

Reward-Based Crowdfunding and EU Consumer Rights

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Abstract: Crowdfunding has become a popular and mainstream way of financing projects and businesses, ranging from community projects and charities to small and medium-sized enterprises (SMEs), creative projects and high potential start-ups. Of the four types of crowdfunding that can be distinguished, this article focuses on reward-based crowdfunding. It will be argued that contracts concluded under a reward-based crowdfunding project within the EU will generally fall within the scope of several EU consumer rights regulations, including the Consumer Rights Directive. This article will focus on the contractual rights and obligations under this directive. As a reward-based crowdfunding project, apart from some exceptions, will have to comply with this directive, the crowdfunding platform and/or the crowdfunding initiator will have to comply with information and delivery requirements, of which especially the delivery requirement do not fit the nature of reward-based crowdfunding. Non-compliance may lead to consumers having the right to terminate, which may compromise the crowdfunding project, as it depends on the participation of the crowd. Possibly the biggest threat to reward-based crowdfunding is the right of withdrawal. Where the withdrawal period for services contract ends 14 days after the conclusion of the contract, with sales contract this period only ends 14 days after the delivery of the goods. The article argues for tailor made exemptions in the Consumer Rights Directive in order to avoid that exercising the right to withdrawal by one or more consumers leads to the collusion of the crowdfunding project.

Résumé: Le crowdfunding (financement participatif) est devenu un moyen populaire et courant de financement de projets et d'entreprises, allant de projets communautaires et d'organismes de bienfaisance à des PME, des projets créatifs et des start-up à potentiel élevé. Parmi les quatre types de crowdfunding qui peuvent être distingués, le présent article se concentre sur le crowdfunding par récompense. Il indique que les contrats conclus sur base d'un projet de crowdfunding par récompense au sein de l'UE relèvent généralement de plusieurs réglementations européennes en matière de droits des consommateurs, y compris la Directive sur les droits des consommateurs (DDC). Le présent article s'intéresse particulièrement aux droits et obligations contractuels visés dans cette directive. Etant donné qu'un projet de crowdfunding par récompense devra, sauf quelques exceptions, se conformer à cette directive, la plateforme de crowdfunding et/ou l'initiateur du crowdfunding devra respecter les obligations d'information et de livraison, lesquelles, spécialement l'obligation de livraison, ne correspondent pas à la nature du crowdfunding par récompense. Une inexécution peut amener les consommateurs à exercer le droit de résiliation, ce qui peut compromettre le projet de crowdfunding car il dépend de la participation du public. La plus grande menace faite au crowdfunding par récompense est sans doute la faculté de rétractation. Là où la période de rétractation pour un contrat de services prend fin 14 jours après la conclusion du contrat, pour un contrat de vente, cette période se termine seulement 14 jours après la livraison des biens. L'article préconise des

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exemptions sur mesure dans la DDC afin d'éviter que l'exercice du droit de rétractation par un ou plusieurs consommateurs n'aboutisse à l'échec du projet de crowdfunding.

Zusammenfassung: Crowdfunding hat sich zu einer beliebten und gängigen Methode zur Finanzierung von Projekten und Unternehmen, von gemeinschaftlichen Projekten und Wohltätigkeitsorganisationen über KMUs bis hin zu kreativen Projekten und high potential Start-ups, entwickelt. Von den vier zu unterscheidenden Arten des Crowdfundings konzentriert sich dieser Artikel auf das belohnungsbasierte Crowdfunding. Der Beitrag argumentiert, dass Verträge, die im Rahmen eines belohnungsbasierten Crowdfunding-Projekts innerhalb der EU geschlossen werden, grundsätzlich in den Geltungsbereich mehrerer EU-Verbraucherrechtsverordnungen fallen, einschließlich der Verbraucherrechterichtlinie. Auf die vertraglichen Rechten und Pflichten gemäß dieser Richtlinie konzentriert sich die Untersuchung. Als belohnungsbasiertes Crowdfunding-Projekt müssen die Crowdfunding-Plattform und/oder der Crowdfunding-Initiator, bis auf einige Ausnahmen, richtlinienkonform agieren und die entsprechenden Informations- und Lieferanforderungen erfüllen, von denen insbesondere die Lieferanforderungen nicht der Natur des belohnungsbasierten Crowdfundings entsprechen. Die Nichteinhaltung dieser Anforderungen kann dazu führen, dass Verbrauchern Rücktrittsrechte zustehen, was jedoch das Crowdfunding-Projekt insgesamt gefährden kann, da es von der Teilnahme einer bestimmten Personenanzahl abhängt. Die möglicherweise größte Bedrohung für das belohnungsbasierte Crowdfunding ist das Widerrufsrecht. Während die Widerrufsfrist bei Dienstleistungsverträgen 14 Tage nach Vertragsschluss endet, endet diese Frist bei Kaufverträgen erst 14 Tage nach Zustellung der Ware. Der vorliegende Beitrag spricht sich für maßgeschneiderte Ausnahmen in der VRR aus, um zu vermeiden, dass die Ausübung des Widerrufsrechts durch einen oder mehrere Verbraucher zur Gefährdung des Crowdfunding-Projekts führt.

1. Introduction

1. Crowdfunding has become a popular and mainstream way of financing projects and businesses, ranging from community projects and charities to small and medium-sized enterprises (SMEs), creative projects and high potential start-ups. In 2015, a worldwide estimate totalling over US\$ 34 billion was raised by crowdfunding.¹ In the literature not much attention has been paid to the question of how EU consumer rights affect crowdfunding, and more in particular how the EU Consumer Rights Directive may affect reward-based crowdfunding.² This article

1 Of which US\$ 25 billion consisted of peer-to-peer lending, US \$ 5.5 billion of reward and donation crowdfunding and US\$ 2.5 billion of equity crowdfunding. See <http://crowdexpert.com/crowdfunding-industry-statistics/>. One of the biggest crowdfunding platforms, Kickstarter, has successfully funded on its crowdfunding site since its founding in 2009 more than 130,000 with more than \$3.5 billion dollars pledged across all Kickstarter projects.

