



CONSUMERPRO

BOOSTING PROFESSIONALS
IN CONSUMER PROTECTION

General Consumer Law

Theoretical background document

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INTRODUCTION TO THIS THEORETICAL BACKGROUND DOCUMENT



Dear Reader,

This theoretical background document is part of the training resources developed for Consumer PRO, an EU initiative that aims at making consumer organisations and other actors in consumer policy better equipped to protect consumers in their country.

The goal of this document is to provide you and your teams with useful and relevant information on consumer rights. Its content has been prepared by BEUC policy experts in consumer rights, from a European perspective and in order to provide you with the keys to:

- Quickly train your teams of practitioners,
- Easily find pertinent information,
- Enable your staff to better inform consumers about their rights, and,
- Raise the awareness of your national ministries and authorities about consumer rights.

This theoretical background document is based on a previous version and has been updated to reflect the fact that the Consumer Rights Directive 2011/83/EU and the Unfair Commercial Practices Directive 2005/29/EC were substantially amended by the [Directive \(EU\) 2019/2161](#) of 27 November 2019 on better enforcement and modernization of Union consumer protection rules. Furthermore, it takes into account the [Directive \(EU\) 2019/770](#) on certain aspects concerning contracts for the supply of digital content and digital services (“Digital Content Directive”) which introduces a legal guarantee for digital content and digital service.

This theoretical background document forms part of a series of training resources that are intended to be adapted to national specificities when they exist. There are complementary theoretical background documents accessible upon request or [online](#), on the topics of Digital Rights and Collective Redress, in English as well as in many other European languages.

About Consumer PRO

Consumer PRO is an initiative of the European Commission under the European Consumer Programme and implemented by BEUC – the European Consumer Organisation. Its aim is to build capacity of European consumer organisations and other actors in consumer policy through non-formal education. The project covers the EU Member States, Iceland and Norway.

For more information, please write to Info@consumer-pro.eu.

The European Commission also offers hands-on training for SMEs that want to understand their obligations when trading with consumers in the EU without studying the legal background (ConsumerLawReady.eu).

1. INTRODUCTION AND HISTORY OF CONSUMER POLICY

Following the creation of the European "single market", it was essential to implement a strong consumer protection policy and to grant the 500 million consumers of the EU market with solid rights.

Consumer protection is recognized in the Treaty on the Functioning of the European Union (TFEU)¹.

Article 12 TFEU establishes that “[c]onsumer protection requirements shall be taken into account in defining and implementing other Union policies and activities”. And article 169 TFEU indicates that “[...] to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests”. These policies have materialised in concrete terms by considering the market developments and the evolution of EU competences. Consumers are protected in the EU against unfair commercial practices, unfair contract terms, and must be provided with clear and comprehensible information before the conclusion of their contracts. They enjoy guarantee rights in case of problems with purchased goods, digital content and digital services.

EU consumer law has been built during the last three decades on directives harmonising the different aspects of consumer protection. The below sections provide an overview of the main consumer rights as adopted by the European legislator. Today, most parts of EU consumer law are fully harmonised, meaning that Member States cannot keep or adopt higher levels of consumer protection. However, in some circumstances the directives have allowed national legislators to deviate from the European rules (e.g. by introducing additional requirements for pre-contractual information to be provided in the business premises). It is important also to stress that everything that is not covered by EU law, is the competence of the Member States and therefore there can be differences between Member States (e.g. regarding rules on contract formation).

2. KEY CONSUMER RIGHTS AND OBLIGATIONS IN A NUTSHELL

2.1. Pre-contractual information requirements

Before being bound by a contract the consumer shall be informed of certain information to allow them to make an informed choice.

This precontractual information should be easily readable and understandable by an average consumer and should be provided in a clear, legible and comprehensible manner. The set of precontractual information that should be given to consumers is defined in the Directive 2011/83/EU on consumer rights² (“[Consumer Rights Directive](#)” or “CRD”) and varies depending on the type of transaction made:

¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>

² <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32005L0029>

- Article 5 provides the list of pre-contractual information that should be provided for in-shop purchases.
- Article 6 lists the information requirements for distance and off-premise contracts (e.g. online purchases), including regarding the existence of a right of withdrawal.
- Some contracts such as social services, social care, gambling, time-sharing contracts are excluded from the scope of application of the Consumer Rights Directive. A full list of the exemptions is found in Article 3(3) of the Directive.
- For some contracts, specific precontractual information is required by sectoral legislation, such as for consumer credit contract³ or electronic communications services⁴.
- In addition, the Article 3(4) of the Consumer Rights Directive introduced the possibility for Member States to exempt low value transaction (less than €50) from the precontractual information requirements. This exemption is possible with regard to off-premise contracts only.

At national level

According to the Consumer Rights Directive, Member States can go beyond the requirements and introduce additional information requirements for contracts concluded on premises. To check which Member States decided to go further, you can refer to the report on the application of the Consumer Rights Directive [Final report](#) and the [table provided to that end](#)⁵.

The directive allows Member States to do this only for contracts, which are not distance and off-premises contracts. For distance and off-premises contracts the directive does not foresee this possibility due to the full harmonization effect⁶.

The Consumer Rights Directive has been amended by the [Directive \(EU\) 2019/2161](#) on better enforcement and modernisation of Union consumer protection rules, the so called “Modernisation Directive”. As of 28 May 2022 (date of application of transposition measures), several pre-contractual information requirements will be updated and new additional pre-contractual information requirements for distance and off-premises contracts will be applicable.

For instance, traders will be obliged to provide consumers with their telephone number and e-mail. Traders may also set out alternative means of communication for consumers (e.g. chats, automated voice assistants, chatbots, etc.), which must ensure direct and effective communication. With respect to such communication tools, the trader should clearly and timely inform consumers whether they

³ 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

⁴ See Directive (EU) 2018/1972 (European Electronic Communications Code), Articles 102–107.

⁵ https://ec.europa.eu/info/sites/info/files/overview_regulatory_choices.pdf

⁶ For distance and off premises contracts, under Article 6(7) CRD, Member States only had the regulatory choice to maintain or introduce in their national law language requirements regarding the contractual information, so as to ensure that such information is easily understandable by the consumer.

allow keeping track of the content and date/time of the correspondences. Where applicable, traders will also have to inform consumers of price personalisation based on automated decision making.

As of 28 May 2022, the new Article 6a of the revised Consumer Rights Directive will introduce new specific information requirements for contracts concluded on online marketplaces. Before the conclusion of a contract, the provider of the online marketplace will have to inform consumers about the main parameters determining ranking of offers presented as a result of the search query, and the relative importance of those parameters as opposed to other parameters. In addition, consumers should be informed:

- Whether the third party offering the goods, services or digital content is a trader or not, based on the declaration of that third party to the provider of the online marketplace.
- Where the third party is not a trader, that the EU consumer rights do not apply to the contract.
- Where applicable, how the obligations related to the contract are shared between the third party offering the goods, services or digital content and the provider of the online marketplace.

This information must be presented in a clear, appropriate, and comprehensible manner, and in a way appropriate to the means of distance communication used. For example, it can be provided in a specific section of the website interface that is directly and easily accessible from the page where the offers are presented.

At national level

Member States can impose additional information requirements for providers of online marketplaces.

In addition to the list of information that should be provided prior to conclusion of a contract, the Consumer Rights Directive also defines the formal requirements on how this information needs to be provided:

- Article 7 sets formal requirements for different types of off-premises contracts, for instance it establishes that traders need to provide pre-contractual information in writing (on paper, or with the consumer consent – on another durable medium⁷) in a legible, plain and intelligible language.
- Article 8 provides a list of formal requirements for distance contracts. For instance, the Directive says that pre-contractual information should be provided or made available to consumers in a way appropriate to the means of communication used, in a plain and intelligible manner. To be concrete, it means that mandatory information must be easily accessible and prominently visible to consumers. Providing this pre-contractual information into the terms and conditions will not be considered as sufficient. The Directive also imposes a special requirement for contracts concluded via electronic means that place consumers

⁷ Article 7(1) CRD.

under an obligation to pay⁸. In such situations, traders should make consumers aware, in a prominent and clear manner, directly before they place their orders, at least of:

- the main characteristics of the goods or services.
- the total price of the goods or services.
- the duration of the contract and/or the condition to terminate it in case of undetermined duration contract.
- where applicable, the minimum duration of consumers' obligations under the contract.

