

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

Reinhard Steennot

Faculty of Law, Ghent University
Ghent, Belgium

Reinhard.Steennot@ugent.be

Abstract. Since 1997, the European legislator aims 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.

1. Introduction

In 2011, the European legislator enacted the Consumer Rights Directive (hereafter: CRD)¹, which aims at modernizing the 1997 Distance Selling Directive (hereafter DSD)² and the 1985 Doorstep Selling Directive³. 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).

¹ 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.

² 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.

³ 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.

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 possibility, without giving any reasons and without incurring any penalty, of no longer being bound by a contract into which he has entered⁴.

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)⁵, 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)⁶. 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.

⁴ Micklitz, H., Stuyck, J and Terry, E. (2010). Cases, Materials and Text on Consumer Law, Oxford. Hart Publishing, p. 239.

⁵ 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.

⁶ It is irrelevant whether a legal person is privately or publicly owned.

It is clear that under EU law the notion “consumer” solely refers to natural persons. Therefore, legal persons cannot be regarded as consumers⁷. 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 profession⁸. 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-case⁹, 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 matters¹⁰, most scholars argued in the past that this interpretation could also be used with regard to the notion of a consumer, used in consumer protection Directives¹¹. 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 Reference¹² (DCFR) (Book I-1:105)¹³.

In the past, some Member States have chosen to also regard legal persons acting for private purposes as consumers (e.g. Denmark, Poland)¹⁴. In France, even professionals concluding a contract that is not directly related to their profession

⁷ 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.

⁸ 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.

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

¹⁰ 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.

¹¹ 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.

¹² Principles, definitions and model rules of European Private Law, available at http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf.

¹³ 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 Unternehmers- und Verbraucherrecht*. Volume 1 (Issue 2), 72-73.

¹⁴ See: Schülthe-Nolke, H. (2008). *EC Consumer Law Compendium*. University of Bielefeld, p. 508-510.

receive the same protection as consumers¹⁵. Later in this paper (section 5), it will be shown, that the CRD, although being based on the principle of full harmonization, does not prevent Member States from protecting these persons in the same way as “consumers” in the meaning of the CRD.

2.3 Distance contracts

The CRD defines a distance contract as any contract concluded between a trader and a consumer under an organized distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded (art. 2.7).

Contrary to the DSD, the CRD no longer contains a separate definition of a “means of distance communication”. However, the CRD has incorporated the specific features of a means of distance communication in the definition of a distance contract itself. Therefore, the only difference between the CRD and the DSD is that the CRD does not provide an indicative list of means which can be considered means of distance communication.

2.3.1 The exclusive use of means of distance communication

Distance contracts are concluded through means of distance communication. Means of distance communication include the Internet, e-mail, regular mail, (mobile) phone, fax, etc... It is irrelevant whether the parties only use one means of distance communication to negotiate and to conclude the contract or combine different means of distance communication (e.g. website and phone). Also, it does not matter whether the parties meet each other after the conclusion of the contract (e.g. at the time of delivery or payment).

Decisive is that the contracting parties, or their representatives, are not simultaneously physically present before or at the time of conclusion of the contract. According to recital 20 of the CRD, this requirement only applies to the actual negotiations and the conclusion of the contract. It does not prevent that a contract is regarded as a distance contract if the consumer has merely visited the business premises for the purpose of gathering information about the goods or services and afterwards has negotiated and concluded the contract at a distance. Later in this paper (section 6.2), it will be shown that this interpretation is not consistent with the objectives pursued with the right to withdraw from a distance contract.

Recital 20 of the CRD also determines that the concept of a distance contract does not include reservations made by a consumer through a means of distance communication to request the provision of a good or a service from a professional. One must be careful with this reasoning. More specifically, it is necessary to distinguish between on the one hand the situation where a reservation does not bind the consumer (i.e. where it does not create any obligation on behalf of the consumer) and on the other hand the situation where the reservation creates the obligation to pick up the goods or to receive the services ordered on behalf of the consumer (and where the violation of this contractual obligation entitles the trader to a compensation). It is clear that in the latter case a real distance contract has been

¹⁵ Cour de Cassation 5 March 2002, Bulletin 2002, I, no. 78, 60.

concluded, since the contract has become binding, following the exclusive use of means of distance communication.

2.3.2 The requirement of an organized scheme

An organized scheme requires that the trader concludes contracts regularly at a distance¹⁶. This requirement implies that not every contract that is concluded by a means of distance communication falls under the scope of application of the provisions on distance contracts. For example, if a trader only exceptionally concludes a contract by e-mail with a consumer, at the consumer's request, this contract cannot be regarded as a distance contract in the meaning of the Directive.

At this point the final text of the CRD differs from the initial proposal which did not contain this requirement. It was originally the intention to broaden the scope of a distance contract, and therefore the right to withdrawal, to cover all contracts where the parties exclusively made use of one or more means of distance communication¹⁷, whether or not an organized scheme was used. In this context, it is interesting to mention that some Member States (e.g. Czech Republic, Hungary, Latvia) in the past already decided not to implement this restrictive precondition into their national legislation¹⁸. It will be shown that the CRD does not oblige these Member States to incorporate this additional requirement into their national legislation (section 5) and that such requirement is not in line with the objectives pursued with the right of withdrawal (section 6.2).

Finally, it is important to emphasize that it is not necessary that the trader itself runs the organized scheme. When a trader sells goods, using websites such as e-bay, the rules on distance contracts apply. Although this view was already accepted by the German *Bundesgerichtshof* under the 1997 Distance Selling Directive¹⁹, the CRD removes all possible doubts by adapting the definition of a distance contract which was laid down in the 1997 Directive. More specifically, it removes the requirement that the organized scheme is *run by the supplier*.

2.3.3 Exclusions

Certain types of distance contracts do not fall under the scope of application of the CRD (art. 3.3), which implies that consumers will not be entitled to withdraw from these contracts²⁰, at least not on the basis of the CRD. However, one must take into account that for some of the excluded services, the right of withdrawal results from other legislation. This is the case for contracts relating to financial services and timesharing agreements. The 2002 Directive on the distance marketing of consumer

¹⁶ Biquet-Mathieu, C. and Decharneux, J. (2001). Aspects de la conclusion du contrat par voie électronique, in *Le Commerce électronique : un nouveau mode de contracter*, Liege, Jeune barreau de Liège, p. 173.

¹⁷ Howells, G. and Schulze, R. (2009). Overview of the proposed Consumer Rights Directive. In *Modernizing and Harmonizing Consumer Contract Law*, European Law Publishers, p. 10; Twigg-Flesner, C. and Metcalfe, D. (2009). The proposed Consumer Rights Directive – less haste, more thought? *European Review of Consumer Law* Volume 5 (Issue 3), p. 378-379.

¹⁸ See: Schülthe-Nolke, H. (2008). *Ibidem*, p. 516-517.

¹⁹ *Bundesgerichtshof* 3 November 2004, available at: <http://www.jurpc.de/rechtspr/20040281.htm>.

²⁰ See article 3.3 for these exclusions. These types of contracts are excluded from the scope of the CRD either because they are already subject to a number of specific requirements under European or national legislation, either because of their fundamentally distinctive features. Moreover, the rules incorporated in the Directive are considered not to be appropriate to those type of contracts.

financial services²¹ as well as the 2009 Timesharing Directive²² allow the consumer to withdraw from the contract within a fourteen day period. Whereas with regard to financial services the right of withdrawal is limited to *distance* contracts²³, this is not the case with timesharing agreements, from which the consumer can withdraw irrespective the way in which the contract has been concluded.

3. Right to withdraw from the contract

In principle, consumers are entitled to withdraw from a distance contract without paying any penalty and without giving any reason. It is interesting to have a closer look at the withdrawal period, the way the right of withdrawal must be exercised, the effects of withdrawal and the situations in which the consumer will not be entitled to withdraw from the contract, although concluded at a distance.

3.1 Withdrawal period

The consumer disposes of a period of fourteen days to withdraw from a distance contract (art. 9). The CRD extends the right of withdrawal from seven working days to fourteen *calendar* days. The main reason for this extension is not increasing consumer protection, but increasing legal certainty and the reduction of compliance costs for traders. More specifically, it was the European legislator's objective to come to one withdrawal period which is the same for all distance contracts (including those on financial services) and off-premises contracts. The Timesharing Directive (art. 42.1) contains the same withdrawal period.