2 An exception is Johannes Wick, 'Pre-purchase Crowdfunding: ein atypischer Kaufvertrag außerhalb der Verbraucherrechterichtlinie', 49. *Verbraucher u. Recht* 2018, which publication was brought to my attention after finishing this article. Wick also argues that the right of withdrawal poses a problem for pre-sales crowdfunding, similar to my point in para. 6.1.

examines the private law aspects of reward-based crowdfunding in the light of EU consumer rights legislation. Among other things, it will be argued that reward-based crowdfunding contracts will generally qualify as distance sales or services contracts and that, given the nature of crowdfunding, the right of withdrawal may pose serious threats to the successful funding of a reward-based crowdfunding campaign. Looking at EU consumer rights, from a reward-based crowdfunding perspective, there is a need for clearer definitions of sales (as opposed to donation) and tailor made exceptions regarding the right to timely delivery and the right of withdrawal, in order to make innovations such as crowdfunding work.³

2. This article first discusses four types of crowdfunding (para. 2), before describing in more detail reward-based crowdfunding (para. 3), in order to analyse this type of contract in the light of the scope of the EU Consumer Rights Directive in particular (para. 4), its information and delivery requirements (para. 5) and its rules on the right of withdrawal (para. 6), followed by a summary and a conclusion (para. 7).

2. Four Types of Crowdfunding

3. Crowdfunding is the practice of funding a project or venture by raising small amounts of money from a large number of people, typically via the Internet. Crowdfunding is a form of alternative finance. Crowdfunding is generally based on three types of actors: the project initiator who proposes the idea or project to be funded, individuals or groups who support the idea (the crowd), and a moderating organization (the ‘platform’) bringing together the parties to launch the idea.

4. Generally, four types of crowdfunding are distinguished: (1) donation-based crowdfunding; (2) reward-based crowdfunding; (3) debt or lending-based crowdfunding; and (4) equity-based crowdfunding.⁴

5. Ad (1) In *donation-based crowdfunding* ‘donors’ generally donate a small amount of money, without a specific reward, except the gratitude of the project

3 See on regulation of financial innovations, C. FORD, *Innovation and the State. Finance, Regulation, and Justice* (New York: Cambridge University Press 2017); and R. SHILLER, *Finance and the Good Society* (Princeton: Princeton University Press 2012).

4 Compare EUROPEAN COMMISSION, *Commission Staff Working Document: Crowdfunding in the EU Capital Markets Union* (Brussels 3 May 2016), SWD(2016) 154 final, pp 8-9 (at <https://ec.europa.eu>); EBA, Opinion of the European Banking Authority on lending-based crowdfunding 26 February 2015, EBA/Op/2015/03, p 8 (<https://eba.europa.eu>). Cf. also information at (accessed 21 January 2019): <https://en.wikipedia.org/wiki/Crowdfunding>; <http://crowdfundinghacks.com/different-types-of-crowdfunding/>; <https://www.fundable.com/crowdfunding101/types-of-crowdfunding/>; and <https://crowdfundinglegalhub.com/2014/04/27/test-3/>. Cf. on other, non-legal aspects of crowdfunding, E.R. MOLLIK, ‘The Dynamics of Crowdfunding: An Exploratory Study’, 29. *Journal of Business Venturing* 2014(1), pp 1-16; and F. POLZIN, H. TOXOPEUS & E. STAM, ‘The Wisdom of the Crowd in Funding. Information Heterogeneity and Social Networks of Crowdfunders’, *Small Business Economics* 2017, pp 1-23.

creator or the beneficiary and the feeling of supporting a cause that they believe in (and possibly a tax deduction). The campaign aims for donations without being required to provide anything of value in return. Donors generally donate small amounts between € 1 and € 1,000, but sometimes more. Donation-based crowdfunding serves social causes, community projects and charities. It is typically used to raise money for a non-profit purpose, a charity or a cause, like disaster relief, building a school or for a personal campaign like an individual's treatment (medical bills).⁵

6. Ad (2) In *reward-based crowdfunding* 'backers' contribute a small amount of money in exchange for a reward. In this funding campaign the individuals contributing money can expect to receive varying returns, mostly at least three levels of rewards that correspond to the amount of money that they contribute (the pledge). This reward is often a product (consumer goods and other tangible products) or a service that the particular company or entity running the campaign produces or provides (or some discount to acquire the product/service), such as clothing, a game or a film. Backers contribute between € 1 and € 1,000, but sometimes more. Reward campaigns are used for client-facing, tangible products that require less than € 100,000 in funding. It is considered to be the most common or most popular type of crowdfunding available. Reward-based crowdfunding will be further elaborated upon below.⁶

7. Ad (3) *Debt or lending-based crowdfunding* (or crowdlending) allows entrepreneurs or consumers to raise funds in the form of loans that they will pay back to the lenders over a pre-determined timeline with a set interest rate. In debt crowdfunding, it is not 'donors' or 'backers' who give money, but 'lenders', who are sometimes called investors. The investors do not get a reward or a piece of equity in the company, but instead they make a loan with the expectation to be repaid the principal plus interest. This type of crowdfunding can be compared with a loan from a bank; instead of borrowing one larger amount of money from one bank, the initiator borrows smaller amounts of money from multiple people. This type of crowdfunding works well for SMEs that do not want to give up equity in their start-up immediately and/or do not have access to more traditional types of loan facilities. For consumers, debt crowdfunding can be used to raise money for credit card refinancing, debt consolidation, home improvement, a car or other reasons.⁷

5 GoFundMe and Crowdrise are two examples of donation-based crowdfunding platforms. Donation-based crowdfunding does not always fall within the guidelines of other (reward-based) crowdfunding platforms such as Kickstarter, where one cannot promise to donate the funds raised to a charity or cause.

6 Kickstarter and Indiegogo are the two most popular reward-based crowdfunding platforms; however, there are many other reward-based crowdfunding platforms. See also RocketHub.

7 In the Netherlands, examples of crowdlending platforms are Collin Crowdfund and Geldvoorelkaar.nl. Other examples are Funding Circle, NL Investeert, SamenInGeld, Voordegroei, Oneplanetcrowd,

8. Ad (4) In *equity-based crowdfunding* (or crowdfunding) ‘investors’ invest larger amounts of money in a private company in exchange for a small piece of equity in the company itself. In this form of crowdfunding, capital is exchanged for equity shares (or membership interest) in the company for each of the crowd members contributing money. If the company does well, the contributing crowd members may realize a financial return on their investment by receiving a share of the profits in the form of a dividend or distribution. Entrepreneurs can set investor caps, minimum pledge amounts (etc.), as well as approve or deny investors who wish to view their business documents. Investors generally give amounts of money of at least € 1,000 and often a lot more, seeking € 100,000 or more in funding. Equity crowdfunding can be used to raise money to fund the launch or growth of a company, such as start-ups, as opposed to initiating a creative project. It suits companies that are looking to raise more capital than those that choose a reward-based approach. Although equity-based crowdfunding campaigns are being used by entrepreneurs and start-ups seeking an alternative to traditional venture capital and angel investors when looking for a capital infusion to take their business to the next level, often these companies go on to raise money from angel investors or venture capitalists.