Before the conclusion of the contract, consumers should also be clearly informed if there is an obligation to pay, otherwise, they shall not be bound by the contract⁹. This means that the button used to place the order on the website or app interface must be clearly labelled. The respective indication (label) must be on the button itself or immediately next to it.

Furthermore, the Directive provides for formal rules for contracts concluded via means of distance communications which impose technical limits on the amount of information that can be presented to the consumer, such as telephone calls, voice operated shopping assistants, SMS.¹⁰ In such situations, the Directive allows the trader to provide the consumer with a more limited range of information elements before the distance contract is concluded, whereas all remaining information required by Article 6(1) must be provided by another source in plain and intelligible language (e.g. an email or hyperlink to a webpage).

At national level

Member States cannot impose further formal pre-contractual information requirements to fulfil the information obligations defined in the Consumer Rights Directive, except for formal requirements for distance contracts concluded by telephone calls. In the latter case, Member States may require that traders confirm the offer to the consumer, who will be bound only once they have signed the offer or sent a written consent¹¹. Member States can also provide that such confirmation must be made on a durable medium.

To check how all EU countries have transposed the Consumer Rights Directive, you can consult the [Consumer Law database](https://e-justice.europa.eu/content_consumer_law_database-591-en.do)¹².

With the updated Consumer Rights Directive, consumers will also benefit from the rights and protection of the Directive not only when they pay with money for goods or services, but also where they provide personal data in order to receive digital service or content. However, the rules of the Directive would not apply where data is strictly necessary for the purpose of performing the contract and complying with legal requirements (e.g. e-mail address to which the digital content needs to be supplied or registration of the consumer for security and identification purposes where specifically laid down by applicable law).

⁸ Article 8(2) CRD.

⁹ Idem, second subparagraph.

¹⁰ Article 8(4) and (5) CRD.

¹¹ Article 8(6) CRD.

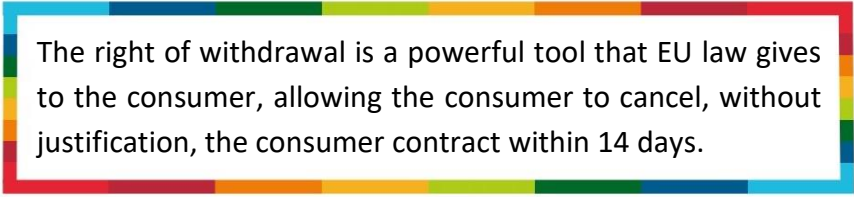
¹² https://e-justice.europa.eu/content_consumer_law_database-591-en.do

2.2. Right of withdrawal

The right of withdrawal is a powerful tool that EU law gives to the consumer. It allows the consumer to cancel, without providing any justification, the contract within 14 days after they have received the goods. The rules on the right of withdrawal for service contracts effectively allow the consumer to test the service and decide, during the 14-day period from the conclusion of the contract, whether to keep it or not.

Two different withdrawal regimes apply for digital content, depending on the mode of delivery. Digital content supplied on a tangible medium follows the rules for goods (e.g. a DVD with a movie or videogame) – i.e. withdrawal is possible within 14 days of delivery. In contrast, there is no right of withdrawal in the case of supply of digital content downloaded online, subject to several conditions – consent for delivery prior to period expiry, warning of loss of right of withdrawal and acknowledgement by the consumer.¹³

- Pursuant to Article 9 of the Consumer Rights Directive, the right of withdrawal applies both to consumer contracts concluded at a distance and consumer contracts concluded outside the business premises.
- Article 11 of the Consumer Rights Directive provides information on how consumers can exercise their right of withdrawal.
- Article 12 is dealing with the effects of withdrawal upon exercise of the right.
- Articles 13 and 14 set out, respectively, the obligations of the trader and of the consumers in the event of withdrawal.
- Article 15 deals with the effects of the exercise of the right of withdrawal on ancillary contracts.
- Finally, Article 10 of the Directive specifies the consequences for traders of an omission to provide consumers with pre-contractual information on the right of withdrawal (i.e. extension of the withdrawal period to 12 months from the end of the initial withdrawal period, no liability for the diminished value of goods, conditional release from the obligation to pay for services and online digital content received).



The right of withdrawal is a powerful tool that EU law gives to the consumer, allowing the consumer to cancel, without justification, the consumer contract within 14 days.

However, all distance/off-premises contracts do not benefit from a right of withdrawal. There are 13 exemptions, for example:

- goods that have been personalized at consumer's request;

¹³ Article 16(m) CRD.

- 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 they will lose their right of withdrawal once the contract has been fully performed by the trader;
- the supply of sealed goods which are not suitable for return due to health protection or hygiene reasons and were unsealed after delivery;
- contracts concluded at a public auction, etc.

Full list of exemptions can be found in [Article 16](#) of the Consumer Rights Directive.

For more practical examples please refer to Section 5.11 of the Guidance on the interpretation and application of the Consumer Rights Directive, available [here](#).

As of 28 May 2022, and the entry into force of the Modernisation Directive, Member States will have a regulatory choice to extend the duration of the right of withdrawal period from 14 to 30 days for two types of off-premises contracts:

- Unsolicited visits by a trader to the consumer's home – namely when a trader visits consumers at their home without being invited or without their prior agreement; and
- Excursions organised by a trader with the aim or effect of promoting or selling products to potential consumers.

The aim of this option is to offer additional protection to consumers regarding these specific sales practices and/or channels. Traders will be required to inform consumers before the conclusion of the contract about the duration of the withdrawal period¹⁴.

In its original version the Consumer Rights Directive, and consequently the right of withdrawal, applied only to contracts where consumers are under an obligation to pay a price. Under the new Article 3(1)(a) CRD, introduced by the Modernization Directive, consumers will have a right of withdrawal also when they acquire digital content and/or use digital services not by way of payment, but by providing personal data (unless this data is necessary for the purpose of performing the contract or complying with legal requirements). The Directive now regulates the consequences of the withdrawal concerning data with specific obligations for traders¹⁵ but also for consumers¹⁶.

Furthermore, the updated Consumer Rights Directive requires that Member States ensure that infringements of the national provisions adopted pursuant to the Directive are sanctioned in an effective, proportionate, and dissuasive manner. Pursuant to Article 24 of the CRD, national authorities concerned by a coordinated action¹⁷ regarding cross-border infringements that affect consumers in several Member States will have the power to impose a fine of up to 4% of the trader's

¹⁴ On 15.02.2022 the updated information about the Member States regulatory choices is not yet available on the website of the European Commission

¹⁵ New paragraphs 4 – 8 in article 13 CRD.

¹⁶ New paragraph 2a in Article 14 CRD.

¹⁷ See Regulation (EU) 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws.

annual turnover, or up to €2 million where turnover information is not available. Member States are free to maintain or introduce higher maximum fines.

2.3. Consumer Rights and guarantees

The Directive on certain aspects concerning contracts for the sale of goods¹⁸ (hereafter the “SGD”) and the Digital Content Directive (hereafter “DCD”) ¹⁹ are two important protection tools for EU consumers as they introduce a mandatory guarantee of conformity for goods and for digital content and services.



The DCD concerns the provision of digital content and services. Digital content is defined as data produced and delivered in digital form (e.g., music, video, etc.), whereas digital services are those enabling the creation, processing or storage of data in digital form (e.g., cloud storage), or services enabling the sharing of and interaction with such data (e.g., Facebook, YouTube, etc.). The DCD applies independently of the medium used for the transmission of, or for giving access to, the digital content or digital service. The Directive also applies to any

tangible medium used exclusively as a carrier for digital content (e.g., DVDs). Number independent interpersonal communication services (e.g. WhatsApp) are also included in its scope, although internet access and other electronic communications services are excluded²⁰.

The SGD covers all contracts for sale of goods, whether they are concluded by physical presence (in stores), online, or through other means of distance selling. Goods with a digital component (e.g. a smart washing machine or a smart watch) are covered by the SGD.

