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## **Cyber Consumer Protection and Fair Trading in the Netherlands**

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### **1. Introduction**

In 2004, the Dutch spent around €1.5 billion on purchasing goods through the internet. Compared with the year 2003, this means an increase of 30%. Almost 4 million Dutch made online purchases in 2004. On average, their purchases were an amount of €424, €60 more when compared to the year 2003. This rise is caused by an increase in the sale of travel arrangements, flight tickets and insurance via the internet.<sup>1</sup>

In this contribution, we describe the legal framework that governs online purchases by consumers. This legal framework mainly protects the interests of the consumer.

### **2. The Legal Framework**

In general, the purchase of goods is governed by the Dutch Civil Code ('DCC'). The online purchase of goods is governed by the same rules of law as those governing the traditional purchase of goods. The DCC provides for various mandatory rules which govern consumer purchases in particular.

Online purchases are characterized by the 'distance' between buyer and seller. Buyer and seller do not meet each other and the buyer does not have the opportunity to inspect the goods prior to the conclusion of a purchase agreement. For distance purchases a specific set of rules is laid down in Section 9A of Book 7, DCC. This section basically implements the EC Directive on the protection of consumers in respect of distance contracts (97/7/EC).<sup>2</sup>

The aforementioned Section 9A gives the online consumer various rights which he does not have in relation to a traditional purchase. Likewise, the seller has various obligations which he does not have outside the scope of a distance sale.

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<sup>1</sup> Thuiswinkel Markt Monitor 2004, research carried out by Blauw Research.

<sup>2</sup> Section IX a was inserted pursuant to the Distance Contract Act (*Wet verkoop op afstand*) of 21 December, 2000 (*Staatsblad* 2000, 617).

The most important right granted to online consumers is a cancellation right, i.e. the right to rescind online contracts for convenience. Within seven working days after the receipt of the goods purchased through the internet, the consumer may cancel the online contract. If the offering party has not provided the consumer with certain information, the period within which the cancellation right can be exercised is extended to three months. In the event of cancellation the consumer is only liable for the cost of returning the goods. The offering party must return all payments made by the consumer.

The cancellation right does not apply to all online purchases of consumer products. No right of cancellation for convenience is granted with respect to, amongst others, audio and music CD's and computer programs if the seal has been broken, newspapers and perishable products. Furthermore, certain types of purchases are entirely excluded from this specific consumer protection. For instance, a consumer who purchased a product through an online auction cannot invoke this protection.

The consumer who purchases services online has, in principle, the same protection as the purchaser of goods, albeit that certain services such as financial services are excluded from this protection (Section 7:46 e DCC).

The electronic offering of financial services is to be given its own legal framework in the Financial Services Act, which implements the EC Directive concerning the distance marketing of consumer financial services (2002/65/EC). This new Act is described further below. First, we shall give a further analysis of the protection offered in relation to online consumer purchases.

### **3. The Obligation to provide Information**

Prior to the conclusion of an online contract, the offering party should provide the purchaser with mandatory information (Section 7:46 c DCC):

- a) the identity and in the event a pre-payment is prescribed, the address of the seller;
- b) the main characteristics of the goods;
- c) the price, inclusive of all taxes;
- d) if applicable, the costs of delivery;
- e) the manner of payment, delivery and execution of the distance purchase;
- f) information on the possibility to rescind agreements;
- g) information on the costs of communication, if these deviate from the standard costs;
- h) the term for the acceptance of the offer or the term during which the price will remain valid;
- i) in the event of continued performance contract – the minimum term of the agreement.

At the conclusion of online purchase or timely thereafter, the seller has to provide certain information, if and when this information has not been provided prior to the conclusion of the purchase agreement. The information that should be provided in writing – an e-mail would suffice – concerns:

- a) the information mentioned above which should have been provided prior to the conclusion of the online contract;
- b) the requirements for exercising the right to rescind agreements;
- c) the address of seller's office where the buyer can file a complaint;

- d) to the extent applicable, information about the guarantee and the services which have been offered in relation to the distance purchase;
- e) the requirements for termination if the distance purchase relates to a period of more than a year or an indefinite period.

If the online seller does not provide this information, the consumer can demand that this information be provided. If the consumer incurs damages as a result of a lack of information, the seller should compensate the buyer. The most far-reaching consequence of the seller not complying with his obligation to provide the mandatory information, is the extension of the cancellation right to three months.