It is important that the consumer is informed about his right to withdraw from the contract, since in order for the withdrawal right to be effective consumers need to be aware of the possibility to withdraw from the contract²⁴. Therefore, article 6.1 h) CRD requires the trader to inform the consumer in a clear and comprehensible manner about the conditions of the right of withdrawal and the time limit and procedures to exercise the right of withdrawal. Also, the trader must provide the consumer with the model withdrawal form, set out in Annex I(B) of the CRD. It is up to the trader to prove that the consumer was provided with this information (art. 6.9).

If the trader does not provide the consumer with this information, the withdrawal period is extended substantially. In such a situation, it only expires 12 months from the end of the initial withdrawal period²⁵ (art. 10). Another possibility would have been to determine that the withdrawal period never starts running, if the

²¹ Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, OJ L 9 October 2002, 271/ 16.

²² Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts, OJ L 3 February 2009, 33/10.

²³ However, if the contract is a consumer credit agreement, falling under the scope of the Consumer Credit Directive, the consumer will also be entitled to withdraw from the contract if it has not been concluded at a distance. See article 14 Consumer Credit Directive.

²⁴ Micklitz, H., Stuyck, J and Terryn, E. (2010). Ibidem, p. 255.

²⁵ However if the trader fulfils its obligation to provide information with regard to the withdrawal right within that period of 12 months (e.g. after six months), a new withdrawal period starts, that will expire 14 days after the day upon which the consumer receives the information.

consumer is not informed about the withdrawal right, as was decided in the *Heiniger* case²⁶. However, an indefinite period of withdrawal was considered incompatible with the principle of legal certainty (recital 43)²⁷. At first sight, the DCFR contains the same rule. However, the calculation of the period of one year is different, since this period starts at the time of the conclusion of the contract (Book II-5:103).

On the one hand, the remedy extending the withdrawal period up to 12 months is more severe than the remedy which is incorporated in the DSD, since the DSD only extended the withdrawal period to three months. On the other hand, one must take into account that this remedy only applies where the trader does not provide the information *with regard to the withdrawal right*. The sanctioning of the violation of other information requirements is – contrary to what was the case under the DSD – not dealt with in the CRD²⁸. It is up to the Member States to determine which sanctions are effective, proportionate and dissuasive (art. 24). Whereas information requirements are harmonized, civil remedies in the case of the violation of these requirements are not (section 5).

3.1.1 Sales contracts and services contract

Since the calculation of the withdrawal period is different in the case of a sale of goods and in the case of a provision of services, one needs to make a distinction between sales contracts and service contracts.

A sales contract is a contract under which the trader transfers or undertakes to transfer the ownership of *goods* to the consumer and the consumer pays or undertakes to pay the price thereof (art. 2(5)). Goods are tangible movable items (art. 2(4)). The European legislator excludes items sold by way of execution or otherwise by authority of law from the definition of goods. The solution is not very elegant, but what the European legislator wants to obtain is that the provisions with regard to goods / sales contracts are not applicable to the situation where goods are sold by way of execution or otherwise by authority of law.

A services contract is any contract other than a sales contract under which the trader supplies or undertakes to supply a service to the consumer and the consumer pays or undertakes to pay the price thereof. Since “services” itself are not defined, they must receive their usual interpretation under EU-law (see: art. 57 Treaty of the Functioning of the EU)²⁹.

Contracts having as its object both goods and services are considered sales contracts, which implies that the calculation of the withdrawal period must be done according to the provisions on sales contracts. This provision is new and constitutes a welcome clarification. Contrary to what is the case in for instance the CISG³⁰ (art. 3.2), it seems that one does not need to determine whether the sale of the good or the

²⁶ See: C.J. 13 December 2001, Case C-481/99, *Heiniger v Bayerische Hypo- und Vereinsbank AG*, Jur. 2001, I-9945 (with regard to doorstep selling). See also: Ramberg, C. (2005). Electronic Commerce in the Context of the European Contract Law Project. ERA-Forum Volume 6 (Issue 1), p. 56; Unger, O. (2012). *Ibidem*, p. 289.

²⁷ See also: Howells, G. and Reich, N. (2011). The Current limits of European harmonisation in consumer contract law. *Era-Forum Volume 12* (Issue 1), p. 53.

²⁸ Howells, G. and Schulze, R. (2009). *Ibidem*, p. 17.

²⁹ van Boom, W. (2009). *De ontwerprichtlijn Consumentenrechten: gemaakte keuzes en gekozen onderbouwing*. In *Het Voorstel voor een Richtlijn Consumentenrechten*. Den Haag, Boom Juridische Uitgevers, p. 16.

³⁰ The United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980.

provision of a certain service is the most important object of the contract. The rules on sales contracts seem to apply as soon as goods are supplied³¹. In this context, it is also interesting to mention that the Proposal for a Regulation on a Common European Sales Law, excludes contracts which contain other elements than the sale of goods from its scope, unless where the services can be considered as related services, such as maintenance or repair (art. 6).

In the past, it has not always been easy to determine the status of contracts relating to gas, water and electricity. Are these to be considered as sales contracts or as services contracts? This has been an important question in case of a distance contract, since the calculation of the withdrawal period has always been different for goods and services. One of the advantages of the CRD is that it explicitly solves this interpretation problem. First, the CRD states that water, gas and electricity are goods, but only where they are put up for sale in a limited volume or set quantity. If they are not, they are not considered goods. However, they are not considered services either. A specific rule applies for the calculation of the withdrawal period.

The European legislator has applied the same reasoning with regard to contracts concerning digital content. Digital content which is delivered on a tangible medium, such as a DVD, is considered a good. Digital content which is not delivered on a tangible medium and which the consumer for example receives through downloading or streaming, is not considered a good. Once again, such content is not considered a service either. A specific rule for the calculation of the withdrawal period applies³².

3.1.2 Calculating the withdrawal period

In the case of a sales contract, the withdrawal period expires after fourteen calendar days from the day on which the consumer acquires physical possession of the goods³³. The European legislator has chosen for a phrasing which is different from the one in the DSD³⁴ in order to make it clear that withdrawal can take place as soon as the consumer is bound by a distance contract or an offer. The consumer does not have to wait to withdraw from the contract until the goods have actually been delivered.

When the consumer has entitled a third party to acquire physical possession of the goods on his behalf (e.g. his neighbor), the withdrawal period expires after fourteen days from the day on which that party has acquired physical possession of the goods. In order to avoid that the withdrawal period already starts during transportation of the goods, the CRD determines that the third party acquiring physical possession must be another one than the carrier (art. 9). This means that the fact that the carrier acquires physical possession of the goods does not start the withdrawal period.

³¹ Twigg-Flesner, C. and Metcalfe, D. (2009), *Ibidem*, p. 378.

³² Tonner, K and Fangerow, K. (2012). *Ibidem*, p. 71.

³³ Which is also new, is that specific rules apply in the case of multiple goods ordered by the consumer in one order and delivered separately, in the case of delivery of a good consisting of multiple lots or pieces and in the case of contracts for regular delivery of goods during defined period of time: see art. 9 (2), b). This will increase legal certainty.

³⁴ Article 6 determines that the period for exercise of this right begins in case of goods, on the day of receipt of the goods. In a literal interpretation, one could argue that the consumer was not entitled to withdraw from the contract before delivery.

In the case of a services contract the withdrawal period expires after fourteen days from the day of the conclusion of the contract. The same rule applies in the case of contracts for water, gas and electricity not put up for sale in a limited volume or set quantity and in the case of contracts of digital content which is not supplied on a tangible medium.

The calculation of the withdrawal period must take place according to the Council Regulation 1182/71 of 3 June 1971 determining the rules applicable to periods, dates and time limits (recital 41). This implies that if the period is to be calculated from the moment at which an event occurs or an action takes place, the day during which that event occurs or that action takes place should not be considered as falling within that period. This means that the withdrawal period only starts running the day after the delivery of the good or the day after the conclusion of the services contract.

A consumer who wishes to withdraw from the contract must inform the trader of his decision to withdraw from the contract, before the end of the withdrawal period. It is sufficient that the consumer dispatches the notice of withdrawal within the period of 14 calendar days (or the extended period of 12 months) (art. 11.2). It is not necessary that the trader actually receives this notification within this period of time. Therefore, it may take a few days longer than fourteen calendar days before the trader is certain that the contract will be definitely binding.

3.2 Exercising the right of withdrawal

A consumer who wishes to exercise his withdrawal right may either use the model withdrawal form³⁵, either make any other unequivocal statement setting out his decision to withdraw from the contract (art. 11.1). The introduction of a model withdrawal form should simplify the withdrawal process, i.e. make it easier for the consumer to withdraw from the contract. The consumer can freely choose whether he actually makes use of this form, since any other statement setting out his decision to withdraw from the contract will have the same effect³⁶. On the contrary, the simple return of the goods is not sufficient to constitute proper exercise of the right of withdrawal³⁷. The solution differs from the one accepted under the DCFR (Book II- 5: 102), where returning the subject matter of the contracts is considered a notice of withdrawal unless the circumstances indicate otherwise.