Under SGD²¹, the seller is liable to the consumer for any lack of conformity which exists at the time when the goods are delivered, and which becomes apparent within two years of that time:

- Under the Directive²², if a defect appears during the first year, the seller is automatically responsible for it.
- However, if the defect appears after the first year, the seller can then ask the consumer to prove that it existed at the time of delivery.

The SGD covers also goods with pre-installed software (i.e. a smart phone) and goods which are connected to a digital service (i.e. internet-of-things products) as long as the digital component is necessary for the goods to perform its functions and was offered under the same sales contract.. This

¹⁸ Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC

¹⁹ Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services

²⁰ Article 3(5)(b) DCD.

²¹ Article 10(1) SGD.

²² Article 11(1) SGD.

means for example that consumers will benefit from legal guarantee rights for pre-installed software, if a security patch is not provided, or if updates are not delivered. However, if the goods and software are offered separately (e.g. consumers downloads an app on their smartphone that was not pre-installed), then the conformity of that software will be covered by the rules of DCD.

National level

Concerning the reversal of the burden of proof, Member States were able in the transposition process to extend the reversal period to two years²³. As a result, Member States may have transposed the Directives differently – see overview by Member States here²⁴.

Regarding digital content(s) and digital service(s):

- Under article 12(2) of the DCD, if the consumer contract provides for a single act of supply (ex: the download of a song) or a series of individual acts of supply, the burden of proof with regard to whether the supplied digital content or digital service was in conformity at the time of supply shall be on the trader, as long as the lack of conformity becomes apparent within a period of one year from the time when the digital content or digital service was supplied.
- Under the article 12(3) of the DCD, where the consumer contract provides for continuous supply over a period of time (e.g. subscription video streaming service), the burden of proof with regard to whether the digital content or digital service was in conformity (within the period of time during which the digital content or digital service is to be supplied under the contract) shall be on the trader for a lack of conformity which becomes apparent within that period.
- The burden of the proof can be shifted to the consumer, if the trader demonstrates that the digital environment of the consumer is not compatible with the technical requirements of the digital content or digital service and the trader informed the consumer of such requirements in a clear and comprehensible manner before the conclusion of the contract. The consumer is obliged to cooperate within reasonable limits with the trader to help ascertain the cause of lack of conformity.²⁵

To determine if a product or a digital service or content conforms or not to the contractual requirements, the SGD and DCD introduced a number of objective and subjective criteria. For example, objective criteria are that the digital content, service(s) and goods must be supplied with any accessories and instructions which the consumer may reasonably expect to receive. Traders

²³ Article 11(2) SGD.

²⁴ On 15.02.2022 the updated information about the Member States full transposition is not yet available on the website of the European Commission

²⁵ Article 12 (4) and (5) DCD.

providing digital content or digital service(s), shall also ensure that the consumer is informed of, and supplied with updates, including security updates, that are necessary to keep the digital content, or the digital service(s), in conformity. On the other hand, subjective criteria are for instance that the goods, the digital content or service(s) shall be of the description, quantity, and quality, and possess the functionality, compatibility, interoperability and other features, as required by the contract. **Both objective and subjective criteria have to be considered on an equal footing.**



For digital content and service(s), subjective and objective requirements for conformity are defined respectively in Article 7 and 8 of the DCD, whereas Article 9 regulates incorrect integration, which can also result in lack of conformity if: (a) the digital content or digital service was integrated by the trader or under the trader's responsibility; or (b) the digital content or digital service was intended to be integrated by the consumer and the incorrect integration was due to shortcomings in the integration instructions provided by the trader.

For the conformity of goods, subjective and objective criteria are defined in article 6 and 7 of the SGD. Similarly to the DCD, additional rules on lack of conformity due to incorrect installation are set in Article 8 of the SGD.

Unlike the Sales and Guarantee Directive²⁶ from 1999, both the SGD and DCD are based on the principle of "maximum harmonisation"²⁷, which means that Member States cannot deviate from the requirements unless otherwise provided for in the Directives. Some regulatory choices have been given to EU Member States to go beyond the requirements of the Directives, in particular to maintain the level of consumer protection already applied at national level²⁸. As a result, Member States may have transposed some provisions of the SGD and DCD differently.

The EC website provides a quick and complete overview of the situation²⁹ per Member State regarding the legal guarantee period. It also presents the national implementation³⁰ of each of the Member States.

In a nutshell, the new Directives also established:

²⁶ 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

²⁷ Article 4 SGD and Article 4 DCD.

²⁸ For example, under the Article 11(2) of the Sales of Goods Directive, Member States may maintain or introduce a reversal of the burden of proof longer than the 1-year period provided by the Directive.

²⁹ On 15.02.2022 the updated information about the Member States full transposition is not yet available on the website of the European Commission

³⁰ On 15.02.2022 the updated information about the Member States full transposition is not yet available on the website of the European Commission

- Coverage of all new and second-hand goods sold by traders by a two-year legal guarantee of conformity as defined in Article 10 of the Sale of Goods directive. A strict and fully harmonized hierarchy of remedies in case of lack of conformity of goods, digital content and digital services and harmonized modalities for the exercise of those remedies. The consumer may, in accordance with Article 13 and 14 of the DCD and Article 13 of the SGD, in order to bring the product into conformity, request repair or replacement and, if this is impossible or disproportionate, a reduction in price or rescission of the contract.
- Repair or replacement shall be free for consumers as set out in Article 14 (1) as well as bringing digital content/service in conformity shall be free of charge to consumers according to Art. (3) of the DCD.
- The DCD³¹ provides for the harmonized rules on the obligations of the consumers and the traders in case termination of a contract for non-conformity of a digital content or a digital service.
- The Sale of Goods Directive³² allows Members States to introduce in their national legislation a possibility for traders and consumers to reduce by contractual agreement the duration of the legal guarantee in the case of sale of second-hand goods. However, the duration agreed in the contract may in no way be less than one year.
- The DCD provides for harmonized remedies³³, if traders fail to supply a digital content or digital service. It also provides for harmonized rules if digital content or services are modified by traders³⁴.
- The DCD³⁵ provides that consumers will also have the right to a remedy in case of faulty digital content or service, even where they did not pay a price but provided their personal data (e.g., creation of an account on social media).
- The Sale of Goods Directive³⁶ introduces additional rules for commercial guarantee, broadly defined as any undertaking of the trader to reimburse the price paid or to replace, repair or service goods when they are not in conformity or do not meet other requirements. In addition, the Directive introduces a special type of the commercial guarantee - commercial guarantee of durability. If a producer offers to the consumer a commercial guarantee of

³¹ Articles 16 to 18 of DCD.

³² Article 10(6) SGD.

³³ Article 13 DCD.

³⁴ Article 19 DCD.

³⁵ Article 3(1) DCD.

³⁶ Article 17 SGD.

durability, they are liable directly to the consumer, during the entire period of the commercial guarantee of durability for repair or replacement under the conditions laid down in Article 14.

- The commercial guarantee can be provided by the seller or another party such as the manufacturer. It is legally binding³⁷ on the issuer, but the rights thereunder are set contractually and will therefore vary from one trader to another or even for different goods offered by the same trader. Furthermore, the conditions laid down in associated advertising available at the time, or before the conclusion, of the contract, will also form part of the scope of the commercial guarantee.

To sum up – Areas harmonised by the Directives

- Conformity of goods, goods with digital elements, digital content and digital services:
 - Conformity criteria
 - Liability of the trader
- Remedies
 - Remedies for failure to supply of digital content/services
 - Remedies for lack of conformity
 - Modalities, including burden of proof, time limits obligations of the parties
 - Modification of digital content or digital service
- Everything else = national law

2.4. Unfair Commercial Practices

A commercial practice is unfair, under EU law, when it prevents the consumer from taking a fully informed transactional decision. Unfair commercial practices are prohibited across the EU.

As the Unfair Commercial Practices Directive 2005/29/EC (“UCPD”) is a maximum harmonisation Directive, Member States have the same standards of consumer protection against unfair commercial practices. In practice, this means that the rules must be the same across the EU. Nevertheless, to protect the economic interest of consumers, the UCPD allows Member States to impose more stringent requirements in the area of financial services and real estate property. Furthermore, the UCPD does not prevent Member States from adopting provisions to protect the legitimate interests of consumers in the context of unsolicited visits by a trader to a consumer’s home or excursions organised by a trader with the aim or effect of promoting or selling products to consumers³⁸.