#### **4. The Cancellation Right**

As mentioned above, the online buyer has a term of seven working days to rescind the purchase contract. The parties can agree to a longer period. This term of seven days is mandatory as far as the protection of the consumer is concerned, the parties cannot agree to a shorter period.

The period of seven working days starts the day following the receipt of the goods. If the information mentioned above has not been provided to the purchaser at the execution of the distance purchase or timely thereafter, the aforementioned term is extended to three months.

If during the three months period, however, the mandatory information has been provided, the term of seven working days starts on the day following the day on which the information was provided.

The cancellation right of rescission does not apply to certain goods. These goods are described as:

- a) goods which have been made according to specifications of the buyer;
- b) goods which clearly have a personal character;
- c) goods which cannot be returned in view of their nature;
- d) goods which can perish or go out of date quickly;
- e) audio, video and computer programs if the buyer has breached the seal of the information carrier;
- f) newspapers and magazines;
- g) goods with a price which is linked to fluctuations of the financial market which cannot be influenced by the seller.

#### **5. Legal Effect of the Cancellation Right**

The cancellation right should be exercised by written statement. An e-mail suffices for this purpose. The statement must be received by the seller (Section 3:37 DCC) within seven working days. The legal effect of exercising the cancellation right is rescission of the contract.

In principle, rescission of an online contract has the same legal consequences as rescission of a contract on the basis of a breach of a contractual obligation. The only difference is that rescission of an online contract – in the absence of a breach – does not entitle one of the parties to damages.

Following a rescission of a contract and thus also an online purchase contract, the parties have to undo the performance of the agreement. In relation to online purchase contracts which are rescinded – in the absence of a breach – specific rules apply:

- a) the seller may not charge any costs to the buyer, apart from the cost of resending the goods;
- b) the purchase price should be paid back to the buyer without incurring costs to him;
- c) repayment must take place as soon as possible, but ultimately within thirty days following the rescission.

A rescission of a contract has no retroactive effect. This means that the legal basis for the obligations that were carried out by the parties remains in place. Accordingly, the parties do not have an action based on undue payment (Section 6:203 DCC). The initial obligations of the parties are replaced by an obligation to undo the obligations which were already carried out by the parties.

In the event of rescission, the buyer has the legal obligation to return the purchased product in the same condition as it was received. If the buyer cannot return the product in such same condition, he has the legal obligation to compensate the seller for the damages, provided that the shortcoming can be attributed to him (Section 6:74 DCC). In general, a shortcoming cannot be attributed to a party, if the shortcoming cannot be imputed to his fault, or cannot be attributed to him according to statutory provision, legal act or according to generally accepted standards. Here it is important that the risk of the goods is transferred to the buyer upon the delivery of the goods to him (Section 7:10 DCC). Whether the ownership of the goods is transferred at the same time, is irrelevant. The physical delivery is decisive for the transfer of the risk. In view of this transfer of risk, we are of the opinion that the buyer should, in principle, always compensate the seller for the damages which he incurs if the product is not returned in its original state. This also applies if the goods are damaged as a result of an event beyond the control of the buyer.

## **6. Limitations to the Cancellation Right**

A question which has been debated in the Netherlands is where the cancellation of the consumer finds its limits. The cancellation right can be limited by the rules of reasonableness and fairness. Also, the principle which prohibits the abuse of rights may play a role here.

In short, the rules of reasonableness and fairness determine that a statutory or contractual provision is not applicable between the parties if and when this would be unacceptable in the given circumstances according to criteria of reasonableness and fairness (Sections 6:2 and 248 DCC). These provisions determine when a party will not be able to invoke a statutory or contractual provision. They also apply to the rescission of an online contract. The Dutch Supreme Court has ruled that the conclusion that a party cannot invoke a statutory provision should not be reached easily. A high standard applies.<sup>3</sup> A mere conflict with the principle of reasonableness and fairness is not sufficient to justify this sanction. The fact that invoking a contractual or statutory provision is unreasonable, is not sufficient to exclude application of this provision. A party is allowed to act unreasonably. Acting in violation of the principle of reasonableness and fairness should be considered 'unacceptable' before the conclusion can be reached that a statutory or contractual provision will not apply.

