The Scope of Rights of Withdrawal in Consumer Contracts under EU Law: The Case of Auctions

By: Kinfemicheal Yilma Desta

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Supervisor: Thomas Myhr Marcus

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Acronyms

AD........................................Anno Domini
BBB........................................Better Business Bureau
BC.........................................Before Christ
C2C........................................Consumer-to-Consumer
CCTV......................................Closed Circuit Television
CRD.........................................Consumer Rights Directive
DSD..........................................Distance Selling Directive
DSSD.......................................Door-Step Selling Directive
EEA..........................................European Economic Area
EEC..........................................European Economic Community
EU............................................European Union
TV............................................Television
**Introduction**

Ever since the formal recognition of the need to provide consumer protection through improving the standard of living and health protection of community citizens at the Treaty of Rome in 1957, consumer protection has remained a core policy of the EU. The evolution of consumer protection has further been taken forward through the launching of a series of consumer protection programmes started in 1975 and which culminated in 2001 with the three years plan which resulted in the promulgation of a range of consumer protection laws. The General Program for reforming European contract law\(^1\) adopted in 2004 was the subsequent major reform of consumer protection in the EU later reshaped by the review of the consumer *acquis* as envisaged in the Green Paper.\(^2\)

In just a year after the Green Paper was published, the Commission came up with a proposal for a CRD in October 2008 which concerned only four directives which lie at the heart of the EU consumer contract law as opposed to the eight directives envisioned in the General program. With significant changes to the text proposed in 2008, the directive was adopted by the EU Parliament on 23 June 2011, on 10 October 2011 by the Council and is yet to be implemented from 13 June 2014. While it totally repeals the DSD and the DSSD, it slightly amends the Unfair Terms in Consumer Contracts and the Sale of Consumer Goods and Associated Guarantees directives.

The directive, guided by maximum harmonization, introduces numerous novel consumer protective measures ranging from rules eliminating hidden charges and costs, increased price transparency, banning pre-ticked boxes on websites, better protection in relation to purchase of digital contents to a harmonized 14 calendar days cooling-off period and embracing auctions within the scope of the directive. Whilst including auctions within the ambit of the directive is commendable as opposed to the ambiguous exclusion of the latter in the DSD, there remain anomalies in relation to the applicability of withdrawal rights for the various types of auctions now in place. The directive generally denies withdrawal rights for consumer contracts concluded at public auction while it makes a vague distinction between public auction

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and auctions conducted through online platforms. Such a vague stipulation is bound to generate questions as to whether withdrawal right does indiscriminately apply to all auctions that make use of the internet in the process.

In the information age where the majority of business activities including public auctions are conducted using the internet--though to a differing degree--the very generic and vague formulation under the directive is likely to permit withdrawal rights to almost all kinds of auctions be it traditional auctions or internet auctions proper, which indeed would have its own undesirable consequences. A far reaching instrument like withdrawal right has to be crafted with all due care and having taken due account of all potential effects of extending the right to a wide range of consumer contracts. Furthermore, despite a mention in the background documents, the CRD has not also addressed the issue whether withdrawal rights apply to television auctions which take place either via the obvious telecasting or live online streaming. This comes as an issue because the directive doesn’t appear to be technologically neutral.

This thesis endeavours to clearly spot the problem and to succinctly define the proper boundary of the scope of withdrawal rights under the CRD vis-à-vis auctions. By examining the various modalities of internet auctions in place in the contemporary marketplace, it tries to offer a pragmatic understanding of withdrawal rights in relation to auctions. Accordingly, this thesis is structured into four chapters. The first chapter sets the stage by defining the research problem, outlining the research questions, stating the significance of the study and the methodology employed. The second chapter gives a background on withdrawal right as one important tool of consumer protection. It begins with discussions on the concepts, features and rationales of withdrawal rights.

With the view to ease the discussion in the last chapter, the third chapter is allotted to reflect on auctions in general. It provides definitions of auctions followed by a discussion on the salient features and typologies of auction in subsequent sections. A separate section is also devoted to discuss features and models of internet auctions.

