

The virtue of cooling-off rights to consumers: ‘be in the habit of choosing the mean’ – a comparative discussion of South Africa, the United Kingdom and Belgium*

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Abstract

The focus of this contribution is on the consumer’s cooling-off right in terms of section 16 of the Consumer Protection Act 68 of 2008 in the case of consumer agreements in South Africa compared with the positions in the EU member states: the United Kingdom and Belgium. In its simplest form a cooling-off right can be described as a statutory right accorded a party in terms of which he or she may withdraw from the agreement without reason or penalty within a specified time, provided that this is done in accordance with the statutory formalities of the particular Act. A comparative analysis is conducted to determine if a cooling-off right is in fact advantageous and how the advantage is to be determined. As a basis the concept of virtue by Aristotle is used in that a ‘virtue is to make a habit of choosing the mean’. The concept is analysed comparatively by discussing ‘the mean’ (the possible voices between which a mean needs to be found); ‘the choice’ (the responsibility of making the choice lies not only in the hands of the consumer but also of the supplier and legislature); and finally making ‘a habit’ of choosing the mean (conclusion after comparative analysis).

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INTRODUCTION

Though consumer protection is not a new concept in South Africa, the implementation of the Consumer Protection Act 68 of 2008 (the CPA) resulted in a significant shift in favour of consumers. Notably, the Act deals with eight fundamental consumer rights that are internationally recognised and thus confirms South Africa's commitment to international consumer rights.¹ The focus of this contribution is on the consumer's cooling-off right in terms of section 16 of the CPA in the case of consumer agreements, when compared to the positions in the EU member states: the United Kingdom (UK) and Belgium.

In its simplest form a cooling-off right can be described as a statutory right given to a party in terms of which he or she may withdraw from the agreement without reason or penalty within a specific period provided that this is done in accordance with the statutory formalities of the particular Act. In the context of consumer protection the consumer is usually provided with such a cooling-off right where he or she suffers from so-called 'buyer's remorse'.² It may be asked if a cooling-off right in a consumer agreement is a virtue and how such a virtue should be determined? In the search for answers, I encountered David Smith's thought-provoking article: 'The great conversation: Aristotle's useful definition of virtue'.³ The author attempts to explain the virtues of an ethical legal practitioner by quoting from Aristotle but, it is submitted, this comparison is just as relevant in assessing the virtue of cooling-off rights to consumers under consumer legislation. Smith quotes Aristotle's *Nicomachean Ethics*:⁴

Virtue, then, is a *habit* or trained faculty of *choice*, the characteristic of which lies in moderation or observance of the *mean* relatively to the persons concerned, as determined by reason, i.e. by the reason by which the prudent man would determine it. And it is a moderation, firstly, inasmuch as it comes in the middle or *mean* between two vices, one on the side of excess, the other on the side of defect; and, secondly, inasmuch as, while these vices fall short of or exceed the due measure in feeling and in action, it finds and *chooses the mean*, middling, or moderate amount.⁵

¹ Preamble & S 2(2) CPA.

² Otto 'Die afkoelreg in die Nasionale Kredietwet en die Wet op Verbruikersbeskerming' 2012 (March) *LitNet Akademies* 23–4, 25.

³ <http://bit.ly/1QLcTLg> (last accessed 22 May 2015).

⁴ Book 2, ch 6, s 15.

⁵ Smith n 3 above at 1. Own emphasis.

Put more simply, virtue is *making a habit of choosing the mean*.⁶ In relation to the discussion of the virtue of cooling-off rights to consumers in South Africa, the UK and Belgium an analysis of this statement is necessary. The statement would be better explained by first considering ‘the mean’.⁷ This suggests examining the possible ‘vices’ between which a mean or midway needs to be found. In the context of cooling-off rights it would be, for example, finding the midway or mean between freedom of contract versus unequal bargaining positions; or party autonomy versus protection of vulnerable consumers. As will be shown, ‘the choice’ refers to the choice of finding a midway or mean between legal concepts and principles relevant to an acceptable application of cooling-off rights. ‘The choice’ also refers to the role-players in consumer protection who are responsible for making the choice to balance such concepts and principles which would include not only the consumer, but also the supplier and legislature. Finally (and this forms part of the conclusion and comparative analysis) making ‘a habit’ of choosing the mean suggests actively introducing, applying, and enforcing best practices regarding cooling-off rights for the process to represent a virtue rather than a vice.

It is crucial to set the comparative analysis in the proper framework to avoid comparing apples to pears, but also to be able to illustrate the core arguments of the research.

FRAMEWORK

The comparative research⁸ was conducted from the perspective of a South African scholar and lawyer in the area of consumer protection law (and the CPA in particular) to the extent that it applies to similar and relevant comparative jurisdictions. Even before the implementation of the CPA, the South African legislature had attempted to bring South Africa in line with international norms and standards which included the area of consumer protection law.⁹ This is also one of the aims of the CPA as provided for in its preamble and purpose (section 3). Because South Africa has a mixed

⁶ *Ibid.*

⁷ See discussion of ‘the mean’ below.

⁸ The terms ‘research’, ‘assessment’ and ‘analyses’ are used interchangeably throughout the contribution.

⁹ See for example legislation implemented prior to the implementation of the CPA such as the Electronic Communications and Transactions Act 25 of 2002 and the National Credit Act 34 of 2005.

legal system with strong roots in our common law (Roman-Dutch law)¹⁰ and indigenous law,¹¹ a direct transposition of any foreign legislation into our law would prove (and indeed is proving) problematic.¹² It is submitted that other countries might benefit from the South African experience in this regard. One of the greatest challenges in the implementation and application of legislation in South Africa (as is often also the case with the EU member states transposing European Directives into their national law)¹³ is not merely the wording or ambiguity of the directives, but also their proper implementation within existing or national law.

