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Salome Jokhadze

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Univ.- Prof. Dr. Christiane Wendehorst, LL.M.

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## 1. Introduction

Market regulation is a persistent concern for the proper order of things at all stages of society, where the seller's intrinsic tendency to gain an advantage over the buyer is held accountable. The efficient functioning of the modern market would be unthinkable without the protection of consumers' rights, who are seen as integral members of the market and recognized as self-sufficient beneficiaries of commercial relationships. Furthermore, customers are referred to as "homo economicus passives," or "invisible (passive) players" in the regular development and functioning of the market.

Consumer law is a relatively new field. Because it has no significant historical origins, it is constantly revalued and developed. Effective consumer protection procedures will be implemented in order to meet the demands of community development and market stability.

From the 1980s to the present, off-premises contracts have remained relevant. In today's market, on the other hand, nearly anything can be supplied to customers outside of the normal trading zone of merchants. Traders have become accustomed to making unexpected appearances at conferences, seminars, informal talks with coworkers, and other public locations. Because door-to-door trading is growing more prevalent, safeguarding the customer's interests is a top priority in such transactions.

The concept of a contract concluded off-premises is covered in the current thesis. The primary goal of the thesis is to explore the content, parties, and location of contracts concluded outside of business premises in accordance with the Consumer Rights Directive. The thesis lists the issues regarding consumer rights and evaluates the current European legislative frameworks on the subject.

When they make a remote purchase of a good or service, European consumers are better protected. They gain from a variety of contractual protections and standardized European laws. The thesis explores the special information requirements for off-premises contracts and distance contracts, as well as the responsibility placed on sellers while conducting business remotely. The thesis further emphasizes that before a customer is bound by a distance contract or any related offer, certain information must first be provided to them.

The EU law grants consumers a significant instrument in the form of the right of withdrawal which is also included in this study. This model was created to equalize the distance contract in the consumer's favor, albeit in a different way. The ways how the right of withdrawal gives the distant customer the ability to reconsider his or her contract decision is also discussed in this thesis. The conditions and consequences of exercising the right of withdrawal pose a challenge. The study highlights the cases when the consumer has the right to withdraw from the contract and cases where this right does not exist. The goal of the study is to investigate issues and loopholes that may require future changes, such as legal gaps, uncertainty, and insufficient treatment.

## 2. Consumer Rights in European Union

### 2.1 Historic development

The framework for a common legal order for the protection of consumer rights on the continent of Europe has been defined since the founding of the Union of European States. The European Coal and Steel Community was founded in 1957 with the signing of the Treaty of Rome, which included the construction of a common European market. The single market allowed for the elimination of trade barriers between European Union member states, as well as free movement of commodities, services, capital, and people.<sup>1</sup>

The Treaty of Rome, on the other hand, focused on production and distribution. Consumers, their rights, and their well-being were only loosely promoted in the rapidly expanding consumer products sector, with no concrete legislative regulation. At the time, the European Union lacked the legal foundation and authority to ensure proper protection of consumer rights, let alone pass particular legislation in this area.<sup>2</sup>

The European Union ratified the Charter of Consumer Rights in 1973, and in 1975, in its Resolution on Consumer Rights and Interests, it acknowledged for the first time the importance of consumer rights for the single market. During this time, however, the European Union lacked any unique competence in the area of consumer protection.<sup>3</sup> Nonetheless, the European Union approved a preliminary consumer protection program in 1975, with the Council naming five basic consumer rights: the right to health and safety; the right to economic interests protection; the right to compensation; the right to information and education; and the right to representation (right to be heard).<sup>4</sup>

The Single European Act, which incorporated revisions and additions to the founding treaties of the European Communities, was signed by the Member States of the European Union on

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<sup>1</sup> Norbert Reich, Hans-W. Micklitz, Peter Rott, Klaus Tonner, *European Consumer Law* (2nd edn, Intersentia 2014) 9.

<sup>2</sup> Norbert Reich, Hans-W. Micklitz, Peter Rott, Klaus Tonner, *European Consumer Law* (2nd edn, Intersentia 2014) 10.

<sup>3</sup> Luisa Antonioli, 'Consumer Law as an Instance of the Law of Diversity' (2006) Vol.30:855 *Vermont Law Review*, 864 <<https://lawreview.vermontlaw.edu/wp-content/uploads/2012/02/antonioli.pdf>> accessed 13 May 2022.

<sup>4</sup> Paolisa Nebbia, Tony Askham, *EU Consumer Law* (Richmond law and tax, 2004) 21.

February 28, 1986. The Single European Act was the first comprehensive legislative act to institutionalize European political cooperation, and it established the European Council as one of the Union's institutions, with the competence to govern a number of regional concerns, including consumer rights. The European Act changed all major internal market laws, including, among other things, the requirement to guarantee a high level of consumer protection, which had an indirect impact on consumer protection law.<sup>5</sup>

An important step was taken in 1992, when the Treaty establishing the European Union was signed. The Treaty on European Union, also known as the Maastricht Treaty, was signed on February 7, 1992, in the city of Maastricht in the Kingdom of the Netherlands. The European Parliament's power was enhanced as a result of the Maastricht Treaty; yet, several topics, notably in the socio-economic realm, could not be agreed upon by the states. There was consideration of developing a single social policy, but this chapter was finally omitted since member states viewed social policy to be a domestic matter. As a result, the question of a single consumer protection policy has yet to be resolved. In terms of the legal framework for consumer protection, the Maastricht Treaty positioned consumer rights as "ancillary" rules that, on the one hand, regulated the internal market while also influencing state laws.<sup>6</sup>

The need for developing standard legal norms on a range of topics, including the preservation, and strengthening of consumer rights, has been elevated by the faster processes of globalization. The Amsterdam Treaty was essential in this regard. The Treaty of Amsterdam, known as the Treaty of Amsterdam, was signed in the capital of the Kingdom of the Netherlands in 1997.

The Amsterdam Treaty defined consumer rights independently and strengthened the Council's authority in this area. In particular, Article 129a of the Maastricht Treaty was replaced with Article 153, which defined the Union's consumer rights strategy. According to the named article, the Union is required to promote the protection of consumers' health, safety, and economic interests, as well as the protection of consumers' right to information through education and self-determination, in order to ensure a high level of protection of consumers'

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<sup>5</sup> Luisa Antonioli, 'Consumer Law as an Instance of the Law of Diversity' (2006) Vol.30:855 Vermont Law Review, 863 <<https://lawreview.vermontlaw.edu/wp-content/uploads/2012/02/antonioli.pdf>> accessed 13 May 2022.

<sup>6</sup> Norbert Reich, Hans-W. Micklitz, Peter Rott, Klaus Tonner, European Consumer Law (2nd edn, Intersentia 2014) 12.

rights. The obligation to protect consumer rights is enshrined in relevant European Union acts, and following these amendments, the conciliation procedure is used in the imposition of any consumer protection measures under Articles 153 and 95 of the same Act, which is consistent with national law of the Member States.<sup>7</sup>

The Nice Treaty of 2001, which came into effect on February 1, 2003, is the following act. It further emphasized the importance of the European Union protecting consumer rights within the proper legal framework. Article 153 of the Amsterdam Treaty is converted to Article 169. The Charter of Fundamental Rights was unanimously adopted as a result of the Nice Agreement.

The Lisbon Treaty, which modified the Treaty on European Union and the Treaty creating the European Union, underlined the need to improve and defend consumer rights. It was signed in Lisbon on December 13, 2007 and came into effect on December 1, 2009. It should be highlighted that the Lisbon Treaty made no significant changes to the European Union's ability to protect consumer rights at the regional level.

Consumers are regarded autonomous beneficiaries of the European Union's economic links, according to the above-mentioned foundational acts, and safeguarding their freedom of choice is one of the key interests of European governments.<sup>8</sup>

## 2.2 Consumer Rights in European Directives

To remove economic obstacles between states after the foundation of the European internal market, new regulations must be introduced, which will ensure, in parallel with each country's national legal system, the establishment of common methods in regional relations. Directives are the means by which the European Union's member states develop a consistent legal system, notably in consumer rights.<sup>9</sup>

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<sup>7</sup> Norbert Reich, Hans-W. Micklitz, Peter Rott, Klaus Tonner, *European Consumer Law* (2nd edn, Intersentia 2014) 12.

<sup>8</sup> Marco Dani, 'Assembling the Fractured European Consumer' (2011) LEQS Paper, No. 29/2011, LSE 'Europe in Question' Discussion Paper Series, 13 <[http://eprints.lse.ac.uk/53284/1/Libfile\\_repository\\_Content\\_Europe%20Institute\\_LEQS%20Discussion%20Paper\\_LEQSPaper29.pdf](http://eprints.lse.ac.uk/53284/1/Libfile_repository_Content_Europe%20Institute_LEQS%20Discussion%20Paper_LEQSPaper29.pdf)> accessed 12 May 2022.

<sup>9</sup> Norbert Reich, Hans-W. Micklitz, Peter Rott, Klaus Tonner, *European Consumer Law* (2nd edn, Intersentia 2014) 43-44.



Because the consumer is considered a "weak" party at the stage of contract formation, or more accurately at the previous contractual stage, the component of the European regulations dealing with consumer rights has the largest impact on contract law. As a result, consumer rights directives have had a substantial impact on contract law in the Member States; nonetheless, contract law has not altered totally, and has focused on only a few areas. In this regard, imposing an obligation to offer information to the trader, providing consumers the ability to withdraw from the contract, and in general, the excess of one-sided imperative standards, which was previously unknown in contract law, is a significant innovation.<sup>10</sup>

The attempt to regulate the same connection under various directives, which slowed the growth of the European internal market, was a major issue. This was especially true when it came to consumer rights.<sup>11</sup> The unification of the concept of consumer remained unresolved: either individuals were recognized as consumers, or legal entities were also protected on a par with consumers. As a result, European Union legislation were to clarify the extent and foundation of consumer status and particular protection measures. The right to withdraw from a contract and to make informed reservations about the responsibility to inform in consumer contracts were also unjustly regulated, which hampered distance commerce and was considered as a roadblock to consumer law harmonization.<sup>12</sup>

The notion of a single market was thwarted by the diversification of medicines.<sup>13</sup> Consumers and enterprises did not take use of all of the internal market's prospects since cross-border trade connections remained undiscovered territory.<sup>14</sup> According to the agenda, three major challenges must be addressed: 1) Strong legal guarantees should be implemented to improve

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<sup>10</sup> Stefan Vogenauer, Stephen Weatherill (eds), *The Harmonisation of European Contract Law* (Bloomsbury Publishing 2006) 85.

<sup>11</sup> Reiner Schulze, *The Right of Withdrawal* in Hans Schulte-Nölke and Lubos Tichy (eds), *Perspectives for European Consumer Law, Towards a Directive on Consumer Rights and Beyond* (European Law Publishers 2010) 13-22.

<sup>12</sup> Martijn W. Hesselink, 'European Contract Law: a Matter of Consumer Protection, Citizenship, or Justice?' (2006) Centre for the Study of European Contract Law Univesiteit van Amsterdam working Paper Series No. 2006/04, 16-20 < [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=946727](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=946727)> accessed 15 May 2022.

<sup>13</sup> Geraint G Howells, 'The Rise of European Consumer Law – Whither National Consumer Law?' (2006) 28(1) Sydney Law Review 63, 69 < <http://classic.austlii.edu.au/au/journals/SydLawRw/2006/4.html>> accessed 17 May 2022.

<sup>14</sup> Geraint G Howells, 'The Rise of European Consumer Law – Whither National Consumer Law?' (2006) 28(1) Sydney Law Review 63, 143 < <http://classic.austlii.edu.au/au/journals/SydLawRw/2006/4.html>> accessed 17 May 2022.

consumer trust; and 2) Flexible methods should be implemented to facilitate the development of trade in the internal market.<sup>15</sup>

Taking these factors into consideration, the European Commission began a process of reviewing and revising consumer rights norms across the EU, with the goal of identifying flaws in existing directives and amendments based on them, as well as laying the groundwork for the adoption of a fully harmonized directive. The project began in 2004 and finished in 2007. The poll results were published and made available to the public in 2008. The project looked at eight European directives<sup>16</sup> and the changes in contract law that resulted from their implementation in Member States' laws. The examination of these acts indicated the most serious concerns relating to the non-uniform regulation of consumer rights relationships in member state treaties, which could only be addressed by maximum harmonization. Consumer and business notions, the ability to withdraw from a contract, and the need to inform were all cited as serious issues.<sup>17</sup>

Finally, on 25 October, a new Directive 2011/83 / EU on Consumer Rights was adopted by the European Parliament and of the Council, amending Council Directive 93/13 / EEC on Unfair Terms in Consumer Contracts; Directive 1999/44/EC of the European Parliament and of the Council; repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

Furthermore, the new directive's dignity is regarded as the refusal of minimal harmonization, which indicates that the relations governed by the directive should be mirrored in similar content in all European Union member states' legislation. Furthermore, the Member States were given until December 13, 2013, to execute the Directive's terms, which they did effectively. Several consumer rights, notably the right to withdraw from a contract, have been significantly impacted by the new directive. It's worth noting that the majority of the activities grouped

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<sup>15</sup> Stefan Vogenauer, Stephen Weatherill (eds), *The Harmonisation of European Contract Law* (Bloomsbury Publishing 2006) 31.

<sup>16</sup> Council Directive 85/577/EEC of 20 December 1985; Council Directive 90/314/EEC of 13 June 1990; Council Directive 93/13/EEC of 5 April 1993; Directive 94/47/EC of the European Parliament and the Council of 26 October 1994; Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997; Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998; Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998; Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999.

<sup>17</sup> Hans Schulte-Nolke, Christian Twigg-Fllesner, Martin Ebers (eds), *EC Consumer Law Compendium, The Consumer Aquis and its Transposition in the Member States* (European Law Publishers 2008) 30.

together under this directive included a right of withdrawal. The new directive goes into further detail on this subject. The term of the right of withdrawal, as well as the conditions under which it might be used, were regulated uniformly. The client's and entrepreneur's obligations to exercise the right of withdrawal were clearly defined, as were the legal implications of withdrawal from the contract, as well as the norm of informing the consumer.<sup>18</sup>

Remotely completed contracts and consumer protection safeguards are the focus of Directive 2011/83/EU. The legal consequences of traders failing to warn consumers became predictable. Customers and traders who are dishonest have their liability increased.<sup>19</sup>

### 2.3 The Notion of Consumer in EU Law

According to the European concept, a consumer is defined by two primary criteria: a) natural person status and b) action beyond the boundaries of trade, business, craft, or profession. Only one European directive does not confine the term "consumer" to individuals: This is Directive 90/314/EEC on travel, leisure, and touring packages, which has been superseded by a new revised directive. This includes the phrase "traveler," which can refer to any individual. It also refers to a legal entity as a contract party, however the recipient of the service cannot travel with an "artificial" legal body (such as a limited liability company) at this time, and his agent is the true beneficiary. The use of services for business purposes, however, is not a reason to refuse to utilize specific protection methods in this scenario.