A legal right cannot be exercised if it is abused (Section 3:13 DCC). A right is abused if it is solely used to harm another party. There can also be abuse (i) if a right

<sup>3</sup> HR (Dutch Supreme Court) 9 January 1998, *NJ* 1998, 363 (*Gemeente Apeldoorn v Duisterhof*); HR 25 February 2000, *NJ* 2000, 471 (*FNV v Maas*).

is used for a purpose other than the purpose for which the right was granted or (ii) if in all reasonableness the right cannot be exercised in view of the disproportionate relationship between the interest that is served by the exercising of the right and the interest which would be harmed.

Can a consumer, for instance, exercise his cancellation right if the purchased product has been used? In general, the relevant statutory provisions do not state that a buyer cannot exercise his cancellation right if a purchased product has been used. A hypothetical case discussed in Dutch literature concerns a consumer who buys a tuxedo through the internet.<sup>4</sup> The consumer wears the tuxedo for one evening and returns it the next day. The tuxedo smells of cigars. Can the consumer still exercise this cancellation right?

Another example discussed in Dutch literature concerns a consumer who bought a walkman through the internet. The walkman is to the consumer's liking and he starts to use it. The next day, the consumer accidentally drops the walkman on the floor. The walkman is no longer working and damaged. The consumer then remembers its right to rescind the agreement and returns the damaged walkman.<sup>5</sup>

Here there are two opposing views. One view is that in these cases the consumer can exercise his cancellation right, but that he has the obligation to compensate the seller for damages. In this view there is no need to apply the principle of abuse of right or the principles of reasonableness and fairness which could prevent a party from exercising a legal right.

A problem with the application of these principles is that they require an insight into the reasons for rescission of the contract. The applicable statutory provisions clearly state, however, that the buyer can rescind the agreement without giving any reasons. This means that the consumer can rescind the agreement for any reason whatsoever.

Nevertheless, a more limited interpretation of the cancellation right is possible. The opposing view<sup>6</sup> holds that the consumer just does not have to state his reasons for cancellation. This does not necessarily mean that he can exercise his cancellation right at all times. In this view, it is accepted that, under circumstances, the buyer will have to explain why he is to rescind the online contract. In this view, the buyer who purchased the tuxedo to wear it for only one day with the intention of returning it the next, would abuse his legal right or violate the rules of reasonableness and fairness. Where the seller invokes these principals the buyer must give his reasons for cancellation. A similar conclusion is reached with respect to the walkman which was dropped on the floor and was subsequently returned to the seller.

In our view, these principles should be applied reluctantly. Accordingly, we do not see a reason in the examples given above that the consumer should be prevented from exercising his cancellation right, keeping in mind the wide protection that is given him. A satisfactory result can be reached by applying the rules governing rescission of a contract.

The relevant rule is that the consumer has to return the purchased product in its original state. If he cannot return the product in its original state, he has the obligation to compensate the seller for the damages. As in general the value of used goods is lower than the value of unused goods, the buyer has to compensate the seller for the difference. If the product has been used, the seller will not be able to sell it to another

<sup>4</sup> Hijma 2004, p. 83.

<sup>5</sup> Hijma 2004, p. 78.

<sup>6</sup> Breedveld-de Voogd 2005, p. 191-193.

party as a new product. The related economic loss should be for the account of the buyer.

If a product which has been used cannot be distinguished from an unused produced, the buyer will be able to return the product in the original state, despite its use. If the tuxedo still looks brand new after it has been worn for some time, the interests of the seller are not harmed.

The interests of the seller are sufficiently protected by the obligation of the buyer to compensate his damages. In the example of the walkman, the damages will probably equal the cost price of the walkman for the seller.

There is also a practical issue to be considered. The intentions of the buyer are hard to prove. It seems more in line with the statutory rules governing the cancellation right to disregard the intention of the buyer entirely. The matter could then be brought back to establishing whether or not the purchased product is still in its original condition. If not, the buyer should compensate the seller. After all, the goods are for the risk and account of the buyer as soon as he has received them – unless the parties have agreed otherwise.

This seems a straightforward approach but in practice, complications can arise. If the seller seeks compensation from the buyer he could have the burden of proof that the product is no longer in its original state, i.e. in the state in which it was delivered to the consumer. If a damaged product is returned, it will be difficult to establish whether the damage occurred prior or after the delivery to the buyer.

