

Online Disclosure Rules of the Consumer Rights Directive:

Protecting Passive or Active Consumers?

(working paper; pre-proof)

1. Introduction.

Despite the growing academic criticism of using mandatory information duties as one of the main consumer protection measures in consumer law¹, the recently adopted Consumer Rights Directive² (hereafter, the “CRD”) maintains this trend in Europe³. The long and detailed list of information duties provided for traders in Articles 5 and 6 of the CRD applies to any sale and services consumer contract that falls under the scope of application of the CRD. For traders, however, fulfilling this obligation may seem to be an exercise in futility due to little evidence that consumers read these disclosures and actually benefit from them⁴. Instead of understanding the duty to disclose as a duty to actually inform consumers we could see it as a duty to reach consumers with the disclosure, so that consumers possessed the information contained in it when they needed it for reference⁵. With this in mind it is important to inquire what efforts traders must undertake to ascertain that the disclosure reaches consumers and whether they could rely on an, at least partially, active behaviour of consumers in obtaining this information. This conundrum plays a special role in online transactions, where the direct contact between traders and consumers does not occur and

* Dr. Joasia Luzak is Assistant Professor at the Centre for the Study of European Contract Law of the University of Amsterdam in the Netherlands and member of the Ius Commune Research School. This paper has been presented at the Ius Commune conference in Edinburgh in November 2014 and will also be published in its proceedings, as a chapter in the book edited by M. Loos and I. Samoy, within the series Ius Commune: European and Comparative Law, published by Cambridge: Intersentia, forthcoming.

¹ O. Ben-Shahar & C. E. Schneider, *More Than You Wanted to Know*, Princeton: Princeton University Press, 2014, 229 p.; O. Bar-Gill, *Seduction by Contract*, Oxford: Oxford University Press, 2012, 280 p.; K. Tonner, ‘The Consumer Rights Directive and its Impact on Internet and other Distance Consumer Contracts’, in: N. Reich, H.-W. Micklitz, P. Rott & K. Tonner (eds.), *European Consumer Law*, Cambridge: Intersentia, 2014, p. 402; N. Helberger, L. Guibault, M. Loos, C. Mak, L. Pessers, B. van der Sloot, *Digital Consumers and the Law*, Aalphen aan den Rijn: Wolters Kluwer, 2013, p. 66–80; A. Nordhausen Scholes, ‘Information Requirements’, in: G. Howells, R. Schulze (eds.), *Modernising and Harmonising Consumer Contract Law*, Munich: Sellier, 2009, p. 213–216; G. Howells, T. Wilhelmsson, ‘EC Consumer Law: Has it Come of Age?’, *European Law Review*, vol. 4, 2003, p. 380–381.

² Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, *OJ* 2011, L 304/64 (“CRD”).

³ See: CRD, Articles 5 and 6.

⁴ C. Leone, ‘Transparency revisited – on the role of information in the recent case-law of the CJEU’, *European Review of Contract Law*, vol. 10, 2014, pp. 312–325; E. Wauters, V. Donoso, E. Lievens, ‘Optimizing transparency for users in social networking sites’, *Info*, vol. 16, 2014, p. 10; T. Wilhelmsson, ‘Cooperation and Competition Regarding Standard Contract Terms in Consumer Contracts’, *European Business Law Review*, vol. 1, 2006, p. 55; O. Ben-Shahar & C. E. Schneider (footnote 1), 229 p.; Y. Bakos, F. Marotta-Wurgler, D. R. Trossen, ‘Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts’, *NYU Law & Economics Research Paper Series*, working paper no. 09-40, October 2009, p. 1–35.

⁵ P. Mankowski, ‘Information and Formal Requirements in EC Private Law’, *European Review of Private Law*, vol. 6, 2005, p. 782–783, 787.

methods of providing consumers with information differ from the offline world. The Consumer Rights Directive was adopted, among others, to update the so-far existing rules on consumer distance selling contracts to the modern technologies, especially the Internet⁶. Its Article 8 determines formal requirements for providing information to consumers, establishing, among other, the extent of the obligation of a trader with regard to providing consumers with mandatory online disclosures and whether any activity is required from a consumer to obtain such disclosures.

Internet users, as consumers concluding contracts at a distance, are perceived as being at a disadvantage compared to consumers shopping in stores. Due to the lack of direct contact with the trader and with the goods, consumers purchasing goods at a distance are likely to encounter more difficulties in establishing the trader's trustworthiness, as well as the goods' quality⁷. Therefore, the European legislator considers it necessary to compensate for the weaker transactional position of such consumers by granting them more information rights. However, the question remains whether the difference between consumer shopping experiences online and offline results also in different attitudes of internet users to disclosures provided to them on the Internet or in traditional stores. For example, if behavioural studies showed that it is more difficult to draw consumers' attention to disclosures online rather than offline, this could signalize that consumers would tend to be more passive in obtaining information online. Under such circumstances, the European legislator should consider demanding more activity from traders in conveying mandatory online disclosures if it aimed to improve consumer protection online. This paper analyses not only what scope of consumer protection the new formal requirements of Article 8 of the CRD regarding online disclosures introduce but also whether they reflect the findings of behavioural studies on how consumers approach online disclosures.

To date, in order to balance the interests of both contractual parties in consumer contracts, European substantive consumer law⁸ has mostly protected active consumers. The next paragraph briefly introduces the justifications for distinguishing between passive and active consumers and their protection in European substantive consumer law. It is important to review whether and under what circumstances European substantive consumer law currently extends its scope of protection to passive consumers, what the trend in protecting online consumers is and whether it is changing due to special characteristics of online trade. After providing general background information on the trend observed in European substantive consumer law, I turn my attention to the focus of this paper, namely, the analysis of the formal requirements for online disclosures and the consumer image (passive or active)

⁶ See e.g. CRD, Recitals 5 and 20.

⁷ J. A. Luzak, 'To Withdraw Or Not To Withdraw? Evaluation of the Mandatory Right of Withdrawal in Consumer Distance Selling Contracts Taking Into Account Its Behavioural Effects on Consumers', *Journal of Consumer Policy*, vol. 37, 2014, p. 98–100; G. Borges & B. Ilrenbusch, 'Fairness Crowded Out by Law: An Experimental Study on Withdrawal Rights', *Journal of Institutional and Theoretical Economics*, vol. 163, 2007, p. 85; S. Harridge-March, 'Can the Building of Trust Overcome Consumer Perceived Risk Online?', *Marketing Intelligence & Planning*, vol. 24 (7), 2006, p. 746.