Even if they have a non-business character, legal persons are not considered consumers under EU legislation (e.g. non-profit associations). The Court of Justice has repeatedly ruled that the EU's definitions of consumers cannot be interpreted broadly. This does not prevent Member States from incorporating broader definitions in minimum harmonized areas into national legislation.

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<sup>18</sup> Geraint G Howells, 'The Rise of European Consumer Law – Whither National Consumer Law?' (2006) 28(1) Sydney Law Review 63, 12 < <http://classic.austlii.edu.au/au/journals/SydLawRw/2006/4.html> > accessed 17 May 2022.

<sup>19</sup> Andreia- Roxana Macsim, 'The New Consumer Rights Directive, A Comparative Law and economics Analysis of the Maximum Harmonization Effects on Consumers and Businesses, The Case of the Cooling-off Period from Online Contracts' (MSc Thesis, Aarhus University 2012) 35-36 < <https://silo.tips/download/the-case-of-the-cooling-off-period-from-online-contracts> > accessed 20 May 2022.

Some legal entities, like as associations, are said to merit treating as customers because they lack expertise and negotiating strength. This has led several Member States to define "consumer" to include legal persons if they are either purchasing goods or services for their own use (like the Czech Republic) or acting as ultimate users (e.g. Greece, Spain). In France, legal persons are occasionally given consumer protection under a similar concept of "non-professional."<sup>20</sup>

Even in the case of sole proprietorships or family firms, small and medium-sized enterprises (SMEs) are never considered as customers under EU legislation. However, several Member States also include them in the scope of consumer protection laws. For instance, small businesses (up to 49 employees) may depend on some provisions regarding unfair conditions in contracts on an equal basis with consumers in the Netherlands. If the contract in question has no direct connection to the trader's commercial activity, courts in France will safeguard solo traders' rights as consumers. In the UK, businesses that purchase items of a type they don't typically deal with may rely on consumer protection against unreasonable terms.<sup>21</sup>

### 3. The protection of Consumer Rights in Case of Off-premises Contracts

#### 3.1 European Model

The legal regulation of off-premises contracts in European regional acts was first implemented in 1985 by adopting Council Directive 85/577/EEC of 20 December 1985<sup>22</sup>. The provisions of this Directive shall apply to contracts whereby a trader supplies goods or services to a consumer and which are concluded during an excursion organized by the trader away from his place of business; or during a visit by a trader to the home of a consumer, to the home of another consumer or to the consumer's place of employment where the visit does not occur at the express request of the consumer.

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<sup>20</sup> The notion of 'consumer' in EU law (2013) Library of the European Parliament, 2 <[https://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130477/LDM\\_BRI\(2013\)130477\\_REV1\\_EN.pdf](https://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130477/LDM_BRI(2013)130477_REV1_EN.pdf)> accessed 17 May 2022.

<sup>21</sup> The notion of 'consumer' in EU law (2013) Library of the European Parliament 2013 3; <[https://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130477/LDM\\_BRI\(2013\)130477\\_REV1\\_EN.pdf](https://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130477/LDM_BRI(2013)130477_REV1_EN.pdf)> accessed 17 May 2022.

<sup>22</sup> Council Directive 85/577/EEC of 20 December 1985 OJ L372/31.

It's worth noting that Directive 85/577 / EEC is commonly referred to as the Doorstep Selling Directive in European consumer law and practice, even though it doesn't address off-premises and public transportation contracts explicitly.<sup>23</sup> The expansion of the Directive's scope is linked to the European Court of Justice's decision in the case of Paola Faccini Dori v. Recreb Srl. which states that Directive 85/577 / EEC applies not only to "door-to-door contracts," but to any contract initiated by the trader outside its trading area.<sup>24</sup>

It's worth noting that the EU's Consumer Rights Directive 2011/83 revoked the Doorstep Selling Directive. Any contract that is made between a business and a consumer is covered by this Directive. Insofar as these goods are supplied under a contract, it shall also apply to contracts for the delivery of water, gas, electricity, or district heating, including by public suppliers.

Directive 2011/83 / EU directly outlines the scenarios that are deemed contracts completed by merchants outside the regular trading area for the sake of legal clarity. In particular, any agreement between the trader and the customer is made off-premises if:

- concluded in a location other than the trader's business premises, in the present physical presence of both the trader and the consumer.
- for which, under similar conditions, the customer made an offer
- concluded in a location other than the trader's business premises or by any means of distance communication right after the consumer was personally and individually addressed there in the trader's simultaneous physical presence with the consumer.
- concluded during an excursion that the trader organized with the intention of promoting and selling products or services to the customer.

### 3.2 Defining Off-Premises Contracts

The European Commission's Guide to Consumer Rights Directive 2011/83 / EU clarifies that the location of public commerce must be the trader's permanent or customary place of business.

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<sup>23</sup> Annette Nordhausen Scholes, *Information Requirements* in Hans Schulte-Nölke and Lubos Tichy (eds), *Perspectives for European Consumer Law, Towards a Directive on Consumer Rights and Beyond* (European Law Publishers 2010) 226.

<sup>24</sup> Case C-91/92 Paola Faccini Dori v Recreb Srl. [1994] ECR I-03325.

Face-to-face negotiations leading to a contract are conducted (or a consumer offer is made) in a location other than the trader's or an agent's place of business is also an off-premises contract. Shops, booths, vehicles, fair stands, and other structures used as permanent or common business locations are considered business premises. Private residences, workspaces, or public venues used sometimes by a trader are not considered business premises under the directive.

Thus, if street stalls are permanent or frequent, they will be deemed a conventional entrepreneurial activity. Furthermore, even if the trader only uses public space, parks, squares, and beaches during the tourist season, these locations will be deemed normal trading operations if the trader uses them on a regular basis, such as during each season.<sup>25</sup>

Contracts made in such circumstances are regarded to be concluded in an informal environment - on the street - when a trader temporarily uses public space for his business. Such temporary outlets are not regarded permanent or typical entrepreneurial places of business if an entrepreneur / trader offers goods or services to customers on a one-time or short-term basis at a designated shopping mall - a specially designed counter in a shopping mall or open public area.<sup>26</sup>

Additionally, the following judgment of the Court of Justice in case *Crt-Vac, S.L.* about the interpretation of Council Directive 85/577/EEC seems important in defining "business premises": "As regards the question whether the contract was concluded away from the trader's business premises, it must be observed that this concept refers to premises in which the trader usually carries on his business and which are clearly identified as premises for sales to the public ."<sup>27</sup>

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<sup>25</sup> European Commission DG Justice Guidance Document 2014, 14.

<sup>26</sup> Christian Twigg-Flesner, Daniel Metcalfe, 'The Proposed Consumer Rights Directive – Less Haste, More Thought?' (2009) European Review of Contract Law, 8 <[https://www.researchgate.net/publication/228245373\\_The\\_Proposed\\_Consumer\\_Rights\\_Directive\\_-\\_Less\\_Haste\\_More\\_Thought](https://www.researchgate.net/publication/228245373_The_Proposed_Consumer_Rights_Directive_-_Less_Haste_More_Thought)> accessed 15 May 2022.

<sup>27</sup> C-423/97 *Travel Vac SL v Manuel José Antelm Sanchis* [1999] ECR I-02195, para 37.

As a result, contracts made with customers may need to be regarded as off-premises transactions if the trader uses locations that are not obvious as being locations for selling to the public.

Moreover, on August 7, 2018, the ECJ revealed its decision in the matter of *Verbraucherzentrale Berlin eV v. Unimatic Vertriebs GmbH* (C485/17),<sup>28</sup> which concerned the definition of "business premises" under the Consumer Rights Directive 2011/83/EU. The court was questioned whether a trade fair stand in a hall used by a trader for the purpose of selling his products during a trade fair taking place for a few days each year constitutes "movable retail premises" in the sense of Article 2(9)(b) of Directive 2011/83. The court was also asked to interpret what it means for a trader to conduct his business "on a regular basis" and, in particular, whether the perception of the customer is significant.

According to the court, whether a business is located in moveable or immovable space is unimportant; what matters is whether the activity is carried out regularly or on a permanent basis. The Consumer Rights Directive does not define the terms "usual basis" or "permanent basis," hence these terms should be given their own independent European interpretation while taking the directive's goals into consideration.

Since consumers do not anticipate being approached by a merchant and may not have enough time to carefully analyze the offer or compare costs, off-premises contracts stand out due to the element of surprise and any psychological pressure they may experience. As a result, a customer who visits a trader's location might anticipate being approached and cannot claim surprise.

The court emphasizes the significance of the typical consumer's view in deciding whether a stand at a trade fair qualifies as a place of business. It lays out the standards to be applied by the national court even if it refrains from deciding whether the trade stand in question meets the definition of business premises.

According to a court, a trade fair stand can be considered business premises if, in light of all the factual circumstances surrounding that activity, particularly the appearance of the stand and the information provided on the fair's premises, a reasonably well-informed, reasonably

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<sup>28</sup> C-485/17 *Verbraucherzentrale Berlin eV v. Unimatic Vertriebs GmbH* [2018] EU:C:2018:642.

observant, and reasonably circumspect consumer could reasonably assume that the trader is carrying out his activity there and will solicit him in order to conclude a contract.

### 3.3 Contracts Concluded as a Result of Addressing Consumer Individually

Off-premises contracts are any agreements reached after the customer has received personalized attention outside of the business's physical location. In accordance with the Commission CRD Guidance, this exempts instances in which the merchant gives out brochures to the general public at a location close to his company premises.

No matter how they may be classified legally, offers and other similar commercial communications should fall under the definition of "personally and individually addressed" in this clause if they are formalized into a contract right away on the trader's business premises or by any other means of distance communication.

For this clause to be applicable, the trader's offer must be made to a specific consumer. For instance, if a representative of the trader approaches a consumer on the street with an offer for a monthly magazine subscription or travel-related services (which are not governed by the specific regulations under Directive 2008/122/EC<sup>10</sup> and instead fall under the Consumer Rights Directive), the contract must be signed there and then.

Contrarily, for the purposes of this rule, merely distributing advertisements in the vicinity of a trader's premises without specifically targeting certain consumers would not qualify as "personally and individually" addressing the consumer.

In addition, the contract must be finalized right away for this clause to be applicable. If the customer leaves the merchant's premises after being invited there and returns later on his own initiative, such as the next day after weighing the offer, the contract would not be immediately finalized.<sup>29</sup>

It is interesting what happens if the vendor personally and individually addresses the customer in the aisle that runs through the trade fair hall and is shared by all of the stands. The CJEU

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<sup>29</sup> European Commission DG Justice Guidance Document 2014, 15.



made an clarification about this topic in the case *B & L Elektrogeräte GmbH v GC*.<sup>30</sup> Given that it gave access to all of the traders' stands in that hall, the aisle shared by the several stands present in the exhibition hall cannot be regarded as "business premises" within the sense of Article 2(9) of Directive 2011/83.

Whether or not the customer requested the trader's visit, the customer may experience psychological pressure or be confronted with a surprise when he is outside the trader's business premises. The EU legislators also wanted to take into account scenarios in which the consumer is spoken to directly and individually off-site, but the contract is then signed there shortly after.

This element of surprise is present in a scenario like the one in the main proceedings, where a consumer is in the trade fair hall, which is the common area shared by the various stands present in that hall, and only the trader's stand serves as its business premises as a result. The trader then addresses the consumer in order to immediately conclude a contract at its stand. As a result, such a contract must be regarded as a "off-premises contract" in accordance with Directive 2011/83's Article 2(8)(c).

#### 3.4 Contract Concluded During Excursion Organized by Entrepreneur

Off-premises deals also include agreements made during an excursion the trader organized. Instances where the trader requests another trader to arrange the journey and make a stop at his shop fall under this category. Furthermore, it makes no difference whether the purpose of the excursion was to encourage the customer to sign a contract or simply to provide goods and services.<sup>31</sup> It should not matter whether the consumer is notified in advance about the intended sale of products during the excursion because the directive includes both excursions with the "aim" and "effect" of promoting and selling products to the consumer.

The term "excursion" refers to more than just transportation to the location of the sale; it also encompasses journeys that include sightseeing or other leisure-related activities. This idea should be applied regardless of whether the vendor selling the goods on an excursion arranges the transportation themselves or with a transport company.

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<sup>30</sup> C-465/19 *B & L Elektrogeräte GmbH v GC*. [2019] EU:C:2019:1091.

<sup>31</sup> European Commission DG Justice Guidance Document 2014, 16.

This notion of contracts formed as a result of a trader-organized excursion is also consistent with ECJ precedent. In this regard, we can highlight the case law of *Travel Vac SL v. Manuel Jose Antelm Sanchis*, which influenced not only the approach to the excursion contract, but also the universal definition of the off-premises contract.<sup>32</sup>

In reaching its ruling in this instance, the court considered various factors. To begin with, the contested contract was signed in a different city. To get there, you had to take part in an organized trip, which is classified as an excursion under the directive. As a result, when the entrepreneur takes the initiative to organize an information trip, it is deemed an excursion organized by the entrepreneur for the purposes of the directive. Second, the trader's activities during the trip, such as the exhibition-sale of products and services, are regarded trade organised beyond the trader's typical site. In this case, the Court clarified that a contract concluded during a trader-organized excursion should be considered to be concluded away from the trader's normal place of business if 1) the contract is concluded in a place specially invited by the entrepreneur; 2) this place is located away from the customer's place of residence and is different from the place where the entrepreneur usually engages in his entrepreneurial activities. 3) It is not readily identified as a venue of public commerce; 4) The invitation is designed to sell the customer goods or services.

### 3.5 Information Requirements for Off-premises Contracts and Distance Contracts

The list of pre-contractual disclosures that a trader must make to customers whenever they transact with them remotely (over the phone or online, for example) and/or "off-premises," such as at the customer's doorstep, has been fully harmonized by the Consumer Rights Directive. As a result, Member States may no longer include pre-contractual criteria in the list set forth in the Directive for these commercial channels. Access to the consumers of all Member States is made easier by compliance with these completely harmonized pre-contractual information standards.

When a trader does business remotely or outside of a business premises, in addition to declaring his identity and the location of his firm, he must also make sure to disclose a phone number and an email address so that customers may get in touch with him quickly and easily. If the

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<sup>32</sup> C-423/97 *Travel Vac SL v Manuel José Antelm Sanchis* [1999] ECR I-02195.

trader is representing another trader, he must additionally reveal his identify and physical address. Generally speaking, dealers should at least detail the distant communication channels they employ for marketing efforts. For instance, traders who enter into contracts over the phone should give their phone number.<sup>33</sup> Additionally, under the Consumer Rights Directive, traders must give customers the information about their preferred means of distance communication that they are required to give them under other pertinent EU laws.

The merchant must also provide the address, including that of the trader acting on his behalf, where the consumer can send any complaints, but only if it differs from the place of establishment. The idea of establishment can be summed up as the provider's sustained pursuit of an economic activity through a reliable infrastructure from which the business of providing of services is really conducted.<sup>34</sup> When a provider has multiple locations, it's critical to identify the location where the specific service in question is delivered.