9. In the United States, equity crowdfunding has been on the rise after the passing of the Jumpstart Our Business Startups (JOBS) Act in April of 2012.⁸ The European Commission has issued, as part of its Fintech action plan,⁹ a proposal for a Regulation on crowdfunding service providers.¹⁰ This proposal basically deals with lending and equity-based crowdfunding for SMEs, and therefore not with reward-based crowdfunding. As a consequence, reward-based crowdfunding will so far only be regulated by other, generally applicable law, including EU consumer rights legislation.¹¹

Horeca Crowdfunding Nederland, Capital Circle, The Dutch Deal, ZIB Crowdfunding, New Funding, Matching Capital, Greencrowd and Knab. See for numbers: <https://www.crowdfundmarkt.nl/crowdfundingplatformen>.

- 8 Crowdcube and Seedrs are two examples of equity crowdfunding platforms in Europe. AngelList and Crowdfunder are two examples of equity crowdfunding platforms in the United States. Of course, there are many more. Although it is expected to be one of the biggest sources of funding for start-ups and small businesses in the near future in the United States, legal and regulatory restrictions make this type of funding campaign the most complex and costly to facilitate.
- 9 See https://ec.europa.eu/info/publications/180308-action-plan-fintech_en.
- 10 See https://ec.europa.eu/info/business-economy-euro/growth-and-investment/financing-investment/crowdfunding_en.
- 11 See for EU information on reward-based crowdfunding: https://ec.europa.eu/growth/tools-databases/crowdfunding-guide/how-to/rewards_en. It does not refer to any legal requirements.

3. Reward-Based Crowdfunding

10. Answering the question whether reward-based crowdfunding is affected by EU consumer rights legislation requires a more detailed description of this type of crowdfunding.¹²

11. Reward-based crowdfunding dates back to 1997, when the U.K. rock band Marillion financed their reunion tour via ArtistShare, a fan-funding website.¹³ Taking the crowdfunding platform Kickstarter as an example, reward-based crowdfunding nowadays may include, among other things, the arts (e.g. drawings), comics and illustration (e.g. graphic novels), designs and technology (e.g. 3D printers, game controllers), film (including documentaries), food and crafts, games, music and publishing (such as albums). Especially technology and games are popular categories of crowdfunded projects.¹⁴

12. The founder seeks funding through the reward-based crowdfunding of a small company or a (creative) project by attracting new customers. Accordingly, the reward-based crowdfunding campaign will often start with a plan to successfully attract backers. Its goal is to raise crowdfunding capital by presenting a market-validated product or service that fills the needs of customers and by sharing that product or service with enough people, answering questions by the crowd and making compelling ‘asks’ in order to raise money. As the funding is rewarded by the product or service, reward-based crowdfunding often contains a detailed description of the product or service, how it works, and why people would want to see it brought to market. As the products or services are being offered as pre-orders, the initiator will be ‘selling’ his product or service. As a result, reward-based crowdfunding campaigns usually include a pitch (stating the problem, introducing the solution and defining the market size, adapted into an elevator and/or e-mail pitch), a company video and/or a product overview, accompanied by the ‘ask’ for money, which may include a detailed plan on how the crowdfunding capital will be spent.¹⁵ From this it follows that reward-based crowdfunding is not only about an alternative to traditional business finance, but it is also about

12 See the references in fn. 3, and <https://www.startups.co/articles/types-of-crowdfunding> (21 January 2019).

13 See <https://www.thebalancesmb.com/what-is-rewards-based-crowdfunding-985103>; <https://www.thebalancesmb.com/what-is-rewards-based-crowdfunding-985103>; <https://www.startups.co/articles/types-of-crowdfunding>; <https://www.fundable.com/learn/resources/guides/crowdfunding/rewards-based-crowdfunding> (accessed 21 January 2019).

14 According to the same platform Kickstarter, the largest reward-based crowdfunding platform, as of 2018 donors have pledged over [\$ 4 billion million] to projects on Kickstarter; over 156,000 projects have been funded successfully; more than 15.6 million people have backed projects; 5.1 million people have backed more than one project; and 50 million total pledges have been made.

15 Which may include product development, sales and marketing, the recruitment of key personnel, legal and accounting, and operating expenses.

winning over potential customers and aiming for popularity by sharing the project over social networks.

13. Although some backers will support a business solely out of personal affinity with the initiator or their desire to see him succeed, most backers will decide to pledge a reward-based crowdfunding based on what they will get out of it. Rewards generally fall into three main categories: (1) selling pre-orders of the product or service the initiator is asking money for to produce or to develop¹⁶; (2) if pre-orders are not available or do not fit the business model, the initiator can offer special services in exchange for support, such as preparing a home-cooked meal for backers or developers offering to write code for fans and supporters; and (3) an entry-level reward for small donations (under € 20) in the form of some sort of personal recognition/swag for their support, such as a company t-shirt commemorating the campaign or the backer's name on the company website. The rewards can also be framed in the following categories: (1) a small price point that offers some sort of simple recognition; (2) a mid-sized price point that offers a pre-order; and (3) a large price point that offers special recognition for generous backers.

14. The founders of the projects may first share the crowdfunding project with friends and family, before they share their activities over social networks, attracting money from other interested backers. In the crowdfunding jargon, if funding targets are hit before the project's deadline, the deal 'tilts'.¹⁷ Reward-based crowdfunding differs from a normal sales or services contract, because the crowdfunding first requires a certain mass to succeed. As a matter of fact, the validity of all customers contracts depend on this critical mass. If and only if the deal tilts are the backers obliged to pay the money (right away), and the founder of the crowdfunding project commits himself to the rewards (later on). Within the months following a successfully funded project, backers receive their rewards. Apparently, research shows that many of the rewards are late in being delivered.

15. As will be argued below, a reward-based crowdfunding project will often qualify as a bundle of various distance consumer sales or services contracts, since the crowdfunding initiators are generally small businesses or non-profit organizations of all sizes ('traders'), the crowd typically consists of customers ('consumers'), and where the traders offer rewards (consumer goods or services) through the internet to the consumers in return for money (the price).

16 In his contribution, Wick focuses on these pre-orders of products ('pre-purchase crowdfunding'). See Johannes Wick, *VuR* 2018/49, para. A.