⁸ In this paper the notion "European substantive consumer law" is used to distinguish it from procedural rules within the area of European consumer law. It does not refer to the difference between the notions of substantive or formal requirements for disclosures, but, among other, it encompasses within its scope information duties, corresponding to them formal requirements, the right of withdrawal.

they apply to. In paragraph three, I first discuss the interpretation of the previously binding formal requirements for online disclosures under the Distance Selling Directive⁹ (hereafter, the “DSD”) in the Court of Justice of the European Union’s (hereafter, the “CJEU”) judgment in the *Content Services* case¹⁰. Then, in paragraph four, I analyse the new wording of Article 8 of the CRD and compare it to the previously binding requirements. I report there also the first reactions of national legislators, on the example of the Netherlands and the UK, to the new formal requirements of the CRD. This allows me to predict the likely interpretation of these provisions in future case law, that is to say whether the courts would incline towards extending their scope to protect passive consumers. Paragraph five addresses the consumers’ attitudes to online disclosures, presenting behavioural studies on whether and to what extent consumers may pay attention to online disclosures. It illustrates also the similarities and differences in attracting consumers’ attention to offline and online disclosures. These behavioural insights are important to consider in examining whether the European institutions should take special needs of internet users into account when setting the formal requirements for online disclosures in the CRD. This could be the case if, e.g., consumers encountered more difficulties in noticing disclosures online rather than offline. In the conclusions readers will find an answer to the question whether there is a new European trend to protect passive consumers online in substantive European consumer law and whether the evidence from behavioural studies shows that consumers may require more protection online due to approaching disclosures with more difficulties than offline.

2. Passive vs. active consumers in substantive European consumer law.

European consumer law uses more than just one notion of a “consumer”. While many European consumer law measures define the consumer as a natural person acting for purposes which are not related to her trade, business, profession¹¹, some other refer to a person concluding a given contract¹². Still, authors predominantly argue that a person concluding a mixed purpose contract, that is to say, when the purchased goods would be at least partially used by this person for professional purposes, could not currently fall under the scope of the definition of a European “consumer”¹³. The notion is interpreted narrowly due to

⁹ Directive 97/7/EC of 20 May 1997 on the protection of consumers in respect of distance contracts, *OJ* 1997, L 144/19 (“DSD”), repealed by the new provisions of the CRD.

¹⁰ CJEU 5 July 2012, case C-49/11, ECLI:EU:C:2012:419 (*Content Services*).

¹¹ See e.g. Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, *OJ* 1999, L 171/12 (“Consumer Sales Directive”); Article 1 Para.2(a); Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *OJ* 1993, L 95/29, Article 2(b) (“UCTD”); CRD, Article 2(1).

¹² Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, *OJ* 1990, L 158/59, Article 2 Para. 4.

¹³ See e.g.: D. Staudenmayer, ‘The Directive on the Sale of Consumer Goods and Associated Guarantees - a Milestone in the European Consumer and Private Law’, *European Review of Private Law*, vol. 4, 2000, p. 548–549; H. Schulte-Nölke, ‘Scope and Role of the Horizontal Directive and its Relationship to the CFR’, in: G. Howells, R. Schulze (eds.), *Modernising and Harmonising Consumer Contract Law*, Munich: Sellier, 2009, p. 37–38; M. B. M. Loos & J. A. Luzak, ‘De nieuwe Richtlijn consumentenrechten’, *Tijdschrift voor Consumentenrecht & Handelspraktijken*, vol. 5, 2011, p. 185–186; H.-W. Micklitz, N. Reich, ‘The Commission Proposal for a “Directive on Consumer Rights”’, *Common Market Law Review*, vol. 46, 2009, p. 481–484. See to the contrary e.g.: N. Reich & H.-W. Micklitz, ‘Economic Law, Consumer Interests, and EU Integration’, in: N. Reich, H.-W. Micklitz, P. Rott & K. Tonner (eds.), *European Consumer Law*, Cambridge: Intersentia, 2014, p. 52, 55–56.

consumer protection rules having been introduced as an exception from general contractual rules. The European legislator repeatedly invokes consumers' transactional weakness as a justification for granting consumers additional rights¹⁴. This justification seems, however, inconsistent with the above-described limitation of the scope of the notion of a "consumer". After all, just the fact that an object would not be used by its buyer for a professional purpose does not need to signify the buyer's transactional weakness.

The European legislator perceives consumers as a weaker party in the transaction. This view has been plausibly justified by vast empirical evidence that consumers suffer from information asymmetry and from many cognitive biases during their decision-making process¹⁵. This disqualifies them as rational agents in a market, that is to say persons who would always act reasonably, in their own best interests¹⁶. To the contrary, consumers have frequently proven that their decision-making is far from rational¹⁷. In light of the empirical evidence to the above, the European legislator decided to adopt varied consumer protection measures that could contribute to the strengthening of the internal market by empowering consumers as market agents.

Some authors believe, however, that granting consumers additional rights, e.g., information rights or the right of withdrawal, could have a counter-effect¹⁸. That is to say, it could discourage consumers from spending any time or effort on trying to familiarize themselves with the transaction they are concluding, from gathering the necessary information and then trying to understand it. For example, due to the right of withdrawal consumers may have no incentive to properly inquire about the goods until after the purchase, knowing that the costs of returning the goods during the cooling-off period are low¹⁹. Under such circumstances consumer protection measures instead of empowering consumers could

¹⁴ See e.g.: EUROPA, 'Convention on the law applicable to contractual obligations (Rome Convention)', available at << http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/133109_en.htm >>, last accessed online on 14 January 2015; European Parliament resolution of 8 June 2011 on policy options for progress towards a European Contract Law for consumers and businesses, 2011/2013(INI), P7_TA(2011)0262, points 11, 16; CURIA, 'The Court sets out the scope of consumer protection in cross-border sales', Press Release No 134/13, 17 October 2013, << <http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-11/cp130134en.pdf> >>, last accessed online on 14 January 2015.

¹⁵ T. Hansen, 'Perspectives on Consumer Decision Making: An Integrated Approach', *Journal of Consumer Behaviour*, vol. 4, 2005, pp. 420–425; H. Luth, *Behavioural Economics in Consumer Policy*, Antwerp: Intersentia, 2010, p. 48–50.

¹⁶ C. Camerer, S. Issacharoff, G. Loewenstein, T. O'Donoghue, M. Rabin, 'Regulation for conservatives: behavioral economics and the case for "asymmetric paternalism"', *University of Pennsylvania Law Review*, vol. 151, 2003, p. 1238; G. Loewenstein, 'Emotions in Economic Theory and Economic Behavior', *The American Economic Review*, vol. 90, 2000, p. 428; C. R. Sunstein & R. H. Thaler, 'Libertarian paternalism is not an oxymoron', *John M. Olin Law & Economics Working Paper No. 185*, 2003, << <http://www.law.uchicago.edu/Lawecon/index.html> >> last accessed online on 14 January 2015, p. 29.