The location whose geographic address shall be reported under this Directive can be found using the same method. Given that a "geographical" address must be provided, it must refer to a physical location.

The Directive outlines the additional pricing information requirements that only apply to contracts that are made at a distance or off-premises. Particular information is needed for subscriptions and contracts with an indefinite length for distance / off-premises contracts. If a product (or a subset of items) is offered under an indefinite-term contract or a subscription and is subject to a fixed rate charge, information on the total cost per billing cycle and the total monthly charges must be provided. For instance, regardless of consumption, Internet and pay-tv subscriptions are often billed at a predetermined rate each month, bimonthly, or quarterly. Therefore, if a customer wants to sign up for a subscription online or off-site, they must be given the monthly cost and, if the billing period is different, the charges per billing period.<sup>35</sup>

The trader must disclose to the customer how these variable costs are computed if the contract covers or includes a good for which the total cost cannot be determined in advance. For instance, the trader should direct the customer to a full price list for phone calls for voice

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<sup>33</sup> European Commission DG Justice Guidance Document 2014, 23.

<sup>34</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006, Article 4.

<sup>35</sup> European Commission DG Justice Guidance Document 2014, 25.

telephony services, the cost of which depends on real consumption. The customer is not responsible for any additional fees or costs that he was not made aware of by the trader.

With the exception of information on the trader's complaint management policy, which is only necessary "where appropriate," all off-premises/distance transactions should include information concerning the arrangements for payment, delivery, and performance. Only when it disadvantages the consumer in comparison to diligent market practice must information concerning payment, delivery, performance, and complaint management be given unambiguously.

If the trader specifies a time frame (such as "10 days" or "two weeks") from the contract's conclusion, this would also satisfy the requirements for the time of delivery or performance (placing of the order by the consumer). It is not always realistic to specify a certain calendar date, hence the trader is not required to do so.

### 3.6 Protective Effect of Withdrawal Right in Off-premises Contracts

The unexpected character of the offer is the major qualifying feature of contracts concluded outside of the business premises. The European Consumer Rights Doctrine applies to a variety of street transactions, not just home contracts. It encompasses a wide range of atypical contractual connections that have only one thing in common: the customer's discussion took place outside the trader's normal place of business - outside the company operation.

The biggest issue is that there are no preconceived beliefs about contracting. The customer's desire to complete the contract is expressed as a result of completely unexpected circumstances, such as receiving an offer to sign the contract at the front door of the house, in a vehicle, in a public place, or while on vacation - in a hotel, boarding house, temporary house, or, for example, by the beach. The effect of surprise is usually so strong that a person's expression of will does not always represent their objective attitude toward the transaction. The contract is concluded as a result of the entrepreneur's persuasive and self-deprecating actions. As a result, it's not impossible that the user's acceptance to the contract's conclusion is motivated by something as basic as avoiding the annoyance of the entrepreneur. In most circumstances, the consumer is lacking the opportunity to consider the appropriateness of his or her decision and

the use of the purchased goods or services. Furthermore, it is incapable of making an objective assessment.<sup>36</sup>

The effect of surprise, on the other hand, is a vital marketing tactic for businesses. The trader / entrepreneur tries to seduce the customer and convert him into a contractor on purpose. This component, however, is what determines the user's undervalued engagement in the pre-nominal relationship. According to studies, customers are drawn to offers made in unusual circumstances and are satisfied with the personalized attention they receive. In a pleasant atmosphere, such as a soothing spot, this sensation is amplified. The other side of the bargain - the goods' price (which is frequently twice the market price of identical commodities), quality, and utility - is currently out of focus.

Consumer behavior research has demonstrated that decisions made under conditions of freedom of choice differ dramatically from decisions made under time constraints. People in the second instance either do not check the attributes of the things offered at all or do so with a lot less diligence. Important details are lost in the fast-paced decision-making mode, which would definitely call their attention compared to the fact that the contract was concluded at a different time or location.<sup>37</sup>

The aforementioned dangers are deemed adequate grounds for identifying the customer to be a weak link in this particular contractual relationship segment. To overcome the unforeseen contract fiber in contracts negotiated outside of the corporate sector, the customer is provided a qualifying right – to withdraw from the contract and return the purchased products without any justification or responsibility. The only requirement for the emergence of this right is the conclusion of a contract outside of the business enterprise. The right must be exercised in accordance with the rules established for that purpose. The customer is not needed to provide evidence of a specific reason for withdrawal right. He has the legal right to withdraw from the

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<sup>36</sup> Peter Rott, 'Harmonizing Different Rights of Withdrawal: Can German Law Serve as an Example for EC Consumer Law?' (2006) Vol. 07, No. 12 German Law Journal, 1110 <[https://www.researchgate.net/publication/46727371\\_Harmonising\\_Different\\_Rights\\_of\\_Withdrawal\\_Can\\_German\\_Law\\_Serve\\_as\\_an\\_Example\\_for\\_EC\\_Consumer\\_Law](https://www.researchgate.net/publication/46727371_Harmonising_Different_Rights_of_Withdrawal_Can_German_Law_Serve_as_an_Example_for_EC_Consumer_Law)> accessed 22 May 2022.

<sup>37</sup> Joasia Luzak, 'To Withdraw or Not to Withdraw? Evaluations of the Mandatory Right of Withdrawal in Consumer Distance Selling Contracts Taking into Account its Behavioral Effects on Consumer' (2013) Centre for the Study of European Contract Law Working Paper Series No. 2013-04, Amsterdam Law School Research Paper No. 2013-21, 10 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2243645](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2243645)> accessed 01 May 2022.

contract simply because he has changed his mind. The right to withdraw, on the other hand, eliminates the requirement for court intervention in the contract's content.<sup>38</sup>

## 4. Consumer in Distance Contracts

### 4.1 From Face-to-face to Distance Communication

The advancement of modern technology has brought about a fresh invention in the trade tradition. Innovative contracting methods, the growth of distance and e-commerce, and the remarkable advancement of electronic media and the Internet have all been subjected to economic and legal adaptation to new technology and trade norms.<sup>39</sup>

It's worth noting that the distance contracts did not exist in their current sense when specific interest in contracts concluded outside of business premises arose in the 1960s and 1980s. However, there was a strong desire among entrepreneurs and customers to form contractual relationships outside of the regular or ordinary place of business (commercial space), such as at home, in the office, or in another public space.<sup>40</sup> It was in fact even the first embryo of a distance relationship, but still with elements of face-to-face communication.

Consumers and entrepreneurs have migrated from face-to-face conversation to distant communication as a result of technological advancements.<sup>41</sup> Distance communication, on the other hand, refers to any type of relationship that is unrelated to the parties' relationship. It's a contract made over the phone, via email, or over the Internet. Contracts reached through advertisements in the press, radio, and television are also included in this category provided

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<sup>38</sup> Reinhard Zimmermann, *The New German Law of Obligations, Historical and Comparative Perspectives* (Oxford University Press 2005) 214.

<sup>39</sup> Avery Wiener Katz, 'Is Electronic Contracting Different? Contract Law in the Information Age' (2005) *Contract Law in the Age of the Internet: An Economic Analysis* <<http://www.columbia.edu/~ak472/papers/Electronic%20Contracting.pdf>> accessed 20 May 2022.

<sup>40</sup> European Research Group on Existing EC Private Law, *Principles of the Existing EC contract Law (Acquis principles), Contract I, Pre-contractual obligations, Conclusion of Contracts, Unfair Terms* (Law Publishers 2007) 195.

<sup>41</sup> Working Document of the Commission, Responses to the Consultation on the Council Directive 85/577/EEC of 20 December 1985 to Protect the Consumer in Respect of Contracts Negotiated Away from Business Premises Summary of Responses.

they include the phone number or e-mail address of the person providing the goods and services.<sup>42</sup>

In 1997, the European Commission passed the first directive on consumer rights in distance agreements. The European Parliament and the Council adopted Directive 97/7/EC on the protection of consumers' rights in distance contracts on May 20, 1997, which established a number of key remedies for distance trade, with a special emphasis on allowing customers the ability to withdraw from contracts.<sup>43</sup>

It's worth noting that the Distance Contracts Directive wasn't designed with e-commerce in mind. Online contracting technologies were not fully developed in 1997. Telemarketing and catalogue purchase agreements were the most common types of distance contracts at the time. Remote trading, in its present form and content, did not exist. The concentration in this area was initially on remotely concluded contracts, followed by e-commerce. The promotion of remotely executed contracts for the supply of goods and services is largely intended to promote cross-border trade and the shared European market.<sup>44</sup> Without the active participation of customers and the protection of consumer rights in this sort of trade, this goal would not have been attainable.

New regulations have become necessary in light of the present problem. As a result, Directive 2011/83 / EU on Consumer Rights was approved in order to unify and simplify consumer protection inside the European Union, establishing a uniform concept for consumer protection in remotely executed contracts.<sup>45</sup> The directive defined what types of contracts might be completed remotely. " Distance contract is any contract concluded between the trader and the 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 one

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<sup>42</sup> Richard Stone, *The Modern Law of Contract* (5th edn, Cavendish Publishing limited 2002) 64.

<sup>43</sup> Siegfried Fina, *The Consumer's Right of Withdrawal and Distance Selling in Europe: A Consumer Stronghold in Festschrift Festschrift Zehetner*, Markus Haslinger, Arthur Kanonier, Sylvia Zehetner (eds) *European Distance Selling and E-Commerce* (2009) 31.

<sup>44</sup> Andreia- Roxana Macsim, 'The New Consumer Rights Directive, A Comparative Law and economics Analysis of the Maximum Harmonization Effects on Consumers and Businesses, The Case of the Cooling-off Period from Online Contracts' (MSc Thesis, Aarthus University 2012) < <https://silo.tips/download/the-case-of-the-cooling-off-period-from-online-contracts>> accessed 20 May 2022.

<sup>45</sup> Joasia Alexandra Luzak, 'Online Consumer Contracts' (2014) Amsterdam Law School Legal Studies Research Paper No. 2014-47, Centre for the Study of European Contract Law, Working Paper Series No.2014-08, ERA Forum Vol. 15, No. 3, 2 < [https://www.researchgate.net/publication/272012015\\_Online\\_consumer\\_contracts](https://www.researchgate.net/publication/272012015_Online_consumer_contracts)> accessed 03 May 2022.

or more means of distance communication up to and including the time at which the contract is concluded" according to the Consumer Rights Directive 2011/83 / EU.<sup>46</sup>

The 2011/83 / EU Directive is significant in a number of ways. First and foremost, this is the foundation for the endeavor to harmonize agreements reached remotely with consumer participation, on the basis of which relevant amendments in national contract law of European Union member states were implemented. Second, the directive establishes a stringent regulatory framework in a number of areas, including the need to give information to consumers. The regulation separated two primary regimes of the requirement to inform: the first applies to contracts concluded outside of the commercial operation (on the street), and the second applies to contracts concluded in distance. The question of the right of withdrawal from a contract has been resolved universally for the same section, which we shall explore in detail in the following chapter. It's also fascinating to read the directive's reasoning and explanations on how to conduct an electronic auction and, in turn, how to exercise the right of withdrawal.

Furthermore, the scope of e-commerce and technology advancements have had an impact on the demand and supply model of services and goods. A "commodity" occurs on the page of the traditional classification of movable and immovable things that, by its substance, does not belong to any of them. We're talking about tangible things with digital content that are constantly the subject of contracts and are deemed intellectual property. Transactions that are not only completed but also executed electronically are known as "online" transactions. For example, ordering an electronic program online and having it delivered by downloading it from a website or delivering information in an electronic format, etc.<sup>47</sup>

## 4.2 Threats of Distance Contracts

While e-commerce offers new ways to enter into effective contracts, it also introduces new flaws in contract validity. How to prevent the potentially negative effects of contracts made by

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<sup>46</sup> Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011.

<sup>47</sup> Marco B.M. Loos, 'The Regulation of Digital Content B2C Contracts in CESL' (2013) Amsterdam Law School Legal Studies Research Paper No. 2013-60, Centre for the Study of European Contract Law Working Paper Series No.2013-10, <[https://www.researchgate.net/publication/272304586\\_The\\_Regulation\\_of\\_Digital\\_Content\\_B2C\\_Contracts\\_in\\_CESL](https://www.researchgate.net/publication/272304586_The_Regulation_of_Digital_Content_B2C_Contracts_in_CESL)> accessed 08 May 2022.



remote communication means is one of the key issues.<sup>48</sup> The consumer can only construct a broad idea of the things to be purchased under the terms of the remote contract. However, it is questionable if a superficial review is sufficient to make an informed selection. When making a purchase and not being able to touch the object immediately, the consumer may find themselves in a similar situation. For example, suppose purchasing a set of boxed linens. However, the consumer is frequently given the opportunity to view the sample and handle it in his hand, which is a benefit over a selection made over the phone. When buying shoes, an alternate example is that the consumer is normally required to buy the shoes only if he can try them on. The lack of such an opportunity is a key stumbling block to decision-making; as a result, despite the urgency of e-commerce, customers prefer to buy goods or services in the local market through a face-to-face contract with a counterparty.<sup>49</sup>

In remotely concluded contracts, consumer protection is much more important. Easy access to the contract presents a considerable risk in the absence of direct contact. Because the degree of knowledge on which the choice to enter into a contract is taken is generally low in a connection established remotely, the contract does not always serve its objective. First and foremost, what is meant here is not the level of information openness and transparency, but rather the consumers' ability to perceive them.

In this way, distance contracts differ from traditional wills and normal contracts in that the contract creation step involves both a human and a machine rather than the declaration of a will by two people. In such contracts, the customer has only two options: to buy or not to acquire the products being offered. While in the event of a face-to-face transaction, he had the opportunity to negotiate the price, select the items, compare the item to its analogue, in the case of apparel, its measurements, and in the case of household appliances, examine them. The inability to check the items, as well as the inability to participate in the creation of the contract terms, limit decision-making freedom at this time.<sup>50</sup>

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<sup>48</sup> Faye Fangfei Wang, *Law of Electronic Commercial Transactions, Contemporary Issues in EU, US and China* (2<sup>nd</sup> edn, Rutledge 2010) 13.

<sup>49</sup> Marco B.M. Loos, 'Right of Withdrawal, Modernizing and Harmonizing Consumer Contract Law' (2009) SSRN Electronic Journal, 246-250 <[https://www.researchgate.net/publication/228218791\\_Rights\\_of\\_Withdrawal](https://www.researchgate.net/publication/228218791_Rights_of_Withdrawal)> accessed 14 May 2022.

<sup>50</sup> Nancy S. Kim, *The Duty to Draft Reasonably and Online Contracts* in Larry DiMatteo, Keith Rowley, Severine Saintier, George Zhou (eds), *Commercial Contract Law, Transatlantic Perspectives* (Cambridge University Press 2013) 186.