- The Directive prohibits misleading commercial practices. The latter are composed of misleading actions (Article 6) and misleading omissions (Article 7)

³⁷ Article 17(1) SGD.

³⁸ New paragraphs 5 and 6 in Article 3 UCPD

- The Directive also prohibits so called aggressive commercial practices. Such aggressive practices are defined in Article 8 and Article 9 of the UCPD.
- There are 31 black-listed practices including both online and offline commercial conducts which may negatively impact a consumer's free and fully informed economic decision - Annex 1 of the UCPD. The first 23 black-listed practices concern misleading behaviour of the trader and the last 8 are prohibited aggressive practices. All these 31 practices are unfair in all circumstances, a case-by-case assessment not being necessary.

The UCPD has also been amended by the "Modernisation Directive". As of 28 May 2022, Annex I of the Directive, that contains the list of commercial practices which shall in all circumstances be regarded as unfair, will be extended by 4 new prohibited practices, namely:

- Providing search results in response to a consumer's online search query without clearly disclosing any paid advertisement or payment specifically for achieving higher ranking of products within the search results³⁹.
- Reselling events tickets to consumers if the trader acquired them by using automated means to circumvent any limit imposed on the number of tickets that a person can buy or any other rules applicable to the purchase of tickets⁴⁰.
- Stating that reviews of a product are submitted by consumers who have actually used or purchased the product without taking reasonable and proportionate steps to check that they originated from such consumers⁴¹.
- Submitting or commissioning another legal or natural person to submit false consumer reviews or endorsements, or misrepresenting consumer reviews or social endorsements, in order to promote products⁴².

Traders will also have to provide the following information that will be regarded as material for consumers⁴³:

- for products offered on online marketplaces, whether the third party offering the products is a trader or not, on the basis of the declaration of that third party to the provider of the online marketplace. If the failure by the marketplace to inform about the identity of the actual trader creates the impression that the marketplace is the actual trader, this may result in it being liable for the obligations of the trader;
- If traders provide access to consumer reviews of products, provide information about whether and how they ensure that the published reviews originate from consumers who have actually used or purchased the product. This information should cover both the specific measures to ensure authenticity and also explain more generally the processing of reviews in

³⁹ New point 11a of the UCPD Annex 1.

⁴⁰ New point 23a of the UCPD Annex 1.

⁴¹ New point 23b of the UCPD Annex 1.

⁴² New point 23c of the UCPD Annex 1.

⁴³ New Articles 7(4)(f), (4a), 7(6) UCPD.

order to ensure that they are genuine. This includes explanation on how the presentation of reviews is influenced by sponsored reviews or by contractual relations between the trader publishing them (in particular, a platform) and the reviewed traders hosted on the platform as well as information on whether all reviews are published, how they are sourced, how average review scores are calculated. This information must be clear, intelligible, and made available ‘when providing access to consumer reviews’, i.e. information should be made available from the same interface where reviews are published for consultation, including via clearly identified and prominently displayed hyperlinks. If traders offer consumers the possibility to search for products offered by different traders or consumers via keywords or other entries, they should clearly inform consumers of the main parameters determining the ranking of the results displayed and the relative importance of those parameters. Therefore, this information requirement applies only to traders that allow consumers to search for products offered by other, third party, traders or by consumers, i.e. online marketplaces and comparison tools. It does not apply to traders that provide their consumers with a possibility to search only amongst their own offers of different products. The information requirement also does not apply to ‘online search engines’⁴⁴.

The UCPD⁴⁵ will also expressly prohibit marketing a good, in one Member State, as being identical to a good marketed in other Member States, while that good has significantly different composition or characteristics (the so called “Dual Quality”), unless justified by legitimate and objective factors (e. g. the use of local or seasonal ingredients, voluntary commitment by the trader to promote healthier food, or national rules on the composition of products).

It will also introduce new rules for “door-step-selling” and commercial excursions. With the new provisions, Member States will have regulatory options to introduce further national measures such as stronger rules on the right of withdrawal to better protect their consumers in these types of sales (see point 2.2 above).

The updated UCPD will also introduce⁴⁶ an explicit obligation for Member States to provide for proportional and effective individual remedies for victims of unfair commercial practices, which are not provided for in the original version of the Directive. Those must include, depending on the circumstances of the case:

- termination of the contract,
- price reduction, or
- compensation for damages.

Member States retain the possibility to offer also other remedies to the victims of unfair commercial practices.

⁴⁴ As defined in Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services

⁴⁵ New Article 6(2)(c) UCPD.

⁴⁶ New Article 11a UCPD.

Finally, Member States must ensure that infringements of the national provisions adopted pursuant to the UCPD are sanctioned in an effective, proportionate, and dissuasive manner. Pursuant to Article 13 of the updated UCPD, national authorities concerned by a coordinated action⁴⁷ regarding cross-border infringements that affect consumers in several EU Member States have the power to impose a fine of up to 4% of the trader's annual turnover, or up to €2 million where turnover information is not available. Member States are free to maintain or introduce higher maximum fines.

2.5. Unfair Contract terms

The [Unfair Contract Terms Directive \("UCTD"\)](#)⁴⁸ protects consumers against unfair standard terms which create in contracts between a consumer and a trader a significant imbalance between the rights and obligations of the parties to the contract, to the detriment of the consumer - (Article 3 UCTD).

- The annex of the Unfair Contract Terms Directive contains an indicative and non-exhaustive list of clauses that could be considered as unfair. Contract terms that are offered to consumers must always be drafted in a plain and intelligible language, so that they are clear, legible and comprehensible, both in terms of form and content. In case of doubt as to the interpretation of the term, the interpretation most favourable to the consumer shall apply - (Article 5).
- The UCTD fairness requirements apply to the contract terms related to the main subject matter of the consumer contract and to the adequacy of the price and remuneration stipulated therein only if these terms are not in plain intelligible language (Article 4(2)).
- Contract terms which are considered unfair are not binding for consumers, as provided for under national law, and thus cannot have any effect on consumers. The contract will remain binding if it can subsist without the unfair terms - (Article 6).

The UCTD allows member states to adopt or maintain stricter national provisions to ensure a higher level of consumer protection - Article 8. It could be the introduction of a so called “black-list” of unfair contract terms (i.e. in France) or the extension of the application of the UCTD rules to contracts that have been individually negotiated between the consumer and the trader.

At national level

To get a quick and complete overview the national transposition of each of the Member States click [here](#).

The UCTD has also been amended by the “Modernisation Directive”.

Just as the Unfair Commercial Practices Directive, the updated Unfair Contract Terms Directive will also give national authorities the power to impose effective, proportionate and dissuasive sanctions.

⁴⁷ See Regulation (EU) 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws

⁴⁸ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts

Member States may limit those sanctions to situations where contract terms are expressly defined as unfair in all circumstances by national law or where the trader continues to use contract terms which have been found unfair by a final decision of the competent court or administrative body (Article 8b(2)). When working together, in the framework of a coordinated action,⁴⁹ on cross-border infringements that affect consumers in several EU Member States, national authorities will have the power to impose a fine of up to 4% of the trader's annual turnover (Article 8b(4)), or up to €2 million where turnover information is not available (Article 8b(5)). Member States are free to maintain or introduce higher maximum fines.

3. MAIN CHALLENGES CONCERNING GENERAL CONSUMER POLICY

3.1. Pre-contractual information

Pre-contractual information is one of the most recognized consumer rights. However, numerous surveys, studies and judgments of national and European courts highlight that many traders do not respect their obligations to provide pre-contractual information to consumers⁵⁰.

3.2. The right of withdrawal

This right allows a consumer to test and inspect products and services bought at a distance. Consumers can withdraw from a contract concluded online within 14 days of the reception of delivery (in the case of a product) or the conclusion of the contract (for services). It is the consumer right most widely known by EU citizens⁵¹ and 95 % of EU shoppers consider it as important⁵².

This right of withdrawal was introduced by the Consumer Rights Directive⁵³ to counterbalance the situation of consumers who buy online, as the latter do not have the possibility to inspect the products as would be the case in a brick-and-mortar shop.