¹⁷ J. R. Bettman, M. F. Luce, J. W. Payne, 'Constructive Consumer Choice Processes', *Journal of Consumer Research*, vol. 25, 1998, p. 187–200; G. Loewenstein, 'Emotions in Economic Theory and Economic Behavior', *The American Economic Review*, vol. 90, 2000, p. 430; R. A. Hillman & J. J. Rachlinski, 'Standard-form contracting in the electronic age', *New York University Law Review*, vol. 77, 2002, p. 479–483.

¹⁸ H. Eidenmüller, 'Why Withdrawal Rights?', *European Review of Contract Law*, vol. 1, 2011, p. 21.

¹⁹ R. E. Scott & G. G. Triantis, 'Embedded Options and the Case against Compensation in Contract Law', *Columbia Law Review*, vol. 104, p. 1424; J. Luzak (footnote 7), p. 106.

systematically weaken them. If further empirical evidence confirms this finding as to consumer behaviour, this could undermine the validity of introducing special consumer protection measures, such as mandated disclosures for distance selling consumer transactions, in Europe. After all, granting consumers additional rights in any case increases transaction costs that in the end rest on consumers, therefore, there needs to be a good reason for it²⁰.

The above-described criticism of the consumer protection system in Europe could be the reason why the CJEU mostly applies substantive European consumer protection rules in favour of active consumers, as I will illustrate further in this paragraph. The distinction between active and passive consumers in the substantive European consumer law, as applied in this paper, tests whether any and what kind of activities are demanded from consumers in order for them to obtain necessary information, to make use thereof and to use their rights. On the one hand, consumers could receive all necessary information to make a transactional decision from the trader, would not need to read it and their rights could be recognized *ex officio*. On the other hand, consumers might be required to search for the necessary information in order to obtain it, familiarize themselves with this information and they would need to claim their rights for these to protect them. Prior to assessing which consumer image applies to obtaining mandatory online disclosures, I will present how in substantive European consumer law the other two points differentiating between passive and active consumers are addressed. That is to say, whether consumers could remain passive and not read the information provided to them, as well as not invoke their rights and still be protected by substantive European consumer law measures.

At a first glance, it seems that European consumer law measures protect exclusively consumers who have used the information made available to them. The fact that the CJEU adopted a high standard of an “average” consumer in its case law, that is to say, of a consumer who is reasonably well-informed, reasonably observant and circumspect, corresponds to this idea²¹. A passive consumer who would not try to gather any information on the transaction she is about to conclude and who would not attempt to protect her own interests by trying to understand this information, would be unlikely to benefit from the protection of European consumer law. Originally, the CJEU and national courts adopted this high standard of an average consumer exclusively in case law pertaining to the assessment of misleading advertising and other unfair commercial practices cases. In assessing whether a given commercial practice is unfair, the national courts need to examine, among other, whether a consumer who disposed of all the correct facts and was not under any undue pressure would have altered her transactional decision²². It is in this assessment that courts look at a well-informed consumer: whether she could have been and was swayed by the misleading information or undue pressure. Additionally, the national courts examine whether the consumer should have been able to understand the product’s description and characteristics. A passive consumer, who, e.g., ignored some available information and did

²⁰ H. Eidenmüller, ‘Party Autonomy, Distributive Justice and the Conclusion of Contracts in the DCFR’, *European Review of Contract Law*, vol. 5, 2009, p. 119–121.

²¹ CJEU 16 July 1998, case C-210/96, ECLI:EU:C:1998:369 (*Gut Springenheide*).

²² See e.g. Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, *OJ* 2005, L 149/22 (“UCPD”). UCPD, Art. 7 Para. 1, Art. 8.

not try to understand it, would not be seen as a victim of an unfair commercial practice. For example, already in the *Mars*²³ case, pre-dating the introduction of the UCPD, the CJEU determined that reasonably circumspect consumers should realize that if there is a marking on the product's packaging saying that this product is now available in a bigger quantity for the same price as previously, the marking's size on the packaging does not need to correspond to the size of the increase²⁴. The court considers, therefore, the average consumer to be an active one, who would take her time to think this offer through and not merely assume that the marking on the packaging has a particular meaning. The latter consumer would not be protected under European consumer law regulating unfair commercial practices.

Recently, the CJEU adopted a similar high standard for the consumers' awareness when interpreting provisions of the Unfair Contract Terms Directive (hereafter, the "UCTD")²⁵. The *Kásler* case concerned a consumer who concluded a mortgage loan in a foreign currency, Swiss francs. Under the terms of the credit contract the consumer had to pay back the loan's amount at the buying rate of Swiss francs, but the monthly repayment instalments had to be calculated pursuant to the selling rate of Swiss francs. One of the questions raised in this case was how to determine the transparency of a contractual term that sets out the calculation method for the outstanding loan and its interest rate. The CJEU for the first time elaborated on the meaning of a notion that contractual terms have to be drafted in "*plain and intelligible*" language in order to be transparent²⁶. To determine whether consumers received transparent information, a national court first needs to establish whether an average consumer, a reasonably well-informed, observant and circumspect consumer, will be aware of the difference between the selling and buying exchange rates of a currency. Next, the court needs to consider whether an average consumer could predict the influence of that difference on the costs of the loan she would need to repay²⁷. While the credit provider has a duty to draft contractual terms not only in a grammatically correct way but also in an understandable language, the consumer needs to have a basic understanding of the financial market and has to be able to apply these terms to her financial situation, as a reasonably well-informed consumer should be able to do. This signifies that the possibility of the consumers' passive behaviour, e.g., the low likelihood of the consumer actually reading and understanding the financial terms of the contract, should not influence the outcome of the unfairness test.

Moreover, not all consumers who conclude a particular contract will benefit from European consumer law protection measures but only these who will then actually invoke them. For example, the Consumer Sales Directive grants European consumers a right to claim remedies when the goods they have purchased prove to be non-conforming the agreement²⁸.

²³ CJEU 6 July 1995, case C-470/93, ECLI:EU:C:1995:224 (*Mars GmbH*).

²⁴ *Ibid*, para. 24.

²⁵ CJEU 30 April 2014, case C-26/13, ECLI:EU:C:2014:282 (*Kásler*). For argumentation why the average consumer benchmark should not be extended to other areas of European consumer law see, e.g., B. Duivenvoorde, *The Consumer Benchmarks in the Unfair Commercial Practices Directive*, PhD thesis defended at the University of Amsterdam, in Amsterdam on 3 July 2014, p. 222–224.