Because of the vulnerabilities inherent in ordinary contracts, consumer rights are given specific emphasis in European contract law. At the same time, protecting the weak party's interests is critical in two areas: the first is to prevent entrepreneurs from earning unreasonably high profits as a result of unjustified advantage, and the second is to protect against contracts based on trust and good faith, which clearly imply unfair terms. A contract that contains reservations that contradict the concept of good faith will not be considered fair.<sup>51</sup>

In remotely concluded contracts, information asymmetry is also regarded a significant risk issue. Furthermore, the supply of information about the goods or services offered by entrepreneurs, as well as its transparency, does not always assure the clarity of consumer contracts and consumer protection, particularly when it comes to contracts that are executed remotely. The reason for this, as previously stated, is that most consumers are unaware of the contract's provisions, making the contract a more important attribute in remotely constructed connections than the parties' agreement in the traditional sense. As a result, the need for consumer protection in contracts entered into with "blind consent" becomes even more apparent.<sup>52</sup>

Nonetheless, in remotely concluded contracts, the list of information that must be disclosed to consumers is long and detailed.<sup>53</sup> The survey's findings, however, demonstrate that consumers only pay attention to material written in basic, understandable language and presented short. With this in mind, we may conclude that the requirement to offer excessive amounts of information may cause customers to be unaware of this information, resulting in a decline in their level of knowledge and awareness.<sup>54</sup>

Furthermore, if the consumer can meet the entrepreneur in person or in advance, physically check the things he wants, and then agree on the conditions, the contract will not be regarded

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<sup>51</sup> Jean-Baptiste Racine, Laura Sautonie-Laguionie, Aline Tenenbaum, Guillaume Wicker, *European Contract Law, Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules* (European Law Publishers 2008) 527-531.

<sup>52</sup> Nancy S. Kim, The Duty to Draft Reasonably and Online Contracts in Larry DiMatteo, Keith Rowley, Severine Saintier, George Zhou (eds), *Commercial Contract Law, Transatlantic Perspectives* (Cambridge University Press 2013) 185.

<sup>53</sup> Christian Twigg-Flesner, *Pre-Contractual Duties – from the Acquis to the Common Frame of Reference* in Reiner Schulze (ed) *CFR and Existing EC Contract Law* (Sellier ELP 2008) 12-17.

<sup>54</sup> Annette Nordhausen Scholes, *Information Requirements* in Hans Schulte-Nölke and Lubos Tichy (eds), *Perspectives for European Consumer Law, Towards a Directive on Consumer Rights and Beyond* (European Law Publishers 2010) 257-294.

remotely concluded, and the customer will not be able to withdraw from it.<sup>55</sup> There are situations when remote communication is used to accept a proposal for contract conclusion. The customer then goes to the entrepreneur's trading location, is convinced of the goods' useful features, and later decides to enter into a contract, also by distant communication. When a consumer has the opportunity to personally see an object before acquiring it, the contract is not considered concluded via remote communication, and the consumer can no longer use his or her right of withdrawal. The contract will not be regarded remotely concluded even if it is reached through electronic correspondence after a face-to-face discussion procedure.<sup>56</sup>

Furthermore, all remotely negotiated agreements must meet the standards for transaction validity, which are governed by the Member States' domestic law, independently of European Union regulations.<sup>57</sup>

#### 4.3 Distance Contract's Formalities

The definition of distance contract which is provided in the directive, ought to include scenarios in which a customer only visits a business location to learn more about the products or services before negotiating and signing a contract remotely. Contrarily, a contract that is discussed on the trader's business property and then finalized by distance communication shouldn't be regarded as a distant contract. A contract that was started over the phone but ended up being signed on-site at the trader's office is not a distance contract either. Similarly, reservations made by a customer through a distance communication method to request a service from a professional should not be included in the definition of a distance contract.

The parties may potentially combine a number of various forms of distance communication to reach a distance agreement (e.g. website and phone). The conclusion of a distance contract should not be altered by the fact that the parties physically interact after doing so, usually during the course of delivery or payment. The contract that the customer later negotiates and enters

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<sup>55</sup> Christian Twigg-Flesner, Pre-Contractual Duties – from the Acquis to the Common Frame of Reference in Reiner Schulze (ed) CFR and Existing EC Contract Law (Sellier ELP 2008) 6.

<sup>56</sup> Christiane Riefa, 'The Reform of Electronic Consumer Contracts in Europe: Towards an Effective Legal Framework?' (2009) Vol. 14 Lex Electronica < [https://www.lex-electronica.org/files/sites/103/14-2\\_riefa.pdf](https://www.lex-electronica.org/files/sites/103/14-2_riefa.pdf) > accessed 05 May 2022.

<sup>57</sup> Siegfried Fina, *The Consumer's Right of Withdrawal and Distance Selling in Europe: A Consumer Stronghold in Festschrift Festschrift Zehetner*, Markus Haslinger, Arthur Kanonier, Sylvia Zehetner (eds) *European Distance Selling and E-Commerce* (2009) 31.

into with the trader remotely should be regarded as a distance contract if his visit to the business location was just to learn more about the products or services.<sup>58</sup> A binding reservation is made even though simply making an appointment with the trader is not regarded as a distance contract. For the purposes of the Directive, a telephone order for goods to be picked up or services to be provided at a specific time is an example of a distance contract.

Only contracts entered into through a formalized program for providing distance sales or services are covered by the Directive. Such a transaction shouldn't be regarded as a distance contract under the Directive, for instance, if a trader only occasionally concludes a deal with a customer by phone or email, following the consumer's contact.

Any program utilized by a trader but provided by a third party, such as an internet platform, should be considered a part of organized distance sales or service offering. However, it shouldn't apply to situations when websites only provide a trader's contact information and information about his or her products and/or services.

An electronically concluded contract is defined by the International Chamber of Commerce as an automated process of concluding a contract between the parties using a computer network or electronic mail.<sup>59</sup>

An electronic contract can be entered into various ways. The most typical method is to email a contract to be signed. Both an offer and an acceptance can be sent by email. The contract signed through the worldwide network is the second type of electronic contract (Internet). In this situation, the entrepreneur must include a catalog of the goods, as well as information about their attributes and value, on his website. After browsing the website, the user selects the desired goods and purchases it according to the contract's terms. Contracts, the third type of e-commerce, are those whose terms are published on an entrepreneur's website via a link. Their

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<sup>58</sup> Kay Henderson, Alan Poulter, David Mcmenemy, 'The distance selling directive: consumer champion or complete irrelevance?' (2003) University of Strathclyde Glasgow, 238 <[https://www.researchgate.net/publication/277105706\\_The\\_distance\\_selling\\_directive\\_consumer\\_champion\\_or\\_complete\\_irrelevance](https://www.researchgate.net/publication/277105706_The_distance_selling_directive_consumer_champion_or_complete_irrelevance)> accessed 17 May 2022.

<sup>59</sup> 'International Chamber of commerce: General Usage for International Digitally Ensured Commerce' (1998) 37(3) International Legal Materials, 714–748 <<http://www.jstor.org/stable/20698802>> accessed 01 May 2022.

unique feature is that in order to purchase the desired items, the customer must agree to the terms of multiple complex or separate contracts.<sup>60</sup>

#### 4.4 Auction, as a Type of Distance Trading and the Right of Withdrawal

Auction is a type of trade that has been practiced since the 500s BC in Babylon. When ladies were sold as a result of the most generous offer made. From there, the auction retains its relevance; but, unlike the Babylonian tradition, in the modern sense, auction refers to the competitive selling of products and services, with the highest bidder having contractual power.<sup>61</sup> This type of trading has taken several shapes over the years. Some are arranged by government agencies, while others are organized by courts, professionals, and direct dealers.

Auctions used to be held largely in specially constructed venues. This type of trading has been influenced by the advancement of modern technology. A virtual auction is one of the expressions of a distant contract because it is now possible to arrange an auction and participate in it via the Internet, resulting in simple access for individuals interested in this sort of commerce.

Users' easier access to the auction has resulted in a number of difficulties. One example is the absence of face-to-face contact and, as a result, the inability to specify terminology. Otherwise, incompatibility of the purchased items with the qualities indicated in the offer, delivery issues, delivery of damaged or broken goods, or the transfer of other goods altogether; this is why internet auctions are covered by consumer protection legislation. Nonetheless, there was no unified approach to this issue in the European Union's member states' legislation.<sup>62</sup>

Uncertainty was raised by Directive 97/7/EC on the protection of consumer rights in remotely concluded contracts, which limited the Directive's applicability to auctions to some extent but did not provide for an auction interpretation.<sup>63</sup> As a result, in many circumstances, the effect

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<sup>60</sup> Raymond T Nimmer, *The Legal Landscape of E-commerce: Redefining Contract Law in an Information Era* in Singapore Academy of Law and Singapore Management University, *Journal of Contract Law Conference, Contract and the Commercialization of Intellectual Property* (2006) 15.

<sup>61</sup> Christine Riefa, *A Dangerous Erosion of Consumer Rights: The Absence of a Right to Withdraw from Online Auctions* in Geraint Howells, Reiner Schulze (eds), *Modernizing and Harmonizing Consumer Contract Law* (European Law Publishers 2009) 177-188.

<sup>62</sup> Christian Twigg-Flesner, Reiner Schulze, *Protection Rational Choice: Information and the Right of Withdrawal* in Handbook of Research on International Consumer Law (Edward Elgar Publishing Limited 2011) 9.

<sup>63</sup> Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997.

of the ability to withdraw from a contract governed by a directive was questionable. The definition of the auction was entrusted to the domestic law of each Member State of the European Union, which allowed for varied interpretations within the range of the minimum harmonization allowed.

This was particularly clear in the case of the withdrawal right. Consumers who participated in online auctions in France and Luxembourg, for example, were protected by the regulations on remotely concluded contracts and could thus exercise their right to withdraw from the contract. The protection standards for remotely negotiated contracts did not apply just to public auctions in these nations. Because the state law of Belgium and Greece did not include any restrictions on the directive on distance auction agreements, E - bay auctions in those countries were likewise subject to distance trade.<sup>64</sup>

However, unlike Directive 97/7/EC, the Consumer Rights Directive applies to online auctions because professional dealers now frequently utilize this sales channel. Directive 2011/83 / EU on Consumer Rights specifically says that the validity of this Directive, and thus the right to withdraw from a contract, does not apply solely to public auctions in order to provide a unified approach to the right of withdrawal in online auctions. The directive allows for the replacement of the name, contact information, and home address of the establishment and place of business of the merchant selling the products or services with that of the auctioneer for public auctions. In accordance with the exception, there is also no right of withdrawal from contracts made at a public auction.

Even though it may also be feasible to place a bid over the phone or online, buyers should have the option to visit in person. Such an auction is specifically deemed to be attended in person by the entrepreneur and the customer, or to have the chance to attend in person. For the purposes of this Directive, the use of online platforms for user and entrepreneur auctions should not be regarded a public auction.<sup>65</sup>

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<sup>64</sup> Christiane Riefa, 'The Reform of Electronic Consumer Contracts in Europe: Towards an Effective Legal Framework?' (2009) Vol. 14 Lex Electronica, 177-178 < [https://www.lex-electronica.org/files/sites/103/14-2\\_riefa.pdf](https://www.lex-electronica.org/files/sites/103/14-2_riefa.pdf)> accessed 05 May 2022.

<sup>65</sup> See. Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011.

The use of consumer and trader-accessible online platforms for auction purposes shouldn't be regarded as a public auction within the meaning of this Directive. As a result, the Directive should apply in full to online auctions with regard to, for example, the pre-contractual information that must be presented before the consumer is bound by the contract (the bid) and the right of withdrawal.

An online marketplace that sells a variety of goods to customers, including furniture, minor appliances, tools, electronics, and auto parts, is an illustration of the restrictions placed on the aforementioned exception. Although transactions might be completed by an auction in which the selling price of the products is established based on bids placed above a beginning price, this would not be considered a "public auction." Customers would still be able to cancel a bid that they have already submitted within the CRD's specified timeframe.

As a result, if the auction is performed over the Internet and the parties do not have the opportunity to attend, it will be considered a remotely concluded contract, with the user having the right to withdraw from the contract if he so desires. Furthermore, the customer must be informed of the existence of the right following the conclusion of the auction, the announcement of the results, and the announcement of the winner. This law takes into account the unique characteristics of online auctions.<sup>66</sup> It is nearly impossible for a potential individual to explain his or her contract rights before entering into a contract with a specific party during the auction. Only under the terms of the contract does the customer have the right to unilaterally withdraw from the contract. Furthermore, because the client must be informed of the terms and conditions of the right of withdrawal from the contract as soon as the contract is signed, the entrepreneur must explain to him in writing as soon as feasible. The time of the right to withdraw from the contract is extended if this obligation is broken.

## 4.5 Special Requirements for Distance Contracts

### 4.5.1 Additional requirements for presenting certain pre-contractual information

The need to act in good faith and its objectivity are even more crucial in partnerships where the expectation of trust and good faith is especially strong, which is why the consumer contract

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<sup>66</sup> Christian Twigg-Flesner, Reiner Schulze, Protection Rational Choice: Information and the Right of Withdrawal in Handbook of Research on International Consumer Law (Edward Elgar Publishing Limited 2011) 9.

includes the principle of good faith, which is a general notion of private law. The nature of the information to be disclosed to the customer prior to the conclusion of the contract is determined by mandatory rules, in order to prevent dishonest business practices as much as feasible.

Regarding distance contracts, the trader is required to make thorough information about goods, services and a trader accessible to the customer in a manner consistent with the type of distance communication method being used, using language that is clear and understandable. It must be legible if such information is presented on a durable medium. Besides, for contracts that are offered against payment of a fee and executed electronically, the directive specifies extra pre-contractual information requirements.

Under the directive “If a distance contract to be concluded by electronic means places the consumer under an obligation to pay, the trader shall make the consumer aware in a clear and prominent manner, and directly before the consumer places his order...”

Although "electronic methods" is not defined in the Directive, it should be understood to pertain to contracts made through websites. It's crucial to make sure that, for online transactions concluded at a distance, the customer can read and comprehend the contract's essential terms before placing his order.<sup>67</sup> To that purpose, this Directive should include a clause that requires those items to be presented close to the confirmation that is needed to place an order. Additionally, because the term "electronic means" is so broad, it might refer to a variety of technologies, such TV set-top boxes that deliver digital material.

This pre-contractual requirement should be viewed in the context of national regulations that implement the eCommerce Directive 2000/31/EC on the formation of contracts. These regulations apply if the contract falls under the definition of a "information society service," which is any service that is typically provided for compensation, at a distance, via electronic means, and at the specific request of a recipient of services.

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<sup>67</sup> Raymond T Nimmer, *The Legal Landscape of E-commerce: Redefining Contract Law in an Information Era* in Singapore Academy of Law and Singapore Management University, *Journal of Contract Law Conference, Contract and the Commercialization of Intellectual Property* (2006) 15.



As a result, in accordance with the eCommerce Directive, this obligation would in fact apply at the point when the customer is prompted to confirm the order, i.e., to review the items in their shopping cart before selecting the "buy" button.

The phrase "directly before" should be understood to imply "immediately before" and cover the temporal aspect first. In addition, the terms "prominent manner" and "close vicinity" imply stricter requirements for how information should be presented than the ones listed below. Before placing a purchase, the consumer should be able to really see and understand the information without having to leave the page where they are placing their order.