17 See e.g. <https://www.thebalancesmb.com/what-is-rewards-based-crowdfunding-985103>.

4. Qualification of Reward-Based Crowdfunding Contracts

4.1. Introduction: The Impact of the Consumer Rights Directive

16. The Consumer Rights Directive (CRD)¹⁸ was adopted at the end of 2011. In substance, the directive was not entirely new; it repealed two existing directives regulating, respectively, distance contracts¹⁹ and off-premises contracts,²⁰ and amending two other directives, pertaining to unfair terms²¹ and consumer sales.²² Nevertheless, the directive has introduced a few significant changes and it has been hailed as an important step in consumer protection in Europe.²³

17. In principle, reward-based crowdfunding will fall under the scope of the CRD,²⁴ as the contracts that are concluded with this type of crowdfunding campaign will in principle qualify as a distance consumer sales or services contract within the meaning of Article 2 CRD, although exceptions may apply. As set out below, this qualification may have an impact on (the feasibility of) the crowdfunding campaign.²⁵ It should be noted that reward-based crowdfunding may also fall

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- 18 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights; OJ EU 22 November 2011, L 304/64, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0083&from=EN>. See on the CRD, Giovanni DE CRISTOFARO & Alberto DE FRANCESCHI, *Consumer Sales in Europe. After the Implementation of the Consumer Rights Directive* (Cambridge (UK): Intersentia 2016); Norbert REICH, Hans-W MICKLITZ, Peter ROTT & Klaus TONNER, *European Consumer Law* (Cambridge (UK): Intersentia 2014), Chs 4 and 9; Hans SCHULTE-NÖLKE & Lubos TICHY (eds), *Perspectives for European Consumer Law* (Munich: Sellier 2010); M.W. HESSELINK & M.B.M. LOOS (eds), *Het voorstel voor een Europese richtlijn consumentenrechten* (Den Haag: Boom 2009).
- 19 Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ EC 04 June 1997 L 144/19, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31997L0007&from=en>.
- 20 Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ EC 31 December 85 L 372/31, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31985L0577:EN:HTML>.
- 21 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ EC 21.04.93 L 95/29, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31993L0013&from=EN>.
- 22 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ EC 07 July 1999 L 171/12, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31999L0044&from=EN>.
- 23 See J.A. LUZAK & V. MAK, 'The Consumer Rights Directive', in A.S. Hartkamp, C.H. Sieburgh, L.A. D. Keus, J.S. Kortmann & M.H. Wissink (eds), *De invloed van het Europese recht op het Nederlandse privaatrecht*, Serie Onderneming en Recht Deel 81-II. Bijzonder deel (Deventer: Kluwer 2014), pp (67-92) at 67.
- 24 Compare Georg GUTFLEISH, 'Prospects for Future EU Legislation on Crowdfunding and Initial Coin Offerings', 8. *Banking & Financial Services Policy Report* 8 August 2018, pp (4-13) at 13, nn. 33 and 68.
- 25 See Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, OJ EU 11

under the scope of other directives, such as the Unfair Commercial Practices Directive and the Unfair Terms Directive. The introduction of the new Sales of Goods Directive²⁶ and the proposal for a new Digital Content Directive²⁷ will not change the analysis hereinafter.

18. As for comparative law aspects, the CRD has been implemented differently in the law of the various Member States. For example, in Germany the CRD has been implemented in various parts of the *Bürgerliches Gesetzbuch* (the German Civil Code) dealing with the relevant contract law subject matter (for example, dealing with ‘rights of withdrawal’), whereas in the Netherlands the CRD has been implemented as a whole in a new section of the *Burgerlijk Wetboek* (the Dutch Civil Code, or ‘DCC’), section 6.5.2b DCC, consisting of Articles 6:230g through 6:230z DCC.²⁸ However, the manner of implementation of the CRD in the laws of the various Member States shall generally be without prejudice to the effect of the implemented provisions of the CRD. It can be assumed that irrespective of the particular place in the civil code (or another statute) in which the provisions have been implemented, the national provisions implementing the provisions of the CRD will have the same material effect on reward-based crowdfunding.

4.2. The Scope of the Consumer Rights Directive

19. The scope of the CRD is defined in Article 3 CRD. Article 3, paragraph 1 CRD states that the CRD shall apply, subject to the conditions and to the extent set out in its provisions, to any contract concluded between a trader and a

June 2005 L 149/22 (<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32005L0029&from=EN>), and Council Directive 93/13/EC of 5 April 1993 on unfair terms in consumer contract, OJ EC 21.04.1993 L 95/29 (<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31993L0013&from=EN>). These directives will not be discussed here. See on these directives, Norbert REICH, Hans-W MICKLITZ, Peter ROTT & Klaus TONNER, *European Consumer Law*, Chs 2 and 3.

26 Directive 2019/771/EU of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, OJ EU 22.05.2019 L 136/28, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0771&from=EN>.

27 Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content and digital services, Council of the European Union, Brussels, 1 February 2019, 5857/19. <https://data.consilium.europa.eu/doc/document/ST-5857-2019-INIT/en/pdf>. Cf. for example Recital 12: ‘In addition, the provisions of Directive 2011/83/EU, for example on the right of withdrawal and the nature of the contract under which those goods are supplied, should also continue to apply to such tangible media and the digital content supplied on it’.

28 For example, the right of withdrawal is implemented in German law in § 356 GCC, in a part of the GCC which deals with various kinds of rights of withdrawal; in Dutch law in the right of withdrawal is implemented in Art. 6:230o DCC, as part of the implementation of the CRD.

consumer.²⁹ Article 2, paragraph 1 CRD defines a ‘consumer’ as any natural person who, in contracts covered by the CRD, is acting for purposes which are outside his trade, business, craft or profession. According to Article 2, paragraph 2 CRD a ‘trader’ means any natural person or any legal person, irrespective of whether it is privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession in relation to contracts covered by this Directive.

20. Generally, those persons participating in reward-based crowdfunding can be considered to be consumers, as they will be the customers of the product or services offered through the crowdfunding campaign. Similarly, the person initiating the crowdfunding for his or her business or creative project can generally be considered to be a trader within the definition of the CRD.³⁰ This is irrespective of whether the crowdfunding platform will be acting in its own name or on behalf of the initiator of the crowdfunding campaign. Although the crowdfunding platform will also qualify as a trader within the meaning of the CRD, the question is whether the platform or the initiator will enter into a contract with the crowd. Usually, the contracts will be concluded between the initiator, on the one hand, and the consumer, on the other, so that these contracts will fall under the scope of the CRD. However, for those consumers who also enter into a – for example – service contract with the crowdfunding platform, this contract would also fall within the scope of the CRD.

