

New EU consumer contracts legislation came into force on 13 June 2014. Are you ready for this tsunami?

There has been a drastic change to consumer contracts legislation in each of the 28 member-states of the European Union, further to the coming into force, on 13 June 2014, of new national rules transposing Directive n. 2011/83/EU on consumer rights. Let's have a look at how these changes and new EU consumer contracts legislation will affect businesses operating in France and the United Kingdom.

According to the European Commission, the Directive 2011/83/EU on consumer rights (the "Directive") aims at *achieving a real-business-to-consumer ("B2C") internal market, striking the right balance between a high level of consumer protection and the*



competitiveness of businesses”.

Is this really the goal of the new European Union (“EU”) consumer contracts legislation? How are companies going to be impacted, in France and the UK?

A. What the Directive is about

The Directive replaces, as of 13 June 2014, Directive 97/7/EC on the protection of consumers in respect of distant contracts and Directive 85/577/EEC to protect consumer in respect of contracts negotiated away from business premises.

Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees, as well as Directive 93/13/EEC on unfair terms in consumer contracts, remain in force but are amended by the Directive.

Member-states had to transpose the Directive into national law by 13 December 2013. Member-states must apply the national laws implementing the Directive from 13 June 2014.

As detailed in its press release and guidance document, the European Commission has identified 10 most important changes for consumers, as follows.

1. The Directive will eliminate hidden charges and costs on the internet

Consumers will be protected against “cost traps” on the Internet. This happens when fraudsters try to trick people into paying for “free” services, such as horoscopes or recipes. From now on, consumers must explicitly confirm that they understand that they have to pay a price.

2. Increased price transparency

Traders have to disclose the total cost of the product or service, as well as any extra fees.

3. Banning pre-ticked boxes on websites

When shopping online – for instance buying a plane ticket – you may be offered additional options during the purchase process, such as travel insurance or car rental. These additional services may be offered through so-called “pre-ticked” boxes. Consumers are currently often forced to untick those boxes if they do not want these extra services. With the new Directive, pre-ticked boxes will be banned across the European Union.

4. 14 days to change your mind on a purchase (compared to the 7 days legally prescribed before)

If the trader has not clearly informed the customer about the withdrawal right, the return period will be extended to 1 year.

5. Better refund rights

Traders must refund consumers for the product within 14 days of the withdrawal. This includes the costs of delivery.

6. Introduction to a EU-wide model withdrawal form

Consumers will be provided with a model withdrawal form which they can use if they change their mind and wish to withdraw from a contract concluded at a distance or at the doorstep.

7. Eliminating surcharges for the use of credit cards and hotlines

Traders will not be able to charge consumers more for paying by credit card (or other means of payment) than what it actually costs the trader to offer such means of payment. Traders who operate telephone hotlines allowing the consumer to contact them in relation to the contract will not be able to charge more than the basic telephone rate for the telephone calls.

8. Clearer information on who pays for returning goods

If traders want the consumer to bear the cost of returning goods after they change their mind, they have to clearly inform consumers about that beforehand, otherwise they have to pay for the return themselves.

Traders must clearly give at least an estimate of the maximum costs of returning bulky goods bought by internet or mail order, such as a sofa, before the purchase, so consumers can make an informed choice before deciding from whom to buy.

9. Better consumer protection in relation to digital products

Information on digital content will also have to be clearer, including about its compatibility with hardware and software and the application of any technical protection measures, for example limiting the right for the consumers to make copies of the content.

Consumers will have a right to withdraw from purchases of digital content, such as music or video downloads, but only up until the moment the actual downloading process begins.

10. Common rules for businesses will make it easier for them to trade all over Europe

These include:

- A single set of core rules for distance contracts (sales by phone, post or internet) and off-premises contracts (sales away from a company's premises, such as in the street or the doorstep) in the European Union, creating a level playing field and reducing transaction costs for cross-border traders, especially for sales by internet;
- Standard forms will make life easier for businesses: a form to comply with the information requirements on the

right of withdrawal, and

- Specific rules will apply to small businesses and craftsmen, such as a plumber. There will be no right of withdrawal for urgent repairs and maintenance work. Member States may also decide to exempt traders who are requested by consumers to carry out repair and maintenance work in their home of a value below €200 from some of the information requirements.