#### 4.5.2 Requirements for the order confirmation button

In accordance with the Consumer Rights Directive, the trader must make sure that the customer explicitly accepts that placing an order involves a commitment to pay. If placing an order requires pressing a button or using a similar function, just the words "order with duty to pay"—or an equivalently clear formulation—must be written on the button or similar function to make it clear that doing so imposes a financial responsibility on the trader. The trader is not in compliance with this clause, and the contract or order is not binding on the consumer.

This responsibility necessitates that the order placement button on the website be clearly marked. This label can be created in a variety of ways as long as it conveys the duty to pay clearly: The message required by this clause, for instance, would be conveyed by terms like "buy now," "pay now," or "confirm purchase." The criteria is less likely to be met by words like "register," "confirm," or "order now," as well as needlessly long sentences that could effectively conceal the message regarding the need to pay.

If the trader created the consumer's presentation of pre-contractual information, then this need should also apply to them.

#### 4.5.3 Contracts concluded over means of distance communication with limited space or time

The directive also addresses long-distance communication methods with constrained display space or time: The trader must provide, on that specific means, prior to the conclusion of such a contract, at least the pre-contractual information regarding the key characteristics of the goods

or services, the trader's identity, the total price, the right of withdrawal, the duration of the contract, and, if the contract is of indeterminate duration, the duration of the indeterminate contract.

The necessity to disclose "the minimum duration of the consumer's responsibilities under the contract" is not part of this provision. A contract of indefinite duration or an automatically extended contract may be terminated under certain circumstances, but any such minimum period is also one of them. This condition should particularly apply to contracts made through the use of technologies like SMS, which have technical restrictions on the quantity of data that may be delivered.<sup>68</sup>

Additionally, it indicates the data that must be given if the trader has tailored the layout and content of his trading website for mobile devices with small screens. In these circumstances, the trader can, where necessary, limit the information presented on the user's screen in an expandable manner without forcing the user to leave the page being used to submit the order.

#### 4.5.4 Contracts concluded by telephone

Directive offers that if the trader calls the customer on the phone with the intention of forming a distance contract, he must reveal his identity, the identity of the person on whose behalf he is calling, and the call's business purpose at the outset of the conversation.

The model withdrawal form should be provided orally to the customer since it would be practically difficult to do so in writing in this situation. The model withdrawal form must be included in the contract confirmation that is supplied on a durable medium after the contract is signed.

#### 4.5.5 Confirmation of the contract

Within a reasonable period following the conclusion of the distance contract, and at the latest at the time of delivery of the products or prior to the performance of the service, the trader

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<sup>68</sup> Siegfried Fina, *The Consumer's Right of Withdrawal and Distance Selling in Europe: A Consumer Stronghold* in Festschrift Festschrift Zehetner, Markus Haslinger, Arthur Kanonier, Sylvia Zehetner (eds) *European Distance Selling and E-Commerce* (2009) 31.

shall deliver to the consumer the confirmation of the contract concluded on a durable medium. Unless the trader has already given the consumer that information on a durable medium, such as such as by an email, SMS, or mail order catalogue prior to the conclusion of the distance contract, that confirmation must include all information about the goods, services, and trader. Where applicable, it must also include confirmation of the consumer's prior express consent and acknowledgment.

The Distance Selling Directive 97/7/EC, which also required confirmation of a distance contract on a durable medium, evaluated the definition of a "durable medium" in case C-49/11 Content Services Ltd.<sup>69</sup> The Court's decision states that merely providing information on a website does not qualify as a durable medium: *"Article 5(1) of Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts must be interpreted as meaning that a business practice consisting of making the information referred to in that provision accessible to the consumer only via a hyperlink on a website of the undertaking concerned does not meet the requirements of that provision, since that information is neither 'given' by that undertaking nor 'received' by the consumer, within the meaning of that provision, and a website such as that at issue in the main proceedings cannot be regarded as a 'durable medium' within the meaning of Article 5(1)."*

However, the Court did not rule out the possibility that particular websites would meet the criteria to count as durable media. Nothing in the file indicates that the consumer may store information that is personally addressed to him so that he may access it and reproduce it unchanged for a sufficient period of time without the seller being able to unilaterally change the content on the seller's website, to which the link sent to the consumer connects.

Therefore, for the purposes of the Directive, a customer's private account on the trader's website, where the trader uploads the information directed to the consumer and is unable to remove or amend it unilaterally, could be regarded as a durable medium. If a customer's

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<sup>69</sup> Case C-49/11 Content Services Ltd v Bundesarbeitskammer [2012] EU:C:2012:419.

access to such an account is necessary for the trader to confirm the terms of the contract, it should be kept open after the customer's contract with the trader has ended.

Even if the customer received pre-contractual information, the trader should still be subject to the need to deliver the confirmation of the contract on a durable medium. The confirmation must be sent within a fair amount of time following the conclusion of the distance contract, according to the timing requirements. Additionally, the confirmation must be given as soon as possible, preferably at the moment the items are delivered or right before the service is rendered.

Before the conclusion of the withdrawal period, there is no necessity to provide the confirmation for services (if the performance of the contract starts after this period ends). The need that the confirmation must be given within a "reasonable time" suggests that it must be sent in advance of the consumer being able to exercise their right to withdraw, nevertheless. A case-by-case analysis would be required to determine if a belated confirmation might be regarded as unreasonable.<sup>70</sup>

Contracts for the provision of public utilities and contracts for the purchase of online digital content have no express, definitive deadline.<sup>71</sup> By analogy, the regulations governing service contracts ought to be applied to these contracts, i.e., the confirmation ought to be given at the latest before the contract's performance starts. The common regulations under the Directive addressing the determination of the right of withdrawal period for these contracts appear to support this similarity.

Contracts for digital content purchased online are typically fulfilled immediately, i.e., before the right of withdrawal time expires, and email is the most popular method of confirmation.

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<sup>70</sup> Andreia- Roxana Macsim, 'The New Consumer Rights Directive, A Comparative Law and economics Analysis of the Maximum Harmonization Effects on Consumers and Businesses, The Case of the Cooling-off Period from Online Contracts' (MSc Thesis, Aarhus University 2012) < <https://silotips.com/download/the-case-of-the-cooling-off-period-from-online-contracts>> accessed 20 May 2022.

<sup>71</sup> Marco Loos, Chantal Mak, Lucie Guibault, Lodewijk Pessers, Natali Helberger, 'Digital Content Contracts for Consumers' (2012) Amsterdam Law School Legal Studies Research Paper No. 2012-66, Centre for the Study of European Contract Law, Working Paper Series No. 2012-05, 2-5 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2081918](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2081918)> accessed 03 May 2022.

In this context, it is important to consider whether the concerned traders must ensure that the customer actually receives the confirmation by email before the download or streaming of the digital content begins, or whether it is sufficient for the trader to send such an email before performance of the contract begins.

It should be observed that this clause calls for the trader to "give" the confirmation rather than refer to the consumer "receiving" it. The Court of Justice examined the definitions of "provide" and "receive" in relation to the Distance Selling Directive 97/7/EC in the aforementioned case C-49/11 Content Services Ltd. According to the Distance Selling Directive, unless the customer has already received the information in writing or on another durable medium prior to the contract's conclusion, the consumer must obtain confirmation in a timely manner.

The meanings of "given" and "received" differ from the term "supplied," which is employed in other articles of the Directive and that the Court considered to be a "neutral" expression, the Court stated in its ruling. It should also be noted that, in the vast majority of linguistic versions, a term with greater implications for the business in the directive was chosen instead of a neutral formulation, according to which the consumer is to "be provided" with the pertinent information, according to which the consumer is to "receive" confirmation of that information.<sup>72</sup>

It should be noted that the sending of the confirmation e-mail is not under the trader's control. Therefore, if the confirmation email is delivered before the digital content is supplied, that is, before the streaming or downloading begins, the requirements are satisfied.

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<sup>72</sup> Case C-49/11 Content Services Ltd v Bundesarbeitskammer [2012] EU:C:2012:419, para 37.

## 5. Right of Withdrawal

### 5.1 Introduction

Remotely awarded contracts to customers, unlike contracts entered into outside of a business operation, are predicated on the asymmetry of knowledge in this sort of contractual connection, which is aggravated by the inability to physically check the items. These elements put the consumer in a disadvantageous position and make him a contract's weak point.

The ability of the customer to be convinced of the usefulness of the purchased items after the conclusion of the contract is the essence of the right of withdrawal for remotely concluded transactions. After receiving the items, the consumer is given an additional opportunity to decide whether to keep or return them.<sup>73</sup> It's worth noting that the ability to withdraw from a contract has a motivating effect. It provides an additional incentive for customers to engage in distance trading and reduces the risks involved, avoiding any additional regrets. Furthermore, knowing that he will be able to return the purchased products after the contract is completed gives the consumer greater freedom to make a decision.<sup>74</sup>

The right of withdrawal allows customer to own, inspect, and, to some extent, consume products within an acceptable time frame. One of the objectives of the European legislation was to give customers a second chance to value things. If the acquired products do not match the customer's expectations, he has the right to withdraw from the contract and return the item without explanation. Furthermore, even if the decision is taken after getting all essential information about the goods or services, the customer has the right of withdrawal. The consumer's apprehension against distance contracts, as well as the European legislator's intention to encourage him to enter into contracts remotely, are at the root of such an excessive system of protection.<sup>75</sup>

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<sup>73</sup> Evelyne Terryn, *The Right of Withdrawal, The Acquis Principles and The DCFR, CFR and Existing EC Contract Law* in Reiner Schulze (ed) *Common Frame of Reference and Existing EC Contract Law* (Vol. 40, European Law Publishers 2011) 118-119.

<sup>74</sup> Anca Nicoleta Gheorghe, Camelia Spasici, 'Consumer's Right to Withdraw' (2013) Vol. 3 *Law Journal Challenges of Knowledge Society, Private Law*, 367.

<sup>75</sup> Joasia Luzak, 'To Withdraw or Not to Withdraw? Evaluations of the Mandatory Right of Withdrawal in Consumer Distance Selling Contracts Taking into Account its Behavioral Effects on Consumer' (2013) Centre for the Study of European Contract Law Working Paper Series No. 2013-04, Amsterdam Law School Research Paper No. 2013-21, 8 < [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2243645](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2243645)> accessed 01 May 2022.

The existence of withdrawal right does not always imply that it will be exercised effectively. Consumer Decision Ability Studies suggest that people with an unstable personality are more inclined to return products than to leave a useless item. Accordingly, the ability to withdraw from a contract is rarely used which results in so-called consumerism. Entrepreneurs are tense about "opportunistic" behavior. Consumers, on the other hand, have a cause for being nervous: the limitless ability to pick more and better makes them reliant on the search for more and better, which consumes all of their spare time.<sup>76</sup>

Consumers are protected from "wrongly" expressed will under the right of withdrawal. It is not, however, regarded equivalent to the will expressed through mistake, deception, or coercion. At the same time, the basic concept of indisputably void transactions can be considered to lie behind the consumer's power to withdraw from the contract. The right to "reconsider" is given to the consumer for two reasons: protection against the entrepreneur's psychological pressure and relief from the contractual fiber caused by inadequate information.<sup>77</sup> Both are linked to entrepreneurs' harmful impact on the creation of consumer will.

A consumer has 14 days under the Consumer Rights Directive to withdraw from a distance or off-premises contract without providing no justification. If the trader has not given all the necessary information, such as information regarding the requirements, time limit, and processes for exercising the right of withdrawal or the model withdrawal form, it provides for an extension of the right of withdrawal period.

The cooling-off period does not begin until the consumer is informed of his right to withdraw, as the ECJ confirmed in the Heiningen-case.<sup>78</sup> Failure to notify the customer of his right to withdrawal indicates that the cooling-off period never begins and, as a result, never ends. As a result, even years after the contract was signed, the customer may withdraw from it if necessary.

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<sup>76</sup> Joasia Luzak, 'To Withdraw or Not to Withdraw? Evaluations of the Mandatory Right of Withdrawal in Consumer Distance Selling Contracts Taking into Account its Behavioral Effects on Consumer' (2013) Centre for the Study of European Contract Law Working Paper Series No. 2013-04, Amsterdam Law School Research Paper No. 2013-21, 257-294 < [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2243645](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2243645) > accessed 01 May 2022.

<sup>77</sup> Jan Smits, '*Rethinking the Usefulness of Mandatory Rights of Withdrawal in Consumer Contract Law: The Right to Change Your Mind?*' (2001) Maastricht European Private Law Institute, working paper No. 2001/01, 7 < [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1719104](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1719104) > accessed 12 April 2022.

<sup>78</sup> Case C-481/99 Georg Heiningen und Helga Heiningen gegen Bayerische Hypo- und Vereinsbank AG [2001] ECR I-09945.

However, national law may stipulate that the cooling-off period does expire when a month has passed following the completion of both parties' contractual responsibilities.<sup>79</sup> In the Heining case, the customer backed out of the agreement nearly eight years after it was signed.

This Directive calls for the interpretation that all periods are expressed in terms of calendar days. When a period represented in days needs to be determined starting from the time an event or action occurs, the day the event or action occurs should not be taken into account as falling inside the period in issue.

Therefore, "14 days" in this clause should be understood to imply 14 calendar days beginning on the day after the relevant event (i.e., the conclusion of the contract or the delivery of goods) occurs. Consequently, the 14 days include Saturdays, Sundays, and public holidays. The withdrawal period should be extended to the following working day if it expires on one of these days.

Despite the fact that traders must acknowledge the consumer's right to withdraw from the contract within the prolonged withdrawal time, they are not required to expressly let the customer know that an extension is conceivable.

## 5.2 Starting point of the withdrawal period

Whether the contract is a sales contract, service contract, contract for online digital content, or contract for the provision of public services determines the day from which the 14-day right of withdrawal period is determined. The Directive specifies two places to begin: (a) the day of the contract's conclusion - for service contracts, contracts for the provision of public utilities, and contracts for the sale of digital content online; (b) the day of receiving physical possession of the goods (delivery) - for sales contracts, subject to a number of special rules for: (1) multiple goods ordered in one order and delivered separately; (2) goods consisting of multiple lots or pieces and delivered separately; and (3) contracts for regular delivery of goods during particular period of time.

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<sup>79</sup> Marco B.M. Loos, 'Right of Withdrawal, Modernizing and Harmonizing Consumer Contract Law' (2009) SSRN Electronic Journal, 14 <[https://www.researchgate.net/publication/228218791\\_Rights\\_of\\_Withdrawal](https://www.researchgate.net/publication/228218791_Rights_of_Withdrawal)> accessed 14 May 2022.



The withdrawal time for delivered products starts the day after they are received by the consumer or a different person the consumer specifies, other than a carrier. Contrary to the directive's provision, which states that if the carrier was chosen by the consumer and not the trader, the risk passes to the customer as soon as the products are delivered to him or her.<sup>80</sup>

The withdrawal period starts the day after delivery of the final item from a single order that was delivered separately if there are multiple deliveries. The consumer's reasonable interest in receiving all components of a single order before determining whether to withdraw from the contract justifies this regulation.