21. The fact that the trader may initially start the crowdfunding by first offering the products or services to friends and family, and later to other potential customers, does not alter the status of the trader as such, even if the products or services are sold to friends and family *only*. It is only relevant that friends and family are consumers, and the person initiating the crowdfunding is acting for purposes relating to his trade, business, craft or profession in relation to contracts covered by the CRD. Moreover, this would not be a feasible approach, as it is hard to make any viable distinction between friends and family, on the one hand, and other customers, on the other. The same holds true for different phases of the crowdfunding campaign, as the initiator could sell the same products and services at a later stage to friends and family within the same campaign.

29 According to Art. 3, para. 1 CRD, the CRD shall also apply to contracts for the supply of water, gas, electricity or district heating, including by public providers, to the extent that these commodities are provided on a contractual basis. I will leave this aside.

30 Compare Johannes Wick, *VuR* 2018/49, para. C.1.

4.3. Reward-Based Crowdfunding Contracts Will Generally Qualify as Distance Sales or Services Contracts Under the CRD

22. Contracts concluded within reward-based crowdfunding will generally qualify as distance sales contracts³¹ or service contracts.

23. Article 2, paragraph 5 CRD defines a ‘sales contract’ as any contract under which the trader transfers or undertakes to transfer the ownership of goods to the consumer and the consumer pays or undertakes to pay the price thereof, including any contract having as its object both goods and services. Goods are any tangible movable items, according to the CRD.³² According to Article 2, paragraph 6 CRD a ‘service contract’ means any contract other than a sales contract under which the trader supplies or undertakes to supply a service to the consumer and the consumer pays or undertakes to pay the price thereof.

24. The definition of a sales contract or a service contract is autonomous and can only be decided upon by the European Court of Justice (ECJ).³³ The difficult question may be whether in some cases the ‘donation’ made by the consumers and the ‘reward’ offered in return by the trader, should be considered to be a donation contract, instead of a sales or services contract. The part of the definition which requires that the consumer pays ‘the price thereof’ (that is, the price of the good or the service) is in my opinion essential: it presupposes that the payment by the consumer represents a fair (or proportionate or a market value) price for the good that is transferred to the consumer or the service that is rendered.³⁴ Whether that amount paid represents the market value can be found by comparing the price of equivalent goods or services performed by other traders in or outside of crowdfunding campaigns.³⁵ The CRD itself does not clarify this point, and to my knowledge there is no case law from the ECJ with regard to this distinction between donation, on the one hand, and sales and services, on the other.³⁶ If reward-based crowdfunding encourages the crowd to make donations, and the crowd are rewarded with a gift, of which the value has no direct relationship to the donation

31 Compare Johannes Wick, *VuR* 2018/49, para. B.I-B.III.

32 Article 2, para. 3 CRD, with the exception of items sold by way of execution or otherwise by the authority of law; water, gas and electricity shall be considered as goods within the meaning of this Directive where they are put up for sale in a limited volume or a set quantity.

33 Wick uses (mainly) German law to answer the qualification question. Cf. Johannes Wick, *VuR* 2018/49, para. B.I-B.III.

34 As may be inferred from Art. 14, para. 3 and Recital 50 RCD, on the obligations of the consumer in the event of withdrawal.

35 Compare Recital 50 CRD. Cf. on the indication of selling prices as such, Directive 98/6/EC of the European Parliament and of the Council of 16 February 1999 on consumer protection in the indication of the prices of products offered to consumers, OJ EC 18 March 98 L 80/27.

36 The Consumer Sales Directive 1999/44/EC, one of the predecessors of the CRD, did not even address a ‘price’ as such, lacking a definition of a consumer sales contract in the first place.

made, then in my opinion the reward-based crowdfunding does not fall within the scope of the CRD. This may for example hold true for special services in exchange for support, such as – as mentioned before – preparing a home-cooked meal for backers or developers offering to write code for fans and supporters. It is not necessarily true for entry-level rewards for small donations under € 20 in the form of some sort of personal recognition/swag for their support,³⁷ if the value of these goods or services would match the price paid by the consumer for these goods or services. However, if the reward-based crowdfunding is a means of pre-selling products or services, which it often is, it will fall within the scope of the CRD. In establishing whether the price represents a fair price for the good or service, it may be taken into account that backers are generally offered some sort of discount.

25. Thus, insofar as the reward-based crowdfunding involves individuals contributing to a business in exchange for a ‘reward’ in the form of the product or service that the company offers, the contract will qualify as a consumer sales or services contract. The view held by some websites that reward-based crowdfunding should be considered a subset of donation-based crowdfunding since there is no financial or equity return, overlooks this ‘third’ option of a consumer sales or services contract as opposed to a donation contract, on the one hand, and an outright (debt or equity-based) finance contract, on the other hand. That said, it will often be true that reward-based crowdfunding shares the emotional or, to some extent, altruistic component of donation-based crowdfunding,³⁸ although this may also be the result of smart marketing, through which potential customers are won over and popularity is achieved by sharing the project over social networks to make the project work. Similarly, most backers will decide to pledge a reward-based crowdfunding based on what they will get out of it in terms of goods or services. Also, some reward-based crowdfunding platforms even prohibit fundraising for charity.³⁹ As the most important category of rewards can be considered to be pre-orders of the consumer good or service, the aforementioned facts confirm that, from a EU consumer rights (private law) perspective, reward-based crowdfunding cannot be considered to be a ‘subset’ of donation-based crowdfunding, but concerns a sales or services contract. Given the importance of the distinction, some clarification from a EU consumers rights perspective as to the fine line between a sales and a donation contract is much needed.

26. As the contracts that are concluded for the reward-based crowdfunding will be concluded through a crowdfunding platform using the internet as its sole mode of

37 Such as (see above) a company t-shirt commemorating the campaign or the backer’s name on the company website.

38 Compare Johannes Wick, *VuR* 2018/49, para. B.I.

39 Compare <https://www.kickstarter.com/rules?ref=global-footer>.

communication, the contracts will qualify as distance contracts within the meaning of Article 2, paragraph 7 CRD. According to this provision, a ‘distance contract’ means any contract concluded between the trader and the consumer under an organized distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded.