²⁶ See more on the principle of transparency: C. Leone (footnote 4), p. 312–325.

²⁷ CJEU (footnote 25), *Kásler*, para. 74.

²⁸ Article 3 Consumer Sales Directive.

Consumers have then a free choice of the remedy, but in order to obtain it they have to request it first from the trader. This was well-illustrated by the judgment of the CJEU in the case *Duarte Hueros*²⁹. Ms Duarte Hueros purchased a car with a sliding roof that proved to be leaking when it rained. The defect could not be repaired, the car dealer refused to replace the non-conforming car with another one, therefore, Ms Duarte Hueros claimed termination of the sales contract in a Spanish court. Since the Spanish court considered the defect at hand a minor one, it refused the claim for a termination of the contract and did not see a possibility to grant the last remedy remaining to the consumer – price reduction. The consumer, namely, had not claimed price reduction as an alternative remedy from the court. The CJEU recognized here the importance of the consumer being able to claim her remedies in the case of non-conformity³⁰. At the same time, however, the CJEU did not oblige the national courts to *ex officio* expand the consumer’s claim to all possible remedies that could be due to her³¹. It is clear that the consumer has to, therefore, actively pursue her rights in order to benefit from them, even if certain procedural benefits (such as an *ex officio* control of unfair contract terms³²) may be granted to her by European consumer law. Of course, in order to fully understand her rights and to make appropriate claims, it is important that the mandatory disclosure reaches the consumer first, so that she can consult it and familiarize herself with her rights at the right moment.

The above-presented analysis clearly points to a pre-dominant trend to protect active consumers in substantive European consumer law. That is to say consumers who make use of the information and invoke legal measures provided to them. The question remains whether consumers also need to be active in obtaining the pre-contractual and contractual information or whether they may remain passive and await this information to reach them.

3. The Distance Selling Directive & the *Content Services* judgment: protecting passive consumers.

Pursuant to Article 4 of the DSD a trader who used any means of distance communication to conclude a contract with a consumer had to provide the consumer with certain pre-contractual information, as well as with a confirmation of a concluded contract (Article 5 DSD). The

²⁹ CJEU 3 October 2013, case C-32/12, ECLI:EU:C:2013:637 (*Duarte Hueros*).

³⁰ *Ibid*, para. 41–42.

³¹ *Ibid*, para. 43.

³² The Unfair Contract Terms Directive (Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *OJ* 1993, L 095/29) is one of a few both substantive and procedural European consumer protection measures that seems to aim at protecting passive consumers. That is to say, consumers who were unaware of their rights and, therefore, did not try to claim them. The CJEU repeatedly outlined the need to protect consumers who may not be aware of the unfairness of a given contractual term and who may, therefore, not claim this unfairness in front of a national court. See e.g. CJEU 26 October 2006, case C-168/06, ECLI:EU:C:2006:675 (*Mostaza Claro*), para. 26, 38; CJEU 4 June 2009, case C-243/08, ECLI:EU:C:2009:350 (*Pannon*), para. 25; CJEU 6 October 2009, case C-40/08, ECLI:EU:C:2009:615 (*Asturcom Telecomunicaciones*), para. 30–31. National courts grant this protection to European consumers through the *ex officio* mechanism, which means that national courts may step in and invoke unfairness of a given contractual term without the consumer mentioning it. However, even this protection does not extend as far as to protect completely passive European consumers. In the *Asturcom* case (CJEU 6 October 2009, case C-40/08, ECLI:EU:C:2009:615 (*Asturcom Telecomunicaciones*), para. 47) the CJEU clearly requires national courts to compensate for consumers’ procedural omissions, however, this obligation does not extend as far as to oblige them to “*make up fully for the total inertia on the part of the consumer*”.

confirmation did not have to be issued if the pre-contractual information had already been given to the consumer in writing or on a durable medium. These two provisions aimed to facilitate the consumer's retention of the information. If the consumer is able to store the contractual information received either prior to or after the conclusion of the contract, then when she has a need to consult this information she will be able to recall contractual terms and conditions and check, e.g., whether the trader properly fulfilled all his obligations³³. Additionally, if the consumer receives this information already prior to the contract's conclusion, then she has a better opportunity to assess the contract's value for her and to compare the trader's offer with other offers³⁴.

In the *Content Services* case the question arose how to interpret the wording used in the two above-mentioned provisions of the DSD. That is to say, whether a consumer could remain completely passive and await the receipt of the information given to her by the trader or whether the trader could expect that the consumer would, at least partially, participate in obtaining the information, as well. Specifically, this issue surfaced due to the possibility to use hyperlinks on an online trader's main website that would send consumers to another webpage displaying and storing the mandatory pre-contractual and contractual information. As a result of this practice, even when the trader has provided this information online, it could still not reach consumers, since they may not find themselves on the webpage containing all the mandatory information if they do not click on the hyperlink. Therefore, the trader by using a hyperlink requests the consumer to undertake a certain action: to click on the hyperlink. Moreover, traders often layer up their disclosures, which means that a hyperlink on the trader's main website would be likely to send the consumer to a webpage with part of the disclosure, and there the consumer may find more hyperlinks to websites containing more mandatory disclosures³⁵. It seems reasonable to assume that the likelihood that the consumer will read each subsequent disclosure, 'hidden' behind yet another click, diminishes with every successive step/click. The conclusion of the contract is not prevented if a consumer does not access the information available to her through the hyperlink. This is consistent with the approach to offline disclosures, where it is not required for the trader to ascertain that the consumer has read the disclosure but only to provide the consumer with an opportunity to read it³⁶. However, it remains debatable, whether by placing a disclosure on a different website and linking to it through a use of a hyperlink the trader actually provided the opportunity to read the mandatory information to the consumer.

The trader, Content Services, offered access to free or trial versions of various software to those internet users who would register to use their services. To register with

³³ P. Mankowski (footnote 5), p. 782–783, 787.

³⁴ T. Wilhelmsson, 'European Fair Trading Law', in: G. Howells, H.-W. Micklitz, T. Wilhelmsson (eds.), *European Fair Trading Law*, Ashgate: Aldershot, 2006, chapter 5, s (c) (ii); S. Grundmann, 'The EU Consumer Rights Directive', *Uniform Law Review*, vol. 18, 2013, p. 109.

³⁵ This practice has even been recommended to American traders by the Federal Trade Commission in its guidelines for effective disclosures in digital advertising, see: FTC, '.com Disclosures', March 2013, available at << <http://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>>> last accessed online on 14 January 2015, p. 10–13.

