



## InSight 2019

### Consumer protection in a changing society

As the digital economy continues to evolve, and the number of independent contractors keeps on rising in all segments of the job market, consumer protection is in need of a new impetus. Better protection of consumers and independent contractors against unfair commercial practices will contribute to a fairer society. But that's not all. Better protection ensures that markets also work better for people and businesses. And that, in turn, helps evolve and grow our economy. As a result, consumers and independent contractors will buy from existing and new businesses with more confidence. That will stimulate market entry, innovation, and employment, also among small and medium-sized businesses.

That is why, in this year's edition of InSight, we ask the Dutch legislature the following:

1. Affording independent contractors the same legal protection against unfair commercial practices as consumers have; and
2. Strengthening consumer protection against unfair online commercial practices through legislative and policy changes.

In addition, we are calling on businesses to design the choice architectures of their websites and platforms in such a way that behavioral pitfalls of consumers cannot be taken advantage of.

#### Protection for independent contractors against unfair commercial practices

*Marije is a copywriter, who owns her own office building in which she also rents out office space to three other independent copywriters. She gets a call from an office-lunch delivery service offering a contract, consisting of simple sandwiches for all four copywriters. Although the sales representative is quite pushy, Marije does react positively, and she asks for an estimate. One week later, she receives a letter in which she is welcomed as a new customer, and finds a one-year contract enclosed with the letter. In the first week already, she finds out that, as explained in the small print, she is stuck with these sandwiches for four people. She cannot adjust that number, even if one of the other copywriters has a day off, although she was told otherwise over the phone. She wants to cancel the contract, but the company maintains that cancellation is only possible at the end of the year, or after paying a hefty early-termination fee. She decides against going to court, because the legal fees will not be cancelled out by the benefits. And no complaints board exists to which she could turn.*

The office-lunch delivery company ties Marije to the contract in an unfair manner. And, since this is a business contract, Marije, like so many other independent contractors, does not have the same options as consumers have to defend themselves against such practices. In situations like these, consumers are able to cancel the contract by writing a letter to the company, but Marije is only able to demand cancellation by going to court. In fact, had Marije been a consumer, the odds of her entering into this agreement involuntarily would have been much slimmer. The contract would only have been made final if she had confirmed the contract in writing or in an email. This requirement (that contracts must be confirmed in writing in order to be legally valid) for telemarketing does not apply to business contracts. Furthermore, as a consumer, she would have had a cooling-off period of 14 days in this

case, during which she would have been able to cancel the contract without having to give a specific reason. As an independent contractor, she does not have that option.

This real-world example is not an isolated incident. ACM receives many reports that suggest a relational imbalance between independent contractors and providers of products and services in various sectors. Examples include subscriptions to listings in an online business directory or to computer maintenance services. In our observations, independent contractors and the average consumer do not differ in the way they make real-world purchasing decisions. Furthermore, ACM receives many reports from independent contractors who are stuck with unfavorable business contracts as a result of aggressive telemarketing practices, while these contracts concern services that they only or primarily use in a private capacity. For example, many independent contractors in the Netherlands are approached by firms that try to sell them business energy contracts for their private homes. These firms use the contact details that independent contractors give to the Netherlands Chamber of Commerce. We thus see that providers take advantage of the fact that independent contractors do not have the same legal protection as consumers have, and that, moreover, providers wrongfully characterize contracts with independent contractors as business contracts<sup>1</sup>.

In 2008, in its implementation of the unfair commercial practices directive, the Dutch legislature chose not to afford independent contractors the same protection as consumers have. It explained this decision by saying, among other things, that independent contractors that have been harmed as a result of an unfair commercial practice (such as deception or deceit) always have the opportunity to go to court<sup>2</sup>. In six European countries (Austria, Denmark, France, Germany, Italy and Sweden), the unfair commercial practices directive has been expanded comprehensively or partially to include commercial practices that harm small businesses<sup>3</sup>. In the implementation of the consumer rights directive, too, which includes the 14-day cooling-off period and the obligation to confirm offers in writing, it was decided to limit the scope to consumers. In the Netherlands, expanding the scope of consumer protection would enable ACM to take action against companies that use unfair commercial practices to target independent contractors. In addition, the threat of enforcement has a preventative effect. The same standards will apply to both consumers and independent contractors. Furthermore, expanding the scope will offer independent contractors more, easy-to-use tools to get rid of unsolicited contracts. Considering the increase in the number of independent contractors in all segments of the job market, now would be a good time for the Dutch legislature to take another good look at past considerations.