4.4. Possible Exceptions for Reward-Based Crowdfunding in Article 3 CRD

27. The CRD does not apply to the contracts mentioned in Article 3, paragraph 3, under a to m CRD. These contracts relate to social services, healthcare, gambling, real estate, travel, food, public office holders and telecommunication.⁴⁰ Of these contracts, especially the contract for ‘the supply of foodstuffs, beverages or other goods intended for current consumption in the household, and which are physically supplied by a trader on frequent and regular rounds to the consumer’s home, residence or workplace’ (sub. j) and contracts for ‘financial services’ (sub. d) may be of importance to crowdfunding. The first type of contract excludes reward-based crowdfunding campaigns for food products from the scope of the CRD, insofar as the reward consists of foodstuffs, beverages or other goods as described in the exception. If the reward-based crowdfunding is only *related* to food, but offers other products or services, falling outside the scope of the aforementioned exception, the CRD will apply.

28. The second type of contract (financial services) excludes both ‘crowdlending’ and ‘crowdinvesting’ from its scope. Such distance financial services involving consumers could in principle be covered by the Distance Marketing of Consumer Financial Services Directive,⁴¹ although some financial market authorities are of the opinion that the lending of money by consumers to a business (as such

40 Other exceptions relate to social services (a), healthcare (b), gambling (c), financial services (d), real estate (e, f, h), travel (g, k), food (j, l), public office holders (i) and telecommunication (m).

41 See Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002, concerning the distance marketing of consumer financial services, OJ EC 09 October 2002 L 271/6 (<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002L0065&from=EN>), which includes a 14-day withdrawal period in Art. 6. The opinion that consumers would be offered protection by means of a 14-day withdrawal period on the basis of Directive 2002/65/EC (Distance Marketing of Consumer Financial Services Directive) and Directive 2011/83/EU (Consumer Rights Directive), as presented by FG Lawyers, ‘New crowdfunding rules as per 1 April 2016’, p 2, fn. 2, is only correct as to the first mentioned directive. See <http://www.fglawyersamsterdam.com/wp-content/uploads/2016/03/20160316-New-Crowdfunding-rules-as-per-1-April-20162.pdf>. Cf. also Georg GUTFLEISH, 8. *Banking & Financial Services Policy Report* 8 August 2018, pp (4-13) at 13, nn. 33 and 68.

comparable to bonds), however with a non-transferable claim to repayment, is not considered to be a ‘financial product’ or a ‘financial service’.⁴² If a crowdfunding campaign would seek to fund a *consumer*, as opposed to a trader, the CRD does not apply, although other EU directives could have an impact (through national legislation), such as the Consumer Credit Directive⁴³ or the Mortgage Credit Directive.⁴⁴

5. Consequences of the Application of the CRD

5.1. Introduction

29. Once the contracts entered into by the initiator of a reward-based crowdfunding campaign and its customers fall under the scope of the CRD, which will generally be the case as established in the previous sections, this has consequences for the crowdfunding campaign. In this section applicable information and delivery requirements will be discussed. In the next section attention will be paid to the right of withdrawal.

30. The discussion will take place in the light of some (legal) characteristics of a crowdfunding project that makes them different from normal distance consumer sales or services contracts. The first characteristic is that a crowdfunding campaign usually concerns a new type of good or service, which needs to be developed or produced, and whose development or production can only take place if sufficient funds have been collected from the crowd.⁴⁵ It therefore differs from normal sales or services contracts where products are readily available. The second characteristic is that a crowdfunding campaign requires a certain critical mass to succeed. As a consequence, the validity of an individual consumer contract, including the obligation of the consumer to pay and the obligation of the initiator to offer the good or service in return, depends on this critical mass. If and only if the deal ‘tilts’ are the backers obliged to pay the money (right away), and the founder of the crowdfunding project commits himself to the rewards. Within the months following a successfully funded project, the ‘backers’ receive their rewards. It should not come as a surprise that many of the rewards are late in their delivery.

42 For example, the Dutch Financial Markets Authority (Autoriteit Financiële Markten).

43 Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ EU 22 May 2008 L 133/66. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0048&from=EN>.

44 Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property, OJ EU 28 February 2014 L 60/34. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0017&from=EN>.

45 Compare Johannes Wick, *VuR* 2018/49, para. A.

5.2. Formal Requirements for Distance Contracts

31. Article 8 CRD lists various formal requirements for distance (consumer sales and services) contracts, including various information requirements. Crowdfunding projects that fall within the scope of the CRD will have to comply with these requirements. For example, Article 8, paragraph 1 CRD states that with respect to distance contracts, the trader shall give the information provided for in Article 6, paragraph 1 CRD or make that information available to the consumer in a way that is appropriate to the means of distance communication used in plain and intelligible language. Article 6, paragraph 1 CRD states that before the consumer is bound by a distance (or off-premises) contract, or any corresponding offer, the trader shall provide the consumer with specific information in a clear and comprehensible manner, as listed. The information includes the main characteristics of the goods or services (a), the identity and address of the trader (b, c, d), the total price of the goods or services and other costs (e, f) and the right of withdrawal and its consequences (h, I, j, k).⁴⁶

32. In my opinion, the trader is compliant if the crowdfunding platform provides this information on behalf of the trader (the initiator of the crowdfunding project) instead of the trader himself. The crowdfunding platform can make this information available on its website. The trader should be aware that this information (as referred to in Article 6, paragraph 1 CRD) shall form an integral part of the distance contract concluded with the crowd and shall not be altered ‘unless the contracting parties expressly agree otherwise’.

33. Bearing in mind the specific procedure for the conclusion of contracts within crowdfunding projects, information will have to be tailor made for this. The CRD provides sufficient room in its information requirements to do so. For example, point (g) mentions (the information requirement regarding) the arrangements for payment, delivery, performance, the time by which the trader undertakes to deliver the goods or to perform the services and, where applicable, the trader’s complaint handling policy. Here the documentation can specify the specific arrangements for payment, delivery, performance, the time by which the trader undertakes to deliver the goods or to perform the services that apply to the reward-based crowdfunding and which differ from normal distance sales or services contracts, as for example they depend on the participation of the crowd. Under the heading of this information requirement, the crowdfunding platform can provide information on the conditions required for the conclusion of the individual sales or service contract. Other information requirements

46 See also Art. 6, paras 7 and 8 CRD.

that can be tailor made are those relating to the duration and the termination of the contract (under o) and which mentions (where applicable) the existence and the conditions of deposits or other financial guarantees to be paid or provided by the consumer at the request of the trader (under q).

5.3. *Timely Delivery of Goods*

34. Article 18, paragraph 1 CRD states that ‘unless the parties have agreed otherwise on the time of delivery, the trader shall deliver the goods by transferring the physical possession or control of the goods to the consumer without undue delay, but not later than 30 days from the conclusion of the contract’. Article 18 CRD only applies to sales contracts (Article 17, paragraph 1 CRD). A similar provision for the delivery of the services is lacking in the CRD.