The world has become a global community. The consumer market on a particular continent (in this instance Africa and Europe) and in the constituent countries, is represented by all classes or groups of consumers. This varies from high income, formally educated, consumer groups, to minimum-wage, low-income and often illiterate (vulnerable) groups.¹⁴ Any consumer legislation within a particular country should provide protection to all of these groups without adversely affecting free trade, competition and economic freedom to conduct businesses. This has always been a balancing act in South Africa, and our experience could offer some guidance to other jurisdictions.

The interpretation of any legislation in the South African context must be done against the back-drop of the Constitution of the Republic of South Africa, 1996, as well as how it will affect existing law (including the common law). As will be shown, many of the provisions in the CPA mimic European Union Directives and international trends.¹⁵ The wording of section 16 of the CPA (governing the consumer's cooling-off rights in consumer contracts) is very similar to the wording in the European Union

¹⁰ Kerr *The law of sale and lease* (3ed 2004) 330.

¹¹ Nagel *et al Commercial law* (4ed 2011) par 2.02.

¹² See for example critique by Woker 'Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act' 2010 *Obiter* 217–231 and Barnard 'The influence of the Consumer Protection Act 68 of 2008 on the common law warranty against eviction' 2012(15) *PELJ* 348–376.

¹³ See for example critical discussion by Samoy on transposition of EU consumer legislation into the Belgian Civil Code 'Afbakeningsvragen bij de proliferatie van koopregelingen (Gemeenrechtelijke Koop, Consumentekoop, Internationale Koop) en totstandkoming van de koop' in *Bijzondere Overeenkomsten* (2008) 260–295.

¹⁴ See s 3(1)(b) CPA.

¹⁵ See also Barnard n 12 above at 371.

Consumer Rights Directive 2011/83.¹⁶ Section 2(1) of the CPA provides that when interpreting the provisions of the CPA, a person, court, the National Consumer Tribunal, and the National Consumer Commission may consider appropriate foreign and international law as well as appropriate international conventions, declarations or protocols relating to consumer protection.

The EU Consumer Rights Directive introduced a uniform set of rules and requirements with regard to cooling-off rights and how it is to be implemented within EU member states. The transposition of these rules and guidelines into the national laws of the UK and Belgium will be analysed and compared to the South African position in an attempt to determine whether or not the cooling-off right benefits the consumer (*ie*, is a virtue). This will be determined by assessing whether or not the legislature, supplier and consumer in each of the countries discussed makes a habit of ‘choosing the mean’.

The United Kingdom was chosen due to its historical connection with and influence in South African law.¹⁷ A further challenge in the UK is not only the transportation of EU legislation into its national legislation, but also its application in the various regions of the UK – England, Ireland, Scotland and Wales. The regulatory framework of sales and consumer sales in Belgium is remarkably similar to that regulating sales and consumer sales in South Africa.¹⁸ In South Africa the consumer sales law is regulated by the general principles of contract law, the common-law of sale, as well as legislation (for example, consumer sales in terms of the CPA). The situation is very similar in Belgium in that consumer sale agreements are regulated by the provisions of the Civil Code with regard to the general principles of contract law (*gemeen contractenrecht*), the provisions with regard to the common-law of sale (*gemeen kooprecht*), and consumer sales (*consumenten kooprecht*). Consumer agreements are also regulated in terms of the recent inclusion of Book VI in the Belgian Economic Code of Law.¹⁹

For purposes of this discussion, cooling-off rights available to consumers in the financial sector,²⁰ in terms of consumer credit agreements and online

¹⁶ Hereafter referred to as The Consumer Rights Directive.

¹⁷ Hahlo & Kahn *The South African legal system and its background* (1973) 177.

¹⁸ Otto ‘Verborge gebreke, voetstoetsverkope, die Consumer Protection Act en die National Credit Act’ 2011 *THRHR* 525–545; 531.

¹⁹ See discussion below.

²⁰ Including the Banking and Investment sector.

consumer agreements (including the supply of digital content), are excluded.²¹ The main reason for this is the use of section 16 of the CPA as a premise and the fact that separate pieces of legislation govern the above types of consumer agreement in South Africa.²² It should further be noted that the term ‘cooling-off rights’, ‘right to cancel’ and *herroepingsrecht* will be used interchangeably throughout the contribution. This will also be the case for the terms ‘consumer transaction’, ‘consumer contract’ and ‘consumer agreement’. Different concepts are used to describe the party that supplies the goods and services to consumers within a particular country – for example ‘supplier’ in the case of the South Africa, ‘trader’ in the case of the UK, and ‘enterprise’ in the case of Belgium – and in general refers to the person marketing and supplying the goods or services in the ordinary course of its business and to which the cooling-off provisions within a particular country will apply.

THE MEAN

In the context of consumer protection law (and the governance of cooling-off rights in particular), there is a constant attempt to find the mean, middle, or moderation between ‘feeling’ as opposed to ‘action’, or ‘excess’ as opposed to ‘falling short’. Finding a mean between the over-regulation of cooling-off rights for example, as opposed to insufficient or inadequate regulation, which disadvantages the consumer. It is submitted that there is a constant battle to find the means between:

- freedom of contract *versus* unequal bargaining positions;
- party autonomy *versus* protection of vulnerable consumers;
- information aimed at consumers (marketing) *versus* consumer education;
- in the South African context: common law *versus* legislation; and
- in the case of the UK and Belgium: existing national law *versus* EU Directives and their transposition.

Establishing the ‘mean’ successfully will be dependent on ‘the choice’ that is made, and on whether or not ‘the choice’ is exercised habitually,

²¹ For a full discussion on the cooling-off rights available to consumers in terms of online and electronic marketing and transactions see Hamann & Papadopoulos ‘Direct marketing and spam via electronic communications: An analysis of the regulatory framework in South Africa’ 2014 *De Jure* 42–62.