Before taking possession of the products, the consumer should be able to use their right of withdrawal. Furthermore, nothing in this situation stops the consumer from declining to accept possession of the goods. When a customer gets a better deal on the same item from another vendor after placing an order with one vendor, for instance, the customer notifies the first vendor that he is exercising his right to withdraw from contract and refuses to pick up the item at all.

### 5.3 Information about the right of withdrawal

According to the rule, businesses must advise customers of their right to withdraw from distance and off-premises contracts. Consumers must be given visible information about their right to withdraw from the contract, the terms and conditions of its fulfillment before the contract is signed, or in writing, or in any other form acceptable to it (electronically); entrepreneur identification data, costs associated with the return of goods; and information on cash deposits and other financial guarantees that must be paid or secured at the request of the entrepreneur. Information about the person against whom the right must be disclosed, as well as the conditions or subject of the contract, in which the right to withdraw from the contract is not applicable. Contracts involving perishable commodities, as well as service contracts where the service is given at the end of the contract, are examples.<sup>81</sup>

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<sup>80</sup> Christian Twigg-Flesner, Reiner Schulze, Protection Rational Choice: Information and the Right of Withdrawal in Handbook of Research on International Consumer Law (Edward Elgar Publishing Limited 2011) 13.

<sup>81</sup> Marco B.M. Loos, 'The Case for Uniformed and Efficient Right of Withdrawal from Consumer Contracts in European Contract Law' (2007) 0943-3929 Zeitschrift Für Europaisches Privatrecht, 14-18.

If the precise mode of delivery (single or multiple) is not known in advance, the trader may inform the consumer that the withdrawal period will expire after 14 days from the day after they acquire, or a third party they specify other than the carrier, acquires physical possession of the last good or lot of the order when providing information on time limits for withdrawal from sales contracts (aside from contracts for regular delivery of goods).

The directive also includes a list of withdrawal right exceptions. The consumer should be made aware of any applicable exclusions when they occur. For items listed by the exception list, such as milk and meat, the trader shall explain to the customer that there is no right of withdrawal because these items are likely to degrade or expire quickly.

On the other hand, more details should be included for exceptions that only apply in specific situations. The trader should explain to the customer the terms, deadlines, etc. for returning sealed canned food, for instance. Additionally, the dealer must let the customer know that opening the cans forfeits their claim to a refund due to health and hygiene concerns.

According to the directive, the trader must disclose the cost of returning any items that can't typically be returned by mail. This holds true, for instance, for large, bulky things like furniture and heavy machinery that are normally delivered door to door rather than dropped off at a post office for delivery. The merchant satisfies this informational requirement, for instance, by designating a single carrier (for instance, the carrier designated to deliver the good) and a single cost for returning the goods.

Additionally, the trader should provide a statement that such a cost will be payable, that this cost may be high, along with a reasonable estimation of the maximum cost, which could be based on the cost of delivery to the consumer, where the trader cannot reasonably calculate the cost of returning the goods in advance, for example because the trader does not offer to arrange for the return of the goods himself.

The cost of the precise delivery method the customer chose can be used to determine the return cost in cases when the trader offers a variety of delivery options. The trader shouldn't be obligated to offer this information for many potential return scenarios by stating the return cost or giving an estimate (such as returning in assembled form furniture that was delivered unassembled in a package).

## 5.4 Exercise of the right of withdrawal

It's crucial to understand how to exercise the right to withdrawal from a contract when considering it.<sup>82</sup> According to the Directive, the consumer may end the contract by using the sample withdrawal form or by making any other clear declaration. However, the consumer should still be allowed to withdraw in his own words as long as his statement to the trader outlining his choice to do so is unambiguous. This condition could be satisfied by a letter, a phone call, or by returning the items with a clear statement, but the customer should bear the burden of proving that they withdrew within the deadlines set forth in the Directive. It is therefore in the consumer's best advantage to use a durable medium to inform the merchant of his withdrawal.<sup>83</sup> The authorized person, on the other hand, does not need to express his or her position in particular words, such as "I exercise my right to withdraw from the contract" or "I withdraw from the deal." The most important thing is for the addressee to comprehend the meaning of the will expressed in such a way that it signifies withdrawal from contract.<sup>84</sup> Furthermore, the option of "default" notice is available. When a person who has the right to withdraw from a contract returns the purchased items to the entrepreneur without following any formalities, for example.<sup>85</sup>

As a result, it shouldn't be able to withdraw from the agreement by merely returning the products without making a clear statement to that effect. Refusing delivery or failing to pick up the items at the post office are not, in and of themselves, acceptable grounds for withdrawal.

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<sup>82</sup> Marco B.M Loos, 'Consumers sales in The Netherlands after Implementation of the Consumer Rights Directive and With a View to the Future Common European Sales Law' (2014) Amsterdam Law School Legal Studies Research Paper No. 2014-53, Centre for the Study of European Contract Law, Working Paper Series No.2014-12, 11  
<[https://www.researchgate.net/publication/314509597\\_Consumer\\_Sales\\_in\\_the\\_Netherlands\\_after\\_Implementation\\_of\\_the\\_Consumer\\_Rights\\_Directive\\_and\\_with\\_a\\_View\\_to\\_the\\_Future\\_Common\\_European\\_Sales\\_Law](https://www.researchgate.net/publication/314509597_Consumer_Sales_in_the_Netherlands_after_Implementation_of_the_Consumer_Rights_Directive_and_with_a_View_to_the_Future_Common_European_Sales_Law)> accessed 19 May 2022.

<sup>83</sup> Marco B.M Loos, 'Consumers sales in The Netherlands after Implementation of the Consumer Rights Directive and With a View to the Future Common European Sales Law' (2014) Amsterdam Law School Legal Studies Research Paper No. 2014-53, Centre for the Study of European Contract Law, Working Paper Series No.2014-12, 262  
<[https://www.researchgate.net/publication/314509597\\_Consumer\\_Sales\\_in\\_the\\_Netherlands\\_after\\_Implementation\\_of\\_the\\_Consumer\\_Rights\\_Directive\\_and\\_with\\_a\\_View\\_to\\_the\\_Future\\_Common\\_European\\_Sales\\_Law](https://www.researchgate.net/publication/314509597_Consumer_Sales_in_the_Netherlands_after_Implementation_of_the_Consumer_Rights_Directive_and_with_a_View_to_the_Future_Common_European_Sales_Law)> accessed 19 May 2022.

<sup>84</sup> European Research Group on Existing EC Private Law, *Principles of the Existing EC contract Law (Acquis principles), Contract I, Pre-contractual obligations, Conclusion of Contracts, Unfair Terms* (Law Publishers 2007) 165.

<sup>85</sup> Christian Twigg-Flesner, Reiner Schulze, *Protection Rational Choice: Information and the Right of Withdrawal in Handbook of Research on International Consumer Law* (Edward Elgar Publishing Limited 2011) 154.

In this approach, the Directive makes sure that the trader won't mistakenly interpret a package's return as a client withdrawal when it hasn't been delivered to the consumer due to a technical issue.

On the other hand, the consumer's statement that he or she is exercising their right of withdrawal from the agreement need not expressly mention that right. For instance, as long as the customer and the contract in question are identified, a declaration "terminating" or "retracting" from the contract or using similar phrases should be considered as sufficiently "unequivocal."

The Directive encourages adopting a durable medium in the event of a disagreement because it is the consumer's responsibility to prove that the right to withdraw was exercised. Additionally, the consumer would definitely benefit from an extra precaution to support his claim, such as the ability to retain a copy of the notification's delivered email, as proof that the notification was sent.

## 5.5 Right of withdrawal in respect of goods

### 5.5.1 Return of the Goods

According to the Consumer Rights Directive, the consumer must ship the items back to the seller within 14 days of the day on which they told the seller they were withdrawing from their contract. It should be in the consumer's natural advantage to return the items as soon as feasible rather than waiting until the deadline has passed because the consumer is responsible for handling the goods and their depreciated worth throughout the right of withdrawal period. However, off-premises contracts are an exception. If the goods were delivered to the consumer's home when the contract was made, the trader is required to pick up at his own expense any items that "cannot typically be returned by post."

Therefore, this obligation is an exemption to the general rule requiring merchants to disclose the cost of returning products that "cannot ordinarily be returned by post." Unless the trader neglected to advise the customer of this need or agreed to cover the expense, the consumer is responsible for the actual cost of returning the products. Additionally, the Model withdrawal instructions contain these two pieces of information that traders can utilize to fulfill their

disclosure duties to consumers. Any handling, administrative, or "restocking" fees paid by the merchant in connection with the return of the products should be excluded from the definition of "direct cost."

A dealer's promise to "collect the items himself" should only bind the customer if the trader additionally promises to cover the expense. The consumer should not be required by the Directive to accept the trader's promise to collect the items if that is not the case and the consumer discovers a more affordable and reliable way of return provided by a recognized service provider.

#### 5.5.2 Reimbursement of the Payments Received from the Consumer

Without undue delay and, in any case, no later than 14 days from the day on which he is informed of the consumer's intention to withdraw from the contract, the trader shall repay all payments received from the consumer, including, if necessary, the costs of delivery.

For sales contracts, the trader may only defer payment past this cutoff point until he has either received the items or, at least, received proof that the consumer has returned the goods.

If the items or the supporting documentation are received after the 14-day grace period has passed, the trader must promptly repay the customer. Although the definition of "undue delay" must be determined case-by-case, processing the refund normally shouldn't take more than a few working days.<sup>86</sup>

The Directive specifies the responsibilities of consumers and traders by permitting the trader to withhold a refund. It strengthens the position of the trader in comparison to the Distance Selling Directive 97/7/EC (DSD), which mandated that the trader pay the customer as soon as feasible and, in any case, within 30 days, without stipulating whether the customer had to send the items back first.

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<sup>86</sup> European Commission DG Justice Guidance Document 2014, 44.

Evidently, the idea of "proof of having sent back the products" is crucial. In general, this "proof" should be interpreted as a written declaration from a recognized supplier of postal or transportation services that names the sender and the recipient.

In theory, this proof shouldn't necessarily include promises from a third party that the in question goods have undergone inspection and verification. These supplemental services are probably expensive, which may deter customers from using their right to withdraw, which is expressly prohibited by the Directive. The consumer's obligations in the event of a withdrawal should not deter the consumer from exercising this right.

Despite the fact that the Directive gives the trader the right to hold the customer liable for any diminished value of the goods brought on by improper handling during the right of withdrawal period, the trader is still required to reimburse the customer once they have proof that the goods have been returned.

The trader shouldn't be allowed to claim the right to withhold the refund if the customer accepts the trader's offer to pick up the items or if the trader has offered to pick them up at his expense. The trader should be further motivated by this to make arrangements for the return of the products as soon as feasible.

According to the Directive, the trader must specifically utilize the same form of payment that the customer used to make the original purchase when issuing a refund. In particular, the merchant must reimburse the consumer for the entire amount paid in the payment's currency. For instance, if a customer transferred €30 to a merchant's bank account to make a purchase, the merchant must compensate the customer by doing the same, while also paying whatever fees the consumer's bank may have assessed for the subsequent transfer. Any bank fees incurred by the customer for the initial payment, however, should not be covered by the trader.

The Directive also permits the trader and the consumer to expressly agree on a different method, such as reimbursement by bank check rather than transfer or in a currency other than the currency of payment, as long as the consumer does not pay any additional fees as a result of using a different method. For instance, if the trader obtains the consumer's consent to accept a refund by bank check rather than a bank transfer, the trader should bear any additional costs to the consumer. It should be highlighted that unless the consumer specifically accepted

vouchers or used them for the initial transaction, the reimbursement should not be paid with a voucher.

### 5.5.3 Consumer's Liability for Mishandling of the Goods

No matter how the items were used within the withdrawal time, customers have the right to withdraw from the agreement: Some customers utilize their right to return products after using them more than is necessary to determine their nature, qualities, and functionality. The consumer should be held responsible for any decreased value of the goods in this situation but should not lose their right to withdraw.<sup>87</sup>

The consumer should only handle and examine the goods in the same way that he would be permitted to do in a store in order to determine their nature, attributes, and functionality. For instance, the customer should only be permitted to try on clothing; they should not be allowed to wear it. Therefore, throughout the return time, the consumer should handle and inspect the goods with care.

The expense of cleaning and repairs, as well as, if the items can no longer be offered as new, the trader's objectively justifiable loss of money from selling the returned item as a used item, can all contribute to the goods' lower value.

In the event of a disagreement, it will be decided case-by-case whether the consumer's testing of the items went beyond what was required to determine their nature, qualities, and functioning. A fair point of comparison is what a customer can often accomplish at a physical store, for instance normally, consumers would not be able to test out domestic items like kitchen appliances because their actual use leaves traces.

It should be remembered that in this context, "establishing the functioning" of the items refers to something different than making sure they are faultless in every way. The law governing sales and guarantees (Directive 1999/44/EC) protects the consumer in the event that the items prove to be defective after being used.

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<sup>87</sup> European Commission DG Justice Guidance Document 2014, 46.

If comparable goods are typically exhibited in stores unpackaged, then in theory the consumer should be able to open the packing and access the goods. Therefore, simply opening the packaging and causing damage to it does not warrant compensation. Any protective coatings should only be removed from an object when absolutely necessary in order to test it.

In this scenario, in relation to the right of withdrawal under the replaced Distance Selling Directive 97/7/EC the case C-489/07 Pia Messner<sup>88</sup> is very interesting. The Court of Justice ruled that a national regulation that put the burden of proof on the consumer to show that he did not use those goods during the period for withdrawal in a way that went beyond what was necessary to allow him to make effective use of his right of withdrawal would be detrimental to the efficiency and effectiveness of the right. This decision relates to the right of withdrawal under the replaced Distance Selling Directive 97/7/EC.

It specifically mentioned that the right of withdrawal is meant to protect the consumer with regard to mail-order sales and to make up for the disadvantage of a distance contract for the consumer by allowing him an adequate time for contemplation. According to the ECJ, these goals are irreconcilable with a general duty to pay compensation for the value of the use of the commodities obtained through a distance contract.

However, the ECJ also ruled that in cases where the consumer used the commodities in a way that was inconsistent with civil law principles like good faith or unjust enrichment, he could be obliged to pay compensation for their use.

This European Court judgement can be regarded to have a summary interpretation for the content and application of the right to withdraw from the contract. Indeed, protecting the weak party's interests is a cornerstone of consumer law, but protective measures must also be consistent with such a fundamental concept of private law as the need to act in good faith. However, it appears that the European legislative closed the door when it stated that compensation for a loss in the value of products could not be claimed if the customer had not been properly notified of the right of withdrawal.<sup>89</sup>

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<sup>88</sup> C-489/07 Pia Messner v Firma Stefan Krüger [2009] ECR I-07315.