35. A late delivery is not without its consequences. Article 18, paragraph 2 CRD determines that ‘where the trader has failed to fulfil his obligation to deliver the goods at the time agreed upon with the consumer or within the time limit set out in Article 18, paragraph 1 CRD, the consumer shall call upon him to make the delivery within an additional period of time appropriate to the circumstances. If the trader fails to deliver the goods within that additional period of time, the consumer shall be entitled to terminate the contract’.⁴⁷ Upon the termination of the contract, the trader is obliged, without undue delay, to reimburse all sums paid under the contract (Article 18, paragraph 3 CRD).⁴⁸ Just as with the right of withdrawal, the right to terminate the contract combined with the 30-day period (if not agreed otherwise) may easily lead to the collapse of the crowdfunding project if one or more backers decide to make use of this right.

36. Given the characteristics of reward-based crowdfunding, generally it will be impossible for the crowdfunding platform to deliver the goods without undue delay, and it may even be impossible to deliver within 30 days. A

47 The first subparagraph shall not be applicable to sales contracts where the trader has refused to deliver the goods or where delivery within the agreed delivery period is essential taking into account all the circumstances attending the conclusion of the contract or where the consumer informs the trader, prior to the conclusion of the contract, that delivery by or on a specified date is essential. In those cases, if the trader fails to deliver the goods at the time agreed upon with the consumer or within the time limit set out in para. 1, the consumer shall be entitled to terminate the contract immediately (Art. 18, para. 2, second subparagraph CRD).

48 In addition to the termination of the contract in accordance with para. 2, the consumer may have recourse to other remedies provided for by national law (Art. 18, para. 4 CRD).

reward-based crowdfunding project can avoid this by agreeing to an alternative time of delivery. According to Article 18, paragraph 1 CRD the trader needs to deliver the goods by transferring without undue delay, but not later than 30 days from the conclusion of the contract, if the parties have not agreed otherwise.^{49,50} This means that if the crowdfunding initiator and the crowd agree that the time of delivery is later than 30 days from the conclusion of the contract, this is also possible. This has to be added to the contracts with the crowd, but if this will be done, it should not pose problems for the crowdfunding project, other than keeping in line with the agreed time of delivery. However, although a reward-based crowdfunding project can arrange for an alternative time of delivery, it would be better to provide for a special rule that takes into account the special nature of reward-based crowdfunding.

6. Right of Withdrawal

6.1. *Withdrawal as a Threat for Crowdfunding Projects*

37. The biggest EU consumer rights obstacle to reward-based crowdfunding is Article 9 CRD, which gives the consumer the right of withdrawal.⁵¹ Article 9, paragraph 1 CRD states that save where the exceptions provided for in Article 16 CRD apply, the consumer shall have a period of 14 days to withdraw from a distance (or off-premises) contract, without giving any reason, and without incurring any costs other than those provided for in Article 13, paragraph 2 CRD and Article 14 CRD. According to Article 9, paragraph 2 CRD, without prejudice to Article 10, the withdrawal period referred to in Article 9, paragraph 1 shall expire after 14 days from: (a) in the case of service contracts, the day of the conclusion of the contract; and (b) in the

49 Compare Recital 52 CRD: ‘If the parties have not agreed on a specific delivery date, the trader should deliver the goods as soon as possible, but in any event not later than 30 days from the day of the conclusion of the contract’. Cf. also Art. 7:9, para. 4 Dutch Civil Code; and *Kamerstukken II* 2012–2013, 33520, nr. 3, p 58. See also J.A. LUZAK & V. MAK, in *De invloed van het Europese recht op het Nederlandse privaatrecht*, pp (67–92) at 89; and Klaus TONNER, in Norbert REICH, Hans-W. MICKLITZ, Peter ROTT & Klaus TONNER, *European Consumer Law*, pp 409–410.

50 Article 18, para. 1 CRD should therefore not be read as that the trader needs to deliver the goods by transferring without undue delay, or at a different time of delivery as otherwise agreed by the parties, but which time of delivery shall in either case not be later than 30 days from the conclusion of the contract.

51 Compare Johannes WICK, *VuR* 2018/49, para. C.I-C.III, who also investigates two possible escapes in para. B.II (reasonableness and fairness) and B.III (ancillary lending contract). See on the right of withdrawal, Marco LOOS, ‘Rights of Withdrawal’, *Centre for the Study of European Contract Law Working Paper Series* No. 2009/04, available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1350224; Klaus TONNER, in Norbert REICH, Hans-W. MICKLITZ, Peter ROTT & Klaus TONNER, *European Consumer Law*, pp 406–409; Reiner SCHULZE, ‘The Right of Withdrawal’, in Hans Schulte-Nölke & Lubos Tichy (eds), *Perspectives for European Consumer Law* (Munich: Sellier 2010), pp 13–22.

case of sales contracts, the day on which the consumer or a third party other than the carrier and indicated by the consumer acquires physical possession of the goods.⁵²

38. If the trader has not provided the consumer with the information on the right of withdrawal as required by Article 6, paragraph 1, point (h) CRD, the withdrawal period shall expire 12 months from the end of the initial withdrawal period, as determined in accordance with Article 9, paragraph 2 CRD (Article 10, paragraph 1 CRD).⁵³

39. Articles 11 to 15 CRD contain rules on the exercise of the right of withdrawal, the effects of the withdrawal, the obligations of the trader and the consumer in the event of withdrawal, and the effects of the exercise of the right of withdrawal on ancillary contracts. Basically, the rules boil down to the obligation of the trader to reimburse all payments received from the consumer, and the obligation of the consumer to return the goods received.

40. It is clear that the fact that reward-based crowdfunding falls under the scope of the CRD may pose problems for the crowdfunding project as such. If the crowdfunding campaign concerns services, the crowdfunding platform and/or the crowdfunding initiator will have to wait at least 14 days with transferring payments after all contracts have been concluded unconditionally (after the project has tilted), until the right of withdrawal period has been expired.