Although no formal requirements apply, consumers must bear in mind that the burden of proof of exercising the right of withdrawal is imposed on them (art. 11.4)³⁸. Therefore, the European legislator states that it is in the interest of the consumer to use a durable medium. However, one must take into account that not every durable medium will guarantee that the consumer will be able to prove that he has withdrawn from the contract (e.g. a regular letter).

Article 11.3 CRD makes it possible for traders to entitle consumers to withdraw from the contract electronically by filling in on the trader's website the model withdrawal form or any other unequivocal statement on the trader's website.

³⁵ Member States cannot provide for any formal requirements, such as the font size, applicable to the model withdrawal form other than those set out in Annex I(B).

³⁶ Unger, O. (2012). Richtlinie über Verbraucherrechte. *Zeitschrift für Europäisches Privatrecht* Volume 20 (Issue 2), p. 289.

³⁷ Howells, G. and Schulze, R. (2009). *Ibidem*, p. 18; Twigg-Flesner, C. and Metcalfe, D. (2009), *Ibidem*, p. 383; Unger, O. (2012). *Ibidem*, p. 289.

³⁸ See also: Loos, M. (2008). *Ibidem*, p. 11.

It is clear that this is an additional option. The consumer must always retain the possibility to withdraw from the contract in another way. If the consumer makes use of the possibility to withdraw from the contract electronically, the trader must communicate to the consumer an acknowledgement of receipt of such a withdrawal on a durable medium without delay.

3.3 Effects of the exercise of the right of withdrawal

The exercise of the right of withdrawal terminates the obligations of the parties to perform the distance contract or to conclude the distance contract, in cases where an offer was made by the consumer and where the consumer exercises his right of withdrawal before the actual conclusion of the agreement (art. 12 CRD).

Since it is possible that goods or services have already been delivered within the withdrawal period and payment has already been made by the consumer, the question arises as to the consequences of the withdrawal on these performances and deliveries. The articles 13 and 14 of the CRD deal with these questions in the same way.

In this context, it is interesting to mention article 9.3 CRD, which prevents Member States from prohibiting the contracting parties from performing their obligations during the withdrawal period. More specifically, Member States can no longer determine in their national legislation that traders cannot claim payment or an advance from the consumer during the withdrawal period (section 5). Therefore, traders will in all Member States have the possibility to claim payment before dispatching the goods.

3.3.1 Obligations on behalf of the trader

When the consumer has paid the trader before exercising the right of withdrawal, the trader must reimburse all payments received from the consumer. Not only the price must be reimbursed, but also the cost for the initial delivery of the goods³⁹. Therefore, a distinction must be made between the costs for sending the goods to the consumer and the costs for sending them back to the trader, when or after exercising the right of withdrawal. Only the latter have to be borne by the consumer (section 3.3.2). Although not explicitly determined in the DSD, the Court of Justice applied the same distinction under the DSD⁴⁰.

In principle, the trader must reimburse the consumer using the same means of payment as the consumer used for the initial transaction. This implies that reimbursement cannot take place via vouchers (except where the original payment was done in the same way). However, reimbursement by other means remains only possible if the consumer expressly agrees and such reimbursement does not create extra costs on behalf of the consumer (art. 13.1).

Reimbursement must take place without undue delay and in any event not later than fourteen calendar days from the day on which he is informed of the consumer's

³⁹ However, if the consumer has chosen expressly for a type of delivery which creates extra costs (although the trader has offered a cheaper type of delivery, which is common and generally acceptable), the consumer must bear the difference in costs between these two types of delivery.

⁴⁰ C.J. 15 April 2010, Case C-511/08, *Handelsgesellschaft Heinrich Heine GmbH v. Verbraucherzentrale Nordrhein-Westfalen eV*, <http://curia.eu>.

decision to withdraw from the contract (art. 13.1)⁴¹. However, unless the trader has offered to collect the goods himself, with regard to sales contracts, the trader may withhold the reimbursement until he has received the goods back, or until the consumer has supplied evidence of having sent back the goods, whichever is the earliest (art. 13.3). This provision is new and clearly benefits the trader⁴². When the trader does not execute its obligation in due time, the consequences need to be determined according to the national law of the Member States.

3.3.2 Obligations on behalf of the consumer

Dealing with the obligations of the consumer, one needs to make a distinction between on the one hand the situation where goods were delivered and on the other hand the situation where services were performed during the withdrawal period or gas, water or electricity (not put up for sale in a limited volume or set quantity) or digital content (which is not supplied on a tangible medium) has been delivered during the withdrawal period.

For contracts having as their object both goods and services, the rules on the return of goods apply to the goods aspects and the compensation regime for services applies to the services aspects.

As is the case with the obligations of the trader, national legislation will determine the consequences when a consumer violates his obligations resulting from the CRD.

3.3.2.1 Sales contracts

In the case of the withdrawal from a sales contract, the consumer will have to send the goods back⁴³ or hand them over to the trader or to a person authorized by the trader to receive the goods. The consumer has to do so without undue delay and in any event not later than fourteen calendar days from the day on which he has communicated his decision to withdraw from the contract to the trader (art. 14). This provision is new. The deadline is considered to be met if the consumer sends back the goods before the period of fourteen days has expired. As already indicated, the trader can withhold reimbursement until he has received the goods back, or until the consumer has supplied evidence of having sent back the goods.

The consumer bears the direct costs of returning the goods unless the trader has agreed to bear these costs himself or the trader failed to inform the consumer that the consumer has to bear them. In this context, it must also be determined who bears the risk if something goes wrong when returning the goods. Since the CRD states that the consumer does not incur any liability as a consequence of the exercise of the right of withdrawal, except as provided in article 13 (2) and 14 of the Directive and these articles don't determine that the consumer is liable for the transportation of the goods to the trader, it is clear that the trader has to bear this risk.

Further, the question arises whether the consumer can be held liable if, in the case of the withdrawal from the contract the value of the goods has diminished. This

⁴¹ Under the DSD reimbursement had to take place within 30 days. The starting point of this period was not explicitly determined. See also Book II.-5:105 DCFR, which also contains a 30 day period.

⁴² Tonner, K. And Fangerow, K. (2012). Ibidem, p. 71; Unger, O. (2012). Ibidem, p. 290-291.

⁴³ Unless the trader has indicated to collect the goods himself.

question is dealt with in article 14.2 CRD. It states that the consumer can only be held liable for any diminished value of the goods resulting from the handling of the goods other than what is necessary to establish the nature, characteristics and functioning of the goods. As the Court of Justice⁴⁴, the European legislator makes a distinction between the mere testing of the good and the actual use of the good. The consumer must (be able to) handle and inspect the goods in the same manner as he would be allowed to do in a shop, without incurring financial consequences when withdrawing from the contract. The mere possession of the goods during the withdrawal period, as well as the unpacking of the goods⁴⁵ will not imply that the consumer has to pay this compensation⁴⁶. It is up to the trader to prove that the consumer has gone beyond the testing of the goods and has actual made use of the goods⁴⁷. Whereas such proof will be easy to deliver with regard to goods having a clock, such as cars and computers, it will be hard to prove that a consumer has worn a sweater instead of merely trying it on.

However, the consumer cannot be held liable for the diminished value of the goods where the trader has failed to provide notice of the right of withdrawal as required by the CRD. This rule is especially important when the consumer decides to withdraw from the contract after several months. As mentioned earlier (section 3.1), the withdrawal period is extended to twelve months in the case the consumer is not informed about the right of withdrawal. If the consumer would have to bear the cost of the diminished value of the goods resulting from the use of the good during the extended withdrawal period, this would discourage him from withdrawing from the agreement in such a situation, which would make this specific remedy useless.

A compensation for the diminished value of the goods needs to be distinguished from a compensation for the benefits the consumer obtained from the actual use of the goods⁴⁸. The difference between these two types of compensations is clear. A compensation for the diminished value of the goods is calculated in function of the trader's loss, whereas a compensation for the actual use of the goods is determined in function of the consumer's benefits from using the good during the withdrawal period⁴⁹. With regard to compensations for the benefits resulting from the use of a good during the withdrawal period, the Court of Justice decided in the *Messner* case that the DSD does not prevent the consumer from being required to pay a compensation for the use of the goods in the case where he has made use of those goods *in a manner incompatible with the principles of civil law, such as those of good faith or unjust enrichment*. However, according to the Court of Justice such compensation may not adversely affect the efficiency and effectiveness of the right of withdrawal. This would, for example, be the case if the amount of compensation were to appear disproportionate in relation to the purchase price of the goods at issue or also if the consumer would have to prove that he did not use the goods in a manner which went beyond what was necessary to permit him to make effective use of his right of withdrawal.