<sup>89</sup> Marco B.M Loos, 'Consumers sales in The Netherlands after Implementation of the Consumer Rights Directive and With a View to the Future Common European Sales Law' (2014) Amsterdam Law School Legal Studies Research Paper No. 2014-53, Centre for the Study of European Contract Law, Working Paper Series No.2014-12, 232



As a result, such regulation has a related reason. First and foremost, it stems from the contract withdrawal right's mandatory nature. Informally, particularly in contracts formed through remote communication, the user's right must be enforced. Furthermore, the harmonization of consumer rights requires enterprises admitted to the European Union's internal market to provide uniform circumstances for the exercise of the right of withdrawal in agreements executed in the designated format. If this responsibility is not met, a range of consequences are possible, including the loss of the right to seek compensation. In this case, the purpose of protection is respect for the interests, not the interests of a specific user. An entrepreneur who violates the established norm of accurate information, whether intentionally or accidentally, loses the benefit of safeguarding his rights.

The enforcement of the consumer's liability for the decreased value of the products is not governed by the Directive. It is unclear, in particular, whether this obligation simply entails that the trader may sue the customer or whether the trader may unilaterally bill the customer for the damage or withhold part of any refund owed to the customer to account for the allegedly lowered worth of the products.

The general contract and procedural laws of Member States apply to these matters. For instance, Member States may permit merchants to deduct a portion from the amount repaid for returned products to account for the items' lower worth as a result of improper handling during the right of withdrawal period.

In any case, the consumer is not liable under the Consumer Rights Directive for the lower worth of the products when the seller neglected to notify them of their right of withdrawal. The withdrawal period is additionally prolonged by up to 12 months if this notification is not given. The 14-day period for contract review will not begin until the consumer has been sufficiently informed about this privilege, and the contract's duration will be increased to one year.<sup>90</sup> If he was not informed of his right of withdrawal from the contract or the service was started without his consent, he will not be held liable for the impossibility of exercising his right of withdrawal

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<[https://www.researchgate.net/publication/314509597\\_Consumer\\_Sales\\_in\\_the\\_Netherlands\\_after\\_Implementation\\_of\\_the\\_Consumer\\_Rights\\_Directive\\_and\\_with\\_a\\_View\\_to\\_the\\_Future\\_Common\\_European\\_Sales\\_Law](https://www.researchgate.net/publication/314509597_Consumer_Sales_in_the_Netherlands_after_Implementation_of_the_Consumer_Rights_Directive_and_with_a_View_to_the_Future_Common_European_Sales_Law)> accessed 19 May 2022.

<sup>90</sup> Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011.

further.<sup>91</sup> This means that after using the items efficiently for a period of time, a consumer may withdraw from the contract without being responsible for any wear and tear that results.

#### 5.5.4 Risk when Returning the Goods to the Trader

When a customer withdraws from a contract, the Directive does not specify who is responsible for any accidental damage or loss that occurs during the return of the goods. As a result, national regulations may also apply to this situation. These laws may, for instance, stipulate that once ownership of the items has been transferred to the customer upon delivery, the consumer bears all risk associated with returning them.

In general, the consumer should exercise reasonable caution while returning the items to ensure that they reach the trader and are not harmed in transit, for as by using a reputable transport or postal service provider.

The trader would continue to bear the risk of loss or damage since no risk transfer to the consumer will have occurred if the consumer never took physical possession of the goods, for example by refusing to accept delivery, either without making any explicit statements or with a statement to the trader about withdrawal from the contract.

### 5.6 Withdrawal from the Provision of Services

#### 5.6.1 Consumer's Consent to immediate Performance and Compensation Obligation

The directive stipulates that the trader shall require an express request from the customer in both cases, for off-premises and distance contracts, respectively, if the customer wants the performance of services, the supply of water, gas, or electricity, where they are not offered for sale in a limited volume or set quantity, or of district heating, to start during the withdrawal period.

Therefore, if the customer wants the service to begin within the withdrawal period, these provisions apply. They shouldn't, however, stop the trader from proactively suggesting that the

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<sup>91</sup> Christian Twigg-Flesner, Reiner Schulze, *Protection Rational Choice: Information and the Right of Withdrawal* in *Handbook of Research on International Consumer Law* (Edward Elgar Publishing Limited 2011) 10.

customer submit such a request. However, they shouldn't compel the trader to provide this choice or to grant the customer's request.

Even after making a specific request, the Directive permits the consumer to stop receiving services or public utilities. Even if the customer requested the provision of services prior to the end of the withdrawal period, he or she should still be able to exercise their right to withdraw.

If the performance of the service has begun with the consumer's prior express consent and with the acknowledgement that he will lose his right to withdraw once the contract has been fully performed by the trader, however, the consumer loses the right of withdrawal "after the service has been fully performed."<sup>92</sup>

When acquiring digital items, a similar reservation is made for distance contracts. Before the process of downloading digital content begins, the user has the right to withdraw his or her will. The customer (purchaser) loses the right once delivery of this sort of product begins or terminates. In this instance, the delivery of digital products must be preceded by the customer's informed consent to begin the download and an obligatory notice from the entrepreneur that the client loses the right of withdrawal from the contract once the download of the acquired goods begins.<sup>93</sup>

The "express consent" should be understood as the consumer's "express request." The trader should additionally get the customer's acknowledgement concerning the loss of the right to withdraw once the contract has been fully executed when the service contract is of such a character that it may be entirely performed during the withdrawal period, such as an installation contract.

The terms "express request/consent" in this case should be understood as reflecting a positive action by the consumer, such as checking a box on the website, by analogy with the regulations on additional payments. It is unlikely that these standards will be met if a pre-ticked box or a clause in the general terms and conditions is used for this purpose.

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<sup>92</sup> An Roinn Post, Fiontar agus Nualaiochta, 'Consultation on the Implementation of Consumer Rights Directive 2011/83/EU' (2013), 18 <<https://enterprise.gov.ie/en/Consultations/Consultations-files/Consultation-Paper-on-the-Implementation-of-Directive-2011-83-EU-on-Consumer-Rights.pdf>> accessed 13 May 2022.

<sup>93</sup> An Roinn Post, Fiontar agus Nualaiochta, 'Consultation on the Implementation of Consumer Rights Directive 2011/83/EU' (2013), 22 <<https://enterprise.gov.ie/en/Consultations/Consultations-files/Consultation-Paper-on-the-Implementation-of-Directive-2011-83-EU-on-Consumer-Rights.pdf>> accessed 13 May 2022.

An explicit agreement between the parties to execute the contract on or as of a specified date during the withdrawal period may also constitute the consumer's express request or assent.

The rules outlined in this Directive on the return of goods should apply to the goods aspects of contracts that have both goods and services as their object, and the compensation regime for services should apply to the services aspects, when services like installation are provided under a sales contract.

Therefore, the trader should obtain the consumer's express request for the performance of the service during the right of withdrawal period if he wishes to be reimbursed for that service in the event that the consumer withdraws from the contract if the service is provided during the right of withdrawal period from the sales contract (e.g., immediately upon delivery of the goods). For instance, if a household appliance delivery and installation are covered by the same distance or off-premises sales contract, the customer may ask the trader to install the equipment as soon as it is delivered. The consumer would still have a 14-day cooling-off period beginning the day following delivery, though.

The Directive requires the consumer to pay the merchant an amount that is in proportion to what has been given on the basis of the whole price agreed upon if the consumer terminates the contract during the right of withdrawal period after seeking its immediate fulfillment. For instance, a customer who cancels a mobile phone service agreement after 10 days of use would be required to pay the trader one third of the monthly membership fee as well as the cost of any additional services obtained during that time.

For making services available to customers requires one-time expenses for the trader, those expenses may be taken into account when determining compensation. Before the customer withdraws from the contract for land-line electronic communication services for instance, the trader may include the cost of installation work performed at the customer's home.

If the overall cost is exorbitant, the compensation should be calculated using the market value of the services rendered. Unless the consumer proves that the total price is inherently disproportionate, in which case the amount to be paid shall be determined on the basis of the market value of the service given, the determination of the proportionate amount shall be based

on the price agreed upon in the contract. By evaluating the cost of an identical service rendered by other merchants at the time the contract was signed, the market value should be calculated.

Regarding the interpretation of certain Articles governing the consumer's right to withdraw, the CJEU delivered a ruling in *PE Digital (C-641/19)*<sup>94</sup>. In this instance, the CJEU recommends to the national court that the proportional compensation be computed on a *pro rata temporis* basis in general. Because of this, a consumer who was only had to abide by an agreement for 4 days out of a 1-year contract may legitimately anticipate getting back most of the money he had invested. However, if the contract specifically stated that one or more services would be provided to consumers in full from the start of the contract's performance as well as separately, meaning that consumers were given a price to be paid for these services, separate from the total contract price, then the full price for such services could be considered owed to the trader.

The decision to ask the trader to begin providing the services during the cooling-off period (knowing then of the reimbursement risk) could only be made in an informed manner when the consumers had the knowledge that a particular service will be provided in full at the beginning of the contract's performance and knew its price (para 29). This was not the case with the contract for the dating site because it did not include a separate cost, such as for the personality test or report that would be provided to a client after the membership agreement was completed.

With relation to the Exorbitant Price According to the directive, the proportionate amount should be assessed based on the market worth of the goods or services delivered to a consumer if the contract price was excessive. By contrasting the cost of an equivalent service rendered by other merchants at the time the contract's conclusion, the market value should be determined. The CJEU instructs the national court to consider both the price a specific trader charges for comparable services to other consumers as well as the price charged by those same service providers.

#### 5.6.2 Consequences of the Trader's Failure to Comply with the Obligations

If the trader has not provided the necessary information about the right of withdrawal or if the consumer has not expressly requested that the service start during the withdrawal period, the

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<sup>94</sup> C-641/19 EU v PE Digital GmbH [2020] EU:C:2020:808.

Directive offers that the consumer bears no cost, i.e., the consumer is entitled to a refund of the amount paid or not to pay at all.

Because the withdrawal time may be prolonged by up to 12 months, just like in the case of the items mentioned above, failure to submit this exact information may cost the merchant money. This implies that for a considerable amount of time, the consumer may be entitled to cost-free services or public utilities.

### 5.7 Termination of the Contract Following the Exercise of the Right of Withdrawal

According to the Directive, if a party exercises their right of withdrawal, all contractual obligations between them are terminated, including any financial or contractual responsibilities the consumer may have if they have made an offer.

However, in accordance with Directives 2009/72/EC on the internal market in electricity and 2009/73/EC on the internal market in gas, the operators in question must make the switch within three weeks if the client requests it while abiding by the terms of the contract.

Therefore, in derogation from the rules mentioned above on compensation for what has been provided up until withdrawal, the previous supplier and the consumer may continue to be bound by their contract for up to three weeks if a consumer decides to withdraw from a contract for electricity or gas and switch to a new provider.

### 5.8 Ancillary Contracts

According to the Directive, an ancillary contract is one in which the consumer purchases goods or services associated to an off-premises or distance contract, and in which the trader or a third party is providing the goods or services as part of a mutually beneficial agreement. It must include a contract for delivery, upkeep, or installation, insurance, and financing for the purchase.

To identify which of the several linked contracts is the main contract and which is an ancillary contract, it is necessary to evaluate the relationships between the various linked contracts. For instance, the service contract should be treated as the primary contract when a customer obtains mobile telephony services and a mobile device through different contracts with the same trader

and that device is (in part) paid for in the monthly service fee. This shouldn't preclude the customer from keeping the service contract while withdrawing merely from the ancillary sales contract.<sup>95</sup>

The customer should reimburse the merchant for the cost of what has been given when the ancillary contract (such as a contract for delivery or installation) is covered by the Directive. The termination's effects, however, will be governed by the Member States' sector-specific or general contract law standards if the ancillary contract is typically outside the Directive's purview (such as an insurance or credit contract).

Member States are responsible for establishing the specific guidelines for terminating ancillary contracts. When a consumer informs a trader of their decision to withdraw from the main contract, for instance, the trader is obligated to inform any other relevant traders.

#### 5.9 Exceptions from the right of withdrawal

The right to withdraw from a contract governed by European consumer law is not absolute. There are exceptions to such general allusions, and their existence undermines the efficacy of the withdrawal right.<sup>96</sup> This means that, despite the right to withdraw being mandatory, it is not always deemed an informal condition or a mandatory provision of a contract entered into by distant communication.

The Directive outlines 13 contracts/situations, some of which merit particular attention, in which the consumer's right to withdraw is either absent or disappears under certain circumstances. Non-prefabricated products manufactured based on the consumer's unique choice or decision are referred to as "goods made to the consumer's specifications or plainly personalized," which are an exception from the right of withdrawal. It uses "tailor-made drapes" as an illustration of a product that is obviously individualized or made to the customer's specifications. This rule should be read narrowly because it is an exception to the Directive's more general rule granting consumers the ability to withdraw from distance/off-premises

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<sup>95</sup> European Commission DG Justice Guidance Document 2014, 53.

<sup>96</sup> Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011.

contracts. Address labels including the customer's contact information, for instance, should be covered by this exception.<sup>97</sup>

In this sense, "specification" or "personalization" should be understood to suggest that the goods are, in theory, unique and created in accordance with each customer's specific wants and needs as declared and agreed upon by the trader.

Contrarily, it should not be possible to speak of "specification" or "personalization" in the strict sense of this provision when the consumer simply chooses the goods by selecting from the standard (pre-set) options provided by the trader, such as color or additional equipment in a car, or builds a set of furniture using standard components.

The exception to the right of withdrawal in situations where the seller provides items that were manufactured to the consumer's specifications or were obviously personalized at the consumer's request has been made explicit by a decision by the European Court of Justice in case C-529/19 (*Möbel Kraft*).<sup>98</sup> In this case, the customer had purchased a fitted kitchen from Möbel Kraft, an interior design and home furnishings company, at a trade show and sought to invoke his right of withdrawal. Möbel Kraft filed a claim for damages with the German Court after the customer refused to take delivery of the kitchen and exercised their right of withdrawal. In this instance, it was clear from the order that the kitchen components covered by the in question contract had not yet been assembled when the consumer opted to terminate the contract. Additionally, Möbel Kraft, not a third party, would have made any necessary adjustments to the products on-site.

The CJEU's response to this query was unambiguous. According to the court, regardless of whether the manufacturing or assembly of the items has started, this exception is inherent in the fundamental subject matter of such a contract and can therefore be used against the consumer. Bringing legal stability to the relationship between businesses and customers, the CJEU's explanation of this exemption to the right of withdrawal may assist to avoid needless disputes in this area. It also highlights the necessity for businesses to be very explicit in their

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<sup>97</sup> European Research Group on Existing EC Private Law, *Principles of the Existing EC contract Law (Acquis principles)*, *Contract I, Pre-contractual obligations, Conclusion of Contracts, Unfair Terms* (Law Publishers 2007) 54.

<sup>98</sup> C-529/19 *Möbel Kraft GmbH & Co. KG v ML* [2020] EU:C:2020:846.



conditions of sale regarding the circumstances under which the consumer's right of withdrawal may be affected.

According to the Court, the provision must be interpreted to mean that, regardless of whether the trader has started producing the goods, a consumer who has entered into an off-premises contract for the purchase of goods that are to be made to his or her specifications may use the exception to the right of withdrawal outlined in that provision against them.