²² In the case of electronic transactions: section 44 of the Electronic Communications and Transactions Act 25 of 2002; in the case of credit agreements: section 121 of the National Credit Act; in the case of electronic transactions and data services: Chapter 8 of the Protection of Personal Information Act 8 of 2013.

consistently, and effectively. But for a cooling-off right to be virtuous, the affected parties must make a habit of choosing the mean. It is only then that a cooling-off right available to consumers can be considered a virtue rather than a vice.

THE CHOICE

It is important to note that each national legislature not only provides the choice of a cooling-off right for the consumer, but also governs the extent and content of such a right within a particular piece of legislation. The legislature, therefore, has the opportunity and power to choose a mean or midway between the over-regulation and inadequate under-regulation of the consumer's cooling-off right. The supplier also has a right of choice in that the supplier may choose how the consumer's right will be conveyed, and how the consumer will be treated in the exercise of such a cooling-off right. The focus of this part of the analysis will be on the consumer's choice. Whether or not the legislature and supplier in a particular country exercise their choice successfully, will be assessed as part of the conclusion.

As a cooling-off right is a statutory right, it is possible that more than one cooling-off right may apply simultaneously in a particular situation in that diverse pieces of legislation may apply to a single consumer agreement.²³ However, the focus of this comparative analysis is on the cooling-off right of the South African consumer in terms of section 16 of the CPA, and how the application of this section compares to similar provisions within the UK and Belgium.

The consumer's choice: South Africa

Consumer Protection Act 68 of 2008 (CPA)

The CPA was implemented incrementally and Chapter 2 of the Act – the fundamental rights of the consumer – came into effect on 31 March 2011.²⁴ The consumer's cooling-off right in terms of section 16 forms part of the consumer's fundamental right of choice. As a general statement as to the

²³ The interplay and simultaneous application of cooling-off rights in the South African context warrants a contribution on its own but falls outside the scope of this analysis and research. Examples of such an overlap would be the case where more than one Act or Statute is applicable to the same agreement or transaction for example where a consumer agreement in terms of the CPA is also a credit agreement in terms of the National Credit Act 34 of 2005; or where goods supplied in terms of a consumer agreement is the sale of immovable property in which case the Alienation of Land Act 68 of 1981 will apply.

²⁴ Also referred to as the 'general effective date'.

application of the CPA, it could be said that the Act applies to suppliers who supply goods and services in the ordinary course of business to consumers for a consideration (generally, payment).

Relevant definitions

Most of the concepts within the general application guideline as expressed above have specific definitions under section 1 of the CPA.

- ‘Supplier’ is defined as a person who markets any goods or services, but it is also used as an umbrella term to include producers, importers, retailers, and service providers.²⁵ ‘Consumer’ is a wide concept and includes natural persons, certain juristic persons, and the users or beneficiaries of the goods or services supplied.²⁶
- ‘Goods’ include, but are not limited to, anything marketed for human consumption, tangible objects (movables), immovable property, music, data, software, water, gas, and electricity.²⁷
- ‘Service’ includes any work or undertaking; provision of information, education, advice or consultation; entertainment; access to any premises; as right to immovable property; and franchise agreements.²⁸
- ‘Supply’ in relation to goods, includes sale, rental, exchange and hire in the ordinary course of business for a consideration, while in relation to services, it includes the sale of services, or their performance or causing them to be performed.²⁹

Information requirements

Section 22 of the CPA provides the consumer with the right to information in plain and understandable language. The section sets out a test for when a notice, document, or visual representation will be regarded as being in plain language,³⁰ and also provides for factors to be taken into consideration

²⁵ Section 1 CPA. Each of these suppliers in the supply chain also has its own definition in terms of section 1 of the Act.

²⁶ Section 1 definitions read together with s 4 & 6 CPA. Juristic persons includes partnerships, body corporates and trusts with an asset value or annual turnover of less than R2 million (GN 294 in GG 34181 of 1 April 2011).

²⁷ Section 1 ‘goods’ CPA.

²⁸ Section 1 ‘service’ CPA.

²⁹ Section 1 ‘supply’ CPA. See also s 1 ‘consideration’ which is defined as ‘.... the payment of any monetary amount in legal currency but also includes a token, ticket, electronic credit, loyalty credit award, labour, barter or other goods or services.’

³⁰ Section 22(2) CPA: A notice, document or visual representation is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the notice, document or visual representation is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected

to assess plain language.³¹ Though section 22 and its plain language requirement are not directly mentioned in section 16, it is argued that any notice, document or visual representation informing a consumer of his cooling-off right (or its limitations or exclusion) must be in plain language and comply with the ‘plain language test’ as set out in section 22.³² This is confirmed by the wording of section 32 (dealing with direct marketing) which provides that a supplier must inform a consumer of his cooling-off right in the prescribed manner and form.³³

Content of the consumer’s cooling-off right and cancellation periods

Section 16(3) provides that a consumer may rescind a transaction resulting from any direct marketing without reason or penalty, by notice to the supplier in writing,³⁴ or another recorded manner and form, within five business days (not calendar days) after the later of the date on which the transaction or agreement was concluded, or the goods forming the subject of the transaction were delivered to the consumer. A supplier must return any payment received from the consumer in terms of the transaction within fifteen business days after either receiving notice of the rescission (if no goods were delivered), or after receiving the returned goods from the consumer. Where goods were delivered to the supplier, their return will be at the risk and expense of the consumer and must be returned to the supplier within ten business days after delivery.³⁵ The supplier may not attempt to collect any payment in terms of a rescinded transaction unless it falls under section 20(6). Annexure C to the regulations set out the prescribed format of the notice establishing the consumer’s cooling-off right to the supplier. There is at present no prescribed format for the supplier’s information

to understand the content, significance and import of the notice, document or visual representation without undue effort.