## **7. Application of the Cancellation Right to other Contracts**

It should be noted that the cancellation right for distance contracts are not limited to contracts concluded through the internet. Contracts concluded by telephone or telefax can also be regarded as distance contracts. Moreover, the scope of the cancellation right is broader than distance purchases. It also applies to contracts for the delivery of services, lease agreements or transportation agreements, if these are concluded at a distance.

The principles discussed above, also apply to the cancellation, i.e. rescission, of these types of contracts.

## **8. International Dimensions**

One cannot deviate by contract from the rules set out above to the detriment of the consumer, as these are mandatory provisions of Dutch law. Of special note is that a consumer that has its residence in the Netherlands can also rely on these rules if the online contract is not governed by Dutch law. The same applies to the residents of other EU Member States. Accordingly, a supplier based in the US can be faced with European residents who rely upon a cancellation of an online contract for convenience. If the US supplier has not fulfilled its information requirements – possibly because he was not aware of them – the consumer can cancel the agreement within three months after the goods were delivered to the consumer in Europe.

## **9. Alternative Dispute Resolution**

In most cases it will not be economical for an individual consumer to bring legal action against a seller who does not comply with his obligations. The legal costs would be prohibitive. In this area, alternative dispute resolution ('ADR') may offer a solution. This obviously only in cases where the seller has agreed to ADR.

### 9.1. *Home-shopping Association*

A majority of the shops in the Netherlands that sell on the internet are connected to the Home-shopping Association (*Nederlandse Vereniging Thuiswinkel Organisatie*). This Association introduced a quality mark in the year 2001: the Home-shopping quality mark. This mark is supported by the Dutch Consumers Association. To use the mark, the party must become a member of the Home-shopping Association. The membership is meant for Dutch companies that realize part of their turnover through sales via the internet, catalogues, mail etc. to consumers and which, therefore, fall under the relevant laws and regulations. Currently, the Association has more than 250 members and is a rapidly growing trade association in the Netherlands. With this quality mark, the member companies make a commitment to the consumers that they conform to the applicable rules and regulations and conform to the code of conduct of the Association. The member companies have agreed to ADR and should respect the outcome of the resolution given by the Home-shopping Dispute Resolution Committee.

In 2004, the Dutch Consumers Association investigated 300 home shopping internet sellers to assess whether they abide by the rules concerning distance contracts. Of the researched internet sellers, 37 (12%) were a member of the Home-shopping Association. The overall outcome of the research was disappointing, but it showed that all or most members of the Home-shopping Association did abide by the rules.

The Home-shopping Association has its own Dispute Resolution Committee, falling under the Dispute Resolution Committees Office in The Hague.<sup>7</sup> If a consumer has a problem with an online purchase, he should turn to the Dispute Resolution Committee of the trade association to which the (online) shop is connected. The decision of the committee leads to a binding third-party ruling. The fee differs from committee to committee but never exceeds €100. The Home-shopping Dispute Resolution Committee fee is only €25, which is paid while submitting the complaint and only when the committee has decided that the case is likely to succeed. If the applicant wins the case, the offering party must pay the fee to the applicant.

A few statistics of the Home-shopping Committee: in 2004, a total of 114 complaints were submitted. In the same year, 16 decisions were given by the committee, 14 of which were submitted the previous year. The major part of the complaints could not be treated, because the consumer did not comply with the formal requirements. Furthermore, many of the complaints filed were settled during the procedure. The money at stake amounted on average to €1.977.

### 9.2. *Examples of Cases of the Home-shopping Committee*

Below we describe some cases which were handled by the Home-shopping committee.

In one case, a consumer bought a battery on the internet, but did not read the advertisement properly, as a result of which, he bought the wrong battery for his notebook. The consumer wanted to return the battery, but the offering party refused. The consumer turned to the Home-shopping committee and demanded rescission of the agreement. The offering party claimed that the product had been especially ordered for the buyer and that the buyer had already opened the packaging, as a result of which the battery had become unsaleable. Furthermore, the offering party referred

<sup>7</sup> See the website: <<http://www.geschillencommissie.nl>>.

to its general terms and conditions. The committee determined that the question in this case was whether the consumer has the possibility to exercise his cancellation right without giving reasons. The Committee decided that the consumer could exercise his right, despite the fact that the packaging had been removed. If the general terms and conditions of the offering party restrict the consumer for that matter, they are legally non-binding. The seller had to accept the battery back and refund the money to the consumer.