Another exception from the right of withdrawal is goods with specific characteristics. This includes the supply of products that are likely to degrade or expire quickly, such as foods and beverages with short shelf lives that must be kept chilled, as well as the supply of sealed products that were unwrapped after delivery for hygienic or health protection reasons and include cosmetics. The merchant may provide the consumer with another option to test other cosmetic products that cannot be regarded to be sealed for reasons of cleanliness or health protection, for as by including a free tester with the purchase. In this approach, consumers might exercise their right to discover the nature and qualities of a product without having to open the container. This clause also applies to the supply of things that, by nature, become inseparably mixed with other items after delivery, such as fuel.

On March 27, 2019, the Court of Justice of the European Union (CJEU) issued its decision in the case C681/17, *slewo — schlafen leben wohnen GmbH ("slewo") v. Sascha Ledowski*<sup>99</sup>. This decision followed a request for a preliminary ruling regarding Article 16(e) of Directive 2011/83/EU, which restricts the right of withdrawal only when the goods have definitively ceased to be sellable for health protection or hygienic reasons.

According to the CJEU, it is the nature of the goods that may justify their packaging being sealed for reasons of hygiene or health protection, and as a result, the unsealing of the packaging deprives the contents of the guarantee in terms of health protection or hygiene. The goods may no longer be able to be used again by a third party and, as a result, may no longer be able to be sold again by the trader after the package is opened by the consumer, depriving the goods of the guarantee in terms of health protection or hygiene.

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<sup>99</sup> C681/17 *Slewo — schlafen leben wohnen GmbH ("slewo") v. Sascha Ledowski* [2019] EU:C: 2019:255.

The Court of Justices determined that the exception to the right of withdrawal only applies if, after the packaging has been opened, the goods inside are definitively no longer in a saleable condition because of real health protection or hygiene reasons, because the nature of the goods makes it impossible or excessively difficult for the trader to take the necessary measures allowing for resale without compromising either the buyer's health or the trader's financial interests.

The Court of Justice determined the following on the product in question (a mattress): Such a mattress does not appear to be definitively unsuited for being used again by a third party or for being sold again, despite the possibility that it has been used. In that regard, it is sufficient to keep in mind that a hotel uses the same mattress for all of its visitors, that there is a market for used mattresses, and that used mattresses can be thoroughly cleaned.

The Court of Justice's ruling seems intriguing since it could have consequences that go beyond the specific case at hand, encompassing everything from the world of cosmetics to medical instruments that can be ordered online in sealed packages following sanitization or sterilisation. In example, the CJEU's reasoning suggests that in some circumstances, customers may be able to exercise their right to withdraw from contract even if the goods were under sealed packaging and in sterile conditions, provided that the maker is permitted to recondition the item for subsequent sale or use. The CJEU's judgment does not address the burden this may place on the manufacturer or the extent to which this is acceptable without amounting to a remanufacturing of the product, even though it is recommended that the possibility of performing reconditioning by sanitization or sterilization of the returned product be considered on a product-by-product basis. The justification for the right of withdrawal appears to be that the seller continues to profit from the returned items, which would not be the case if reconditioning was more expensive than initial manufacture.

Contracts with a specific date or period of performance are also subject to the exception list under the Directive- the provision of accommodation not intended for residential use, the transportation of products, the renting of cars, the provision of catering services, or the provision of services associated with recreational activities provided the contract specifies a certain date or time for execution.

This exception must be included in the contract as "a specified date or period of performance." The granting of a consumer's right to withdraw from a purchase may also not be appropriate in the case of some services, where the conclusion of the contract necessitates the reservation of capacity that, in the event that the consumer's right to withdraw was exercised, the vendor might find it challenging to fill. For instance, this would be the situation when bookings are made for hotels, vacation rentals, cultural or sporting events. As a service "connected to leisure activities," renting motorcycles and other means of transport at particular dates or times may also be exempt from the right of withdrawal. The Court of Justice concluded in the case C-336/03 *easyCar*<sup>100</sup> involving the Distance Selling Directive 97/7/EC that "transport" also includes making the means of transportation available to the consumer. That interpretation states that renting trucks for the transportation of products on a specified date may be included in the exception for "transport of commodities." Despite the fact that the Directive applies to contracts for the transit of goods, it would not apply to services for storage, even if they are offered on particular dates.

## 5.10 Right of Withdrawal as Protection Mechanism

It's worth noting that the various types of transaction rescission trace back to a time when the qualities of the goods or services offered were considerably simpler, and the contract's form was merely a written or oral agreement. The withdrawal from contracts concluded remotely in the modern world may be based on the categories of classic mistakes, such as mistakes in choosing the type of transaction, its substance, basis, and so on. However, it is likely that the contract consent was the result of a mechanical or technical error. This is particularly visible in the case of "forwarding" contracts, in which the contract's terms are communicated via internet links. Instead of expressing a wish to acquire the intended items, the customer may manually hit another button or navigate to a different link, resulting in an agreement to purchase entirely different things.<sup>101</sup>

In remotely concluded contracts, the language barrier is also regarded as an obstacle. Frequently, the contract conditions are written in the manufacturer's language, which the

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<sup>100</sup> C-336/03 *easyCar (UK) Ltd v Office of Fair Trading* [2005] ECR I-01947.

<sup>101</sup> Christiane Riefa, 'The Reform of Electronic Consumer Contracts in Europe: Towards an Effective Legal Framework?' (2009) Vol. 14 *Lex Electronica*, 244-248 < [https://www.lex-electronica.org/files/sites/103/14-2\\_riefa.pdf](https://www.lex-electronica.org/files/sites/103/14-2_riefa.pdf) > accessed 05 May 2022.

consumer does not understand. He is unable to accurately grasp the content of contracts and the duties deriving from them due to a lack of or inadequate knowledge of the language. Ignorance, on the other hand, seldom, if ever, undermines the impression of the transaction's validity and is rarely, if ever, regarded a reason to withdraw from the transaction.<sup>102</sup>

The impact of the right of withdrawal from a contract is that it protects the consumer from a mistakenly concluded contract rather than a mistaken will. The right to revoke a mistaken will, on the other hand, requires proof of the existence of the will, but the right to withdraw does not.<sup>103</sup> The consumer's subjective negative attitude toward the completed contract is sufficient to void the contract's binding power. The time limit is the only restriction. When the stated duration expires, the right of withdrawal protection function is no longer effective.

The terms of the contract, as well as the presentation and appearance of the items, have an equal impact on the consumer's decision in e-commerce. The customer's actions and expectations are determined by the digital image of the contract's subject. It can be claimed that the form and design of an electronic offer impact the formation of the user's will, rather than the substance (which the consumer is usually unaware of). In this way, the digital image has a significantly higher influence on the user's decision than the contract's content.<sup>104</sup>

The primary goal of the right of withdrawal is to offer the consumer more time to reflect and gather essential information, which is typical of the contract's previous stages. In other words, in this scenario, the determination of the conformity of the inner will with the outward will to the manifest will occurs after the contract is signed, for an additional length of time to be evaluated, rather than during the contract's conclusion. As a result, the institution of revoke the will is regarded as a right that applies retroactively.

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<sup>102</sup> Marco B.M. Loos, 'Right of Withdrawal, Modernizing and Harmonizing Consumer Contract Law' (2009) SSRN Electronic Journal, 248 <[https://www.researchgate.net/publication/228218791\\_Rights\\_of\\_Withdrawal](https://www.researchgate.net/publication/228218791_Rights_of_Withdrawal)> accessed 14 May 2022.

<sup>103</sup> Nils Jansen, Reinhard Zimmermann, 'Contract Formation and Mistake in European Contract Law: A Genetic Comparison of Transnational Model Rules' (2022) Oxford Journal of Legal Studies, 33 <[https://www.researchgate.net/publication/228224906\\_Contract\\_Formation\\_and\\_Mistake\\_in\\_European\\_Contract\\_Law\\_-\\_A\\_Genetic\\_Comparison\\_of\\_Transnational\\_Model\\_Rules](https://www.researchgate.net/publication/228224906_Contract_Formation_and_Mistake_in_European_Contract_Law_-_A_Genetic_Comparison_of_Transnational_Model_Rules)> accessed 14 May 2022.

<sup>104</sup> Nancy S. Kim, *The Duty to Draft Reasonably and Online Contracts* in Larry DiMatteo, Keith Rowley, Severine Saintier, George Zhou (eds), *Commercial Contract Law, Transatlantic Perspectives* (Cambridge University Press 2013) 182.

The right of withdrawal, on the other hand, is regarded as one of the best options for the customer. He can request withdrawal even if he is dealing with a fraudulent or incorrect transaction, allowing him to get rid of the contract's binding force more swiftly.

The appeal of the right of withdrawal is the possibility of a cooling-off time. Its goal is to make joining a commercial venture and entering into long-distance contracts easier. The exercise of the right, however, does not necessitate the other party's violation of responsibility. As a result, the authorized person has the freedom to substantiate his or her decision, which is considered the right's essential dignity.<sup>105</sup>

## 6. Conclusion

This research focuses on off-premises and distance contracts, which are becoming increasingly important in today's legal transactions for both individuals and businesses. The primary goal of this master's thesis is to examine consumer as well as to examine consumer protection issues, such as the implementation of their right to information when purchasing over the internet, and to suggest possible solutions to these issues. The current thesis has reviewed international consumer protection provisions based on Consumer Rights Directive, which defines a number of fundamental consumer rights as well as standards for contracts between consumers and businesses that are applicable throughout the European Union. The directive directly affects how consumers in the European Union live their daily lives. Any assessment should make sure that, especially in light of the digital economy, consumer rights are strengthened and modernized rather than reduced across the EU.

One of the most crucial tools in consumer protection is information requirements which work to eliminate information gaps between consumers and sellers. Informational regulations both increase consumer freedom of choice and prevent customers from making poor decisions. Typically, traders have more economic sway and can force the customer to agree to contractual terms. The lack of information or the poor quality of the information offered is among the most frequently encountered concerns by consumers, according to studies and consumer surveys.

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<sup>105</sup> European Research Group on Existing EC Private Law, *Principles of the Existing EC contract Law (Acquis principles)*, Contract I, *Pre-contractual obligations, Conclusion of Contracts, Unfair Terms* (Law Publishers 2007) 164.

This means that adhering to mandatory information requirements can raise standards, increase consumer confidence, and support the internal market's potential.

The Commission should concentrate on determining whether the information obligations established by the Directive have been appropriately incorporated into the laws of the Member States and if they are sufficient to allow consumers to make the best decision. Due to the full harmonization nature of the Directive, the focus should be on determining whether consumers actually receive transparent and complete information about important contractual provisions, rights, and obligations. If the degree of protection is high and the regulations take into account consumer realities in their everyday interactions, only then can full harmonization benefit consumers.

The right of withdrawal, which is discussed in the thesis is one of the Directive's most important components. Customers who shop from a distance are unable to inspect the product before making a purchase and are unable to judge the worth of the goods or services they wish to acquire. As a result, clients are permitted to test and examine the goods as well as exercise the right of withdrawal from the contract within 14 days. Consumers should benefit from a right of withdrawal from contracts when they are dealing with aggressive activities and/or psychological coercion off-premises since they may encounter a surprise element. As a key component of consumer protection, the right of withdrawal from a contract must be preserved.

## Fazit

Diese Forschung konzentriert sich auf Verträge außerhalb von Geschäftsräumen und im Fernabsatz, die im heutigen Rechtsverkehr sowohl für Privatpersonen als auch für Unternehmen immer wichtiger werden. Das primäre Ziel dieser Masterarbeit ist es, verbraucher- sowie Verbraucherschutzrechtliche Fragestellungen, wie zB die Umsetzung ihres Auskunftsrechts beim Einkauf über das Internet, zu untersuchen und mögliche Lösungsansätze für diese Fragestellungen aufzuzeigen. Die vorliegende Dissertation hat internationale Verbraucherschutzbestimmungen auf der Grundlage der Verbraucherrechterichtlinie überprüft, die eine Reihe grundlegender Verbraucherrechte sowie Standards für Verträge zwischen Verbrauchern und Unternehmen definiert, die in der gesamten Europäischen Union gelten. Die Richtlinie wirkt sich direkt darauf aus, wie die Verbraucher in der Europäischen

Union ihr tägliches Leben führen. Bei jeder Bewertung sollte sichergestellt werden, dass insbesondere angesichts der digitalen Wirtschaft die Verbraucherrechte in der gesamten EU gestärkt und modernisiert und nicht eingeschränkt werden.

Eines der wichtigsten Instrumente im Verbraucherschutz sind Informationspflichten, die darauf abzielen, Informationslücken zwischen Verbrauchern und Verkäufern zu schließen. Informationsvorschriften erhöhen sowohl die Wahlfreiheit der Verbraucher als auch verhindern, dass Kunden Fehlentscheidungen treffen. In der Regel haben Händler einen größeren wirtschaftlichen Einfluss und können den Kunden zwingen, Vertragsbedingungen zuzustimmen. Der Mangel an Informationen oder die schlechte Qualität der angebotenen Informationen gehören laut Studien und Verbraucherbefragungen zu den häufigsten Bedenken der Verbraucher. Das bedeutet, dass die Einhaltung obligatorischer Informationsanforderungen die Standards erhöhen, das Vertrauen der Verbraucher stärken und das Potenzial des Binnenmarkts unterstützen kann.

Die Kommission sollte sich darauf konzentrieren festzustellen, ob die durch die Richtlinie eingeführten Informationspflichten angemessen in die Gesetze der Mitgliedstaaten aufgenommen wurden und ob sie ausreichen, um den Verbrauchern zu ermöglichen, die beste Entscheidung zu treffen. Aufgrund des Vollharmonisierungscharakters der Richtlinie sollte der Schwerpunkt darauf liegen, festzustellen, ob Verbraucher tatsächlich transparente und vollständige Informationen über wichtige Vertragsbestimmungen, Rechte und Pflichten erhalten. Nur wenn das Schutzniveau hoch ist und die Vorschriften die Realitäten der Verbraucher in ihren alltäglichen Interaktionen berücksichtigen, kann eine vollständige Harmonisierung den Verbrauchern zugute kommen.

Das in der Diplomarbeit behandelte Widerrufsrecht ist einer der wichtigsten Bestandteile der Richtlinie. Kunden, die aus der Ferne einkaufen, können das Produkt vor dem Kauf nicht inspizieren und den Wert der Waren oder Dienstleistungen, die sie erwerben möchten, nicht beurteilen. Dem Kunden wird daher die Möglichkeit gegeben, die Ware innerhalb von 14 Tagen zu testen und zu untersuchen sowie vom Rücktrittsrecht Gebrauch zu machen. Verbraucher sollten von einem Widerrufsrecht für Verträge profitieren, wenn sie es mit aggressiven Aktivitäten und/oder psychologischer Nötigung außerhalb von Geschäftsräumen zu tun haben, da sie auf ein Überraschungselement stoßen können. Als wesentlicher Bestandteil des Verbraucherschutzes muss das Widerrufsrecht gewahrt bleiben.

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