41. If the crowdfunding campaign concerns sales of goods, the withdrawal period only starts 14 days after the day on which the consumer (or a third party other than the carrier and indicated by the consumer) acquires physical possession of the goods. This means that the withdrawal period only ends after the crowdfunding project has been finished. As a crowdfunding project requires a minimum participation of the crowd - a certain critical funding mass - for the project to start, it seems undesirable that only afterwards may one or more backers back out, thereby

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

53 If the trader has provided the consumer with the information provided for in Art. 10, para. 1 CRD within 12 months from the day referred to in Art. 9, para. 2 CRD, the withdrawal period shall expire 14 days after the day upon which the consumer receives that information (Art. 10, para. 2 CRD).

compromising the funding of the whole project and thereby also compromising rewards for fellow backers. Despite the fact that earlier on it has been determined that there is sufficient participation (that is, funding), the crowdfunding may fail nevertheless due to rules of consumer protection. Yet, under the CRD this seems to be a realistic possibility that cannot be avoided, unless reward-based crowdfunding would fall under one of the exceptions (or unless the CRD will be amended). It is very likely that when drafting the CRD, the European legislator did not foresee this problem relating to reward-based crowdfunding.⁵⁴

6.2. Possibilities for an Exception for Crowdfunding Projects

42. Article 16 CRD contains several exceptions to the right of withdrawal, listed in points a to m. Some types of exceptions will be useful for particular types of reward-based crowdfunding projects. This holds true, for example, for the reward-based crowdfunding of games and the exception under m: ‘the supply of digital content which is not supplied on a tangible medium if the performance has begun with the consumer’s prior express consent and his acknowledgment that he thereby loses his right of withdrawal’. This exception is very close to the exception mentioned under (i): the supply of sealed audio or sealed video recordings or sealed computer software which were unsealed after delivery. It is comparable to the exception under m; however, it does not prevent the exercise of the right of withdrawal if – after disappointing reviews – the sealed computer software is sent back to the trader. Another exception worth mentioning is: (b) the supply of goods or services for which the price is dependent on fluctuations in the financial market which cannot be controlled by the trader and which may occur within the withdrawal period. It may be of use for Initial Coin Offerings (ICOs) where coin can be traded and buyers speculate. In general, it may apply to some types of reward-based crowdfunding projects, depending on the specific goods or services provided.

43. The CRD does not contain an exception for reward-based crowdfunding as such. In my opinion it would be desirable to add an exception to the CRD which takes into account the specific nature of reward-based crowdfunding.⁵⁵ In this light, it is worth mentioning existing exceptions that indicate that there is policy room for such an exception and which may serve as a stepping stone for such

54 Compare Johannes Wick, *VuR* 2018/49, para. D.I.

55 Different view is held by Johannes Wick, *VuR* 2018/49, para. D.I-D.II, who, if I understand it correctly, first considers pre-purchase crowdfunding contracts outside the scope of (consumers) sales contracts and inside the scope of (consumer) services contracts, due to the project finance aspect of pre-purchases, and then argues that the consumers sales right of withdrawal (14 days after the day on which the consumers acquires physical possession of the goods) should apply to these contracts as well.

general exceptions for reward-based crowdfunding and/or may serve - through a broad interpretation of the CRD - as exceptions as such.

44. The first exceptions to be mentioned are those under c and j. These exceptions are closely related to the spirit of crowdfunding, as they are both related to goods or services that are specially made for a customer: (c) the supply of goods made to the consumer's specifications or clearly personalized,⁵⁶ such as tailor-made goods⁵⁷; and (j) the provision of accommodation other than for residential purposes, the transport of goods, car rental services, catering or services related to leisure activities if the contract provides for a specific date or period of performance. Depending on the type of goods or services offered, some crowdfunding events will directly fall under this exception.

45. As for a broader application, one could argue that insofar as these aforementioned exceptions are based on the idea that the right of withdrawal does not exist for goods and services that are made at the special request of a consumer, the right of withdrawal should not exist either for goods and services that are made at the special request of a crowd (once the project has tilted) through a crowdfunding campaign. According to Recital 49 CRD 'the granting of a right of withdrawal to the consumer [is] inappropriate in the case of certain services where the conclusion of the contract implies the setting aside of capacity which, if a right of withdrawal were exercised, the trader may find difficult to fill', giving as examples reservations made at hotels or concerning holiday cottages or cultural or sporting events.

46. Moreover, the exception under a deserves attention; it states: (a) service contracts after the service has been fully performed if the performance has begun with the consumer's prior express consent, and with the acknowledgement that he will lose his right of withdrawal once the contract has been fully performed by the trader.

47. One could argue that the performance of the crowdfunding project as such also begins with the consumer's prior express consent, and that he also acknowledges that he will lose his right of withdrawal once the crowdfunding project has been fully performed by the trader. It is not the individual service, but the crowdfunding service as a whole - mass consumer sale constituting project finance⁵⁸ - that should qualify for the exception, one may argue.

48. If the CRD right of withdrawal would be amended for reward-based crowdfunding projects, it is reasonable that the right of withdrawal period expires 14 days after the day of the conclusion of the consumer sales (or services) contract, as

56 Article 2, para. 4 CRD defines 'goods made to the consumer's specifications' as non-prefabricated goods made on the basis of an individual choice of or decision by the consumer.

57 Recital 49 CRD.

58 Compare Johannes Wick, *VuR* 2018/49, para. D.

opposed to 14 days after the day on which the backer acquires physical possession of the goods.

7. Conclusion

49. Four types of crowdfunding can distinguished, donation-based crowdfunding, reward-based crowdfunding, lending-based crowdfunding and equity-based crowdfunding. Contracts concluded under a reward-based crowdfunding project within the EU will generally fall within the scope of the CRD, as the crowdfunding initiator will qualify as a trader, the crowd (the ‘backers’) as consumer(s) and as the contracts qualify as distance consumer sales or services contracts, given the characteristics of reward-based crowdfunding. In some exceptions, the reward-based crowdfunding may qualify as a donation contract. A clear distinction between the two kinds of contracts is missing in EU consumer law. If the crowdfunding concerns lending or equity-based crowdfunding, the CRD will not apply due to one of the exceptions to the scope of the CRD. Also reward-based crowdfunding concerning foods is excluded from its scope. This does mean, however, that a reward-based crowdfunding project will have to comply with EU consumer rights regulations. Among other things, crowdfunding platforms and/or crowdfunding initiators will have to comply with information and delivery requirements, of which especially the delivery requirement do not fit the nature of reward-based crowdfunding. Non-compliance may lead to consumers having the right to terminate, which may compromise the crowdfunding project, as it depends on the participation of the crowd. Possibly the biggest threat to reward-based crowdfunding is the right of withdrawal. Where the withdrawal period for services contract ends 14 days after the conclusion of the contract, with sales contract this period only ends 14 days after the delivery of the goods. The article argues for tailor made exemptions in in the CRD in order to avoid that exercising the right to withdrawal by one or more consumers leads to the collusion of the crowdfunding project.