The last chapter addresses the main themes of the thesis. The pre-CRD scope of withdrawal rights vis-à-vis auctions is first discussed by recounting earlier drafts of CRD. The subsequent three sections deal with the scope of withdraws right under CRD/2011/83/EU. The first criti-
cally examines the public auction exception and queries whether a blanket exception from the right is justified. Secondly, it meticulously discusses the applicability of withdrawal right in relation to internet auctions followed by a brief reflection of the fate of television auctions under the CRD vis-à-vis withdrawal rights. The possible ramifications of wider withdrawal rights are also addressed in this chapter from consumer protection perspective. With the view to lessen ambiguities highlighted in earlier sections, this chapter finally suggests a way towards pragmatic understanding of the scope of withdrawal right in relation to the auctions. Finally, concluding remarks ensue.
Chapter One: Background of the Study

1.1. Statement of the problem

In contrast with the DSD which categorically excludes ‘auctions’ from its remit (Art 3(1)), the CRD regulates auctions in general, be it traditional auctions or internet auctions (Recital 20). There are yet anomalies on the scope of withdrawal right for contracts concluded at auctions. Whilst the CRD denies withdrawal right to 'contracts concluded at public auction' in its operative provision, it appears to permit withdrawal rights in relation to auctions concluded via online platforms under its recital. The latter is however through a ‘definition by exclusion’ of the so called auction through online platforms. Based on this distinction, one may arguably state that the exception under Art 16(k) concerns only public auction, not internet auctions through platforms such as eBay. Indeed, the extension of application of the directive to internet auctions has also been mentioned in the press releases following the adoption of the directive by the European Parliament.

More puzzling is that withdrawal right applied only to ‘public auctions’ and the exclusion concerned ‘auctions’ under the draft CRD. This stands in stark contrast with the way how the exceptions to withdrawal rights are crafted in the adopted CRD where public auctions are rather not subject to withdrawal. The draft indeed contained definitions of both public auction and auction as opposed to the adopted CRD which just contains definition of public auction. Given this structure of the regime in early gestation of the CRD, the outcome in the adopted CRD is rather ambiguous. It is likely that recital 24 of the directive may be interpreted in a way to allow withdrawal right with respect to all kinds of auctions in so far as online platforms are made of use in the process. Moreover, the recital has the potential to be construed to stretch the typology of non-public auctions to auctions that are neither public; nor auctions via online platforms.

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3 See, Recital 24, CRD/2011/83/EU
6 Ibid, Art 16
7 Ibid, Art 15
8 See, Art 2(13), CRD 2011/83/EU
The directive also ignores the fate of consumers participating at auctions through televisions. Moreover, one might even wonder if a blanket exception of all public auctions from withdrawal right is justified in all circumstances. In short, the CRD comes up with ambiguous rules concerning the scope of withdrawal right in relation to auctions. This thesis accordingly scrutinizes the scope of withdrawal rights in the case of auctions under the CRD.

It attempts to draw a line between the traditional auctions or public auctions and internet auction in the context of withdrawal rights in light of the basic rationales that justify grant of a far reaching instrument of withdrawal. Informed by economic theories it discusses the possible economic and legal implications of extending withdrawal right to a wide array of contracts concluded at internet auctions. The resulting interplay with the maximum harmonization opted for in the CRD is also to be examined.

1.2 Research questions
In resolving the above stated research problem, the study attempts to answer the following four broad research questions:

1. Where lies the line between ‘public auctions’ and ‘auctions conducted through online platforms’? What are the underlying distinctions between these modes of auctions?
2. Which forms of auctions fall within the ambit of the so called ‘auctions via online platforms’? What are and should be the legal thresholds for online platforms to fall within the requirement of online platforms subject to right of withdrawal under recital 24 of CRD?
3. Does withdrawal right apply to television auctions under the CRD?
4. What are the implications of indiscriminately extending withdrawal right to all auctions that make use of online platforms?

1.3 Significance of the study
The study will have at least three main significances:

First, it enables to draw a line between traditional auctions and internet auctions from a consumer protection perspective;
Second, it helps to realize the potential economic and legal ramifications of indiscriminate extension of withdrawal right to all kinds of auctions for the sheer criterion that online platforms were used regardless of the extent of the use;

Third, it also suggests a way forward in crafting withdrawal right regime that takes full account of the reality in auctioning practice that would in turn help to optimise consumer protection and ensure legal certainty to businesses.