³⁶ P. van Wijck, J. Theeuwes, 'Protection against Unfair Contracts: An Economic Analysis of European Regulation', *European Journal of Law and Economics*, vol. 9, 2000, p. 79, 85.

Content Services, consumers had to fill in a registration form and tick a box on it that confirmed their acceptance of the company's standard terms and conditions together with the consumers' waiver of their right of withdrawal. The information on the consumers' right of withdrawal was, however, placed on a different webpage to which Content Services referred to by means of a hyperlink³⁷. Since the consumer could not access the service without ticking the box, it meant that all clients of Content Services had to waive their right of withdrawal. Some consumers were likely to waive their right of withdrawal without realizing what right they were waiving and what the consequences thereof could be. Furthermore, even after a consumer had registered with Content Services, in the confirmation email sent by the trader with her password and username, there was no specific notice of the consumer's right of withdrawal and its waiver. Instead, again, the email contained only a hyperlink to the website with the information about this right and its significance³⁸. Only in the invoice, issued shortly after the confirmation e-mail was sent to a consumer, to claim the payment of the 12-months subscription fee for the service, the consumer received information about her right to withdraw from the contract and the fact that she had already waived it³⁹.

The Austrian court invested with this case asked the CJEU whether just by placing information about the right of withdrawal on a website, which consumers could access through a hyperlink, the trader fulfilled both his pre-contractual information duties, as well as the obligation to provide the consumer with the confirmation of this information. What draws attention to the judgment is that the CJEU clearly states, for the first time while interpreting substantive European consumer law, that the DSD aimed at protecting passive consumers⁴⁰. The Court deduced this from the wording of Article 5 DSD, which mentions that consumers must "receive" confirmation of and "be given" pre-contractual information. The CJEU's interpretation is mainly based on the meaning of these words in everyday language, however, it also considers the context, in which these words are used, as well as the Directive's aim⁴¹. The notions "receive" and "be given" refer to a process of transmission, in which it is unnecessary for the information's recipient to take any particular action to obtain this information, pursuant to the CJEU. The Court states then that if a consumer is required to click on a hyperlink to obtain information, she needs to undertake an activity and, therefore, it cannot be said that the information "was given" or was "received" by her⁴². The CJEU explicitly indicates the difference between the wording used in Articles 4 and 5 DSD, observing that in the first provision the European legislator preferred to use a more neutral notion pursuant to which the consumer is to be "provided" with the relevant information⁴³. Article 5 DSD, instead, uses a notion indicating a preference for the trader's active behaviour and allowing for a passive conduct of consumers⁴⁴. Unfortunately, the CJEU does not address the issue why the European legislator would choose to expect an active behaviour of

³⁷ CJEU (footnote 10), *Content Services*, para. 18.

³⁸ CJEU (footnote 10), *Content Services*, para. 20.

³⁹ CJEU (footnote 10), *Content Services*, para. 21.

⁴⁰ CJEU (footnote 10), *Content Services*, para. 35.

⁴¹ CJEU (footnote 10), *Content Services*, para. 32.

⁴² CJEU (footnote 10), *Content Services*, para. 33.

⁴³ CJEU (footnote 10), *Content Services*, para. 35.

⁴⁴ See also C. Goanța, 'Information Duties in the Internet Era: Case note on *Content Services LTD v. Bundesarbeitskammer*', *European Review of Private Law*, vol. 21, 2013, p. 648.

consumers with regard to obtaining pre-contractual information but not in respect of receiving confirmation of that information after the contract's conclusion. The Court does not examine either whether, in general, encompassing passive consumers within the scope of protection of the DSD fits in the broader *consumer acquis*⁴⁵.

The Court interprets provisions of the DSD as, at least partially, aiming to protect passive consumers in the substantive European consumer law. This is of special significance for this research, since as it has been argued in the previous paragraph, European substantive consumer law generally focuses on protecting active consumers. Considering the high costs of compliance with providing consumers with mandated disclosures for traders, it would not have come as a surprise if the Court decided to limit the scope of consumers who are to receive such disclosure to active consumers. With this judgment the Court introduced, however, a new standard for consideration when elaborating on the notion of European consumers. Therefore, what is important to reflect on is whether broadening of the scope of this notion could be justified due to specific characteristics of online trade. For example, such justification could be found if consumers were more prone to passive behaviour and more likely to conclude contracts they would later regret online rather than offline. The attitudes of online consumers to disclosures will further be discussed in paragraph 5 to review whether they could provide a justification for a different approach to the scope of consumer protection. First, in the following paragraph, the new formal requirements that have been introduced in the CRD are illustrated in order to examine whether they continue to protect passive conduct of online consumers or whether they deviate from the standards set in the DSD, as explained in the *Content Services* judgment.

4. CRD: new online disclosure rules.

Article 8 of the CRD sets the formal requirements for conclusion of consumer distance selling contracts. Its paragraph 1 replaces Article 4 of the DSD and its paragraph 7 – Article 5 of the DSD. When we compare all these provisions some significant differences in their wording become clear.

While Article 4 of the DSD used, pursuant to the CJEU, a neutral wording that pre-contractual information needs to be “provided” to consumers, Article 8(1) of the CRD states that the trader has to “give” information to consumers or “make it available” to them. We may wonder whether the European legislator, in recognition of the CJEU’s interpretation in the *Content Services* judgment of the notion “to provide information” as a neutral one, purposefully decided to alter the focus group of this provision: from active to passive consumers. This assumption could be supported by the shift of focus in the provision from the consumers’ right to information to the traders’ obligation to inform. Former law shed spotlight on the consumer’s right to be “provided” with information, while the new provision changes the perspective and highlights instead the trader’s obligation to “give” information or to “make it available”. At the first glance this seems to follow the reasoning of the CJEU expressed in the *Content Services* judgment. That is to say, at least the first part of this

⁴⁵ On the idea of lack of “cross-directive” interpretation by the CJEU see also C. Goanța (footnote 44), p. 650.

provision indicates the need to protect passive consumers by requesting active conduct of the trader, for him to “give” the information to a consumer. Unfortunately, the second part of this provision introduces an ambiguity to this evaluation. While the new notion of the trader having to “give” information to consumers should have greater implications for the trader than the old notion of consumers having to be “provided” with information, the same cannot be said about the second new notion of “making information available” to consumers. The CJEU has not elaborated on the meaning of this last notion and it begs a question why the European legislator would decide to introduce yet another wording on the formal requirements for providing information to consumers, one without a harmonized meaning in the EU. The fact that the European legislator did not stop at the first notion of the trader having to “give” information to the consumer but also gave him a possibility to “make information available” could suggest that under some circumstances passive consumers should be excluded from the scope of the CRD’s protection⁴⁶. It remains, however, to be seen how the national and European courts will interpret this provision and under what circumstances will they consider the information as perhaps not “given” but still “made available” to consumers.

