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# The right of withdrawal under the Consumer Rights Directive as a tool to protect consumers concluding a distance contract

**Reinhard Steennot**

Faculty of Law, Financial Law Institute, Ghent University, Belgium

## ABSTRACT

### Keywords:

Consumer Rights Directive 2011  
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Distance contracts  
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Since 1997, the European legislator has aimed to protect consumers concluding a distance contract amongst others by entitling them to withdraw from the contract. First, this paper analyses the right of withdrawal as it is incorporated in the 2011 Consumer Rights Directive (CRD). This paper illustrates that, compared to the 1997 Distance Selling Directive, the CRD, contains more detailed rules, offering some useful clarifications. Further, this paper shows that the CRD slightly increases consumer protection, for example by determining that the mere beginning of performance under a services contract does not lead to the loss of the right to withdraw from the contract. However, consumers are also at risk where, without any explicit warning, they are held liable for the diminished value of the goods used during the withdrawal period. In a second part of the article, it is argued that the full harmonization approach should have been limited to the technical aspects of the withdrawal right, in order to avoid a reduction of consumer protection in some Member States. Finally, this paper shows that the CRD not always sufficiently takes into account the objectives pursued with the right of withdrawal as a tool to protect consumers concluding a distance contract.

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## 1. Introduction

In 2011, the European legislator enacted the Consumer Rights Directive (hereafter: CRD),<sup>1</sup> which aims at modernizing the 1997 Distance Selling Directive (hereafter DSD)<sup>2</sup> and the 1985 Doorstep Selling Directive.<sup>3</sup> Amending the provisions incorporated in these Directives, including those on the right of withdrawal, had become necessary in order to simplify and update these rules, to remove inconsistencies and to close

unwanted gaps. Member States must adopt and publish the provisions that are necessary to comply with the new CRD by 13 December 2013. The adopted measures will apply to contracts concluded after 13 June 2014 (art. 28).

Apart from information requirements, the CRD mainly contains provisions on the right of withdrawal, which is awarded to consumers in the case of a distance contract as well as in the case of a contract concluded outside the trader's premises. The right of withdrawal gives the consumer the

<sup>1</sup> Directive 2011/83/EU of the European Parliament and the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and the Council, OJ L 22 December 2011, 304/64.

<sup>2</sup> 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, OJ L 4 June 1997, 144/19.

<sup>3</sup> Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ L 31 December 1985, 372/31.

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possibility, without giving any reasons and without incurring any penalty, of no longer being bound by a contract into which he has entered.<sup>4</sup>

The aim of this paper is to examine the right of withdrawal only where a consumer concludes a distance contract, for example using the Internet, e-mail, regular mail or the phone. More specifically, we will examine when a consumer is entitled to withdraw from the contract, within which period, in which way and what the consequences are of exercising the right of withdrawal. Since most provisions that are incorporated in the CRD are similar to those laid down in the Proposal for a Regulation on a Common European Sales Law (art. 40–46),<sup>5</sup> this part of the article is to a large extent also relevant for the discussion of the provisions of this Proposal.

However, this paper is not limited to a mere technical analysis of the provisions which are incorporated in the CRD. It will also focus on the shift from minimum harmonization (1997 DSD) to full harmonization (2011 CRD) and indicate the rationales which justify the existence of a withdrawal right, especially in the case of a distance contract.

## 2. Scope of application of the Directive

According to article 3.1 CRD, the right of withdrawal only applies to distance and off-premises contracts concluded between a trader and a consumer.

### 2.1. Trader

A trader is any natural person or any legal person who is acting, for purposes relating to his trade, business, craft or profession in relation to contracts covered by the CRD (art. 2.2).<sup>6</sup> The fact that the scope of application is limited to contracts concluded between consumers and traders implies that a consumer will not be entitled to withdraw from a distance contract that he has concluded with another private person acting outside his trade or business.

### 2.2. Consumer

Article 2.1 CRD defines a consumer as any natural person who, in contracts covered by the Directive, is acting for purposes which are outside his trade, business, craft or profession. This definition is well known in consumer law. It is used in many other Directives, such as the 1985 Doorstep Selling Directive, the 1993 Unfair Contract Terms Directive, the 1997 Distance Selling Directive, the 2005 Unfair Commercial Practices Directive, the 2008 Consumer Credit Directive and the 2009 Timesharing Directive.