⁴⁴ C.J. 3 September 2009, case C-489/07, *Messner*, Jur. 2009, I-7315.

⁴⁵ Loos, M. (2008). *Ibidem*, p. 12.

⁴⁶ Rott, P. (2010). The Balance of Interests in Distance Selling Law - Case Note on *Pia Messner v. Firma Stefan Krüger*. *European Review of Private Law*. Volume 18 (Issue 1), p. 89.

⁴⁷ Loos, M. (2008). *Ibidem*, p. 13; Rott, P. (2010). *Ibidem*, p. 191.

⁴⁸ Rott, P. (2010). *Ibidem*, p. 194.

⁴⁹ Rott, P. and Terryn, E. (2009). The proposal for a Directive on Consumer Rights: No single set of Rules. *Zeitschrift für Europäisches Privatrecht* Volume 17 (Issue 3), p. 474.

It is accepted that a compensation for the actual use of the goods must not be calculated in line with the normal price for renting the good for the time in question. The difference in value should be calculated on the basis of the expected total performance of the good. For example, in Germany the courts accept that the compensation for the use of a car with an expected durability of 200.000 km equals 0.5% of the purchase price per 1000 km⁵⁰.

Under the CRD, there seems to be no room for a compensation for the actual use of the goods during the withdrawal period (art. 14.5)⁵¹. The European legislator has chosen for a compensation for the diminished value of the goods, instead of a compensation for the actual use of the goods. It is clear that a compensation for the diminished value of the goods may be much higher than a compensation for the actual use of the goods during the withdrawal period, since the use of the goods will have turned them into second-hand goods⁵². In Belgium and Germany for example, the value of a car will diminish with 10% or even 20% when it has been used. A huge difference compared to the compensation for the actual use of a car. It is regretful that the CRD, contrary to the DCFR (Book II-5:105), does not require that consumers are explicitly warned (informed) about the possible financial consequences of actually using (instead of testing) the goods during the withdrawal period⁵³.

Finally, it must be determined who must bear the risk if the goods are lost or damaged during the withdrawal period, due to circumstances which do not result from testing or using the goods (e.g. theft, fire). As mentioned earlier, article 14.5 CRD determines that the consumer does not incur any liability *as a consequence of the exercise of the right of withdrawal*. Whether this rule includes the situation of damages to or losses of the goods within the withdrawal period, due to unforeseeable circumstances appearing before exercising the right of withdrawal, is not entirely clear. Nevertheless, the question is important, since if it does include these situations, the trader will have to bear this risk⁵⁴. If it doesn't, the outcome will depend on civil law principles incorporated in the law that is applicable to the contract. In my view, article 14.5 does not deal with the question of loss or damages due to *force majeure*. Anyhow, it is unfortunate that this situation is not explicitly dealt with in the Directive, contrary to what is the case in the DCFR. Under the DCFR, the consumer is not held liable for damages to or loss of the goods during the withdrawal period, unless the consumer did not use reasonable care to prevent, destruction, loss or damage (Book II-5:105).

3.3.2.2 Services, water, gas, electricity and digital content

Contrary to what has been the case under the DSD, the beginning of the performance of services during the withdrawal period does not imply that the consumer loses his right to withdraw from the contract (section 3.4). This made it necessary to determine which costs must be borne by the consumer if he exercises his right to withdraw from the contract after the trader has started to execute the

⁵⁰ Rott, P. (2010). Ibidem, p. 191.

⁵¹ Rott, P. and Terryn, E. (2009). Ibidem, p.474; Unger, O. (2012). Ibidem, p. 294.

⁵² Rott, P. (2006). Can German Law serve as an Example for EC Consumer Law?. German Law Journal Volume 7 (Issue 12), p. 1127-1128. See also: Austrian Supreme Court 27 September 2005. Verbraucher und Recht 2006, p. 242.

⁵³ Rott, P. and Terryn, E. (2009). Ibidem, p. 474.

⁵⁴ Unger, O. (2012). Ibidem, p. 293-294, supports this view.

contract. First, it is important to emphasize that the consumer will only have to bear the cost of the services delivered if the consumer has expressly requested the trader to perform services within the withdrawal period. The same goes for the supply of gas, electricity or water (not put up for sale in a limited volume or set quantity) during the withdrawal period.

If the consumer has expressly requested performance during the withdrawal period, he will have to pay to the trader an amount which is in proportion to what has been provided until the time the consumer has informed the trader of the exercise of the right of withdrawal, in comparison with the full coverage of the contract. The proportionate amount to be paid by the consumer to the trader must be calculated on the basis of the total price agreed in the contract. However, if the total price is excessive, the proportionate amount must be calculated on the basis of the market value of what has been provided. The market value must be defined by comparing the price of an equivalent service performed by other traders at the time of conclusion of the contract.

If the trader has failed to provide information on the right of withdrawal or on the obligation to pay reasonable costs for services performed within the withdrawal period, the consumer does not have to pay for the services performed and the gas, water or electricity supplied during the withdrawal period.

In the case of the supply, in full or in part, of digital content which is not supplied on a tangible medium the consumer will not bear any cost if 1) the consumer has not given his prior express consent to the beginning of the performance before the end of the withdrawal period or 2) the consumer has not acknowledged that he loses his right of withdrawal when giving his consent; or 3) the trader has failed to provide the confirmation of the contract concluded, as required by article 8.7 CRD.

3.4 Ancillary contracts

If the consumer exercises his right of withdrawal with regard to a distance contract, any ancillary contract is automatically terminated, without any costs for the consumer. Ancillary contracts are contracts by which the consumer acquires goods or services related to a distance contract and where those goods are supplied or those services are provided by the trader itself or by a third party on the basis of an arrangement between that third party and the trader (art. 2.15). Member states must lay down detailed rules on the termination of such contracts (art. 15 CRD).

This provision is new, since the DSD only contained a rule on “linked credit agreements”. It is important to emphasize that the provision on ancillary contracts incorporated in the CRD does not apply to linked credit agreements, which fall under the scope of the Consumer Credit Directive (CCD)⁵⁵. More specifically, article 15 CCD determines that, in the case the consumer withdraws from a contract on the basis of Community legislation (e.g. distance contract), the consumer is no longer bound by a linked credit agreement.

3.5 Exceptions to the right of withdrawal

Article 16 CRD enumerates in which cases the consumer is not entitled to withdraw from the distance contract. A few of these exceptions deserve some explanation.

⁵⁵ Twigg-Flesner, C. and Metcalfe, D. (2009), *Ibidem*, p. 384.

First, the consumer is no more entitled to withdraw from a *services contract*, after the service has been fully performed. It is important to emphasize that the consumer only loses his right of withdrawal if the performance has begun with the consumer's prior express consent, and with the consumer's acknowledgement that he will lose his right of withdrawal once the contract has been fully performed by the trader. Comparing this exception, with the one laid down in the DSD, it becomes immediately clear that the protection offered by the CRD is larger. Under the DSD the consumer already lost his right to withdraw from the contract when the provision of the services or performance *had begun* during the withdrawal period (with the consumer's agreement). The new regime is the same as the one incorporated in the 2002 Distance Selling of Financial Services Directive.

If a contract relates to the supply of digital content which is not supplied on a tangible medium, the consumer loses the possibility to withdraw from the contract, once the performance has begun with the consumer's prior express consent and his acknowledgement that he thereby loses his right of withdrawal (see: section 6.2).

Another exception to the right of withdrawal concerns (services) contracts relating to the provision of accommodation other than residential purpose (e.g. hotel booking), transport of goods, car rental services⁵⁶, catering or services related to leisure activities (e.g. theatre, movies, sports games). This exception, which only applies if the contract provides for a specific date or period of performance, is important, since this type of contracts are often concluded over the Internet⁵⁷.

Further, the consumer is not entitled to withdraw from contracts concluded at a public auction. Public auctions are methods of sale where goods or services are offered by the trader to the consumer, who attend or are given the possibility to attend the auction in person, through a transparent, competitive bidding procedure run by an auctioneer and where the successful bidder is bound to purchase the goods or services (art. 2.13). It is clear that the use of online platforms for auction purposes (e.g. e-bay) is not considered as a public auction in the meaning of the CRD⁵⁸. Therefore, this exception is not relevant with regard to distance contracts.