On the other hand, while Article 5 of the DSD required that the consumer “received” the confirmation of the contractual information, unless it has already been “given” to her, Article 8(7) of the CRD now introduces the trader’s obligation to “provide” consumers with this confirmation. If the trader has already “provided” the pre-contractual information to the consumer on a durable medium, he does not have to separately deliver its confirmation. The change of the wording in this provision is even more confusing in light of the *Content Services* judgment, where the Court specifically interpreted the notion of “providing” information as a neutral one⁴⁷. The European legislator in the guidelines accompanying the adoption of the CRD clarifies that the choice to use a neutral notion in this provision was an intentional one and explains that it has introduced it with the full awareness of the CJEU’s judgment in the *Content Services* case⁴⁸. This could imply that the European legislator aimed at introducing more trader-friendly formal requirements that could better accommodate conclusion of online contracts in the future by limiting the scope of their recipients to active consumers. After all, ensuring that the mandated disclosure have reached every online customer of a given trader, also completely passive ones, might make disclosures more complex, require additional technology to be used, etc. Placing too complicated and not adjusted to modern technology formal requirements for provision of consumer information could hinder online traders, e.g., if it delayed provision of services that consumers expect to have access to immediately. Under such circumstances consumers may begin to consider concluding such contracts with other online traders, not bound by the CRD rules. This could cause harm to the internal market of the EU.

⁴⁶ J. Luzak, ‘Online Consumer Contracts’, *ERA Forum*, vol. 15, 2014, p. 386–387.

⁴⁷ See, however, for interpreting the notion of ‘providing’ information as requiring an active behaviour of the trader rather than forming a neutral obligation: S. Grundmann (footnote 34), p. 111.

⁴⁸ European Commission, DG Justice document, June 2014, available at <<http://ec.europa.eu/justice/consumer-marketing/files/crd_guidance_en.pdf>>, last accessed online on 14 January 2015, p. 36–37.

While the European legislator might have intended to halt the proliferation of the CJEU's interpretation of the above-discussed provisions with a deliberate change of wording introduced in Article 8 of the CRD, the national legislators seem more reluctant to abandon this construction. In the Netherlands the formal requirements of Article 8 of the CRD are implemented in art. 6:230v of the Dutch Civil Code⁴⁹. Interestingly, the Explanatory Memorandum to the new Dutch law still relies on the interpretation given to Article 5 of the DSD by the CJEU while discussing the implementation of Article 8 of the CRD. That is to say, it highlights the need to provide consumers with the confirmation of contractual information, drawing attention to the fact that consumers need to possess a copy of contractual provisions for their purview. The word used by the Dutch legislator to define the traders' obligation to provide pre-contractual information and its confirmation to the consumer is "*verstrekken*", which could either mean to "give" or to "provide" information⁵⁰. The Memorandum refers, however, to the *Content Services* judgment and states that only when a trader makes a disclosure to a consumer it would be effective. Consequently, the Dutch legislator clarifies that if a trader uses a hyperlink to disclose mandatory information online to consumers this practice will not be considered a compliant, effective one. It seems, therefore, that without waiting for the CJEU to interpret the scope of application of Article 8 of the CRD the Dutch legislator decided to uphold the passive consumers' protection as established in the *Content Services* judgment⁵¹.

In English law the CRD was implemented through the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (hereafter, the "Regulations 2013")⁵². The formal requirements of Article 8 of the CRD are laid down in Articles 13 and 16 of the Regulations 2013. In the Implementing Guidance to the new law the English legislator clarifies that it requires an action on the side of the trader when the latter provides consumers with information. The trader needs to either "send" the information to consumers or "place" it on the website, which wording reflects the wording of Article 8 of the CRD. However, also the English legislator explicitly states that the trader may not settle for just providing consumers with mandatory information through the use of a hyperlink to another website that contains this information. Especially, if this website is under the control of the trader, which means he may change its content at any time⁵³. This latter argument may, however, be based more on the consumer's need to have a possibility to store the information than on how she receives it.

⁴⁹ Memorie van implementatie van de Richtlijn consumentenrechten, available at <<<http://www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2013/02/01/memorie-van-implementatie-van-de-richtlijn-consumentenrechten.html>>>, last accessed online on 14 January 2015, Transporteringstabel.

⁵⁰ This follows the Dutch text of the CRD, Article 8.

⁵¹ Implementatiewet Richtlijn consumentenrechten, *Kamerstukken II* 2012/2013, 33520, Nr. 3, p. 33.

⁵² The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, No. 3134, available at <<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/265898/consumer-contracts-information-cancellation-and-additional-payments-regulations-2013.pdf>>, last accessed online on 14 January 2015.

⁵³ Department for Business Innovation & Skills, Consumer Contracts (information, cancellation and additional charges regulations), Implementing Guidance, December 2013, p. 15–17. See also: P. Mankowski (footnote 5), p. 787; S. Grundmann (footnote 34), p. 111.

Even if the European legislator tried to give a broader meaning to the formal requirements for mandatory consumer disclosures, requiring some activity on the side of the consumer to obtain this information, the national legislators may not follow this new path so easily. That is to say, as long as the CJEU does not interpret the European legislator's intentions in adopting Article 8 of the CRD as encompassing within its protective scope only active consumers, the national legislators and courts could follow the *Content Services* approach. The narrow interpretation of the formal requirements for online disclosures may, however, prove problematic for online traders who could find it difficult to comply therewith in the evolving modern technology world. Not to mention it may negatively impact the European traders' capability to compete against traders from outside the EU since it could significantly raise their costs of providing online consumers with mandated disclosures. Moreover, such a narrow interpretation would deviate from the general trend of protecting active consumers in substantive European consumer law, as outlined in paragraph 2. The following paragraph examines, therefore, whether behavioural studies on the attitudes of internet users to disclosures show differences in the consumers' approach to disclosures online and offline. If the assumption that it is more difficult to draw consumers attention to disclosures online rather than offline held true, the introduction of additional protection for passive online consumers should be actively pursued by the European legislator aiming at attracting more consumers to online trade.