³¹ Section 22(2)(a)-(d) CPA: Having regard to – (a) the context, comprehensiveness and consistency of the notice, document or visual representation; (b) the organisation, form and style of the notice, document or visual representation; (c) the vocabulary, usage and sentence structure of the notice, document or visual representation; and (d) the use of any illustrations, examples, headings or other aids to reading and understanding.

³² For the sake of convenience the masculine form is used throughout this contribution to refer to all genders and types of consumers.

³³ Section 32(1) CPA.

³⁴ In terms of the regulations to the CPA, ‘in writing’ also includes electronic means recognised by the Electronic Communications and Transactions Act 25 of 2002 including electronic transmission, telephone, fax, sms, wireless computer access, email or any other data message.

³⁵ Section 20(4) CPA.

requirement, or how it must be provided to the consumer, other than the provisions of section 22 of the CPA.

The consumer will only be able to exercise his cooling-off right in terms of section 16 if the transaction was a result of direct marketing.³⁶ To fully understand what direct marketing is, the definition of direct marketing in terms of section 1 must be read with section 32 of the CPA. Direct marketing means to approach a person (consumer), either in person or by mail or electronic communication,³⁷ for the direct or indirect purpose of either promoting³⁸ or offering to supply (in the ordinary course of business) any goods or services to the consumer; or requesting the consumer to make a donation of any kind for any reason.³⁹ Writers have attempted to explain and give practical examples of what exactly direct marketing might entail.⁴⁰

Otto argues that the definition of direct marketing should be interpreted restrictively and although it would be hard to pin-point exact examples in practice, an advertisement in a newspaper, a road sign, or even a pamphlet in the post should not be included in the definition of direct marketing.⁴¹ Contrary to Otto, Jacobs, Stoop and Van Niekerk are of the opinion that a consumer has a right to block the receipt of flyers or brochures in his letterbox or unsolicited phone calls pre-emptively, and consider these forms of marketing to fall under the definition of direct marketing under the CPA.⁴²

³⁶ For a complete discussion on the role of direct marketing in terms of the consumer's fundamental right to fair and responsible marketing in terms of the CPA see Barnard & Scott 'An overview of promotional activities in terms of the Consumer Protection Act in South Africa' 2015(3) *SA Merc LJ* 441–477.

³⁷ Section 1 'electronic communication' CPA: means communication by means of electronic transmission, including by telephone, fax, sms, wireless computer access, email or any similar technology or device.

³⁸ Section 1 'promote' CPA: means to – (a) advertise, display or offer to supply any goods or services in the ordinary course of business, to all or part of the public for consideration; (b) make any representation in the ordinary course of business that could reasonably be inferred as expressing a willingness to supply any goods or services for consideration; or (c) engage in any other conduct in the ordinary course of business that may reasonably be construed to be an inducement or attempted inducement to a person to engage in a transaction.

³⁹ Section 1 'direct marketing' CPA.

⁴⁰ Otto n 2 above at 26 & 40; Jacobs, Stoop & Van Niekerk 'Fundamental consumer rights under the Consumer Protection Act 68 of 2008: A critical overview and analysis' 2010(13) *PELJ* 302–508; 339; Melville *The consumer protection act made easy* (2010) 64–65; Naudé & Eiselen *Commentary on the Consumer Protection Act* (2014) 30–1 & 30–2.

⁴¹ Otto n 2 above at 26 & 40.

⁴² Jacobs, Stoop & van Niekerk n 40 above at 339.

Though Otto is correct in arguing that direct marketing should include some kind of an ‘approach’ aimed at the consumer,⁴³ it is submitted that direct marketing should include telephone calls, cell phone messages, electronic mail, or a letter directly addressed and sent to a consumer. It should further include, for example, the distribution of pamphlets at a traffic light or at a shopping centre, and would most probably also include practices by suppliers to approach consumers directly in a particular store to draw their attention to specific goods. For a consumer to be able to exercise his cooling-off right in terms of section 16 a further step is required in that any such direct marketing must have resulted in the conclusion of a consumer agreement.⁴⁴ Direct marketing as defined in the CPA will include marketing at the doorstep of the consumer’s home or even workplace, but also marketing both at and away from the supplier’s business premises. This statement is important before we analyse the choice available to consumers in the UK and Belgium.

Limitations and exclusions

The consumer’s cooling-off right in terms of section 16 will not apply if he or she can exercise the cooling-off right afforded to them in terms of section 44 of the Electronic Communications and Transactions Act⁴⁵ and is in addition to any right to rescind an agreement that may otherwise exist in law.⁴⁶

Section 20 of the CPA governs the consumer’s right to return goods and confirms the right in terms of section 16 to return goods upon the exercise of the consumer’s cooling-off right. However, section 20 excludes and limits the consumer’s cooling-off right under the provisions of sections 20(3) to (6) where there was an actual delivery of goods. The consumer may not return goods or demand a refund at all if their return is prohibited by reason of public health or public regulation; or where goods were disassembled, physically altered, permanently installed, or blended with other goods.⁴⁷ The supplier may deduct amounts as described in section 20(6) of the CPA and the onus to prove the existence of such costs as well as compliance with the

⁴³ Otto n 2 above at 26.

⁴⁴ Section 16(3) CPA.

⁴⁵ 25 of 2002.

⁴⁶ Section 16(2) CPA. This also refers to common law rights available to consumers.