As under the DSD, the consumer is not entitled to withdraw from a contract as regards the supply of a newspaper, periodical or magazine. However, the CRD determines that this exception from the right of withdrawal does not apply to subscription contracts for the supply of such publications.

The CRD also contains some exceptions to the withdrawal right which were not included in the DSS. However, the impact of these on the level of consumer protection must not be overestimated.

4. Comparing the CRD to the DSD

Compared to the DSD, the CRD at some points slightly increases consumer protection. This is for example the case 1) where it extends the withdrawal period to fourteen calendar days, 2) where it reduces the period within which the trader must reimburse the consumer after exercising his right of withdrawal and more important 3) where it determines that with regard to services contracts the consumer only loses

⁵⁶ See: C.J. 10 March 2005, Case C-336/03, EasyCar (UK) Ltd v Office of Fair Trading, *Jur.* 2005, I-1947.

⁵⁷ Ramsay, I. (2007). *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets*. Oxford, Hart Publishing, p.340.

⁵⁸ Unger, O. (2012). *Ibidem*, p. 290.

his right to withdraw from the contract when the services have been fully performed. The obligation on behalf of the trader to provide the consumer with the model withdrawal form may also be considered an important change which could facilitate the exercise of the right of withdrawal (section 6.3). On the other hand, consumers are at risk, where the CRD determines that the consumer must pay a compensation for the diminished value of the goods, when he has used the goods before exercising his right of withdrawal, especially since the CRD does not require the trader to warn the consumer about the possible financial consequences of the use of the goods during the withdrawal period.

The CRD also contains much more detailed provisions⁵⁹, offering useful clarifications, for example with regard to the delivery of gas, water, electricity and digital content, the calculation of withdrawal periods, the exercise of the right of withdrawal and the consequences of or the obligations resulting from exercising the right of withdrawal. Although in some cases, these “new” rules simply incorporate the principles the European Court of Justice elaborated with regard to the DSD (e.g. with regard to the cost of resending the goods), these additional rules can be welcomed⁶⁰. However, this paper has also shown that some uncertainties remain, e.g. with regard to loss of or damages to the goods due to unforeseeable circumstances during the withdrawal period.

5. Full harmonization

Whereas the DSD was based on the principle of minimum harmonization (art. 14), the CRD is based on the principle of full harmonization (art. 4). The choice for full harmonization has become standard in the European legislator’s consumer policy. More specifically, the European legislator argues that full harmonization is necessary to increase legal certainty for both consumers and traders, who should be able to rely on a single regulatory framework (see e.g. recital 7 CRD).

In the case of minimum harmonization, Member States retain the possibility to maintain or introduce measures which offer additional protection to consumers⁶¹, the only requirement being that these rules are compatible with the principles on the free movement of goods and services laid down in the European Treaty⁶². First, measures imposing higher levels of consumer protection than incorporated in the European Directive, must be non-discriminatory, i.e. apply in the same way to domestic traders as to traders from other Member States⁶³. Secondly, these rules offering additional protection must be necessary to reach a legitimate public interest (in our case consumer protection)⁶⁴. Finally, additional protection measures must be proportionate. This implies that they must be suitable or appropriate in achieving

⁵⁹ Unger, O. (2012). Ibidem, p. 288.

⁶⁰ See: Howells, G. (2004), *European Consumer Law – The Minimal and Maximal Harmonisation Debate and Pro Independent Consumer Law Competence*. In *An Academic Green Paper on European Contract Law*. Kluwer Law International, p. 79.

⁶¹ Mak, V. (2009). *Review of the Consumer Acquis: Towards Full Harmonization?*. *European Review of Private Law* Volume 17 (Issue 1), p. 58-59; Twigg-Flesner, C. (2007). *No sense of purpose or direction? The modernization of European Consumer Law*. *European Review of Consumer Law* Volume 3 (Issue 2), p. 204.

⁶² Reich, N. (2009). *Economic Law, consumer interests and EU integration*. In *Understanding EU Consumer Law*. Oxford. Intersentia, p. 40.

⁶³ Barnard, C. (2007) *The substantive law of the EU – The four freedoms*. Oxford University Press, p. 378.

⁶⁴ C.J. 4 December 1986, Case 205/84 *Commission v. Germany*, Jur. 1986,I- 03755.

their objectives and it may not be possible to protect the consumer in the same way by using measures which restrict the free movement of goods and services to a lesser extent⁶⁵.

In the past, several Member States (e.g. Belgium, Germany, Italy) have used the possibility to introduce more stringent provisions in order to offer additional protection to consumers concluding distance contracts, for example by extending the withdrawal period or not incorporating certain exceptions to the right of withdrawal⁶⁶. An interesting example, which has led to a judgment of the Court of Justice, can be found in article 81 of the former Belgian Act on Commercial Practices. More specifically, this article prohibited the trader in the case of a distance contract to claim payment or an advance from the consumer before the expiration of the withdrawal period. The Court of Justice decided that this prohibition could be justified, since it aims at protecting consumers. However, it fails to meet the requirement of proportionality if this rule is interpreted as also prohibiting traders to ask the consumer his credit card number as a guarantee⁶⁷. Since the competent authorities in Belgium upheld this severe interpretation, this rule was considered an unjustified restriction of the free movement of goods and services. In the meantime, the Belgian legislator has abandoned this rule, in that way anticipating the CRD.

Minimum harmonization implies that different rules may apply in different Member States (so-called fragmentation of the law). Full harmonization on the contrary implies that, within the harmonized field of law, Member States are no longer entitled to introduce or even maintain rules, which offer consumers more protection than the level of protection incorporated in the European Directive⁶⁸. The Directive does not only determine the minimum level of protection that must be awarded to consumers, but also the maximum level of protection that can be offered to consumers⁶⁹. As far as harmonization has taken place, the law should be the same in all Member States of the European Union. Of course, full harmonization does not prohibit traders to offer additional protection to consumers on a contractual basis (art. 3.6).

Also, full harmonization does not prevent Member States from maintaining or adopting additional protection measures with regard to matters or persons falling outside the scope of the Directive (as long as these are compatible with the principles of the European Treaty on the free movement of goods and services)⁷⁰. More specifically, Member States can entitle persons, that are not considered consumers in the meaning of the CRD, to withdraw from the contract⁷¹. Also they can entitle consumers to withdraw from contracts which cannot be regarded as a

⁶⁵ C.J. 4 December 1986, Case 205/84 Commission v. Germany, Jur. 1986, I- 03755.

⁶⁶ See: Schülthe-Nolke, H. (2008). Ibidem, p. 546.

⁶⁷ C.J. 16 December 2008, Case C-205/07, Lodewijk Gysbrechts and Santurel Inter BVBA, Jur. 2008 I-09947.

⁶⁸ Loos, M. (2008). Herziening van het consumentenrecht: een teleurstellend richtlijnvoorstel. Tijdschrift voor Consumentenrecht (Issue 5), p. 173; Mak, V. (2009). Ibidem, p. 58.

⁶⁹ C.J. 23 April 2009, case C-261/07, VTB-VAB versus Total Belgium, <http://curia.europa.eu>; Verhoeven, A. (2009). Consument en interne markt – beschouwingen bij het Voorstel van Richtlijn Consumentenrechten. In Het EG-Consumentenacquis: nu en straks. Antwerpen, Intersentia, p. 51; Wilhelmsson, T. (2006). Harmonizing unfair commercial practices law: the cultural and social dimensions. Osgoode Hall Law Journal Volume 44 (Issue 3), p. 477.

⁷⁰ Hesselink, M. (2010). Towards a Sharp Distinction between b2b and b2c? On consumer, Commercial and General Contract Law after the Consumer Rights Directive. European Review of Private Law Volume 18 (Issue 1), p. 90; Verhoeven, A. (2009). Ibidem, p. 51.

⁷¹ Rott, P. and Terryn, E. (2009). Ibidem, p. 466.

distance contract in the meaning of the CRD, for example because the contract has not been concluded under an organized distance sales or service-provision scheme.

The same goes for contracts excluded from the scope of application of the CRD. On the contrary, it would not be possible for the Member States to determine that the consumer is entitled to withdraw from the contract in cases, where according to the CRD, the consumer is not⁷². More specifically, Member States could decide to entitle the consumer to withdraw from a contract relating to passenger transport services (excluded from the scope of the CRD), but not from a contract concerning the transport of goods or car rental (excluded from a right of withdrawal).