5. Internet users' attitudes to disclosures.

While the precise interpretation and scope of application of the new Article 8 of the CRD is yet unknown, the question remains whether it would be desirable to encompass within its protection also passive consumers. As it has been mentioned above, the CJEU did that in the *Content Services* case, but some authors have already argued that this was a mistake⁵⁴. One of the raised arguments is that while online consumers have to be active and click on a hyperlink added to an e-mail to receive their mandatory disclosure, consumers concluding offline distance transactions may also be required to be active to obtain their mandatory information. As an example may serve a situation, in which a consumer receives a letter from a trader with a disclosure enclosed in it⁵⁵. To reach the disclosure the consumer needs to open an envelope, therefore, also exhibit some activity. This comparison contrasts the use of two different methods of distance communication, as a result of which contracts may be concluded online or through mail. In both these situations consumers may have an enhanced need for receiving additional disclosure, considering they are concluding a distance selling contract and may need to compensate for lack of information as to the goods' quality or lack of trust in the transaction's success⁵⁶. However, this comparison does not seem to be the most fitting. Nowadays, consumers receive many spam e-mails with unnecessary and often also ridiculous information. For this reason many e-mail inboxes have spam filters installed and immediately direct any dubious e-mails there⁵⁷. Most often these would be e-mails that come from a new

⁵⁴ See e.g.: C. Goanta (footnote 44), p. 650–653.

⁵⁵ See also C. Goanța (footnote 44), p. 652.

⁵⁶ See e.g. footnote 6.

⁵⁷ See e.g. D. Hendricks, 'Reaching Spam-Savvy Consumers by Email Is Harder Than Ever', *Forbes*, 2 June 2014, available at <<<http://www.forbes.com/sites/drewhendricks/2014/02/06/reaching-spam-savvy-consumers->

e-mail address, e.g., from the new trader that the consumer just got in touch with. Additionally, e-mails which contain suspicious hyperlinks or attachments are likely to be diverted to the spam inbox, as well. The consumer may, therefore, never experience the online version of an envelope in her hands that she could decide whether to open, since not every consumer reviews her spam inbox and its content nor could be expected to do so⁵⁸.

Researchers often claim that consumers are unlikely to benefit from any mandatory online disclosures since they are either incapable of processing the information revealed to them or not interested in even attempting to process this information⁵⁹. In this paper it is important to consider the first step that could lead to consumers' understanding of the (pre-)contractual information, namely, when consumers notice disclosures and whether the requirements for gaining their attention differ online and offline. After all, as mentioned in the introduction, while mandated disclosures might have failed in their goal to better inform consumers, they could still provide consumers with useful information on the transaction and its conditions. For this, the disclosure needs only to reach the consumer in a format that would allow for storing of this information and, therefore, it is important to consider when consumers would notice disclosures. If there is a difference in consumer approach to disclosures online and offline, this could explain why the European legislator may want to set different standards for consumer protection in the CRD than in other substantive European consumer law measures. Researchers of consumer behaviour have identified five main reasons why consumers do not notice or do not pay attention to disclosures: when the disclosure is not personally relevant; when the consumer was already familiar with the disclosure; when the consumer was distracted from the disclosure; when the trader did not ensure to capture sufficient attention of the consumer; when the consumer has become desensitized to the disclosure after repeated exposure to it⁶⁰.

Since the disclosure's content would be similar for online and offline distance selling transactions, the first two factors should not contribute to a difference between the levels of

by-email-is-harder-than-ever/>>, last accessed online on 14 January 2015. It could be argued that it would be the active consumers that would have sophisticated spam filters installed, if these would not come pre-installed in the purchased computer hardware, since activity would be required to install them on consumer's computer. However, the division between protection granted to active and passive consumers in the substantive European consumer law as applied in this paper refers to any activities that consumers would need to take to obtain information and to use their rights instead of this information being provided to them and their rights being recognized *ex officio*.

⁵⁸ However, this reasoning would continue to apply also to consumers receiving an e-mail with an attached file in a .pdf format containing the disclosure instead of with an e-mail containing a hyperlink that directs the consumer to the disclosure. See also: C. Goanța (footnote 44), p. 652.

⁵⁹ O. Ben-Shahar & C. E. Schneider (footnote 1), p. 7–13; G.R. Milne & M. J. Culnan, 'Strategies for Reducing Online Privacy Risks: Why Consumers Read (or Don't Read) Online Privacy Notices', *Journal of Interactive Marketing*, vol. 18, 2004, p. 17, 19, 23–25; S. Furnell & A. Phippen, 'Online Privacy: A Matter of Policy?', *Computer Fraud & Society*, August 2012, p. 14–15; I. Pollach, 'A Typology of Communicative Strategies in Online Privacy Policies: Ethics, Power and Informed Consent', *Journal of Business Ethics*, vol. 62, 2005, p. 223.

⁶⁰ D. Albarracin, J. B. Cohen, G. T. Kumkale, 'When Communications Collide with Recipients' Actions: Effects of Post-Message Behavior on Intentions to Follow the Message Recommendation', *Personality and Social Psychology Bulletin*, vol. 29, 2003, p. 834–845; T. Hansen (footnote 15), p. 420–437; D. W. Stewart, I. M. Martin, 'Intended and Unintended Consequences of Warning Messages: A Review and Synthesis of Empirical Research', *Journal of Public Policy & Marketing*, vol. 13 (1), Spring 1994, p. 5.

attention consumers pay to disclosures in these two different environments. However, we could imagine that the type and the amount of distractions that consumers would face online and offline would differ. In general, consumers tend to pay attention selectively to the information that is provided to them⁶¹. This means that while they focus on certain information, they ignore some other information. Especially when consumers are confronted with a large amount of information at once and they need to analyse it in a short time, they might need to make trade-offs as to which information they will follow more closely and which they will not spend much of their energy and time on⁶². A lot of research on online disclosures focuses on the topic of how to attract consumers' attention to them, which shows that – whether online or offline – consumers may ignore certain displayed information and special marketing techniques may be needed to encourage consumers to notice certain information⁶³. However, due to the increased availability and constant presence of online advertisement consumers may suffer more distractions online than offline, that could further inhibit their memory and data-processing capabilities when they are to notice and read even a simple disclosure (or perform an otherwise easy task⁶⁴). This last research may point to the need to protect passive consumers online more than offline, however, more empirical data would need to be gathered to fully support this statement.

Additional complication arises when we consider how traders draw consumers attention to disclosures. The online environment may offer traders more varied options with regard to increasing the attractiveness of the disclosure's display than the offline world. For example, online traders may play around with the disclosure's design, position, colour, font, etc. in order to increase the internet users' chance of actually noticing and reading it⁶⁵. The options of an offline trader are not only more limited in this respect, but also less flexible, since he will not be able to easily change an already printed design. However, in both cases similar rules apply: the disclosure's font should not be smaller than the font of any other information that is being conveyed alongside it; the disclosure's content should be concise in order to be comprehensive; the information should not be hidden but rather prominently displayed⁶⁶. As I have mentioned previously, it can be problematic to disclose mandatory information to consumers through the use of a hyperlink, which would lead to the information opening in a separate Internet window. After all, this may require the consumer to pay even more attention to what is happening on her computer screen and for her to take an action to receive this information. However, some authors have argued that the disclosure's display would be more clear and, therefore, more approachable to internet users if it occurs in

⁶¹ T. Hansen (footnote 15), p. 420-437; D. Zillman, J. Bryant, *Selective Exposure to Communication*, Hillsdale, NJ: Lawrence Erlbaum Associates, 1985.