⁴⁷ Section 20(3) CPA.

above sections is on the supplier.⁴⁸ The supplier may not deduct any amount if the goods are unopened and still in their original packaging.⁴⁹ A reasonable amount may be deducted by the supplier but only where it will incur repackaging or restoration costs.⁵⁰ The reasonable use and opening of the packaging by the consumer will weigh in the consumer's favour in determining the costs to be deducted.⁵¹

The consumer's choice: the United Kingdom

*The Consumer Contracts (Information Cancellation and Additional Charges) Regulations 2013*⁵² (*Consumer Contracts Regulations*)

The Consumer Contracts Regulations govern on-premises, off-premises, and distance consumer contracts subject to certain exceptions.⁵³ These Regulations are an attempt by the UK legislature to transpose amongst other legislation, the EU Consumer Rights Directive into UK law. The focus of the analysis will, however, mainly fall on Part 3 of the Regulations as it pertains to the cooling-off rights available to consumers in the case of distance contracts and off-premises contracts, and will be discussed concurrently due to the similar content of the provisions.⁵⁴ The Consumer Contracts Regulations supersede the Consumer Protection (Distance Selling) Regulations 2000⁵⁵ and the Cancellation of Contracts made in a Consumer's Home or Place of Work, etc Regulations 2008.⁵⁶

⁴⁸ Sections 20(3) to (6) provides for the circumstances and requirements when a supplier may deduct reasonable costs upon the return of goods. This also includes where goods are returned in terms of s 16 (cooling-off right).

⁴⁹ Section 20(6)(1) CPA.

⁵⁰ Section 20(6)(b) & (c) CPA.

⁵¹ *Ibid.*

⁵² Hereafter referred to as the Consumer Contracts Regulations.

⁵³ The Regulations were laid before Parliament on 13 December 2013 and came into effect on 13 June 2014.

⁵⁴ The Distance Contracts Regulations also governs certain general information requirements (Part 2); protection from inertia selling and additional charges (Part 4); and delivery and risk (Part 5) which falls outside the scope of this discussion.

⁵⁵ Consumer Protection (Distance Selling) Regulations of 2000 (SI 2000/2334).

⁵⁶ Cancellation of Contracts made in a Consumer's Home or Place of Work etc. Regulations (SI 2008/1816). The superseded legislation will still be relevant in respect of any contracts concluded prior to the Regulations coming into force.

Relevant definitions

The most relevant definitions⁵⁷ as set out in the Consumer Contracts Regulations⁵⁸ form the basis for our discussion.

- ‘Consumer’ means an individual acting for purposes which are wholly or mainly outside that individual’s trade, business, craft or profession.
- ‘Trader’ means a person acting for purposes relating to that person’s trade, business, craft or profession, whether acting personally or through another person acting in the trader’s name or on the trader’s behalf.
- ‘Business premises’ in relation to a trader, means either any immovable retail premises of a permanent nature or movable retail premises where the activity of the trader is carried out on a usual basis.
- ‘Distance contract’ means a contract concluded between a trader and a consumer under an organised distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one⁵⁷ or more means of distance communication up to and including the time at which the contract is concluded.
- ‘Durable medium’ means paper or e-mail, or any other medium that allows information to be addressed personally to the recipient, enables the recipient to store the information in a way accessible for future reference for a period that is long enough for the purposes of the information, and allows the unchanged reproduction of the information stored.
- ‘Off-premises contract’ means a contract between a trader and a consumer (in person or by way of distance communication) concluded away from the business premises of the trader; or where a contract was concluded on the business premises of the trader or through any means of distance communication immediately after the consumer was personally and individually approached or addressed, in a place which is not the business premises of the trader; or an excursion organised by the trader with the aim or effect of promoting and selling goods or services to the consumer.
- ‘Goods’ means any tangible moveable items, but includes water, gas and electricity only if it is put up for sale in a limited volume or set quantity.
- ‘Service’ includes the supply of water, gas or electricity if they are not put up for sale in a limited volume or a set quantity; and the supply of district heating whereas ‘service contract’ means a contract, other than a sales contract, under which a trader supplies or agrees to supply a service to a consumer and the consumer pays or agrees to pay the price.

⁵⁷ See Reg 5 Consumer Contracts Regulations for relevant definitions as set out below.

⁵⁸ Most of the relevant definitions are also very similar to the definitions given in terms of the Consumer Rights Directive.

Information requirements

There are certain pre-contractual information requirements in terms of Part 2 of the Consumer Contract Regulations that must be complied with by the trader and are also incorporated as an implied term as part of the consumer contract.⁵⁹ Where off-premises and distance contracts are concluded, part of the information requirements includes a duty on the trader to inform the consumer of his or her cooling-off right as governed by Part 3 of the Regulations.⁶⁰ This information includes explaining to the consumer when his or her cooling-off right will be excluded,⁶¹ as well as the circumstances in which the consumer may be liable for costs if he or she exercises the cooling-off right.⁶² The information must be given on paper or (with the consumer's consent) on another durable medium and must be given within a reasonable time.⁶³ The trader is given the option of using model cancellation instructions as set out in Schedule 3, but is not obliged to do so. This form is given to the consumer as an example as to the wording of a notice of cancellation to the trader. The information requirements in terms of Schedule 2 must be given even if the trader makes a telephone call to conclude a distance contract.⁶⁴ It is a fineable offence not to provide a consumer with information about the right to cancel and about the cost of returning any goods or paying for any services provided during the cancellation period, and public authorities can enforce the information rules on receipt of a complaint.⁶⁵ Though the Consumer Rights Directive provides that the information regarding the consumer's cooling-off right should be given in 'plain intelligible language',⁶⁶ no such mention is made in the

⁵⁹ In terms of Part 2 and Reg 27 Part 3 of the Consumer Contracts Regulations, the information requirements as well as the cooling-off right itself will not be applicable to on-premises contracts involving a day-to-day transaction performed immediately at the time when the contract is entered into; contracts for medicinal products or certain other healthcare products; or contracts for passenger transport services.