However, although this right is well-known and straightforward, in practice consumers face many obstacles to enforce it, such as:

- Some traders refuse to apply the Directive.
- Some traders refuse to reimburse consumers when they want to enforce this right.
- Consumer sometimes receive only a partial refund, some traders pretexting that the consumer has misused the product, without providing any proof (i.e. photo).
- Some traders falsely claim not to have received the product returned by the consumer.

49 Under Regulation (EU) 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws

⁵⁰ In 2015, a [large-scale check](https://ec.europa.eu/info/live-work-travel-eu/consumers/enforcement-consumer-protection/sweeps_en) coordinated by the European Commission ("SWEEP") highlighted that on 743 websites controlled, irregularities were confirmed in 436 cases (63%). [https://ec.europa.eu/info/live-work-travel-eu/consumers/enforcement-consumer-protection/sweeps_en]

⁵¹ https://ec.europa.eu/info/sites/info/files/consumer-conditions-scoreboard-2017-edition_en.pdf

⁵² Study on the application of the Consumer Rights Directive (2017), 160.

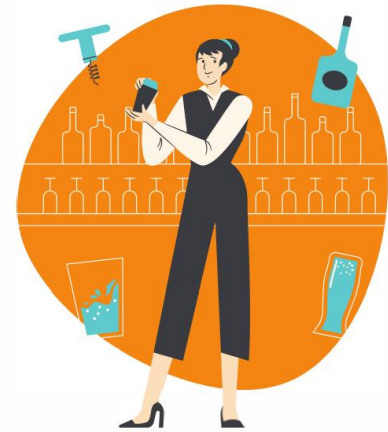
⁵³ Article 9 of the Consumer Rights Directive.

- Some traders refuse to reimburse the consumer via the same means of payment used by the consumer but give vouchers instead.

3.3. Consumer Rights and guarantees

If a consumer buys goods or digital services or digital content from a European trader or a trader directing sales to the European market, they are entitled to a legal guarantee (see point 2.3 above).

This legal guarantee shall be distinguished from so-called “*commercial guarantees*”. The latter are additional contractual guarantees, offered by the seller or the manufacturer, which are binding in accordance with the specific conditions set by the issuer. These two types of guarantees lead to numerous disputes for European consumers:



- There is a great deal of confusion for consumers between the legal guarantee of conformity and the so-called commercial guarantees. In practice, very often, traders do not inform consumers about the legal guarantee of conformity even though it is an obligation, but only refer to their commercial guarantees (i.e. Apple case).
- Some traders refuse to apply the legal guarantee, which often obliges consumers to pay for expensive counter-expertise to enforce their rights.
- Some traders ask the consumer to pay for the repair under the legal guarantee which is forbidden by EU law.
- Some traders ask consumers to advance the return costs but do not reimburse the consumer afterwards.
- Under the SGD and DCD, if the lack of conformity appears during the first year, it is considered that the lack of conformity existed at the time of the delivery. Traders must apply the legal warranty of 2 years unless they prove that the consumer is at the origin of the defect. After the first year, the burden of the proof changes and it is up to the consumer to prove that the product was defective at the purchase time. In case of termination of contract following the application of the legal guarantee, refunds to consumers are often made after a long period of time (or even not made at all by rogue traders).
- In principle, the duration of the legal guarantee is 2 years for all goods, whether the goods are new or second hand. However, in several Member States, the legal guarantee for second-hand products may contractually be reduced to no less than 1 year. Check your national law which implements the sale of consumer goods and associated guarantees directive.

3.4. Unfair Commercial Practices

A commercial practice is unfair where it is contrary to the requirements of professional diligence and distorts or is likely to substantially distort the economic behaviour of a reasonably well-informed and reasonably observant and circumspect consumer in relation to a good or service.

The Unfair Commercial Practices Directive⁵⁴ is fully harmonized⁵⁵ and applies to all sectors. It is a very good tool for practitioners to know and use. However, its implementation is far from uniform. For example:

- Consumers face unfair commercial practices in many areas and more and more in the digital area (social network, online platforms etc.).
- Misleading environmental claims. This is even more relevant now with the European Green Deal. Some new unfair commercial practices have been added to the Annex in the “Modernisation Directive” such as hidden advertisements, or fake consumer reviews.

3.5. Unfair Contract terms

The Unfair Contract Terms Directive (93/13/EEC) protects consumers against standard unfair contract terms imposed by traders. It applies to all contracts for the purchase of goods and services, whether they are online or offline. However, the Directive does not apply to contract terms which reflect mandatory statutory or regulatory provisions, as well as provisions or principles of international conventions to which the EU Member States or the EU are party, such as those in the transport area.

The following is a non-exhaustive list of recurrent unfair clauses found in consumers contracts:

- Consumers face contract terms which inappropriately exclude or limit consumers' rights to compensation if the trader fails to fulfil their part of the contract.
- Some traders include clauses in their contracts which allow them to terminate a contract unilaterally without granting the same right to the consumer.
- Some traders reserve the right to unilaterally amend contracts without having a valid reason to do so and without giving notice to the consumer.
- Some traders insert clauses in their contracts to limit consumers' rights to take legal action.

⁵⁴ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive')

⁵⁵ Except for the aspects mentioned at point 2.4.

LAWS AND REGULATIONS AT EU AND NATIONAL LEVEL

4.1. The Unfair Contract Terms Directive (“UCTD”)

- [Council Directive 93/13/EEC](#) of 5 April 1993 on unfair terms in consumer contracts.
- [Guidance on the interpretation and application of Council Directive 93/13/EEC](#) on unfair terms in consumer contracts.
- [Directive \(EU\) 2019/2161](#) of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules.

Case law is starting to be publicised in Luxembourg. Courts’ judgements are available online at: <https://justice.public.lu/fr/jurisprudence.html>

At national level:

- *Luxembourg law implementing the Unfair Contract Terms Directive at a national level: (transpositions at national level are available [here](#).)*
- In Luxembourg, the Unfair Contract Terms Directive has been transposed into Luxembourg’s Consumer Code (articles L. 211-1 to L. 211-7 of the Consumer Code).
- Article L. 211-2 transposes articles 3 to 6 of the UCTD prohibiting the use of terms causing an imbalance in the parties’ rights and unclear terms.
- Article L. 211-3 transposes the annex of the UCTD, which provides a list of terms which should be considered unfair in consumer contracts.
- Article L. 211-4 transposes article 7 of the UCTD. A fine ranging from 300 to 10.000 EUR can be imposed on traders who would continue to use terms that have been previously ruled unfair by a Court.
- Article L. 211-5 transposes article 1 of the UCTD stating that terms reflecting mandatory statutory of regulatory provisions are not to be considered unfair.
- Article L. 211-6 transposes article 6 of the UCTD and states that consumers cannot renounce to the protection against unfair terms.
- Article L. 211-7 transposes article 6 of the UCTD by ensuring that consumers cannot be deprived from the protection against unfair terms by choosing a non-member State’s law as the applicable law to the contract.
- *No national authority has issued specific guidelines, recommendations or decisions based on the Unfair Contract Terms Directive.*
- *Under Article 8a of the Unfair Contract Terms Directive, Member States can take national measures that go beyond the UCTD requirements. The following [table](#) reflects the information provided by Member States (on 31/05/2019).*
- Luxembourg law has broadened the scope of the unfairness assessment to individually negotiated contract terms and to the main subject matter. According to article L. 211-2 of the consumer code an imbalance in the rights and obligations of the parties suffices to qualify a term as “unfair” whereas the directive refers to a significant imbalance.

- Luxembourg law contains a blacklist of contractual terms which are considered unfair in all circumstances (i.e. a black list article L. 211-3 of the consumer code) which has been extended compared to the UCTD.
- Article L. 211-14 transposes article 1 of the omnibus Directive. Unfair terms can now also be sanctioned by a fine going from 300 to 10 000 euros (to be determined according to the criteria set out by the omnibus directive).

Complementary documentation:

- Practical information about the Unfair Contract Terms Directive available [here](#).

4.2 The Unfair Commercial Practices Directive (“UCPD”)

- [Directive 2005/29/EC](#) of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (‘Unfair Commercial Practices Directive’).
- [Interpretative guidelines](#) of the Unfair Commercial Practices Directive.
- [Consolidated text](#) of the reviewed Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council.
- [Directive \(EU\) 2019/2161](#) of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules.

