

# Two-way automation in online contracting and the information duties of the Consumer Rights Directive (CRD)

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# Automation in online contracting

- One-way automation – only the one party is substituted by a machine, software and/or a system, the other acts personally.

Standard website contracting or e-commerce (ex. shopping on Amazon or eBay):

- the merchant is substituted by the website and the machines/systems behind it
- the consumer acts personally, sits in front of his computer (or holds his mobile device), reviews the product offerings presented on the website, interacts with it, fills in and submits online order forms.

# Automation in online contracting

- Towards two-way automation – only the one party is substituted by a machine, the other acts personally *but not during the whole process*

Automatic bidding facilities or sniping agents (ex. eBay automatic bidding, Ezsniiper.com)

The merchant is represented/substituted by a system/machine/software

The consumer sits in front of his computer (or holds his mobile device), reviews the product offerings as presented on auction websites, decides on the one he is interested in but can delegate part of the process (ex. bid placing) to software.

# Automation in online contracting

- Two-way automation – *both* parties are represented or substituted by a machine/software

Just like the merchant submits his offerings and terms (and hence, his intentions) to his systems/machines to enable them to close contracts on his behalf, the consumer instructs software to find and purchase a product on his behalf.



# Two-way automated contracting

- *Is it achievable and how? (1)*

Software agent technology - trading agents - agent marketplaces (ex. Kasbah, AuctionBot)

Agent technology enables the design of advanced, pro-active, autonomous and even intelligent software, the so-called 'software agents' (Bradshaw, 1997, p.8) to which users can delegate important tasks.

They are often named after the task designed to perform: notification agents, recommendation agents, shopping agents, trading agents (Guttman, Moukas and Maes, 1998, p.149)

“A trading agent is an agent that lives, acts, and interacts in an electronic market. It represents a user, knows her preferences, respects the set budget, and acts in the market by negotiating and performing transactions on behalf of the user” (Fasli, 2007, p.210)

# Two-way automated contracting

- *Is it achievable and how? (2)*

The earliest notable example of an agent marketplace is *Kasbah* – it supports selling and buying software agents negotiating and closing contracts on behalf of sellers and buyers respectively (Chavez and Maes, 1996).

Agents engaging in multi-factor negotiations, often by iteratively formulating, exchanging and evaluating offers and counter-offers (Rahwan et al., 2003)

# Two-way automated contracting

- *Any signs of it?*

No commercialized agent marketplaces as yet *but*

- widespread use of price comparisons websites (tools instructed to find and display all available offerings for a specified product)
- widespread use of sniping agents and automatic bidding facilities

Trading agents may be just a brave extension of such already-commercialized software

# Legal significance of two-way automation

- Trading agents decide according to a negotiation strategy incorporated into them *via* computer science rules and techniques (Hou, 2004; Skylogiannis, 2005); this defines automation to an important extent.
- **Automation means that:**
  - Software simply (mechanically) follows its strategy – bound to produce the results enabled by it, unless it malfunctions.
  - Very different type of decision-making – software (as opposed to human) ‘thinking’ and ‘deciding’.
  - Traditional misleading, deceptive or otherwise inappropriate commercial practices *unworkable*;
  - Traditional consumer protection legal rules including information duties incepted with *human* decision-making in mind also unworkable.
  - Information duties still necessary; fully automated decisions still need to be quality decisions.

# Two-way automated contracting and the CRD

- The CRD is applicable to two-way automated contracting.
- Technology-neutral definition of ‘distant contracts’: ‘distant contracts’ are contracts concluded without the simultaneous physical presence of the trader and the consumer with the exclusive use of means of distant communication (Article 2(7), CRD)
- Two-way automated contracts are ‘distant contracts’.

# Two-way automated contracting and the CRD

- Yet, the CRD has not been incepted with two-way automation in mind – tied to standard website or one-way automated contracting:
  - Article 7(2) – refers to placing of orders through the activation of buttons
  - Article 22 – prohibits default options (pre-checked boxes) referring to additional charges-purchases
  - Article 6(1) – pre-contractual information duties: some listed information items only usable by human (not software) minds.

## CRD pre-contractual information duties unsuitable for two-way automated contracting

- Predecessor of the CRD, the Distance Selling Directive, 97/7/EC (DSD): “... the information that is required to be sent to the consumer should ... be determined, *whatever the means of communication used*” (Recital 11)
- No deviation from this idea in the CRD – Article 6(1) specifies the required information items for *all* cases of distant contracts.
- It assumes that distant contracting is conducted through means of communication *used by* the consumer rather than through contracting software substituting him.