⁶⁰ Regs 10(1) and 13(1) Part 3 read together with Schedule 2 Consumer Contracts Regulations. S 12 of the Consumer Rights Act 2015 provides that any information to be provided by a trader in terms of the Consumer Contract Regulations will be regarded as part of the particular consumer contract as an implied term.

⁶¹ In accordance with the exclusions and exceptions as set out in Regs 28, 36 and 37 of the Consumer Contracts Regulations.

⁶² Schedule 2 (l) to (o).

⁶³ According to Reg 16 of the Consumer Contracts Regulations no later than at the time of delivery of the goods or prior to the performance of any services.

⁶⁴ Reg 15 Consumer Contract Regulations.

⁶⁵ Part 2 Chapter 2 Consumer Contracts Regulations.

⁶⁶ See Articles 7 and 8 of the Consumer Rights Directive. It is uncertain why the UK legislature chose not to also include it.

current Regulations other than giving information in a ‘clear and comprehensible manner’ which is unfortunately not defined.⁶⁷

Contents of the consumer’s cooling-off right and cancellation periods

Part 3 to the Consumer Contracts Regulations governs the consumer’s cooling-off right. The consumer must give notice of cancellation of the consumer contract either in terms of the form as prescribed in Schedule 3 to the Regulations, or make any other clear statement setting out the decision to cancel the contract.⁶⁸ The cancellation periods are governed by the particular types of distance or off-premises consumer contract and will apply as follows:

<i>Contract type</i>	<i>Cancellation period ends</i>
Services	End of 14 days after the day the contract was entered into.
Sales contracts (goods or services)	End of 14 days after the day the goods come into physical possession of the consumer (or a person nominated by the consumer other than the carrier)
Sale of multiple goods with different delivery dates	End of 14 days after the day the goods come into physical possession of the consumer (or a person nominated by the consumer other than the carrier)
Regular delivery of goods	End of 14 days after the day the goods come into physical possession of the consumer (or a person nominated by the consumer other than the carrier)

⁶⁷ Regs 10 & 13 Consumer Contract Regulations. An interpretation of the wording ‘clear and comprehensible manner’ within the Consumer Rights Directive 2011/83/EU itself will most likely be helpful.

⁶⁸ Reg 32 Consumer Contract Regulations. Reg 32 further provides that if the trader gives the consumer the option of filling in and submitting such a form in terms of Schedule 3 or other statement on the trader’s website, the consumer need not use it, but if the consumer does, the trader must communicate to the consumer an acknowledgement of receipt of the cancellation on a durable medium without delay.

It should be noted that the cancellation period extends by an additional twelve months if the trader fails to provide the consumer with valid notice of the right to cancel.⁶⁹ If valid notice is provided during the extended period of twelve months, the cancellation period will last for fourteen days after the consumer receives the information.⁷⁰

Where the consumer exercises his or her cooling-off right in terms of the Consumer Contracts Regulations, the obligations of the parties to perform the contract will end.⁷¹ In terms of Regulation 34 the trader must reimburse all payments (except for delivery charges in excess of standard delivery costs) for sales contracts, or, where the trader has agreed to collect the goods, without undue delay and no later than fourteen days after the day on which the trader receives the returned goods, or (if earlier) evidence that the consumer has returned the goods. For other contracts or where the consumer has to return the goods, reimbursement must take place within fourteen days after cancellation or the trader being informed of the cancellation – this will be treated as a term of the contract where it applies.⁷²

Limitations and exclusions

The consumer will bear the cost of returning the goods unless the trader has agreed to do so or failed to notify the consumer prior to conclusion of the contract that the consumer would be liable for such costs (as required under Schedule 2), or where the goods were sold and delivered under an off-premises contract and are too bulky to return by post.⁷³ This must be done within fourteen days from the date of notification of the cancellation period.⁷⁴ The consumer will be liable to pay for any reduction in the value of the goods due to handling or use by the consumer.⁷⁵ It is unclear exactly how any deduction will be determined, although the Regulations do state that the type of handling which would trigger a deduction would be anything beyond what is necessary to establish the nature, characteristics, and

⁶⁹ Reg 31 Consumer Contracts Regulations.

⁷⁰ *Ibid.*

⁷¹ Reg 34 Consumer Contracts Regulations.

⁷² *Ibid.* Reg 34 further provides that the trader must also collect goods if he has offered to do so or, if in an off-premises contract, the goods were delivered to the consumer's home on conclusion of the contract and cannot be returned by post. The trader must further inform any other trader with whom the consumer has an ancillary contract which is automatically cancelled, of the cancellation.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ Reg 35 Consumer Contracts Regulations.

functioning of the goods, particularly if it goes beyond what might reasonably be allowed in a shop.⁷⁶

In general the Consumer Contracts Regulations will not apply to immovable property; the supply of food and beverages supplied by regular rounds; travel and holiday packages; automatic vending machines; and automated commercial premises.⁷⁷ Regulation 28 sets out the circumstances in which a cooling-off right will not be available to the consumer. The most notable of these are contracts for:

- goods or services (excluding some utilities) whose prices fluctuate due to market fluctuations beyond the trader's control;
- personalised goods;
- goods liable to expire or deteriorate rapidly;
- the supply of urgent repair or maintenance services specifically requested by the consumer;
- the supply of a newspaper, periodical or magazine (other than by subscription);
- the provision of accommodation, transport of goods, vehicle rental services, catering or services related to leisure activities where the contract includes a specific date for performance;
- sealed goods whose seal has been broken which cannot be returned for health and safety reasons;
- sealed audio, video or computer software if unsealed after delivery; and
- goods which become inseparably mixed with other goods after delivery.