⁶² L. A. Morris, M. B. Mazis, D. Brinberg, 'Risk Disclosures in Televised Prescription Drug Advertising to Consumers', *Journal of Public Policy and Marketing*, vol. 8 (1), 1989, p. 64-80.

⁶³ G.R. Milne & M. J. Culnan (footnote 59), p. 17, 19, 25; S. Harridge-March (footnote 7), p. 754-755; J. Wirtz, M. O. Lwin, J. D. Williams, 'Causes and Consequences of Consumer Online Privacy Concern', *International Journal of Service Industry Management*, vol. 18, 2007, p. 341.

⁶⁴ B. J. Sagarin, A. Britt, J. D. Heider, S. E. Wood, J. E. Lynch, 'Bartering Our Attention: The Distraction and Persuasion Effects of On-line Advertisements', *Cognitive Technology*, vol. 8, 2003, p. 4-17.

⁶⁵ G.R. Milne & M. J. Culnan (footnote 59), p. 17, 19, 25; S. Harridge-March (footnote 7), p. 754-755; J. Wirtz (footnote 63), p. 341.

⁶⁶ G.R. Milne & M. J. Culnan (footnote 59), p. 23.

a separate window⁶⁷. In such a case, the hyperlink should be prominently displayed and the importance of the internet users clicking on it should be clearly communicated to them⁶⁸. While the consumer may be more distracted from the information online rather than offline due to the large amount of ever-present online advertisement, an online trader seems to have more techniques and tricks available to him to draw consumer's attention to the disclosure.

The remaining factor that may influence the consumers' attention to disclosures is the consumers' potential desensitization to disclosures due to the repeated exposure to them⁶⁹. Some research suggests that as long as online disclosures would vary, consumers would be less likely to get desensitized to them, since the single-message overexposure would thus be prevented⁷⁰. However, other research suggests standardization of online disclosures in order to facilitate consumers' understanding of the disclosed message⁷¹. It is logical to assume that the possibility of overexposure would be bigger online, especially if online trade continues to grow and consumers more often find themselves concluding online contracts. Due to the mandatory nature of the CRD's information requirements every online trader will have to provide consumers with the same, extensive list of information. However, the evidence from behavioural studies is not conclusive as to the effects of overexposure. Therefore, it is hard to estimate whether the dangers of overexposure would hinder consumers' attention to online disclosures and how precisely these could be overcome.

Despite a few potential differences between consumers' attention to disclosures online and offline, more empirical research is needed in order to conclude that consumers have more difficulties noticing and paying attention to disclosures online rather than offline. It certainly could be easier to attract consumers' attention due to various disclosure methods that are at the disposal of online traders, their flexibility. Still, there is a big risk online of overwhelming consumers with many different disclosures, particularly if every online trader has to repeat the same information. Whether this would lead to consumers becoming better informed with mandatory disclosures or rather becoming desensitized to them remains to be seen. In any case, so far, the behavioural studies do not indicate the need to treat online consumers differently than offline consumers, e.g., by protecting passive and not only active online consumers.

6. Conclusion.

⁶⁷ R. Jones & D. Tahri, 'EU Law Requirements to Provide Information to Website Visitors', *Computer Law and Security Report*, vol. 26, 2010, p. 620.

⁶⁸ L. van Wel & L. Royakkers, 'Ethical Issues in Web Data Mining', *Ethics and Information Technology*, vol. 6, 2004, p. 134.

⁶⁹ W. Magat, W. K. Viscusi, J. Huber, 'Consumer Processing of Hazard Warning Information', *Journal of Risk and Uncertainty*, vol. 1, 1988, p. 201-232.

⁷⁰ R. N. Mayer, K. R. Smith, D. L. Scammon, 'Evaluating the Impact of Alcohol Warning Labels', *Advances in Consumer Research*, vol. 18, 1991, p. 706-714.

⁷¹ C. Castro, F. J. Tornay, T. Horberry, C. Martínez, A. Gale, F. J. Martos, 'Worded and Symbolic Traffic Stimuli Analysis Using Repetition Priming and Semantic Priming Effects', *Advances in Psychology Research*, vol. 53, 2007, p. 39-40; J.A. Luzak, 'Privacy Notice for Dummies? Towards European Guidelines on How to Give 'Clear and Comprehensive Information' on the Cookies' Use in order to Protect the Internet Users' Right to Online Privacy', *Journal of Consumer Policy*, vol. 37, 2014, p. 547-559.

Despite some arguments presented in the previous paragraph as to why the internet users' attention to disclosures could be limited in comparison to that of offline consumers, it is difficult to assess whether these differences should stimulate the European legislator to introduce the passive consumers' protection in online transactions. At the moment, there is still no sufficient empirical research proving the existence of special needs of online consumers with regard to providing them with mandatory information. Additionally, even if online consumers were more difficult to reach through mandatory disclosures, the legislators should first establish whether there are any less intrusive formal requirements that could be adopted to improve the disclosures' visibility to online consumers, diminishing, therefore, the consumers' weak transactional position. Only following the failure of such measures, should the European legislator consider whether to broaden the scope of application of substantive European consumer law, such as formal requirements on mandated disclosures, to passive consumers in the case of online transactions. After all, this last solution deeply influences the balance between the parties' rights and obligations in a consumer online transaction and other, more proportional measures could be more appropriate to protect consumers⁷².

It would be a complex process to establish whether online disclosures are less likely to be noticed by consumers than offline disclosures, to what extent and what measures could remedy this situation. This may be the reason why the European legislator did not take a specific stand on this issue while drafting Article 8 of the CRD and instead used mixed-meaning notions that require national courts to protect at times only active, but at other times also passive consumers. Whether the CJEU will interpret this provision in accordance with its point of view expressed in the *Content Services* judgment remains to be seen. In the meantime, considering the interpretation given to Article 8 of the CRD in the Netherlands and in the UK, at least on national levels passive consumers online could continue to enjoy the protection against online traders hiding mandatory disclosures behind various hyperlinks.

⁷² W. Kerber, 'Soft Paternalismus und Verbraucherpolitik', *List Forum für Wirtschafts- und Finanzpolitik*, vol. 40 (2), 2014, p. 282.