At national level

Luxembourg law implementing the Unfair Commercial Practices Directive at a national level: Transpositions at national level available [here](#).

- In Luxembourg, the Unfair Commercial Practices Directive has been transposed into Luxembourg’s Consumer Code (articles L. 121-1 to L. 122-8 of the Consumer Code).
- Article L. 122-1 transposes article 5 of the UCPD. It sets forth a general prohibition of Unfair Commercial Practices, when such practices are contrary to professional diligence and could distort consumer’s freedom of choice with regards to the product.

- Articles L. 122-2 to L. 122-4 transpose articles 6 and 7 of the UCPD. They prohibit misleading commercial practices. The newly created UCP related to ranking operated by the traders have been introduced into art. L. 122-4 (at § 24; 25; & 26).
- Articles L. 122-5 to L. 122-7 transpose articles 8 and 9 of the UCPD. They prohibit aggressive commercial practices.
- Article L. 122-8 transposes the sanction provided for by article 13 of the UCPD. All practices referred to in the previous articles of the Consumer code can lead to the order to pay a fine ranging from 251 to 120.000 EUR, and/or the termination of contract. Unfair practices creating the false impression that the consumer has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit may lead to have the trader providing the promised prize to the consumer.
- The fine remained unchanged after the transposition of article 3 (6) of the omnibus Directive. The Luxembourg legislature has just integrated into the Consumer Code the requirement of the necessity to take into account the nature, gravity, scale and duration of the infringement; any action taken by the trader to mitigate or remedy the damage suffered by consumers; any previous infringements by the trader; the financial benefits gained or losses avoided by the trader due to the infringement, if the relevant data are available; the penalties imposed on the trader for the same infringement in other Member States in cross-border cases where information about such penalties is available through the mechanism established by Regulation (EU) 2017/2394 of the European Parliament and of the Council; any other aggravating or mitigating factors applicable to the circumstances of the case.
- *National authorities have not issued specific guidelines, recommendations or decisions based on the Unfair Commercial Practices Directive.*

Complementary documentation:

- More information on the UCPD [here](#).

4.3 The Consumer Rights Directive (“CRD”)

- [Directive 2011/83/EU](#) of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance
- [EU Guidance](#) on the Consumer Rights Directive
- [Consolidated text](#) of the reviewed Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council
- [Directive \(EU\) 2019/2161](#) of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules.

At national level:

- *Luxembourg law implementing the Consumer Rights Directive at a national level. Transposition at national level available [here](#).*

In Luxembourg, the Consumer Rights Directive has been transposed into Luxembourg’s Consumer Code (articles L. 113-1, L. 213-1 to L. 213-7 and L. 222-1 to L. 222-23 of the Consumer Code).

- Article L. 113-1 transposes article 5 of the CRD. It provides a list of information that traders must communicate to consumers before entering any other contract than a distance contract. This article has integrated all the new elements to be communicated to the consumer according to article 3 (4 & 5).
- Articles L. 213-1 to L. 213-7 transpose articles 18 to 22 of the CRD, and article 27 of the CRD regarding other consumer rights (Delivery, Fees for the use of means of payment, Passing of risk, Communication by telephone, Additional payments and Inertia selling).
- Articles L. 222-1 to L. 222-23 transpose articles 6 to 16 of the CRD, regarding specific information that traders must give to consumers before entering a distance contract, as well as the modalities and effects of withdrawal in distance contracts.
- Article L. 222-11 transposes the sanctions established by the omnibus directive (article 4). The fine to be applied according to the criteria set out by the directive can go from 251 to 15 000 euros).
- *No national authority has issued specific guidelines, recommendations or decisions based on the Consumer Rights Directive.*

Complementary documentation:

- More information on the Consumer Rights Directive [here](#).
- Factsheets on the key facts on the Consumer Rights Directive [here \(in EN\)](#).

4.4. The Sale of Goods Directive and the Digital Content and Digital Services Directive

- [Directive \(EU\) 2019/770](#) of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services,
- [Directive \(EU\) 2019/771](#) of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC.

At national level:

National provisions implementing [Directive \(EU\) 2019/770](#) on certain aspects concerning contracts for the supply of digital content and digital services, and the [Directive \(EU\) 2019/771](#) on certain aspects concerning contracts for the sale of goods.

The so-called twin directives were transposed according to a verbatim approach (copy-paste of the provisions of the directives). To facilitate the understanding of the new regime for the readers the transposed provisions are grouped by topics.

Conformity requirements

Article L.212 – 3 of the consumer code enshrines the subjective requirements for the sale of goods with or without embedded digital elements, while Article L.212 – 4 sets out the objective criteria.

In the context of contracts for the supply of digital content and services, the subjective and objective requirements related to conformity are respectively contained in Articles L.212 – 15 and L.212 – 16 of the consumer code.

Provisions excluding the existence of a lack of conformity in case of “particular characteristics deviating from the objective requirements for conformity” of which consumers were informed (Articles 8(5) of DCD and Article 7(5) of SGD) were respectively transposed into Article L.212 – 16(5) and Article L.212 – 4(5) of the consumer code.

Consequences of the incorrect installation of the digital content or digital service (Article 8 of DCD) are to be found in Article L.212 – 16(3) of the consumer code. The liability exemptions (Article 7(4) of SGD and Article 8(3) of DCD) are enshrined in Articles L.212 – 4(4) and L.212 – 16(3).

Duty to inform and supply the consumer with updates.

Article 8(2) of DCD and Article 7(3) of SGD established a duty to inform and supply the consumer with updates which are necessary to keep the digital content or digital service in conformity.

To transpose such duty into national law, the Luxembourg legislature has introduced two distinct articles in the consumer code, using the same wording as the Directives (Article 8 DCD was transposed in Article L.212 – 16(2) and Article 7(3) of SGD in Article L.212 – 4(3) of the consumer code). Articles L.212 – 4(4) and L.212 – 16(3) of the consumer code also literally reproduce the provisions of Article 8(3) DCD and Article 7(4) SGD regarding the liability exemption for cases in which the consumer fails to install updates.

Immediate and continuous supply of digital content and services.

Article L.212 – 18 of the consumer code, transposing Article 11 of DCD, establishes the rules for the liability of the trader in the context of contracts for the supply of digital content and services for a lack of conformity resulting from an act or omission, including the failure to provide updates. This article makes a distinction between, on the one hand, contracts providing for a single act of supply or a series of individual acts of supply, and on the other hand, contracts providing for continuous supply over a period of time. In the context of the former, Article L.212 – 18(2) of the consumer code establishes that the trader of digital content and services is liable for any lack of conformity existing at the time of the supply for a period of two years.

Any lack of conformity that appears within one year from the supply is presumed to have existed at the time of the delivery, as stated in Article 212–19(2) of the consumer code transposing Article 12(2) of DCD, not using the possibility to extend the delay of one year as allowed by the Directive. For the case of continuous supply of digital content and services over a period of time, the liability period corresponds to the duration of the contract pursuant Article L.212 – 18(3) of the consumer code. In this type of contract, any lack of conformity that appears within the entire period of the contract is presumed to have existed at the time of the delivery, as stated in Article 212–19(3) of the consumer code transposing Article 12(3) of DCD.

Third parties' rights and lack of conformity due to the violation of third parties' rights.

Article 9 SGD and 10 DCD were respectively transposed in Articles L.212 – 10 and L.212 – 28 consumer code in a servile way. When third parties' rights are violated, two alternatives are offered to consumers by Article L.212 – 28 of the consumer code. They can seek for the nullity of the contract or claim that they are deprived of the possibility to exercise their property rights and invoke the "*garantie légale d'éviction*" ("legal guarantee on eviction") as per Article 1626 of the civil code. In this case consumers may ask for price restitution as well as the restitution of any benefit produced by the good and expenses related to the claim. They may be compensated for the damages suffered.

Commercial guarantees.

Article L.212 – 31(2) transposes in a literal way Article 17(1) of SGD. However, Luxembourg used the option granted in Article 17(4). The latter allows Member States to establish rules on other aspects related to commercial guarantees which were not covered in that article, such as the language(s) in which the guarantee must be made available to the consumer. Article 212–31(2) provides that commercial guarantees should be written in simple and intelligible terms, in French or German, depending on the consumer's choice.