Taking into account the fact that the DSD is based on the principle of minimum harmonization and the CRD is based on the principle of full harmonization, it is possible that - although the CRD maintains or even increases the level of consumer protection compared to the Distance Selling Directive - it reduces the level of protection in a given Member State. This will be the case if the level of protection offered by the CRD is lower than the level of protection in a given Member State, that has used the possibility to incorporate additional protection measures. For example, under German Law (§ 357 BGB), the consumer must not bear the cost for resending the goods to the trader if the price of the returned goods exceeds 40 euro. If the price does not exceed 40 euro, the parties can agree that the consumer will have to pay for returning the goods. In the absence of such agreement the consumer does not have to pay the costs of returning the goods⁷³. Also, under German law (§355 (4) BGB), the withdrawal period cannot expire when the consumer has not been adequately informed about his right of withdrawal⁷⁴. Under Belgian law (art. 46 Act on Market Practices), the consumer is entitled to keep the goods or services received without having to pay for them, if he is not informed about his withdrawal right. It is clear that the national legislator will have to abandon or adapt these rules, which will lead to a decrease of consumer protection in Germany and Belgium.

The fact that full harmonization (possibly) reduces consumer protection in some Member States, has received lots of criticism⁷⁵. This is the main reason why the CRD, contrary to the initial proposal, does not contain any provisions on unfair contract terms. Full harmonization of these rules was not acceptable for certain Member States (e.g. Belgium). However, with regard to distance contracts and contracts concluded outside the trader's premises the full harmonization approach has survived. The Commission believes that the possible decrease of consumer protection can be justified by the future increase of cross-border trade. According to the Commission, full harmonization will increase legal certainty and consumer confidence, decrease compliance costs for traders and therefore stimulate the cross-border selling of goods and services. Since the increase of cross-border trade will result in more competition and therefore lower prices, consumers will also benefit from the full harmonization approach.

Many scholars are quite skeptical about these arguments⁷⁶. Consumer protection should not be victimized on the altar of alleged needs of internal market

⁷² Unger, O. (2012). *Ibidem*, p. 290.

⁷³ See also: Rott, P. (2006). *Ibidem*, p. 1123-1124

⁷⁴ See also: Rott, P. (2006). *Ibidem*, p. 1117.

⁷⁵ E.g.: Rott, P. and Terryn, E. (2009). *Ibidem*, p. 464. However, all authors agree that this is a disadvantage: See e.g. Hondius, E. (2010). The Proposal for a European Directive on Consumer Rights: A step Forward. *European Review of Private Law* Volume 18 (Issue 1), p. 109-110.

⁷⁶ Howells, G. and Schulze, R. (2009). *Ibidem*, p. 8; Rott, P. and Terryn, E. (2009). *Ibidem*, p. 460-462; Smits, J. (2010). Full Harmonization of Consumer Law? A Critique on the Draft Directive on

policy⁷⁷. Moreover, there are many other factors, which are more likely to deter consumers and traders from cross-border trade, such as language barriers, lack of trust in unknown businesses, concerns regarding the practicality and the costs of transporting goods over long distances, after sale services (for certain goods) and unease over the prospect of resolving disputes across borders. Full harmonization will not solve these problems.

Some other arguments have been put forward to criticize the concept of full harmonization in consumer law. Several authors argue that full harmonization of consumer law is an illusion⁷⁸, as long as private law has not been harmonized. Others argue that full harmonization does not make sense when open norms - which can be filled in differently in the Member States (e.g. unfair commercial practices⁷⁹) - are used. Also, full harmonization will have limited impact if not all or at least most important questions, including remedies in the case of violation⁸⁰, are dealt with (which is for example not the case in the CCD⁸¹). Finally, some authors believe that one of the greatest dangers of full harmonization is that it represents a fixing of the goal posts⁸². On the one hand, full harmonization makes it much more difficult to adapt the law, if new business practices (within certain Member States) require changes to guarantee the effectiveness of the rules. On the other hand, Member States will no longer be able to act as laboratories, experimenting with rules that can be useful in consumer policy.

The question arises whether these critics are also relevant with regard to the right of withdrawal as dealt with in the CRD. First, it must be emphasized that many provisions on the right of withdrawal (e.g. withdrawal period, its calculation, the way the right of withdrawal must be exercised) are rather technical, which makes them suitable for full harmonization⁸³. Secondly, the provisions incorporated in the CRD on the right of withdrawal are quite detailed, which at first sight would seem to imply that one no longer has to fall back on civil law⁸⁴. However, this paper has shown that some aspects of the withdrawal right are still left out of the harmonized field. For example, the CRD explicitly determines that termination of ancillary contracts needs to be dealt with in national legislation (section 3.4). Further, remedies are lacking in case the trader or the consumer violate their obligations imposed by the CRD (sections 3.3.1 and 3.3.2) and it seems not to be determined who bears the financial consequences if the goods are damaged due to *force majeure* during the withdrawal period, but before exercising the right of withdrawal (section 3.3.2.1). Also, the provisions on the right of withdrawal incorporated in the CRD contain some open norms. This is for example the case where the CRD states that

Consumer Rights. European Review of Private Law Volume 18 (Issue 1), p. 8; Twigg-Flesner, C. and Metcalfe, D. (2009), Ibidem, p.372; van Boom, W. (2009). The Draft Directive on Consumer Rights: Choices Made and Arguments Used. Journal of Contemporary Research Volume 5 (Issue 3), p. 461; Wilhelmsson, T. (2004). The Abuse of the "Confident Consumer" as a justification for EC Consumer Law. Journal of Consumer Policy Volume 27, p. 317 ff.

⁷⁷ Tonner, K. and Fangerow, K. (2010). Ibidem, p. 77.

⁷⁸ Storme, M.E. (2010). Consumer Rights Proposal and Draft CFR. European Review of Private Law Volume 18 (Issue 1), p. 1; Twigg-Flesner, C. and Metcalfe, D. (2009), Ibidem, p.372.

⁷⁹ Wilhelmsson (2006), Ibidem, p. 479.

⁸⁰ Rott, P. and Terryn, E. (2009). Ibidem, p. 459.

⁸¹ Gourio, A. (2008). La Directive européenne du 23 avril 2008 concernant les contrats de crédit aux consommateurs. La semaine juridique Entreprises et Affaires (Issue 36), 15-16.

⁸² Howells, G. (2004), Ibidem, p. 75-76; Smits, J. (2010). Ibidem, p. 11-12.

⁸³ Smits, J. (2010). Ibidem, p. 10.

⁸⁴ Storme, M.E. (2010), Ibidem, p. 1.

the consumer is liable for any diminished value of the goods resulting from the handling of the goods *other than what is necessary to establish their nature*, characteristics and functioning (section 3.3.2.1). Although the CRD, in its recitals (recital 47), provides some additional clarifications, it will be up to the courts to determine which handling can be considered as necessary for testing the good. Also, the Directive does not determine how the diminished value must be calculated. Another example relates to services contracts, where the courts will have the possibility to take into account the market value if the total price is *excessive* (section 3.3.2.2). It will be up to the courts to decide when this is the case.

In conclusion, fully harmonizing the right of withdrawal makes sense for technical aspects, such as the duration and the calculation of the withdrawal period and the way the right of withdrawal must be exercised. Apart from these rules, the full harmonization approach used in the CRD, cannot be considered very successful. First, the CRD, due to its full harmonization approach, will reduce the level of consumer protection with regard to the right of withdrawal in some Member States. Secondly, differences between the laws of the Member States (fragmentation of the law) will remain since harmonization has not been complete (e.g. remedies) and some open norms have been used.

6. Justification and effectiveness of the right of withdrawal

The question arises whether the right of withdrawal, as it is determined by the CRD, can be justified and whether it is or could be an effective tool of consumer protection.

6.1 Justification of the right of withdrawal in general

The right of withdrawal can be considered as a nuance to the principle of *pacta sunt servanda*⁸⁵, which is considered a principle that is necessary to reach legal certainty⁸⁶. The consumer is given the opportunity to get out of the contract, to which he has consented, without paying a compensation and without any motivation. Being a nuance to one of the basic principles of civil law and creating additional costs because of uncertainty and delay⁸⁷, it is necessary to have a closer look at the rationales behind the right of withdrawal⁸⁸.

A right of withdrawal can be justified for several reasons⁸⁹, which have all in common that they relate to circumstances in which there is a danger that the consumer was not able to come to a substantially free decision⁹⁰. First, a right to

⁸⁵ Stauder, B. (1982). *Pacta sunt servanda et le droit de repentir*. La Semaine Juridique Volume 32, p. 481-500.

⁸⁶ H. Eidenmüller (2011). *Why Withdrawal Rights?*. European Review of Consumer Law Volume 7 (Issue 1), p. 2.