1.4. Methodology
The study employs a syndicate of analytical, normative and at times positive research methodologies. In so doing, the study primarily relies on primary sources mainly the relevant EU legal instruments on consumer protection. In addition, the study makes extensive use of secondary source materials such as preparatory works of laws, policies and resolutions. Needless saying, relevant legal and economics literature such as books, periodicals and journals are abundantly used throughout the study to describe, analyse concepts and back arguments put forward.
Chapter Two: Withdrawal Rights as Tools of Consumer Protection

2.1. The concept of withdrawal rights

2.1.1. Origin and meaning

As much as its current prominence in EU consumer law, the origin of withdrawal right is also
to be traced back to national legal system of member states. The first ever proposal to intro-
duce withdrawal rights dates back to late 19th century. It relates to a proposal tabled by Wie
den Heck for a statutory Reurecht for buyers in a hire-purchase scheme of 1891 in Germany.9
According to the proposal, buyers may be enticed to buy goods through installment sale ar-
rangements without realizing that the goods may appear less useful at a later stage. Neverthe-
less, it was only in 1969, in Germany and 1973, in the Netherlands, that withdrawal rights
were recognized by law.10

Withdrawal rights are basically milder options than declaring a contract ipso jure null and
void in situations of disparities between contracting parties.11 It gives consumers the possibil-
ity to decide whether or not the contract ought to be continued with.12 Withdrawal rights are
above all directed at giving a party additional time to reconsider the contractual commitment
as a compensation for particular disadvantages.13 It must however be noted that though with-
drawal rights are normally granted to consumers who are thought to be in a weaker bargaining
position than traders, some jurisdictions do allow traders to withdraw from contracts. A good
case in point is the German Insurance Contract Act of 2008 which allows businesses to with-
draw from insurance contracts which last longer that one month.14

The terms withdrawal rights and cooling-off periods are often mistakenly used interchangea-
ibly while they are slightly different. Withdrawal rights are rights that enable a buy-
er(consumer) to terminate a contract within a legally or contractually set period of time,

9 Marco Loos, Rights of Withdrawal, in Geraint Howells and Reiner Schulze(eds., 2009), Modernizing and
Harmonizing Consumer Contract Law(Sellier), P.239
10 Ibid.
11 Christian Twigg-Flesner and Reiner Schulze, Protecting Rational Choice: Information and The Right of With-
drawal, , in Geraint Howells and et al(eds., 2010), Handbook of Research on International Consumer
Law(Elgar), P.145
12 Ibid.
13 Ibid, P.146
whereas cooling-off periods refer just to the period of time during which the withdrawal rights can be exercised. Cooling-off periods can therefore be seen as ‘statute of limitation’ for exercising ones withdrawal right.

A cursory look at the law and economics literature reveals generally three conceptions of withdrawal rights. The first views withdrawal right as a ‘default’ rule enforceable by courts while entertaining every consumer contract cases so that merchants would be encouraged to specify termination rights in the contract.\textsuperscript{15} This view seems to suggest that withdrawal rights are always to be considered to exist irrespective of any legal or contractual stipulation to that effect.

The second approach holds that withdrawal rights apply to neutralize the monopoly power of sellers and accordingly it results in positive and redistributive effects.\textsuperscript{16} In other words, withdrawal rights have to be awarded only in relation to consumer markets in which the seller enjoys dominant position. There is however skepticism towards this view in that mandatory withdrawal rights may rather favor large retailers who maintain large inventories. And, as small discount retailers cannot offer as much withdrawal options as large retailers, the later may eliminate competition in retail markets by offering enticing withdrawal options as part of the sales.\textsuperscript{17} Unlike the second approach, the third view describes withdrawal rights as an aspect of the optimal contract between sellers and buyers regardless of relative bargaining powers.\textsuperscript{18} In so doing, it balances the buyer’s gains from reduction of uncertainty and the seller’s loss in terms of depreciation loss.

\textbf{2.1.2 Functions}

Withdrawal rights are often used as additional tools to information obligation on traders. Information obligations solely don’t bridge the gap between traders and consumers. Studies have revealed that consumers are unable and sometimes unwilling to use information and that

\begin{itemize}
\item Robert Scott and George Triantis(2004), Embedded Options and the Case Against Compensation in Contract Law, \textit{Columbia Law Review104}, PP.1488-1489
\item See generally, Alexander Stremitzer(2010), Opportunistic Termination, \textit{Journal of Law, Economics and Organization}, Vol. 28
\item \textit{Ibid}, P.117ff
\end{itemize}

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information are largely utilized in purchasing decisions by better-off consumers, not vulnerable consumers. The long held assumption that consumers behave rationally in making choices has also fallen short of the reality as consumers are far less rational than expected. Thus, withdrawal rights emerged as an additional remedy from this ‘paternalistic’ view of consumer behavior in relation to information overload.