While it is undeniable that the Directive is going to significantly improve the security and easiness of distant-selling transactions for consumers, traders and their legal advisers must get to grips as soon as possible with the terms of the national laws which have transposed the provisions of the Directive in the EU countries in which they offer their goods and services for sale. Indeed, these national laws have entered into force on 13 June 2014 so, any trader which is not compliant with them, risks severe sanctions.

We will have a look now at the specific rules adopted in the 2 member-states where we, at Crefovi, operate; namely the new national laws applicable in the United Kingdom ("UK") and France.

B. The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 in the UK

The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (the "**Regulations**") came into force on 13 June 2014.

The Regulations apply to contracts entered into on or after that date. The Consumer (Distance Selling) Regulations 2000 and the Cancellation of Contracts made in a Consumer's home or place of work regulations 2008 will not longer apply to any

consumer contract entered into on or after 13 June 2014.

Therefore, businesses, in particular e-businesses (which sell or provide goods and services via websites or apps), either located in the UK or targeting consumers in the UK, should review their terms and conditions of sale now.

The majority of the new consumer rights cannot be excluded from contracts; any contractual terms that waive or restrict the rights will not be binding on the consumer.

Failure to meet the requirements of the Regulations can have many consequences: the consumers may be granted additional rights (such as increased cancellation periods), may be entitled to recover damages and in some circumstances the contract itself may be void. The business concerned may also face significant adverse publicity for their failure to comply with the mandatory requirements.

The most important new consumer rights set out in the Regulations, are detailed as follows.

1. Pre-contract information

Examples of the specific information to be provided include a description of the goods or services; the identity of the trader (including its geographical address, not just its registered office); the total price payable including any taxes, delivery charges or additional costs; and the duration of the contract or any conditions for terminating it. This is not an exhaustive list and the information may differ depending on the type of contract (e.g. distance, off-premises or on-premises).

The information must be "made available", meaning that the consumer must reasonably be expected to know how to access it. For online orders, the information must be provided before the order is placed "in a clear and prominent manner".

2. Cancellation and returns

The Regulations provide for an extended “cooling-off” period for distance and off-premises contracts, of 14 calendar days (this used to be 7 days). For goods, this period starts from the date of delivery of the goods to the consumer and, for services, this period starts from the day the contract between the service provider and the consumer was entered into .

If the trader has not provided enough pre-contract information, the cancellation period is extended to 12 months (although the period can be reduced to 14 days once the breach is corrected).

To obtain a refund, the consumer must return the goods or show evidence of a return. For distance and off-premises contracts, consumers can be required to return within 14 calendar days of cancelling the contract.

There are certain exemptions to the cancellation rights including contracts for bespoke and customised goods, goods sealed for health or hygiene reasons that have been unsealed and goods that deteriorate rapidly.

3. Model cancellation form

It is a requirement that traders inform consumers of their cancellation rights. To assist with this, the Regulations contain model cancellation instructions and a model cancellation form. If the trader gives the consumer the option of filling it and submitting this or a similar form, the consumer need not use it – any “clear statement” of cancellation is sufficient.

4. Payments

Express consent is required from the consumer where extra payments are to be charged in addition to the price of the goods or services. Hidden charges or pre-ticked boxes (where purchasing optional extras are made the default) are not

acceptable. Consumers will not be liable for any costs which they were not told about before entering into the contract. For online transactions, it must be obvious when clicking a button will result in payment. The button should be labelled "order with an obligation to pay", or other similar unambiguous formulation.

The consumer is liable to pay an amount proportionate to the services already provided up until the time he notified the business that he wishes to cancel.

5. Refunds

Businesses must refund all payments made by the consumer (including, if applicable, the costs of delivery) without undue delay and no later than 14 calendar days from the day the business receives either the unwanted goods or proof of return, whichever is earlier.

In respect of goods, unless businesses have offered to collect the goods themselves, they may withhold the refund until they have received the unwanted goods or proof of return, whichever is earlier.

In relation to services, consumers must be refunded within 14 calendar days from the day the business is notified of the cancellation.

Businesses are required only to refund the cost of the least expensive type of outbound standard delivery, even if express delivery was used. Businesses can avoid covering the inbound cost of returning the goods by informing the consumer that they will be responsible for these costs.

6. Extras

Calls to customer helplines must be at basic rate, not premium rate (otherwise the trader is liable to compensate the consumer for any charges over the basic rate).