In another case, a consumer responded to an online advertisement and concluded an online contract via e-mail. He bought two samples of an all-in-one device that prints, scans and copies. The price was €65. The offering party confirmed the purchase and gave instructions on how to download the invoice. The consumer paid €130. A few days later, the offering party informed the consumer that there had been a mistake: the correct price per device was €259. He notified the consumer and let him choose either to pay the remaining amount and have the products delivered or to cancel the contract. The consumer refused both. He was of the opinion that he had a valid purchase agreement, which had even been confirmed by the offering party. The consumer claimed delivery of the products for the amount of €130. The offering party claimed that, according to its general terms, the quotation was always made under reservation of errors. He claimed that the incorrect price was due to a conversion error, which occurred when converting guilders into euros. Furthermore, he stated that before the order was carried out, the consumer was notified about the error in the price and was given the choice, either to buy and pay the remaining amount or to cancel. The order was not confirmed in writing and therefore an agreement was not concluded. The Committee decided that the offering party had sent an invoice to the consumer, which can be considered as a confirmation of the order. The fact that the billing was automatic was for the account of the offering party. This, however, did not mean that the consumer had the right to order at the price mentioned in the offer. This would amount to a violation of the principles of reasonableness and fairness, according to the Committee. When comparing prices, it appeared to the Committee that the cheapest offer for the same product was €310. Because there was such a big difference in price, the consumer could have known that the price mentioned in the offer was incorrect. It would not be fair to allow the consumer to buy the products for the amount of €130 each. The Committee decided that the consumer had the right to buy the product for the correct price, €259 each. On the other hand the Committee found the offering party to blame that the consumer had been, for a considerable period of time, under the impression that he had encountered a great bargain. Accordingly, the offering party should compensate the consumer for the postage and telephone costs, amounting to €45.

In the last case we mention, a consumer concluded an online contract for the purchase of a laptop. A day after conclusion, the consumer notified the offering party that he would like to cancel the agreement within seven days after receiving the product. Three days later, the consumer returned the laptop, but did not receive his money back from the offering party. The offering party claimed that the consumer cannot rescind the agreement, because he had already turned the laptop on. The Committee was of a different opinion. The consumer had the right to terminate the agreement within seven working days. The offering party should refund the purchase sum within 30 days. The Committee took the view that the cancellation right was granted to the consumer for the reason that it is impossible for the consumer to know everything about the product before having bought and received the product. Hence, the consumer is entitled to a reasonable time for reflection. The consumer must,

however, take into account the interests of the offering party and do no more than necessary to see whether the product is usable for the intended purpose. By turning on the laptop, the consumer stayed within these limits and, therefore, maintained the right to cancel the online contract. The offering party had to refund the purchase sum of € 1,504.16 to the consumer.

## **10. Electronic Signature**

An important issue regarding the enforcement of online contracts, is proof. The authenticity and, therefore, the reliability of electronic documents and messages may be difficult to establish as they can be tampered with. Under Dutch law, electronic documents and messages can, in general, be used as evidence. The fact that electronic documents can be used as evidence does not necessarily mean that they are of great evidential value, as the courts are free in their assessment of evidence. The ability to prove the authenticity of the document depends to a large extent on the reliability of the techniques used. The use of the international safety protocol Secure Electronic Transactions (SET) or the use of Trusted Third Parties, will certainly increase the evidential value of electronic documents.

Many of the uncertainties about proof of electronic transactions can be overcome by using electronic signatures. In legal transactions, an electronic signature that meets certain reliability requirements is assumed to have the same status as a handwritten signature on paper.

Electronic signatures can be used to secure an online transaction. Currently, electronic signatures do not play an important role with regard to the conclusion of online contracts by consumers, although this will probably change in the future.