⁸⁷ See: Rekaiti, P. and Van den Bergh, R.. (2000). *Cooling-off periods in the consumer laws of the EC Member States. A comparative law and economics approach*. Journal of Consumer Policy Volume 23 (Issue 4), p. 383.

⁸⁸ Eidenmüller, H., Faust, F., Grigolet, H.C., Jansen, N., Wagner, G. and Zimmerman, R. (2011). *Towards a Revision of the Consumer Acquis*. Common Market Law Review Volume 48 (Issue 4), p. 1096-1097.

⁸⁹ See also: Ramsay, I. (2007). *Ibidem*, p.330; Rekaiti, P. and Van den Bergh, R.. (2000), *Ibidem*, p. 373-381; Micklitz, H., Stuyck, J and Terryn, E. (2010). *Ibidem* p. 240.

⁹⁰ Rott, P. (2006). *Ibidem*, p. 1112-1113.

withdraw from the contract is justified when the consumer did not behave rationally when concluding the contract. This will for instance be the case if the consumer has been overwhelmed and / or put under pressure to conclude the agreement (e.g. when the agreement is concluded at the consumers' home)⁹¹. However, this will normally not be the case when a contract is concluded at a distance. One exception might be where the contract is concluded over the phone.

Secondly, a right to withdraw from the contract can be useful, where the consumer at the time of conclusion of the contract, did not possess sufficient information to make an informed decision (informational asymmetries). This can be due to the fact that the agreement is a complex agreement, the consumer not being able to immediately absorb all relevant information. Whether allowing the consumer to withdraw from such a complex contract is an effective means of consumer protection has been doubted⁹². Anyhow, complexity cannot explain why the consumer is entitled to withdraw from all distance contracts. Indeed, the mere fact that the contract is concluded at a distance does not make the contract a complex contract.

In the case of a distance contract, the lack of information justifying the existence of the withdrawal right, results from the way the contract is concluded, i.e. from the fact that means of distance communication were used to conclude the contract. The consumer buying goods (e.g. clothes) at a distance will not have the opportunity to actually see the goods and to assess their quality⁹³. This is why the consumer must be entitled to get rid of the contract. In economic literature it is emphasized that the informational asymmetries-argument is only convincing for search and experience goods and not for credence goods⁹⁴. Credence goods are goods for which it is difficult for consumers to ascertain their quality, even after they have used them. Therefore a withdrawal right will be of limited use to protect consumers buying credence goods at a distance. On the contrary, when a contract relates to experience goods, a withdrawal right is useful, since the consumer will only be able to ascertain the quality of the goods upon consumption. Search goods are goods where the consumer can assess their quality upon inspection. However, if the agreement is concluded using means of distance communication it becomes impossible to ascertain their quality upon the conclusion of the contract. Therefore, a right of withdrawal with regard to search goods bought at a distance makes sense.

Since it would be difficult to distinguish between these different types of goods in legislation, some authors argue that the existence of a right of withdrawal should be accepted for all goods. If a withdrawal right for certain types of goods is problematic, they should be exempted from the right of withdrawal⁹⁵. This is also the approach used in the CRD.

⁹¹ See also: Eidenmüller, H., Faust, F., Grigolet, H.C., Jansen, N., Wagner, G. and Zimmerman, R. (2011). *Ibidem*, p.1084-1085.

⁹² Eidenmüller, H., Faust, F., Grigolet, H.C., Jansen, N., Wagner, G. and Zimmerman, R. (2011). *Ibidem*, p. 1102, who argue that a fourteen day withdrawal period will not be sufficient for the consumer to absorb all information.

⁹³ Eidenmüller, H. (2011). *Ibidem*, p.7-8; Rekaiti, P. and Van den Bergh, R.. (2000). *Ibidem*, p. 379-380.

⁹⁴ Rekaiti, P. and Van den Bergh, R.. (2000). *Ibidem*, p. 380; Eidenmüller, H., Faust, F., Grigolet, H.C., Jansen, N., Wagner, G. and Zimmerman, R. (2011). *Ibidem*, p. 1100. These authors argue that the right to withdraw from the contract should not be mandatory but optional. In that way, only consumers choosing for a distance contract from which can be withdrawn, should have to pay the costs related to the right of withdrawal.

⁹⁵ Terry, E. (2008). *Bedenktijden in het Consumentenrecht*. Antwerp. Intersentia, p. 562.

6.2 The right of withdrawal in the CRD (distance contracts)

Now that we have determined the justification of a withdrawal right for distance contracts, it is interesting to have a closer look at the CRD to see whether the provisions incorporated in it, are in line with this justification. Looking at the definition of a distance contract, it becomes immediately clear that the European legislator not always sufficiently takes into account the rationale of the right to withdraw from a distance contract. Recital 20 is a good example. It determines that the mere visit of the business premises for the purpose of gathering information about the goods or services does not prevent that a contract is regarded as a distance contract, the only requirement being that the contract afterwards is negotiated and concluded at a distance (section 2.3.1). However, if the consumer has visited the trader's premises, he will most likely have had the possibility to have a closer look at the goods. In such situation, a right of withdrawal is not justified, merely because of the fact that afterwards the contract is concluded at a distance. Of course, in reality it would be very hard for the trader to prove that the consumer has visited his premises.

Taking into account the justification of the right of withdrawal, the right of withdrawal should not be limited to contracts concluded within an organized scheme for distance selling (section 2.3.2). Whereas it can be accepted that traders only occasionally concluding distance contracts are not subject to the detailed information requirements laid down in the CRD, there are no good reasons to exempt them from the right of withdrawal. Secondly, the justification of the right of withdrawal also illustrates why reservations of goods, which are binding for consumers, should not be exempted from the right of withdrawal (section 2.3.1).

Taking into account the justification of the right of withdrawal in the case of a sales contract concluded at a distance, it immediately becomes clear why the withdrawal period only starts running when the consumer has acquired possession of the goods (section 3.1.2)⁹⁶. Only at that point in time, the consumer will be able to assess the goods bought at a distance.

With regard to the scope of the right of withdrawal, the question arises whether the above can also justify the existence of the right to withdraw from a services contract, concluded at a distance. In many circumstances, the consumer concluding a services contract at a distance will have exactly the same information as a consumer concluding this type of a contract in the trader's premises⁹⁷. Therefore, informational asymmetries cannot justify the existence of the right of withdrawal for services contracts. Probably, the rationale behind such right of withdrawal is not ensuring consumer protection but stimulating cross-border distance services contracts. Awarding the consumer to withdraw from the contract must increase consumer's confidence in distance contracts. Awarding a right of withdrawal for such reasons is not very convincing⁹⁸.

Informational asymmetries are also not able to justify the existence of a withdrawal right expiring after fourteen calendar days from the day of conclusion of the contract with regard to contracts for gas, water and electricity where they are not put up for sale in a limited volume or set quantity. The practical scope of application

⁹⁶ Rott, P. and Terryn, E. (2009). *Ibidem*, p. 467.

⁹⁷ Terryn, E. (2008). *Ibidem*, p. 640.

⁹⁸ Eidenmüller, H. (2011). *Ibidem*, p. 6; Terryn, E. (2008). *Ibidem*, p. 575.

of a right of withdrawal for digital content contracts can hardly be seen, since consumers will not wait with starting downloading during the withdrawal period and the beginning of performance leads to the loss of the right of withdrawal⁹⁹.

Another question is whether the right of withdrawal should also be awarded to entities that cannot be regarded as a consumer in the meaning of the CRD. In my view, some professionals, such as small and medium sized enterprises, will often experience the same difficulties as consumers when concluding a distance contract. For example, why not entitle a hairdresser to withdraw from the contract if he buys a sofa for his clients to sit in while waiting to get their hair cut? Just as a consumer, he will not be able to see the sofa or to sit in it before buying it. However, when the hairdresser buys a hairdryer over the Internet, he should not be entitled to withdraw from the contract, taking into account the experience he has in this regard. Therefore, extending the right of withdrawal to other entities than consumers in the meaning of the CRD seems to be useful, but protection should be limited to professionals buying goods which are not directly linked to their professional activity¹⁰⁰.

On the other hand, the right of withdrawal should not apply to distance contracts concluded between two persons acting outside their trade, craft or profession. Persons not acting as a trader should not be confronted with the uncertainty created by a withdrawal period.

6.3 Effectiveness of the right of withdrawal

The right to withdraw from the contract can only protect consumers if it is actually being used¹⁰¹. More specifically, this means that consumers need to be aware of the possibility to withdraw from the contract and of the procedures to be used. Further, the period to withdraw from the contract should be sufficiently long. Also, withdrawing from the contract may not be too burdensome and should not create prohibiting costs.