The consumer's choice: Belgium

Book VI: Market Practices and Consumer Protection

On 31 May 2014 Book VI: Market Practices and Consumer Protection of the Belgian Code of Economic Law (the Economic Code) came into force. This involved adapting existing law (the Market Practices and Consumer Protection Act 6 of 2010)⁷⁸ into the Economic Code, but also the implementation of (amongst other legislation) the Consumer Rights Directive.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Wet op Marktpraktijken en Consumentenbescherming 6 van 2010.*

Relevant definitions

Due to the implementation of Book VI some definitions in Book I that apply the whole of the Economic Code⁷⁹ were amended, together with the inclusion of definitions that apply only to Book VI.⁸⁰ ‘Consumer’ has been amended to provide that a consumer is no longer somebody who acts exclusively for non-business purposes, but it is now sufficient that the goal of concluding the contract in question lies outside the professional activity of the natural person who is buying the goods. ‘Enterprise’ is used in preference to ‘trader’ but has the same definition as ‘trader’ in terms of the UK Consumer Contracts Regulations.⁸¹ Similarly, the definitions of ‘distance contract’, ‘business premises’, ‘off-premises contract’ and ‘durable medium’ are identical to the definitions in terms of the UK Consumer Contracts Regulations.⁸² The reason for is the transposition of the Consumer Rights Directive as part of national law.

‘Distance communication’ includes (other than under UK law) any means which, under the simultaneous physical presence of the enterprise and the consumer, may be used for the conclusion of a contract between those parties without giving specific examples (such as fax or telephone).⁸³

‘Goods’ are described as tangible movable goods.⁸⁴

‘Service’ is any performance made by an enterprise in the context of its professional activity, or in carrying out its statutory purpose.⁸⁵

Information requirements

As the information requirements and provisions pertaining to the consumer’s cooling-off right are the same for both distance contracts⁸⁶ and off-premises contracts⁸⁷ they will be discussed simultaneously. The information requirements for these types of consumer contract (including information regarding the consumer’s cooling-off right) are identical to those in the UK

⁷⁹ Title 1, Book I Economic Code.

⁸⁰ Ch 4, Title 2, Book I Economic Code.

⁸¹ See description of definitions above.

⁸² *Ibid.*

⁸³ Ch 4, Title 2, Book I Economic Code.

⁸⁴ Title 1, Book I Economic Code.

⁸⁵ *Ibid.*

⁸⁶ Articles VI 45 – 53, S 1, Ch 2, Title 3, Book VI Economic Code.

⁸⁷ Articles VI 64 – 74, C 3, Title 3, Book VI Economic Code.

Consumer Contracts Regulations.⁸⁸ The only notable difference is that the information requirements in terms of the Economic Code confirm the wording of the Consumer Rights Directive in that any information given to the consumer must be given in plain and intelligible language.⁸⁹

Contents of the consumer's cooling-off right and cancellation periods

Before the implementation of Book VI, the cooling-off period for off-premises contracts was seven days but in order to comply with the Consumer Rights Directive this was extended to fourteen days. Both off-premises contracts and distance contracts now have a cancellation period of fourteen days.⁹⁰ As in the UK, a standard cancellation form may be sent to consumers to facilitate the exercise of their cooling-off right.⁹¹ The position as set out in the UK Consumer Contracts Regulations⁹² with regard to the cancellation periods, extension of the cancellation periods, and how to exercise the consumer's cooling-off right applies equally in Belgium.⁹³ This also applies to the reimbursement of any monies to the consumer taking into account the permissible reductions in favour of the enterprise.⁹⁴

Limitations and exclusions

The UK position as set out above⁹⁵ with regard to the limitations and exclusions⁹⁶ of the consumer's cooling-off rights also apply in Belgium save for one additional exclusion. The consumer will not have a cooling-off right in the case of service contracts after full implementation of the service, if the performance has begun with the explicit prior consent of the consumer and that the consumer has acknowledged that he or she will lose his or her cooling-off right once the contract has been fully performed by the enterprise.⁹⁷ It is submitted, however, that the enterprise will still have to comply with the information requirements as set out in the Economic Code.

⁸⁸ Title 2, Ch 1, Book VI Economic Code read together with Arts VI 45 & 64, Title 3, Book VI Economic Code.

⁸⁹ Articles VI 46 & 64, Title 3, Book VI Economic Code.

⁹⁰ Articles VI 50 & 69, Title 3, Book VI Economic Code.

⁹¹ Schedule (*Bijlae*) 2 to the Economic Code.

⁹² See discussion of UK position above.

⁹³ Articles VI 50 & 69, Title 3, Book VI Economic Code.

⁹⁴ Articles VI 50 & 71, Title 3, Book VI Economic Code.

⁹⁵ See discussion of 'limitations and exclusions' in terms of the UK position above.

⁹⁶ Articles VI 53, 66 & 73, Title 3, Book VI Economic Code.

⁹⁷ Articles VI 53 1° & 73 1, Title 3, Book VI Economic Code.

CONCLUSION AFTER COMPARATIVE ANALYSIS: MAKING A HABIT OF CHOOSING THE MEAN

After the comparative analysis of the positions in South Africa, the UK, and Belgium a determination needs to be made as to whether or not the cooling-off right available to a consumer can be seen as a virtue. This will be determined by assessing the choice available to consumers in each country⁹⁸ and also whether or not the legislature and supplier make a habit of choosing the mean.

Information requirements

Clearly suppliers in all three countries have a duty to comply with some form of information provision.⁹⁹ However, suppliers have a choice whether or not to inform the consumer of the cooling-off right at all (despite the sanctions related to non-compliance) and also have a choice as to how and when the consumer is informed. It is submitted that suppliers should always choose to inform consumers of the cooling-off right (and relevant limitations and exclusions) at the earliest possible point in the conclusion of consumer agreements and this must be done in plain and understandable (intelligible) language. South Africa provides more comprehensive guidelines on what information in plain language would be, as it must comply with section 22. No such guidelines exist in the UK and Belgium.