In 2003, the Dutch Government finally implemented the Directive on a Community framework for electronic signatures (99/93/EC) in the Dutch Electronic Signature Act.<sup>8</sup> This Act added a section to the Dutch Civil Code (Section 3:15a and further DCC). The most important rule is that if an electronic signature meets certain reliability requirements, it can be considered an alternative for a handwritten signature. The technical method of authentication (identification of the sender) as such is not prescribed. The Act distinguishes between two electronic signatures: the regular signature and the advanced signature. The most reliable is the advanced electronic signature, i.e. an electronic signature that (a) is uniquely linked to the signatory; (b) is capable of identifying the signatory; (c) is created using resources that only the signatory can maintain under his sole control; and (d) is linked to the data to which it relates in such way that any subsequent change of the data is detectable. Furthermore, it should be based on a qualified certificate and generated by a secure-signature-creation device. Under Dutch law, an electronic signature can be used as evidence. In practice, an advanced electronic signature more or less offers the same level of proof as a handwritten signature. If however, a court determines that the method of authentication that was being used was sufficiently reliable in the given circumstances, a non-advanced electronic signature could also offer the same proof as an advanced electronic signature.

<sup>8</sup> Dutch Electronic Signature Act (*Wet Electronische handtekeningen*) of 8 May 2003 (*Staatsblad* 2003, 199).

## **11. Fraud with Payment Cards**

Consumers who purchase products online often pay by credit or debit cards. Section 7:46 g DCC protects the consumer against the fraudulent use of his credit card and debit card within the scope of distance transactions. If the credit or debit card of a consumer has been fraudulently used, he has no obligation to pay the amounts charged to him as a result of the fraudulent use, provided the fraudulent use took place in the scope of a distance purchase. This is only different if and when the fraudulent use is the result of a circumstance which can be attributed to the consumer. The consumer should take all reasonable measures to maintain the security of his payment cards. If a consumer does not keep a pin-code secret, the use thereof by third parties could be attributed to him. The consumer also has an obligation to report the loss or theft of his card as soon as possible. Violation of this obligation could lead to the conclusion that the fraudulent use should be attributed to the consumer.

The consumer will, in general, not know whether his card has been used fraudulently in a distance purchase. If he does not recognise a payment as a payment authorised by him, he could ask his bank or credit card company to specify the transaction. The consumer could also ask his bank or credit card company to provide the proof that he authorised the transaction. If such proof cannot be provided, the consumer should be able to rely on the protection against fraudulent use of his credit or debit card.

## **12. Financial Services**

The EC Directive concerning the distance marketing of consumer financial services (2002/65/EC) has not yet been implemented in the Netherlands. The proposal for a Financial Services Act is still pending, and the act is expected to enter into force on 1 January 2006. The submitted proposal has been published. The Financial Services Act specifies the responsibilities of financial service providers with regard to the protection of consumers and provides for rules concerning financial services in general. The Authority Financial Markets (AFM) is charged with supervision of compliance with the Financial Services Act. The Act covers intermediaries as well as providers of financial services, such as insurance companies. The Act deals with both online transactions and traditional transactions. Here also the consumer who concludes the transaction online or at a distance is offered more protection. Also in this context, the offering party has a mandatory obligation to provide certain information to the consumer.

Article 40 of the Act gives the consumer a cancellation right. The consumer has the right to rescind the contract within fourteen calendar days from the day of its conclusion. If the mandatory information was not provided, this term starts on the day the information was provided to the consumer. For a life insurance contract, the term during which the cancellation right can be exercised is thirty calendar days. Here also, the term is extended if the mandatory information has not been provided.

In the case of linked contracts, rescission of the online contract also implies rescission of the linked contracts.

Article 41 of the Act provides for the consequences of rescission. In the case of rescission of the online contract, the service provider will be able to demand compensation for the financial product he delivered prior to rescission, provided he has informed the consumer beforehand about this compensation. However, the financial service provider may only start executing the contract after having been given permission by the consumer to do so. This permission can be given separate

from the contract or it can be laid down in the contract. If the consumer did not give the provider permission to deliver the service immediately following the conclusion of the contract, he cannot be required to pay compensation to the service provider.

Worthy of note is that the rules on the cancellation right related to financial services differ somewhat from the rules we discussed above in relation to purchase contracts for goods and other services. For example, with respect to the cancellation of a financial services contract it is explicitly stated that the consumer can exercise his cancellation right by sending a statement to that effect to the provider within the specified term. The statement of the consumer does not have to reach the provider within that term.

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