Withdrawal rights are seen by some commentators just as extension of information obligations and should rather be seen basically as informational rights. They do induce sellers to disclose information about the quality of offered products through the price mechanism. While information obligations are aimed at ensuring that contracts are, under normal circumstances, the result of informed decision-making processes, withdrawal rights offer the contracting partner an additional period of reflection after the conclusion of contract. In economics terms, cooling-off periods enable the consumer to reconsider his short-term choices and give way to his long-term preferences.

Withdrawal rights mainly permit termination of contractual relation after the buyer (consumer) entered into the contract and perhaps after performance has started. Exceptions to this are however sometimes to be found in laws of some countries. French law, for instance, recognizes what is called ‘delai de reflexion’ which prohibits a consumer from accepting an offer within a certain period. This rule applies to distance education and purchase of dwelling house contracts and credit contracts for immovables. Thus, French law providers for withdrawal rights before the conclusion of the contract by forbidding acceptance of offer. Such forms of withdrawal rights are dubbed by some authors as ‘rights to a period of deliberation’.

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20 Bech Serrat(2012), Selling Tourism services at a Distance(Springer), P.103
23 Rekaiti and Van den Bergh, (n21), P.378
24 Jan Smits(2011), The Right to Change Your Mind?:Rethinking the Usefulness of Mandatory Rights of Withdrawal in Consumer Contract Law, Maastricht Faculty of Law Working Paper No.2011/01, P.4
25 Ibid, P.5
26 Rekaiti and Van den Bergh, (n21), P.371
2.2. **Features of withdrawal rights**

Following is a brief discussion of the major common features of withdrawal rights shared by all withdrawal regimes save narrow exceptions.

2.2.1 Discretionary

Withdrawal rights are discretionary and optional devices of consumer protection. The consumer can withdraw from a contract in the situation described by the statutory instrument granting this right, without having to prove that he was influenced or manipulated by the trader or by other circumstances. There is no need to state any reason or to pay penalty for the sheer exercising of withdrawal rights. They only thing that could befallen to the consumer is payment of depreciation loss to the diminished value of the good and perhaps the cost of returning the goods. This is usually justified as consumers are in weaker bargaining position vis-à-vis traders who enjoy both economic and informational superiority.

2.2.2 Independent

The right is not contingent upon the existence or otherwise of any non-performance on the part of the trader. The consumer has the option to rethink his decision whether or not there is alleged non-performance by trader. Withdrawal rights are not, therefore, contractual remedies. The existence withdrawal right doesn’t deprive the consumer of general contract law remedies should the seller breach the terms of the contract. Indeed, withdrawal rights significantly differ from the general rules of contract modification. In the latter case, there is no, generally, time limit with respect to the power of courts to modify or fail to enforce contract terms while withdrawal rights are exercisable only within the cooling-off periods.

2.2.3 Exceptions, not the rule

Withdrawal rights are not the rule but the exception. They are set to deal with situations in which the decision-making process of one party, usually the consumer, is regarded as incomplete at the time of concluding the contract. Even in case of consumer contracts, only a certain set of contracts are subject to withdrawal rights. If withdrawal rights were to be pre-

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27 Serrat, (n20), P.101
28 Ibid, P.102
29 Rekaiti and Van den Bergh, (n21), P.376
30 Rott, (n22), PP.187-188
scribed for every consumer contract, conclusion of long-term contracts would have been im-
possible for the fear that enforcement would be impractical. It would also disrupt certain
kinds of transactions such as stock markets and ultimately drive out traders from the market.
Therefore, withdrawal rights have to be awarded only when their benefits outweigh the costs
and indeed only after having well understood when and where they make sense.