### **Generic legal protection is needed**

The State Secretary for Economic Affairs and Climate Policy has already taken steps to grant independent contractors expanded legal protection in two sectors: energy and telecom. With regard to telecom, a bill is now open for public consultation, which proposes to afford independent contractors more protection against involuntary switches to other providers. In the energy market, too, independent contractors have enjoyed increased protection than in other markets for some time now. For example, independent contractors have the opportunity, under certain circumstances, to bring disputes with their energy suppliers to an independent complaints board. This complaints board subsequently hands down a binding ruling. In addition, ACM can enforce certain sector-specific rules with regard to

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<sup>1</sup> These problems do not occur if independent contractors purchase products or services for private purposes. In that case, they act in their capacities as consumers, and thus enjoy the same protections as consumers do. Independent contractors that use the products or services in question for both private and business purposes, are also legally protected, but only if the service is used predominantly for private purposes. In most cases, however, independent contractors do not know what their rights are.

<sup>2</sup> Parliamentary papers II 2006/07, 30 928, no. 8, p. 6

<sup>3</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52012DC0702>

business customers (including small businesses)<sup>4</sup>. However, the problems that ACM has found can be solved best by synchronizing the legal protections of consumers and those of independent contractors. That will also grant ACM the power to take action in cases involving independent contractors, for example, by imposing fines, orders subject to periodic penalty payments, and public warnings.

### What does ACM do?

Consumer law already applies to independent contractors that use the purchased products and services completely or predominantly for private purposes. For example, independent contractors that take out an energy contract (or any other contract for that matter) for their homes are considered 'regular' consumers to ACM. ACM will devote more attention to enforcement of their rights. In addition, we will also educate independent contractors, explaining in what situations consumer law already applies to them.

### Protection against unfair practices when purchasing online

*Tom is one of those consumers who shop online a lot. Like almost 80% of all Dutch people, he made several online purchases last year. And like most consumers, he easily falls for the marketing tricks used by online stores and platforms. For example, when booking a trip, he is pressured into making a decision quickly because of the notification in giant red letters, stressing that only a couple of tickets are left, and that he is not the only one currently looking at those tickets. He does not click on the small icon, which would have revealed, after several additional clicks, that the warning about the limited availability of tickets does not necessarily relate to the search dates that Tom had entered earlier.*

When making purchases, consumers should at least be offered correct information in an easy-to-understand manner. In that way, they will know what to expect, and they will be able to make a rational decision. However, providing correct information in an easy-to-understand manner alone does not offer sufficient protection. Behavioral insights show that more is needed in order to protect consumers against online commercial practices that lead to unwanted purchases or the use of private data. Many decisions that consumers make are the products of unconscious processes, pitfalls<sup>5</sup>. And online providers take advantage of precisely those unconscious processes. Taking advantage of behavioral pitfalls is not something new, and had existed even before the advent of online sales, for example in television ads. That also explains why, in that area, certain systems were put in place in order to limit certain forms of advertisements through regulations and self-regulation (for example, the Dutch Advertising Code, and various, specific codes for subtopics, including for vulnerable groups of consumers). However, no specific code for choice architectures currently exists.

Online choice architectures potentially have far more influence than ads, as well as in a much more direct manner: it is not just the consumer's desire to buy that is influenced, but also the decision-making process itself is influenced, and in real-time. With the help of data and algorithms, online businesses are able to create individual choice architectures that encourage consumers to make purchases or to share private data, which are not in the interest of consumers. Online architectures

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<sup>4</sup> In the Dutch Gas Act and the Dutch Electricity Act (including related regulations), a distinction is made based on consumption, the so-called small-scale users and large-scale users. The small-scale users can be both consumers and small-business owners, and enjoy virtually the same protection.

<sup>5</sup> There are many behavioral pitfalls affecting consumers when making purchasing decisions, such as the 'framing effect' in which consumers allow their choices to be influenced by the way something is presented, the 'bandwagon effect', in which consumers allow themselves to be influenced by the group's norm or by someone else's behavior, and the 'confirmation bias', in which consumers allow themselves to be guided by information that approximates their own assumptions the most.

that are designed in a certain way can prod consumers into taking quick decisions, as a result of which consumers may buy or share something they might regret afterwards. Various studies confirm this. For example, it has been found that businesses test the effectiveness of online persuasion techniques on a permanent basis, and that businesses tweak such techniques in order to make consumers take purchasing decisions they had not planned on making beforehand<sup>6</sup>. Another recent study concluded that the webpage design of several major online platforms was primarily aimed at having consumers unconsciously select the privacy settings that are the least beneficial to them<sup>7</sup>. Furthermore, a large-scale study conducted by the European Commission revealed that consumers trust online businesses' good intentions blindly, but that they are insufficiently aware of the way online choice architectures influence their choices<sup>8</sup>. The study thus recommends introducing 'design-based regulation', in which the design of the online choice architecture is central, and which must be geared towards the way in which people actually behave online. Finally, a recent study commissioned by the UK government showed that the digital economy has raised new challenges with regard to consumer protection<sup>9</sup>. The researchers concluded that the online environment has created new ways for businesses to exploit the behavioral pitfalls of consumers, and to mislead them in that manner. The researchers recommend regulators to intensify consumer protection oversight of the digital economy, and to point out to the legislature any shortcomings in the rules and regulations.