It is clear that under EU law the notion “consumer” solely refers to natural persons. Therefore, legal persons cannot be

regarded as consumers.<sup>7</sup> The same goes for natural persons concluding a contract in order to obtain goods or receive services which will be used within their business, craft or profession.<sup>8</sup> The fact that they have no particular experience with regard to that type of contract is irrelevant.

With regard to mixed purposes contracts, the European Court of Justice stated in the Gruber-case,<sup>9</sup> that a person who concludes a contract intended for purposes which are in part within and in part outside his trade or profession cannot be considered a consumer, unless the trade or professional purpose is so limited as to be negligible in the overall context of the supply, the fact that the private element is predominant being irrelevant in that respect. Although this decision relates to the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters<sup>10</sup>, many scholars argued in the past that this interpretation could also be used with regard to the notion of a consumer, used in consumer protection Directives.<sup>11</sup> Taking into account recital 17 of the CRD, it can be doubted whether this is the legislator’s intention under the CRD. More specifically, recital 17 states that in the case of dual purposes contracts, a person must be considered a consumer if the trade purpose is so limited as not to be predominant in the overall context of the contract. Therefore, although defined in the same way as in previous Directives, the notion of a consumer must probably be interpreted differently, including natural persons acting for primarily private purposes. It is to be regretted that the CRD does not simply define a consumer as a natural person acting primarily for purposes which are outside his trade, business, craft or profession. Moreover, such definition would have been in line with the Draft Common Frame of Reference<sup>12</sup> (DCFR) (Book I-1:105).<sup>13</sup>

<sup>7</sup> C.J. 22 November 2001, Case C-541/99 and 542/99, *Cape Snc v Idealservice Srl and Idealservice MN RE Sas v OMAI Srl*, Jur. 2001, I-9049.

<sup>8</sup> C.J. 14 March 1991, Case C-89/91, *Patrice Di Pinto*, Jur. 1991, I-1189, where the Court of Justice decided that a trader concluding an advertising contract concerning the sale of his business is not to be regarded as a consumer.

<sup>9</sup> C.J. 20 January 2005, Case C-464/01, *Johann Gruber v Bay Wa AG*, Jur. 2005, I-439.

<sup>10</sup> The Brussels Convention of 1968 has been replaced by the Regulation 44/2001 of the Council 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation). The definition of a consumer has remained the same.

<sup>11</sup> Howells, G. (2005). The scope of European consumer law. *European Review of Contract Law* Volume 1 (Issue 3), p. 360–361; Loos, M. (2005). Het begrip “consument” in het Europese en Nederlandse privaatrecht. *Weekblad voor privaatrecht, Notariaat en Registratie* Volume 6638, p. 771–772; Straetmans, G. (2009). Het Europese consumentenacquis: genese en toekomstblik. In *Het EG-Consumentenacquis: nu en straks*. Antwerpen. Intersentia, p. 25.

<sup>12</sup> Principles, definitions and model rules of European Private Law, available at [http://ec.europa.eu/justice/contract/files/european-private-law\\_en.pdf](http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf).

<sup>13</sup> Loos, M. (2008). Review of the European Consumer Acquis. Working Paper Series Centre for the Study of European Contract Law. <http://ssrn.com:abstract=1123850>; Tonner, K. and Fangerow, K. (2012). Directive 2101/83/EU on Consumer Rights: a new approach to European Consumer Law? *Zeitschrift für Europäisches Unternehmern- und Verbraucherrecht*. Volume 1 (Issue 2), 72–73.

<sup>4</sup> Micklitz, H., Stuyck, J and Terryn, E. (2010). *Cases, Materials and Text on Consumer Law*, Oxford. Hart Publishing, p. 239.

<sup>5</sup> Proposal of the European Commission for a Regulation of the European Parliament and of the Council on a Common European Sales Law, 11 October 2011, COM (2011) 635 final.

<sup>6</sup> It is irrelevant whether a legal person is privately or publicly owned.

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