## CRD pre-contractual information duties unsuitable for two-way automated contracting

- The list of information items of **Article 6(1)** contain information items clearly of no use to contracting software representing or substituting the consumer:
  - (c) geographical address and contract details of trader
  - (d) if different, geographical address for complaint filing
  - (h)-(k) conditions, procedures, sample forms for the exercise or the loss of the 'withdrawal right, costs payable in case it is exercised.
  - (l) a reminder of the existence of a legal guarantee of conformity for goods;
  - (m) conditions of after sales assistance.
  - (n) how to obtain copies of codes of conduct.
  - (t) possibility of having recourse to alternative dispute resolution and the methods for having access to it.

## CRD pre-contractual information duties unsuitable for two-way automated contracting

Why unsuitability is a problem?

- Superficial information duties – useless, yet required information – insisting in the provision of information that does not perform any purpose- ‘empty’ requirements.
- Confusion/uncertainty/unsatisfactory results regarding the position of merchants – deemed incompliant with their legal duties for failing to provide *useless* information or information whose provision would make serve no purpose – dramatic extension of the right of withdrawal period.

# Approaches of application of the CRD to two-way automated contracting

## *'the-software-as-the-consumer'* approach

- As the trading software substitutes the consumer in the contractual process, if the required information is provided to the trading software, it is deemed to have been provided to the consumer and the information duties are complied with.

## *'from-the-software-to-the-consumer'* approach

- The information that the CRD requires that it be provided to *the consumer*, must be provided to his trading software on the understanding that it will ultimately be passed to the consumer. “... if the ... information is provided to the agent, the user of the agent will be able to obtain the information” (Lodder and Voulon, 2002, p.283)

## *'direct communication with the consumer'* approach

- “... the only satisfactory means for a supplier to ensure full compliance with these obligations is to communicate directly with the consumer ...” (Cross, 2007, p.31) – it ignores the involvement of the trading software. The merchant must provide the information to the consumer as in the case of one-way automated contracting

## Approaches of application of the CRD to two-way automated contracting

- There are problems with all three approaches:
  - *‘software-as-the-consumer’ approach*: it does not address the ‘unsuitability’ problem at all – insists in the provision of information that is useless – ignores the ‘emptiness’ of certain information duties in the context of two-way automated contracting.

# Approaches of application of the CRD to two-way automated contracting

- *from-the-software-to-the-consumer* approach: it does address the ‘unsuitability’ problem but perhaps only temporarily
- It requires that the information be provided to the consumer and accepts that this will be done through her trading software – merchants must make use marketplaces incorporating a ‘user prior approval’ option - the consumer software will most likely communicate the information supplied to it to its consumer user.
- Reasonable approach for as long as two-way automated contracting is new - not a standard contracting method: “In the beginning of the interaction, the agent can perhaps have more of an advisory role, and as trust builds up, this leads to a more active role in the transactions being carried out, ultimately allowing it to act autonomously in the user’s interest” (Fasli, 2007, p.358)
- When and if agents become a widespread contracting method, consumers will probably not want to review and approve each and every transaction they have delegated to trading software – the personal involvement of the consumer runs contrary to the very idea of two-way automated contracting.
- Will insist in the provision of information knowing that it will not be used.

# Approaches of application of the CRD to two-way automated contracting

- ‘direct communication with the consumer’ approach – it does address the ‘unsuitability’ problem but by rejecting the idea of two-way automated contracting or by refusing to accept that the consumer is represented by software and does not act personally.
- Requires merchants to behave ‘as if’ the consumer has not delegated the task of contract conclusion to software – direct communication (for example by email) that will not to be read - consumers who wanted to review the information directly would not have delegated the task to trading software.
- Does not take the idea of two-way automated contracting seriously and may stifle its adoption and development.