### Consumer protection

Several but not all problems that consumers encounter online can already be dealt with using existing regulations. For example, we take action against false and misleading scarcity notifications, and against pre-ticked checkboxes for optional services. However, some problems could be dealt with more effectively if the requirements for providers were raised. A commercial practice is considered to be unfair if it conflicts with the professional diligence of the provider, and if this practice disrupts or can disrupt the economic behavior of 'the average consumer.' Consumers are expected to take a critical attitude, and to assume a high degree of self-responsibility. Providers are expected to observe the standard of professional diligence. However, this standard has not yet been fleshed out for online trade.

Last year, ACM called on companies to rethink their online choice architectures on their websites and platforms, and to show responsibility<sup>10</sup>. We believe that such a process should lead to a concrete interpretation of the principle of professional diligence. In our view, the standard of professional diligence entails a duty of care on the part of providers, preventing them to set up their choice architectures in such a way that the behavioral pitfalls of consumers are taken advantage of. Choice architectures may definitely lead to efficient decision-making processes and pleasant shopping experiences. In fact, we would welcome that! However, providers must also make sure that foreseeable disappointments on the part of consumers are prevented. Moreover, we know that, when being in stressful situations, certain groups of consumers will have a harder time keeping an overview of those same situations, thereby making less-informed decisions. Having choice architectures in place that intuitively guide consumers in their decision-making processes without letting them fall into their behavioral pitfalls, is in the interest of consumers as well as in that of providers, also in the long run.

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<sup>6</sup> Digitaalguid 'Sturend Webdesign,' Dutch Consumers' Association, November/December 2018

<sup>7</sup> 'Deceived by design', Forbrukerradet, June 2018, <https://www.forbrukerradet.no/side/facebook-and-google-manipulate-users-into-sharing-personal-data/>

<sup>8</sup> 'Behavioral Study on the Transparency of Online Platforms', European Commission, 2018.

<sup>9</sup> "Unlocking digital competition", Digital Competition Expert Panel, March 2019,

<https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel>

<sup>10</sup> "Misbruiken van voorspelbaar consumentengedrag moet stoppen", <https://fd.nl/ opinie/1267966/misbruiken-van-voorspelbaar-consumentengedrag-moet-stoppen>

Financial-service providers already need to comply with a duty of care. They have to take into account, in a careful manner, the justified interests of consumers and beneficiaries. And when developing financial products, they are also required to take into account the interests of customers belonging to the product's target audience. A duty of care may offer a model for how businesses must design their online choice architectures for situations where online consumers take decisions about big or long-term obligations regarding buying a service or sharing data, and where algorithms determine what groups of consumers are approached in what way.

By supporting this call, the Dutch legislature is able to stimulate the sector to take action, and also by calling on each other to draw up a code of conduct. In addition, it is essential that, when drafting new pieces of legislation and policies, behavioral insights about consumer behavior are taken into account. In her consumer agenda, the State Secretary says that, as part of the European New Deal for consumers, she will argue in favor of a robust European framework with strict rules that will result in more transparency when making purchases on online platforms<sup>11</sup>. In our opinion, those rules should be limited to providing more information, but also be expressly aimed at protecting consumers against behavioral pitfalls.

### **What does ACM do?**

The more providers know or are able to know about actual consumer behavior, and the more they take advantage thereof when designing their online choice architectures, the bigger their responsibilities are to do all of that in a responsible manner. Consumers cannot be tricked into entering into agreements in choice architectures that take advantage of behavioral pitfalls of consumers. If such environments can lead to decisions that consumers otherwise would not have made, ACM may take enforcement action, as such are considered unfair commercial practices. When taking action, ACM applies existing rules and regulations, and we take into account how the average consumer in the provider's target audience behaves. Furthermore, ACM, together with the sector, will draw up a guideline that will flesh out the duty of care for businesses, as well as the statutory standard of professional diligence. That is how we wish to help interpret the standard of professional diligence in the digital economy.

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<sup>11</sup> 'Consumentenagenda: houvast bij voortdurende verandering', <https://www.rijksoverheid.nl/documenten/kamerstukken/2018/10/08/kamerbrief-consumentenagenda-houvast-bij-voortdurende-verandering>