Confirmation of the contract must be supplied to the consumer via a durable medium, such as email, text, letter, in a personal account or on a CD or DVD. Sending an email to an email address provided by the consumer would fulfil this requirement.

The rules set out above are fully harmonised throughout the European Union. Member-states are not allowed to maintain or introduce national laws that provide for less or more stringent levels of consumer protection. E-commerce businesses may, however, offer more favourable terms to consumers, as long as the consumer is provided with full information about these before making a purchase.

In light of these changes, businesses should health-check their current processes, policies, terms and documentation and implement any changes before the 13 June 2014 deadline.

We, at Crefovi, have conducted a number of website audits for clients which sell goods or services to UK consumers. Audits can be done quickly and cost-effectively.

If you have not already done these health-checks or if you would like us to review your consumer-facing website or app please contact our founding and managing partner Annabelle Gauberti on +44 20 3318 9603 or contact@crefovi.com.

C. The “Hamon” law of 17 March 2014 in France

The new law relating to consumer protection measures, known as the “Hamon” law, was adopted on 13 February 2014 and published on 17 March 2014 after being declared lawful by the French Constitutional Council (the “**Law**”).

The provisions of the Law go well beyond consumer protection and aim at extending measures to business-to-business relationships including sub-contracting. Penalties for failure to comply with these new requirements have been reinforced.

The main changes set out in the Law are therefore affecting both consumers and businesses, as follows.

1. How French consumers will benefit from the Law

1.1. Class action à la française known as “*action de groupe*”

The Law has added a new chapter to the French Consumer code creating a class action à la française, known as the “*action de groupe*”.

The Law creates a French-law class action, but it is restricted both in terms of scope and damages awardable. It is more in the nature of a “trial run” than a definitive statute, since article 2 VI of the French Consumer code provides that “*no later than 30 months following promulgation of the (Law), the government shall submit to Parliament a report evaluating the implementation of the class action and examining possible extension to the areas of health and environment*”. Thus, although it is possible that the procedure will be extended to new areas, this will depend on the satisfactory implementation of the procedure in its current form.

Although a decree still to be adopted will specify certain details of the new procedure, it is useful to outline its main features.

a. The limited scope of the class action

New article L. 421-1 of the French Consumer Code provides as follows:

“An association for the defence of consumers that is representative at the national level and approved in accordance with article L. 211-1 may bring an action before a civil jurisdiction in order to obtain redress for individual damage suffered by consumers placed in an identical or similar situation and having as its cause a failure by one or the same professionals to comply with their legal and contractual

obligations:

- 1. With respect to the sale of goods or the supply of services;*
- 2. Or when such damages result from anticompetitive practices as defined in Title II of Book IV of the Commercial Code or articles 101 and 102 of the Treaty on the Functioning of the European Union.*

The class action may only relate to damages for damage to proprietary interests resulting from material damage suffered by consumers”.

The Law therefore considerably limits the scope of application of the class action, which is confined to consumer disputes and to certain damages incurred by consumers resulting from anti-competitive practices such as cartels or abuse of dominant positions.

Only natural persons who have concluded an agreement for sale of goods or supply of services for personal use are entitled to be indemnified under a class action.

In order for a class action to be constituted, it is also necessary that the consumers have suffered damages resulting from the same legal or contractual breach by the professional.

The Law also drastically limits the type of damages for which redress may be sought, since class action may only be brought to obtain redress for *“damage to proprietary interests resulting from material damage suffered by consumers”*. This not only means that the breach must relate to material damages but that the amount awarded is limited to the monetary consequences of such breach.

b. Procedure for class actions

The French-law class action may only be brought by associations for the defence of consumers that are representative on a national scale and approved to do so. Only

16 associations are so recognised in France, at the present time. Lawyers may not, under the current statute, bring class actions on behalf of consumers.

c. New class action in France and its impact on insurers

The ability to bring a French class action increases the exposure of insurers:

- for the insurance products that they sell to consumers;
- for the coverage of the liability of the insured traders, subject of a class action, and
- to numerous small individual claims that may not otherwise have been brought.

It is likely that insurers will face increasing risks relating to insurance products sold to consumers. The wide range of products and distribution channels used means that it is therefore impossible to assess the risk.

In addition to the direct risk of facing a French class action, insurers should be aware of the fact that the traders that they insure may face class actions.