Obligation to notify the seller of a lack of conformity.

The obligation to notify had not been introduced when the non-conformity regime established by Directive 99/44 was implemented in Luxembourg law. Luxembourg legislature stuck to this approach when transposing the SGD.

Non-performance of the contract by the trader.

Under Luxembourg law, the consumer is entitled to withhold payment of the price, or part of it, for the contracts covered by DCD and SGD until the trader/seller has fulfilled her/his obligations. While such right is provided by Article L. 212–21(7) of the consumer code in the context of contracts for the supply of digital content and services, Article L. 212–6(6) grants this right for contracts regarding the sale of goods with or without embedded digital elements. As stated in these two Articles, the conditions for consumers to withhold payment are laid down in Articles 1134–1 and 1134–2 of the civil code. According to the former,

an agreement giving rise to reciprocal obligations obliges each party to perform its obligation so that it coincides with the correlative obligation of the other party, unless otherwise intended or used.

Article 1134–2 of the civil code specifies that if one party fails to perform any of its obligations, the other party may suspend performance of its obligation as the direct counterpart of that which the first party fails to perform, unless the agreement has provided for deferred performance in favour of that party. In other words, consumers are entitled to exercise the right to withhold payment provided that the latter is the direct counterpart of the obligation which the seller failed to perform.

Choice of remedy.

Luxembourg has chosen not to prioritise repair over replacement in its legal regime. Pursuant to Article L.212 – 6(2) of the consumer code, the consumer is entitled to choose between repairing or replacing the goods where there is a lack of conformity. This option, however, does not apply if the remedy chosen is impossible or if, compared to the other remedy, it would impose costs on the seller which would be disproportionate considering the following circumstances: (i) the value of the goods would have had in the absence of the lack of conformity, (ii) the significance of the lack of conformity and, (iii) whether the other remedy could be chosen without significant inconvenience to the consumer. Article L.212 – 6(3) further states that the seller can refuse to bring the goods into conformity if replacement and repair are impracticable or would impose disproportionate costs on the seller, considering all the circumstances, including those referred to above. Nevertheless, a hierarchy of remedies can still be identified in the event of a lack of conformity in the national legal regime. Unlike previously, only after an attempt has been made to bring the goods into conformity by repair or replacement will it be possible to terminate the contract or reduce the price, according to Article L.212 – 6(4) of the consumer code. Two exceptions are made if (i) the lack of conformity is so serious that it justifies an immediate reduction of the price or the termination of the contract, or (ii) the seller has stated, or it is clear from the circumstances, that the seller will not bring the goods into conformity within a reasonable time or without causing significant inconvenience to the consumer.

Place of delivery, repair, and replacement. Article L.212 – 7 of the consumer code, following Article 14 of SGD, specifies the rules under which the seller must remedy a lack of conformity by repairing or replacing the goods. Articles 3(6) and 16(3) of DCD, together with Recitals 18, 56, 60 and 61, allow Member States to specify certain aspects regarding repair and replacement, such as the place where it should take place and where the obligations of a debtor must be performed. The Luxembourg legislator has decided not to use this opportunity by implementing Article 14 of DCD into national law *ad verbum*.

Costs of transport for the case of repair or replacement.

Following Article 2(14) of DCD, Article L. 212–7(1)(a) of the consumer code defines free of charge as “free of the necessary costs incurred in order to bring the goods into conformity, particularly the cost of postage, carriage, labour or materials”. No additional rules were introduced, except that the consumer should not pay for the costs of transport in case of repair or replacement.

Right of redress.

Such right is provided by article L.212 – 29 that does not specifically determine the person against whom the trader may pursue remedies, and the relevant actions and conditions. It states that “principles of the civil code”, will apply. The broad reference made to the application of “principles of the civil code” probably implies that the right of redress is enshrined in Article 1251–3 of Luxembourg civil code dealing with legal subrogation. In other words, the seller held liable for an infringement of the conformity requirements is automatically subrogated to the rights of the consumer under the condition that he/she did not know the defect in the thing.

Durability.

The concept of “durability” was transposed *ad verbum* in Article L.010 – 1(13) of the Consumer code, as “the ability of the goods to maintain their required functions and performance through normal use”, as was the requirement regarding this concept in Article L.212 – 4(1)(d).

It must be noted that **Enforceability of the consumer’s duty to provide personal data as a counter-performance**. No specific provisions were established as to the enforceability of such duty. This question will be handled by the courts. Contract law will probably apply by analogy GDPR provisions prevailing when necessary.

“Restitution” of digital content and/or digital services.

Luxembourg law imposes obligations relating to restitution on both the trader and the consumer in case of the termination of a contract. On the one hand, Article L.212 – 23(4) of the consumer code establishes that the trader must make available to the consumer, at his/her request, any content other than personal data which was provided or created by the consumer when using the digital content or digital service supplied by the trader. It further states that consumers should have the right to retrieve such digital content free of charge, without any interference from the trader, within a reasonable timeframe as well as in a commonly used and machine-readable format. On the other hand, consumers must refrain from using said digital content or digital services, and from making it available to third parties after the termination of the contract pursuant to Article L.212 – 24 of the consumer code. If digital content was provided on a tangible medium, the consumer shall return the tangible medium to the trader, at the trader’s request and expense, without undue delay. If the trader requests the return of the physical medium, this request must be made within fourteen days from the date on which the trader is informed of the consumer’s decision to terminate the contract.

Time limits for the sale of goods.

The period of the liability of the seller is the same as that imposed by SGD. If the goods include continuously supplied digital elements, following the Directive, Article L.212 – 5(2) of the consumer code also draws distinction depending on the duration of the contract. Article L.212 – 5(4) of the consumer code deals with the rules concerning the presumption regarding the existence of the defect in the good and reproduces in a servile manner the provisions of the directive.

Time limits for the supply of digital content or digital services.

The time limits regarding the liability of service providers for the content or the service supplied do not deviate from those stated (and proposed) by the directive (Article L.212 – 18 (1) and Article L.212 – 18 (2), if the delivery is continuous.

Article L.212 – 19 of the consumer code transposed *ad verbum* the provisions of Article 12 DCD regarding the presumption regarding the non-conformity in the content or of the service, of the consumer code.

Second-hand goods.

The Luxembourg legislature took the opportunity offered by the directive (Art. 10 SGD) to provide for a shorter period of time – a one-year-period – regarding the liability of the seller for second-hand goods (Article L.212 – 5(3) of the consumer code).

Specific rules on prescription.

The specific rules on prescription existing under the law transposing Directive 99/44/CE have been maintained. The action of the consumer against the seller can be time-barred (“*déchu*”). The forfeiture delay is of two years, starting from the notification to the seller of the lack of conformity. One derogation is however considered: the situation in which the consumer would have been barred from bringing her/his action due to a fraudulent behaviour of the trader. The rule applies for contracts of sale of goods (Article L.212 – 9 consumer code) and for the supply of digital content and services (Article L.212 – 27). The two-year delay is the minimum tolerated by the two directives.

Interruption of the limitation period.

Articles L.212 – 9 and L.212 – 27 consumer code have maintained the existing provisions on the interruption of the limitation period.

The two-year forfeiture delay is interrupted by any negotiation (*pourparlers*) related to the conformity problem brought to the attention of the trader.

Eventually, it is to be noted that both Articles L.212 – 9 and L.212 – 27 consumer code provide that a new forfeiture delay of one year will run starting from the notification to the consumer by the trader that he/she breaks off the negotiations. This new delay also runs when the consumer has been informed of the closing of the judiciary investigations on the case ("*clôture de l'instruction*").

- *No national Authority issued specific guidelines, recommendations or decisions based on the two directives.*

Complementary documentation:

- Legal guarantees and commercial warranties on consumer goods in the EU, Iceland and Norway "Are they Worth the Money?" – [Report of the ECC-NET \(updated in April 2019\)](#).
- [Guarantee and returns – Practical information \(to be updated soon\)](#).

4.5. Legal references of the new Directive "for the better enforcement and modernisation of Union consumer protection rules" (Modernisation Directive)

The Directive (EU) 2019/2161 on better enforcement and modernisation of Union consumer protection rules, so called "Modernisation Directive":

[Directive \(EU\) 2019/2161](#) of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules.

