital Single Market. Much in line with the approach of the European Commission and the European Court of Justice, the Member States focus on consumer empowerment, which entails that consumers ought to be properly informed about at least the name, address and contact information of the supplier of the goods or services on the Internet. Belgium seems to have the most extensive information requirements but also in other countries, like the Netherlands, these requirements play an important role in protecting consumers and in helping consumers to actively exercise their rights. Furthermore, the requirements do not considerably differ across the selected Member States. And we see that consumers are generally willing to purchase goods or services from both domestic and foreign webshops. But the research also shows – and this is generally confirmed in legal literature – that there should not be an exclusive emphasis on empowerment. Other measures, which are targeted at consumers’ safety and protect consumers against harmful practices, are needed to protect consumers against the inherent dangers of the Digital Single Market. Empowerment is just one tool to realize consumers’ rights in the field of e-commerce.<sup>126</sup> Or, according to Weatherill, empowerment should not be used to ‘confine or exclude other concerns – if EU consumer protection law is to be converted into EU consumer law or dissolved into some generalized EU law or market freedom – then not only will the constitutional commitments found in Article 12 TFEU (consumer protection requirements must be integrated into other EU policies) and Article 38 of the Charter (consumer rights) have been violated’.<sup>127</sup>

### CHALLENGES

There are still numerous challenges for consumers in the EU when it comes to the (cross-border) online purchase of goods and services. The European Commission has recognized this by proposing new rules, which should tackle discrimination of consumers based on nationality or place of residence, making cross-border parcel delivery more affordable and efficient and by increasing consumers’ trust in e-commerce.<sup>128</sup>

The findings of our research reveal that these challenges start at the level of implementation of EU legislation. There are different modes of implementation across the Member States. Whereas, for instance, the protection of personal data and concerns related to cybersecurity have been relatively important issue in some Member States, like Belgium and Spain, in others these concerns were less

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<sup>125</sup> See <[http://ec.europa.eu/priorities/digital-single-market\\_en](http://ec.europa.eu/priorities/digital-single-market_en)>. Last accessed 6 June 2016.

<sup>126</sup> See with respect to consumer empowerment: S. Weatherill, ‘Empowerment is not the only Fruit’, in: D. Leczykiewicz and S. Weatherill (Eds), *The Impages of the Consumer in EU Law* (Oxford: Hart Publishing 2016), 203-221.

<sup>127</sup> Weatherill (2016), *ibid*, 221.

<sup>128</sup> See <[http://europa.eu/rapid/press-release\\_IP-16-1887\\_en.htm](http://europa.eu/rapid/press-release_IP-16-1887_en.htm)>. Last accessed 6 June 2016.

apparent (Netherlands and Denmark). These conflicts between privacy and data protection rights on the one hand, and the economic rights of consumers and businesses on the other may be a source for conflicts and barriers (see also WP7). Furthermore, where countries have chosen to implement the e-commerce Directive literally, problems may arise at national level as to how ambiguities, which relate to the application of the Directive, should be clarified and solved in the national legal system. A third issue related to the implementation of EU legislation relates to the lack of proper enforcement at national level in some Member States.

A second challenge, which has also been addressed by the European Commission, is the lack of trust in (foreign) webshops. This may partly relate to the fact that part of the population is unskilled in the use of the Internet (Hungary). But we see that in countries where the use of the Internet is widespread, like in Denmark, Belgium or the Netherlands, due to a variety of problems, mistrust remains an important issue as well. Raising awareness of consumers in using the Internet is one of the instruments that Member States use to overcome this. Consumers are, for instance, often not aware where the supplier is established.

The third challenge relates to the different ways in which contracts between businesses and consumers are presumed to enter into force in the different Member States in case of e-commerce. The 'click button' which consumers will press, if they accept the offer by the supplier, functions differently in different Member States. In some Member States it suffices to click only once (the Netherlands), whereas in others the click button should be pressed twice – the one click order is explicitly prohibited (Spain). It is generally agreed though in e.g. the Netherlands that there must be safeguards if consumers by accident press the button.

In the Digital Single Market attention should also be drawn to the social rights of employees working in the e-commerce sector. The Belgian report shows that here the economic rights of consumers in seeking to purchase online from domestic webshops may clash with the social rights of employees, which are protected by rather stringent legislation on night works in shipment logistics. Consumers are thus induced to purchase products and services from foreign webshops (see also WP6).

Lastly, regarding payment methods, it is not only important for consumers that, due to the variety that exists between the Member States, can get their payment method accepted, but also that they are able to recover their money (or reverse the transaction), if a product fails to arrive or is defective. Certain electronic payment methods make this more difficult (iDeal).

#### ***FURTHER OPPORTUNITIES TO ENHANCE CONSUMER RIGHTS OF EUROPEAN CITIZENS***

The Digital Single Market offers many opportunities for businesses and consumers in terms of increasing choice of products and services, cheaper and higher quality products and services, or convenience, as consumers do not have to use their free movement rights. The Digital Single Market where neither consumers nor businesses will have to use wide-reaching mobility rights to engage in cross-border trade, may well fit in a 'commuting model' with less emphasis on mobility of citizens, as has been explored in WP4. Some initiatives taken at national level may be interesting for other Member States and the EU as well, for example where information on (foreign) webshops is concerned. The 'Online Shopscan' developed by the Dutch ConsuWijzer offers consumers the possibility to quickly check the shop before they purchase a good or service. This could be a useful instrument for other Member States as well.

But information is not always a panacea for consumers, even in the field of e-commerce, where in one State something may be perceived as unintelligible or unsafe and in another State not; or where in one state consumers are insufficiently aware of the dangers related to the use of the Internet and in another they are. As stated above, consumer empowerment must not be the only tool to promote

consumer interests. More is needed to further develop the consumer dimension of the Digital Single Market. The EU could carefully monitor consumers' behavior in the online purchase of goods and services and, where necessary, adopt additional rules to protect their safety. Furthermore, differences continue to exist between consumers in the different Member States as to their views on data protection, cyber security etc. And the use of payment methods and the click methods differ per Member State. Here there are opportunities for the EU, which it has already begun to use, to protect consumers more actively against the dangers of the use of the Internet, to promote the harmonization of payment methods and to require a click method, which on the one hand makes it easier for consumers and businesses to accept an offer and on the other protect them against too quick, irrational or unfounded decisions.