Insurers should monitor the activity and reports of consumer associations that can initiate class actions in France. It is also important that insurers continue to assess the practices of insured companies who sell goods and services to consumers.

Bringing French-law class actions through the Law is definitely a step way beyond the requirements of the Directive. The Law has, of course, transposed in France, the provisions set out in the Directive, as follows.

1.2. Pre-contractual information requirements

These requirements have been strengthened in relation to:

- the general duty to give information that applies to any

sales of goods or services agreement entered into on a business-to-consumer basis (on-premises sales, distance sales and off-premises sales), and

- information specific to distance contracts about the existence (or non existence) of the withdrawal right. The precise list and content of such information will be determined by a future decree taken by the French "*Conseil d'Etat*".

1.3. Withdrawal right

The current withdrawing period of 7 days has been increased to 14. This period can be extended by 12 months from the date of expiration of the initial period when the consumer did not receive information relating to the withdrawal right.

The Law also introduces the use of a standard form (the presentation and wording of which will also be set out by a decree taken by the "*Conseil d'Etat*") that can be used by consumers to exercise their withdrawal right. This form must either be made available to consumers online or sent to them before the contract is entered into. If a consumer exercises this right, the business must refund the consumer for all amounts paid, including delivery costs, within a period of 14 calendar days.

1.4. Order process

The trader must ensure that the consumer is explicitly informed, when placing his/her order, of his/her payment obligation, by including (on penalty of invalidity) a clear and legible notice "order with payment obligation" or similar unambiguous wording.

Also, e-commerce websites must clearly and legibly indicate, by no later than the start of the ordering process, the means of payment that are accepted and the possible restrictions that may apply to deliveries.

An order confirmation must be sent. Indeed, the trader must send the consumer, on a durable medium and within a reasonable timeframe after the contract is entered into, and by no later than the date of delivery of the good or commencement of fulfilment of the service, a confirmation setting out the main provisions of the contract.

1.5. Extras

In case of pre-ticked boxes, the consumer is entitled to claim for a refund of any paying options that were billed to him/her and which he/she did not request.

The French Authority for Competition Policy, Consumer Affairs and Fraud Control (“**DGCCRF**”) (the French anti-fraud watchdog) will perform controls and apply, as appropriate, administrative fines to non-compliant websites. Failure to give the required information carries a maximum fine of Euros3,000 for vendors who are natural persons and of Euros15,000 for vendors which are legal entities.

Breach of the obligations relating to the exercise of the withdrawal right carries a maximum fine of Euros15,000 for vendors who are natural persons and of Euros75,000 for vendors which are legal entities. These administrative fines apply without prejudice to any possible criminal penalties.

Businesses incorporated in France and/or targeting French consumer customers, should update their general terms and conditions and, if they are distance sellers, their online practices, as soon as possible, in order to comply with these new French legal requirements.

If you have not already done these health-checks or if you would like us to review your consumer-facing website or app please contact our founding and managing partner Annabelle Gauberti on +33 1 78 76 52 23 or contact@crefovi.fr.

2. How the Law implements changes in business-to-business contracts

Below is a description of the main changes concerning business contracts, i.e. agreements entered into by 2 natural entities which are traders.

2.1. Greater regulation of trade negotiations

Several provisions of the Law seek to impose greater regulation over B-to-B purchase terms and business negotiations. In this respect, the role of the seller's general terms and conditions of sale becomes preponderant as the "*only foundation for trade negotiations*" (article L. 441-6 of the French commercial code). Although the real impact of this provision is uncertain, the French government's stated objective is to achieve "balanced" business negotiations.

Indeed, in France, general conditions of purchase are often presented at best as the basis for trade negotiations and, at worst, as a document that must be signed by the supplier which will become the only agreement in place. The French government, through the Law, wishes to clearly reaffirm the rule: negotiations must rely on and solely on general terms and conditions of sale.

Therefore, general terms and conditions of sale must not be ignored by purchasers in the context of trade negotiations and their terms must be discussed between the parties in order to come to a final agreement. Parties will have to demonstrate that they are in compliance with this legislation. Parties are therefore advised to keep all documents evidencing that some effective negotiations have occurred between them regarding conditions of the parties' cooperation, and, in particular, the agreed price of services or products.