On the other hand, in terms of the CPA, suppliers should also be compelled (as is the case in the UK and Belgium) to give specific and not merely general information to the consumer regarding his or her cooling-off right and this should include the exclusion of the right in certain instances, as well as the reduction in costs from the amount to be repaid to the consumer. Similarly, failure by South African suppliers to comply with the information requirements should result in an extension of the cooling-off period as a sanction for non-compliance in favour of the consumer.

Content of the consumer's cooling-off right and cancellation periods

The comparative analysis above indicates that in principle the content of a consumer's cooling-off right remains the same. The consumer will have a cancellation period in which to exercise his or her cooling-off right and how it is exercised must comply with statutory requirements. The result of the consumer exercising his or her cooling-off right is also the same in that the

⁹⁸ See comprehensive discussions of individual country above.

⁹⁹ See discussion of information requirements for each country above.

legal obligations in terms of the consumer agreement (be it by South Africa, the UK, or Belgium) falls away and some form of restitution will take place. The cancellation period in terms of the CPA is five business days, but may be a longer period in actual calendar days. This is so due to the calculation of 'business days' in terms of section 2(6) of the CPA. Business days are calculated by excluding the day on which the first event occurs (day on which the consumer agreement is concluded) but including the day on which the second event occurs (for example, the delivery of the goods). Saturdays, Sundays and public holidays are also excluded from the calculation of business days in terms of the CPA.¹⁰⁰ In the case of the UK and Belgium, the cancellation period is fourteen calendar days, but the commencement of the period will vary in accordance with the type of consumer contract.¹⁰¹

Limitations and exclusions

In terms of the South African position, unscrupulous suppliers may always choose to either exclude or limit the exercise of the consumer's cooling-off by bringing the goods under the application of section 20(3) to (6) of the CPA. The limitations in terms of section 20 are not without merit as the return of any unsafe goods or the return of goods blatantly reassembled or altered, should not be allowed. (This is also the case in the UK and Belgium.) On the other hand, it could be argued that the wording of section 20 is so wide that it leaves the back door open for South African suppliers always to find a way by which to exclude or limit the cooling-off right of the consumer under the CPA. This confirms the importance of choosing the mean or midway between over-regulation and protection of consumers on the one hand, and inadequate or under-regulation causing unequal bargaining positions between the consumer and the supplier on the other. In the case of South Africa, such action would fall fowl of the aim of the CPA which attempts to correct unequal bargaining positions without stifling economic growth. In this instance it is the responsibility of suppliers to make a habit of treating consumers fairly and finding a mean between serving their own interests and allowing (*bona fide*) consumers an opportunity to exercise their cooling-off rights.

In the same vein, the legislature in each specific country has a choice as to the wording and scope of application of a cooling-off right within a particular piece of legislation. It is uncertain from the discussion of the

¹⁰⁰ Section 2(6) CPA.

¹⁰¹ See table in the discussion of the UK position above.

South African position in terms of the CPA, whether the legislature has made a habit of choosing the mean. There might be an over-regulation in the case of South Africa as an interpretation that is most beneficial to the consumer must be followed¹⁰² and the cooling-off right under section 16 of the CPA is supplementary to any other right including any common-law rights available to consumers.¹⁰³ On the other hand, there might also be inadequate regulation by the South African legislature (taking into account the comparative analysis of the UK and Belgium) because direct marketing as a prerequisite for the exercise of the consumers cooling-off right inhibits its application. At the same time the definition of direct marketing in terms of the CPA includes elements of on-premises, distance, as well as off-premises consumer contracts as defined in the UK and Belgium. This seems to point to inadequate regulation on the part of the UK and Belgium as no cooling-off right will be available to consumers who concluded on-premises contracts in these countries. On the whole the implementation of the Consumer Rights Directive in these countries seems commendable. This said, however, the extensive lists of restrictions and exclusions where the cooling-off right will not apply is unfortunate. It is understandable that it would be unfair on suppliers of rapidly consumable goods (bread or dairy products, for example) to take back goods where the consumer has fourteen days in which to return the goods and cancel the contract by which stage the goods are already past their expiry date or have perished. However, goods whose prices fluctuate due to market fluctuations beyond the trader's control and the provision of accommodation, transport of goods, vehicle rental services, catering, or services related to leisure activities where the contract includes a specific date for performance, should not prevent a consumer from exercising his or her cooling-off right and should not be excluded. These are exactly the type of consumer agreement where the consumer should be allowed to take advantage of his or her cooling-off right.

It is submitted that the application of consumer legislation in a particular country as regards the overall application of the particular Act, but also specifically to cooling-off rights, offers perfect examples of where the legislature has unfortunately not yet made a habit of establishing the mean. In the case of South Africa and the CPA, one encounters both over-regulation and inadequate regulation of the consumer's cooling-off right. This is due to the broad scope of application of the CPA in general, but also

¹⁰² Sections 2(8) & (9) CPA.

¹⁰³ Section 16(3) CPA.

because of the contents of section 16 governing the cooling-off right of the consumer, which in turn provides for uncertainty rather than certainty.

In the UK and Belgium, however, there may be under-regulation due to the strict general application of consumer legislation and because many categories of consumer agreement are excluded from the application of the specific cooling-off legislation. The information requirements and sanctions for non-compliance are, however, a step by the UK and Belgian legislatures to make a habit of choosing the mean and making the cooling-off right of the consumer a virtue rather than a vice. In the South African context as well, education is needed alongside legislative amendments to the CPA if the application of a virtuous cooling-off right for consumers is to be achieved.