# Approaches of application of the CRD to two-way automated contracting

- *Which one of the three approaches?*
  - The second – a balanced approach ensuring sufficient consumer protection (the consumer personally must be provided with the required information) while not ignoring the involvement of consumer trading software (the information is provided through the trading software which must be able to communicate it to the consumer).
  - Compatible with the Article 6(1) obligation to ‘provide’ the information – ‘neutral formulation’ that does not require that the consumer actually receives, reads or acts upon the information (Case C-49/11 Content Services Ltd v Bundesarbeitskammer, paragraph 35; European Commission, 2014, p.37); if the consumer does not utilize the prior approval option or otherwise, use the information, there will still be compliance.
  - Even if it becomes superficial, it will not be a lot more so than the application of information duties to one-way automated contracting – studies show that consumers do not make use of the provided information; yet, information duties exist and are an important and widespread ‘consumer protection’ technique

## A fourth approach to the application of the CRD information duties to two-way automated contracting

- All three approaches settle with a shallow and/or temporary compliance with information duties – focus is diverted away from the construction of an information duty specifically suitable for two-way automated contracting – certainty and quality of fully automated purchase decisions.
- *A fourth approach: information reduction or the possibility of reducing required information* – more drastic and/or complex than the alternatives but not superficial or temporary, a ‘real’ information - readily adjustable to two-way automated contracting.

# Information reduction: not really dramatic

- It has been considered even in the context of one-way automated contracting mainly because “*research as well as consumer experience show that consumers cannot take in and process all the information provided before making any decision*” (Nordhausen, 2006, p.9)
- Hesitation to adopt it in that context justified: presentation can improve manage the relevant cognitive limitations – some (wary) consumers may actually use it.
- Not similarly justified in relation to two-way automated contracting - non-processing of provided information due to the unavoidable (technical) nature of software that can simply NOT utilize certain information.

## Information reduction: not really dramatic

- The CRD not totally unprepared to accommodate an ‘information removal’ approach in appropriate cases:
  - Article 8(4): certain means of communication suffer from space and time limitations - allows for some of the information listed in Article 6(1) to be omitted.
  - Possible also to refer to technological limitations that exclude the possibility of any reaction to it, thus rendering it totally useless.

# Information reduction: flexibility

- A provision allowing authorities and courts to permit the omission of useless or unusable information – such discretion would furnish the long list of information items of Article 6(1) with the flexibility necessary to accommodate the needs of two-way automated contracting.
- Section 102(14) of the Uniform Computer Information Transactions Act (United States of America), deems a term as “conspicuous” if “it is presented in a form that would enable a *reasonably configured* electronic agent to take it into account or react to it ...”
- This US law provision could inspire the formulation of a flexibility-affording provision in the CRD that takes into account the relevant technological possibilities when determining whether there has been a violation of the Article 6(1) information duties.
- In effect, merchants will only be obliged to provide *that* information (from the Article 6(1) list) that reasonably-designed (programmed or utilized) trading software can react upon.

# Information reduction: still a satisfactory level of consumer protection

- Any information allowed to be omitted pre-contractually (ex. reminder of the existence of a legal guarantee, procedures for exercising the right of withdrawal) will *still* be provided to the human consumer (for example, by hand or email) who is actually the one to utilize it: **Article 8(7) requires that all the information of Article 6(1) be provided to the consumer on a durable medium within reasonable time after contract conclusion and at the latest at the time of the delivery of the goods or before the instigation of the performance of the service.**
- Allowing for post-contract conclusion (or during contract performance) compliance, Article 8(7) is not affected by two-way automated contracting – the human parties take over; the automation mostly characterizes the pre-contractual and contract-conclusion stages.
- The predecessor of CRD, DSD required information on the procedures of exercising the withdrawal right, after-sales and the address of the trader *only* through Article 5 (i.e., the provision corresponding to Article 8(7), CRD) and not by Article 4 which contained the pre-contractual information duties – acknowledgement of their reduced relevance pre-contractually even in relation to one-way automated contracting.

# Conclusions

- The CRD has been drafted with one-way automated contracting in mind, yet it is generally neutral enough to be applicable to two-way automated contracting too.
- The pre-contractual information duties of the CRD are however unsuitable in the context of two-way automated contracting; some of the required information items cannot be utilized by ‘software minds’.
- Three simple approaches of application of the CRD to two-way automated contracting, namely the ‘software-as-the-consumer’ approach, the ‘from-the-software-to-the-consumer’ approach and the ‘direct communication with the consumer’ approach do not address the ‘unsuitability’ problem or do so in a way that cannot survive the development of two-way automated contracting as a standard or widespread contracting method.
- A fourth alternative approach, namely information reduction may be more complicated but is flexible enough not to insist in ‘empty’ or superficial information duties and only requires information that can be reacted upon by trading software without lowering the level of consumer protection.

Thank you!

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