2.2. Reduced payment terms

The Law revised payment terms for "periodic invoices". For any summary invoice edited at the end of the month, the new

payment term is 45 days from the date of issuance of the invoice (article L. 441-6 of the French commercial code).

This new payment term is likely to apply to intermediate invoices in the framework of global services.

Existing payment terms of 45 days end of month or 60 days from the invoice date remain in force for any other invoices.

2.3. Increased penalties

Failure to comply with the provisions of the Law set out above in 2.1. and 2.2., may lead to a fine of Euros375,000 for companies and Euros75,000 for an individual and may be imposed by the DGCCRF. These amounts may be doubled in case of repetition of the breach within a period of 2 years from the date on which the first decision became final.

These fines mentioned above reflect the desire to increase the effects of sanctions. Civil and criminal penalties have been replaced by administrative fines which may be imposed faster and are deemed to be more dissuasive.

These administrative fines will be enforceable in the event of failure to comply with rules applicable to payment terms, rules regarding contractual formalism and clauses or practices that have an effect of delaying the starting point for payment terms (article L. 441-6, L. 441-8 and L. 441-9 of the French commercial code).

D. Practical applications of the new EU consumer contracts regulations for the art sector

The Regulations in the UK and the Law in France will significantly impact dealer and gallery sales.

1. Cancellation rights in the art world and disclosure of the identity and details of the consigning dealer

The main issues for dealers and galleries selling art, antiques and collectibles are the consumer's right to cancel the sale without giving any reason or incurring any costs and the obligation on the dealer selling on consignment for another dealer to provide the consumer-buyer with the identity and address of the consigning dealer.

Art dealers and galleries should consider adjusting their way of doing business to comply with the Regulations in the UK, and the Law in France. Violation of certain provisions is an offence, particularly the obligation to give consumers buying off-premises information on their right to cancel.

If the art sale qualifies as a distance sale, the dealer or gallery must offer the consumer-buyer the right to cancel the sale within a period of 14 calendar days commencing after the day on which the art object comes into the physical possession of the consumer or their agent. The consumer can cancel the art sale without giving reasons, and the dealer or gallery must give the consumer a full refund (including the cost of delivery to the consumer unless the consumer selected a particularly expensive method of delivery). The contract may specifically set out that the consumer is liable to pay the cost of returning the property if the sale is cancelled. Otherwise, if the contract is silent, the cost must be borne by the art dealer or gallery.

The cancellation right should prompt dealer and galleries selling on consignment to reconsider their payment terms, to avoid being under an obligation to pay the consignor before the expiry of the period during which the consumer may exercise the cancellation right.

The other unattractive consequence of selling at a distance is

the obligation to disclose the geographical address and identity of the other trader where the art dealer or gallery sells on consignment for another dealer or gallery. Auctioneers selling by public auction are exempt from that obligation. Failure to provide that information amounts to a breach of contract by the art dealer or gallery.

2. Sales at art fairs: off-premises or on-premises sales?

Do art sales at art fairs qualify as off-premises sales? In the definition of "off-premises contract", the Regulations provide that this includes "a contract concluded during an excursion organised by the trader with the aim or effect of promoting or selling goods or services to the consumer". It does seem to infer that an art fair is an "excursion" away from the dealer's or gallery's premises.

3. Cross-border art sales

As far as cross-border sales are concerned, the question is whether the rights given to consumers under the Regulations in the UK, and the Law in France, apply if the consumer is outside the UK or France, or the dealer or gallery is based outside the UK or France.

The Regulations and the Law derive from the Directive. Accordingly, consumers in other EU member-states must be expected to benefit from the same protection as UK or French consumers.

Also, agreeing that the sale contract with the consumer will be subject to the law of a country outside the EU will not have the effect of depriving EU consumers of the protection afforded by EU and national laws.

Finally, the courts in EU member-states will enforce their own consumer protection laws if the consumer resides in the EU, even if the dealer or gallery is based outside the EU. This

means that non-EU dealers and galleries should not assume that they are immune from the new EU consumer protection framework. If they conduct business in the EU or direct their activity to consumers located in one or more EU countries, they are bound to comply with the Regulations in the UK, the Law in France, and any other national transposition regulations in the other 26 member-states of the EU.

Crefovi regularly updates its social media channels, such as LinkedIn, Twitter, Instagram, YouTube and Facebook. Check our latest news there!

Your name (required)

Your email (required)

Subject

Your message

Send

8 P UP