4. RELEVANT CASE LAW

5.1. Unfair Commercial Practices Data base

[Annex 1 of the Guidance on the implementation/application of the UCTD](#) provides a list of all relevant EU case law relating to the Unfair Commercial practices.

5.2. Unfair Contract Terms Directive data base

[Annex 1 of the interpretative guidance on the implementation of the UCTD](#) provides a list of all relevant EU case law relating to the Unfair Contract Terms.

5.3. Consumer Rights Directive data base

[Annex 1 of the interpretative guidance on the implementation of the CRD](#) provides a list of all relevant EU case law.

5.4. Documentation of the European Court of Justice on Consumer law cases

In 2018, the European Court of Justice published [a brochure](#) (in EN) recalling the main cases held in the Consumer Law area (UCTD, UCPD etc.).

5.5. Consumer Law Database

The European Commission maintains a database with summaries of the most relevant cases for each of the directives: https://e-justice.europa.eu/591/EN/consumer_law_database

5. WHAT CAN CONSUMERS DO IF THEY HAVE A PROBLEM?

6.1. National consumer associations

Consumer associations have an extremely important role to play in the event of disputes between consumers and professionals. By clicking [here](#), you can find a list of national consumer bodies by country.

6.2. European Consumer Centres (ECC-NET)

The ECC-NET is a network of consumer centres. They are competent to deal with cross-border issues between a consumer and a trader. There is one European Consumer Center (ECC) in each EU Member States, plus Norway and Iceland. The list of all the ECCs is available [here](#).



6.3. Small claim procedures in courts and the European Small Claim Procedure (“ESCP”)

In many countries, consumers can use small claims procedures when they have disputes with the traders. Those procedures are usually cheaper and quicker than usual court procedures. But to be able to use small claims procedures? there is usually an upper limit of the value of the claim.

If the trader is abroad, the consumer could use the European Small Claim Procedure. The European Small Claim Procedure is a simplified judicial procedure based on a standardized form available in all [28 EU Languages](#). Its objective is to simplify and speed up cross-border claims of up to €5000. The procedure is available in all EU Member States except Denmark.

- **Legal References:**
 - [Regulation \(EC\) No 861/2007](#) of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure.
 - [Regulation \(EU\) No 1215/2012](#) of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) – so called “Brussels I”.

- **How to find the competent tribunal and the national costs of the procedure?**
 - Tool to determine the relevant tribunal available [here](#)
 - Tool to determine the national costs of the procedure available [here](#).

- **Complementary documentation** on ESCP (Practice guide for the application of the ESCP, Infographic for consumers, Leaflet for legal professionals etc.) available [here](#).

6.4. Public authorities

In some instances, consumers can submit complaints to the national public authorities, such as Market authorities or the regulators of specific sectors. However, not all authorities accept complaints from individual consumers. The authorities also do not deal with redress issues: e.g. the authority might sanction the company for unfair practice but would not say whether the consumer is entitled to a compensation.

When the infringement of consumer rights is spread in many EU countries, the authorities of those countries cooperate and help each other to investigate through the special network, called Consumer Protection Cooperation network.

- **Legal reference:**

[Regulation \(EU\) 2017/2394](#) of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004 (Text with EEA relevance).

6.5. Alternative Dispute Resolution bodies (ADR) and Online Dispute Resolution platform (ODR)

Alternative dispute resolution can be an efficient way for individual consumers to resolve their disputes with traders and to obtain redress. There are ADR bodies in all EU countries, and they are created specifically to give consumers an easy and affordable way to resolve their disputes to make it easier and cheaper for consumers to fix their problems.

Alternative Dispute Resolution bodies (ADR)

Definition: **Alternative Dispute Resolution (ADR)** is an out-of-court process for solving disputes between a consumer and a trader, with the assistance of an ADR body.

- **Legal reference:**

[Directive 2013/11/EU](#) of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC. You will find the current list of available ADR bodies [here](#) (classified by country and by sector).

Online Dispute Resolution platform (ODR)

Definition: The Online Dispute Resolution Platform (the ODR Platform) is an EU official website managed by the European Commission. Its objective is to help consumers and traders to find an out-of-court settlement to their disputes regarding their online purchases. The ODR platform is designed to facilitate communication between consumers, traders and ADR bodies if both consumer and trader agree to use it.

- **Legal reference:**

[Regulation \(EU\) No 524/2013](#) of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC. The full list of ODR contact points is available [here](#). Their role is to advise the consumers, traders and ADR entities on the functioning on the ODR platform, and on the other redress possibilities if the dispute was not resolved on the platform.

National level

In Luxembourg, the only public authorities that receives complaints from consumers is the “Commission de surveillance du secteur financier – CSSF” (<https://www.cssf.lu/fr/reclamations-clientele/>).

While other public authorities may not receive complaints from consumers, most offer mediation procedures to consumers facing issues with traders (see below).

There are several alternative dispute resolutions entities in Luxembourg:

1/ The médiateur de la consommation who deals with disputes deriving from a sale contract or a service contract entered into between a consumer and a trader: <https://www.mediateurconsommation.lu/en>

2/ The Institut Luxembourgeois de Régulation dealing with disputes related to electronic communications, energy, and postal service markets: <https://web.ilr.lu/FR/ILR/A-propos-de-lInstitut>

3/ The Commission luxembourgeoise des litiges de voyages (CLLV) dealing with disputes related to travel issues : <https://www.ulc.lu/fr/organes/detail.asp?T=1&D=descr&ID=5>

4/ The Médiateur en Assurances (ULC/ACA) dealing with disputes related to insurance contract: <https://www.aca.lu/fr/mediateur-assurance>

As to the Online Dispute Resolution procedure, on the basis of Article 7.2 of the ODR Regulation, the European Consumer Centre has been designated as the contact point for Luxembourg (article L. 412-3 of the Consumer Code). Thus, two ODR advisors perform this task at the ECC Luxembourg.

6.6. Collective actions

Where the same or similar unlawful practice concerns a number of consumers, the collective legal actions may be an efficient solution to enforce consumer rights.

Definition : “The injunction action” means a legal action that is brought by a qualified entity to stop or prohibit traders’ infringements that harm or may harm the collective interests of consumers. The qualified entities are designated by EU countries. Some of them, under certain conditions, can initiate injunction actions in another Member State than the one of their designation. You can find the list of these qualified entities [here](#).

Legal reference :

[Directive 2009/22/EC](#) of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (Codified version) Text with EEA relevance. Directive 2009/22/EC will be repealed and replaced by Directive (EU) 2020/1828, please see below.

Definition: ‘The representative action’ means an action for the protection of the collective interests of consumers that is brought by a qualified entity as a **claimant party on behalf of consumers** to seek an **injunctive measure, a redress measure, or both**. The qualified entity means any organisation or public body representing consumers’ interests which has been designated by a Member State as qualified to bring representative actions. Redress measures issued within the representative actions will require an infringing trader to provide consumers concerned with remedies such as compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid, as appropriate and as available under Union or national law. **The representative actions should be available in all EU countries starting from 25 June 2023.**

Legal reference:

[Directive \(EU\) 2020/1828](#) of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (Text with EEA relevance).

6.7. Ordinary court procedures

Consumers can always use national court procedures, as access to justice is a fundamental right. However, in practice, very low number of consumers would go to courts, as this is usually very lengthy and expensive.

7. OTHER INTERESTING TOOLS: EU CASE LAW DATABASES

Below you will find various tools to help you find quickly relevant cases.

- **The database of the European Court of Justice (Curia)** available in all EU languages - [here](#).
- **The Eur-Lex database:** the European Union's legal database: EU case law in all EU official languages, including case law from the period before 17/06/1997 - [here](#)
- **The JURIFAST database** : the latter is run by the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union (ACA Europe), which contains preliminary rulings by the European Court of Justice, and the relevant preliminary questions by the Member States' courts (this database works in English and French) – available [here](#).
- **The JURE case-law database:** the database was created by the European Commission, contains case law on jurisdiction in civil and commercial matters and on the recognition and enforcement of judgments in a State other than the one where the judgment was passed. This includes case law on relevant international conventions (i.e. 1968 Brussels Convention, 1988 Lugano Convention as well as EU and Member State case law) – available [here](#).



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