The CRD creates the obligation on behalf of the trader to inform the consumer about his right to withdraw from the contract and the procedures the consumer must follow (section 3.1). Therefore, consumers should be aware of the possibility to withdraw from the contract. A fourteen calendar day period is certainly long enough where a right of withdrawal is awarded because of the fact that the contract has been concluded at a distance¹⁰². Moreover, exercising the right of withdrawal will become easier, since the trader must provide the consumer with a model withdrawal form, which consumers can, but do not have to use (section 3.2). In that way, the transaction costs for exercising the right of withdrawal are lowered¹⁰³. Also, the fact that a model form is attached will show consumers that exercising the right of withdrawal isn't something which is commercially unacceptable.

Further, the consumers can withdraw from the contract without any compensation, at least if they have only tested the goods (section 3.3.2.1). In principle, consumers only need to pay the cost for sending back the goods to the

⁹⁹ Tonner, K. and Fangerow, K. (2012). Ibidem, p. 71.

¹⁰⁰ See: Hesselink, M; (2010). Ibidem, p. 100.

¹⁰¹ Ramsay, I. (2007). Ibidem, p. 346.

¹⁰² Eidenmüller, H., Faust, F., Grigolet, H.C., Jansen, N., Wagner, G. and Zimmerman, R. (2011). Ibidem, p. 1104, who argue that even a seven day period is too long if the contract relates to search goods.

¹⁰³ Eidenmüller, H. (2011). Ibidem, p. 21.

trader. However, the fact that consumers are liable for the diminished value of the goods when they actually used the goods during the withdrawal period, could have an adverse effect on the effectiveness of the right to withdraw from the contract¹⁰⁴, especially since these costs can be very high with regard to certain goods. The question therefore arises whether it wouldn't have been better only to allow the trader to ask a compensation for the benefits that the consumer obtained from the actual use of the goods during the withdrawal period. However, this raises another question: Will such a compensation be sufficient to avoid that the consumer abuses the right of withdrawal (opportunistic behavior). Avoiding such opportunistic behavior is not only in the interest of traders, but also in the interest of consumers. Indeed, in the end, it will be the consumers who will pay the costs related to the existence and exercise of the right of withdrawal¹⁰⁵. Anyhow, if one opts for a compensation for the diminished value of the good, this should, contrary to what is the case in the CRD, be combined with a very clear warning, which informs the consumer that the use of the good makes him liable for the diminished value¹⁰⁶. In that way, the consumer who considers withdrawing from the contract can abstain from using the goods during the withdrawal period.

As mentioned earlier, the CRD does not prohibit performance of a services contract during the withdrawal period. However, consumers will only lose their right to withdraw from the contract when the contract has been fully performed and the consumers have expressly consented to begin the performance of the services during the withdrawal period. Further, the consumer will have to pay for the services delivered, but only if he has expressly requested performance to begin during the withdrawal period. These rules strike a balance between the legitimate interest of the parties involved. They allow immediate performance, but only if the consumer consents. Anyhow, this rule is to be preferred above an absolute prohibition to start performance during the withdrawal period, since such rule could also be contrary to the consumers' interests¹⁰⁷.

The CRD makes it possible to ask payment before the withdrawal period expires and even before sending the goods. The fact that the consumer will have already paid when he receives the goods may have a negative impact on the use of the right of withdrawal¹⁰⁸. Further, one must not forget that in the case of a withdrawal, the consumer first needs to send the goods back and the trader can withhold reimbursement until he has received the goods or the consumer is able to prove that they have been sent. Therefore, the consumer withdrawing from the contract must trust the trader that he will be reimbursed. Also, the trader might allege the consumer has used the goods and therefore deduct a certain amount from the price paid as a compensation for the diminished value. Although it is up to the trader to prove that the good has been used, it will be the consumer who in such case will have to go to court if he believes that such compensation is not due.

But what could be the alternative? The former Belgian Act on Trade Practices has made it clear that a general prohibition of claiming payment or claiming an advance before the withdrawal period has expired is problematic¹⁰⁹. At first sight, an option could be to use a system in which the amount paid is credited temporarily, i.e.

¹⁰⁴ Rott, P. (2010). Ibidem, p. 194.

¹⁰⁵ Rekaiti, P. and Van den Bergh, R.. (2000). Ibidem, p. 383.

¹⁰⁶ Rott, P. and Terryn (2009), Ibidem, p.474.

¹⁰⁷ Micklitz, H., Stuyck, J and Terryn, E. (2010)., p. 263.

¹⁰⁸ Terryn, E. (2008), Ibidem, p. 624.

¹⁰⁹ Terryn, E. (2008), Ibidem, p. 625.

during the withdrawal period, to the account of a trustworthy third party. Although attractive from a theoretical point of view, such system probably creates too many costs.

Another alternative is to oblige the trader to reimburse the consumer before the consumer, exercising the right of withdrawal, needs to dispatch the goods. However, in such solution, the trader is at risk. Anyhow, when imposing the risk on the consumer, the European legislator should have incorporated a severe and dissuasive sanction which applies in the case the trader does not reimburse the consumer as prescribed by the CRD. Effective and dissuasive sanctions must be in place to ensure that traders comply with the provisions of the CRD. Whether sanctions are to be considered as effective must be determined taking into account the available means of private and public enforcement¹¹⁰.

Apart from the civil remedy imposed in the case of a violation of the obligation to provide the consumer with information on the right of withdrawal, the CRD leaves it upon the Member States to determine effective and dissuasive remedies. Not only, can this lead to a fragmentation of the law. Also, it creates the risk that within some Member States, violations of the provisions incorporated in the CRD are not sanctioned severely enough to be effective.

7. Conclusions

This paper has shown that the CRD, compared to the DSD, slightly increases consumer protection with regard to the right of withdrawal, for example by determining that the mere fact that the performance of a services contract has begun during the withdrawal period does not lead to the loss of the right to withdraw from the contract. Further, the provisions in the CRD are much more detailed, offering welcome clarifications, in particular with regard to the consequences of exercising the right of withdrawal. However, the liability for the diminished value in the case of the use of the goods during the withdrawal period might have an adverse effect on the effectiveness of the right of withdrawal, especially because the consumer does not have to be warned about the financial consequences.

Although the provisions incorporated in the Proposal for a Common European Sales Law are similar to the ones incorporated in the CRD, it has been shown that the provisions of the CRD sometimes differ from the DCFR. This can be regretted, especially where the DCFR contains more detailed provisions than the CRD (with regard to losses and damages during the withdrawal period) and therefore offers more legal certainty.

The fact that the CRD is based on the principle of full harmonization implies that, at least in some Member States, the level of consumer protection will decrease. Further, the use of some open norms and the fact that certain questions, and in particular remedies, are not dealt with, will not tackle the problem of a fragmentation of the law. Therefore, the use of the full harmonization approach should have been limited to the technical aspects of the withdrawal right, such as the withdrawal period, its calculation and the way the right of withdrawal can be

¹¹⁰ Stuyck, J. (2009). Public and private enforcement in consumer protection: general comparison EU-USA In *New Frontiers of Consumer Protection: the Interplay between Private and Public Enforcement*, Oxford, Intersentia, p. 78; Van den Bergh, R. (2007). "Should consumer protection law be publicly enforced?". In *Collective enforcement of Consumer Law*, Europa Law Publishing, p. 195-196.

exercised. For other provisions, such as the consequences of exercising the right of withdrawal, minimum harmonization should be preferred.

In this paper, it has also been shown that the justification of the right of withdrawal in the case of a distance contract is to be found in informational asymmetries. Therefore, the right of withdrawal is not necessary in order to protect consumers concluding a services contract or a contract relating to gas, water and electricity, not being put up for sale in a limited volume at a distance. As far as goods are concerned, it could be useful to extend the protection to professionals concluding contracts that do not have a direct link with their professional activity. Further, a right of withdrawal should exist when goods are bought using means of distance communication outside an organized scheme for distance selling.

In order to be effective, consumers need to be informed of the right of withdrawal and withdrawing from the contract should be easy. At this point the CRD seems to be able to reach its goal, since it obliges the trader to inform the consumer about his right of withdrawal and to provide the consumer with a standard withdrawal form. Moreover, the CRD itself contains a civil remedy, in case this obligation is not met. However, with regard to other obligations imposed on the trader (e.g. the obligation to reimburse the consumer exercising his right of withdrawal), civil remedies are lacking, which could undermine the effectiveness of the right of withdrawal.