2.2.4 At odds with *pacta sunt servanda*
Withdrawal rights are often portrayed to imply significant weakening of the classical principle
of *pacta sunt servanda* according to which contractual promises must be kept except certain
exceptional circumstances such as duress, fraud, deceit, and fundamental mistake. This is
mainly because withdrawal rights render contracts binding only after the cooling-off periods
have expired or at least the contract would have only a ‘provisional’ binding effect. Some
authors however argue that though it *prima facie* appears to restrict the principle, it does at the
same time protect the freedom of contract in a material sense. Instead of contradicting the
principle, the right rather gives the principle an additional justification and therefore merely a
more refined version of the principle is seen in the right of withdrawal.

2.2.5 Warranties
Withdrawal rights can also be regarded as warranties for consumer goods purchased. This is
particularly the case for those traders who supply higher-quality products and services and
who may use withdrawal rights as signal of quality as just sellers use warranties. In this
sense, they are trust and reputation building mechanisms. Buyers are more likely to purchase
goods if there are possibilities for return. Hence, granting of withdrawal rights works as an
incentive for sellers to set product prices that match the product’s actual quality. Of course,
this applies in cases of customary and contractual rights of withdrawal proffered by the trad-
ers on their own whim, not mandatory statutory rights.

31 Eidenmuller, (n14), P.2
32 Ibid, PP.4-5
33 Twigg-Flesner and Schulze, (n11), P.145
34 James Netto(2010), Withdrawal Rights and Their Impact on Domestic Law, University of Warwick Blog,
35 Ben-Shahar and Posner, (n17), P.135
36 Rekaiti and Van den Bergh, (n21), P.381
2.3. **Rationales of withdrawal rights**

Given diverse societal and ideological backgrounds of jurisdictions, there are variations in justifying consumer protection in various countries.\(^{37}\) In what follows rationales for withdrawal rights are explained in three categories; viz. traditional rationales, legislative rationales and economic rationales to withdrawal rights.

### 2.3.1 Traditional rationale

Withdrawal rights largely draw from factors that are often raised to justify consumer protection as a whole. The traditional justification of consumer protection is founded on the notion of restraining monopoly power of huge companies and their potential to manipulate consumers via various tactics.\(^{38}\) This notion can be subsumed as ‘doctrine of inequality of bargaining power’. It assumes that consumers are in economically weaker position and less knowledgeable vis-à-vis traders.\(^{39}\) The inequality may also be expressed in terms of information deficit and lack of expertise with respect to the contracts on the part consumers.

Related to this is that consumer markets are generally considered to work inefficiently due to various factors.\(^{40}\) Among others, there is insufficient competition and various products are tied up in way that prevents the market from working properly.\(^{41}\) This later situation is sometimes referred to as ‘market failure’. As a result, the imbalance of countervailing power in the market dictates regulatory intervention by the state to reconcile, compensate or balance the interest of the weaker consumer.\(^{42}\) Such regulatory intervention is translated into adoption of consumer law which embodies protective measures including withdrawal rights. Withdrawal rights are hence introduced to redistribute the incidence of costs between the contracting parties and to ensure equality within the market.\(^{43}\)

The notion of inequality in bargaining power is however criticized by commentators. Dominant position in the market is said to affect only quantity by restricting it rather than quality

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\(^{37}\) Howells, Ramsay and Wilhelmsson, (n19), P.13


\(^{39}\) *Ibid.*

\(^{40}\) Howells, Ramsay and Wilhelmsson, (n19), PP.10-11

\(^{41}\) *Ibid.*

\(^{42}\) *Ibid.*

\(^{43}\) Rekaiti and Van den Bergh, (n21), P.373
restrictions which results in market inefficiency.\textsuperscript{44} Moreover, problems of consumer protection are common in markets with many small enterprises than monopolists.\textsuperscript{45} As already noted, large retailers are tended to favor the existence of withdrawal rights to drive out small discount retailers from the market and to establish monopoly. And, situations of monopoly are principally to be handled by competition law rather than consumer law.

\textbf{2.3.2 Legislative rationale}

By legislative rationales it is meant those rationales to be read into various consumer protection legislations as justification to introduce withdrawal rights. Statutory withdrawal rights are often targeted towards protecting the consumer against disadvantages of certain sales techniques used and/or types of contracts which have the potential to affect the psychological and informational strength of the consumer. The usual instance relates to sales conducted at the doorsteps of the consumer or at any other location other than the business premises of the trader. It is generally believed that such types of sales are very sudden and entail a surprise element usurping the consumer’s ability to make rational choices.

There are cases where traders use aggressive sales techniques to persuade the consumer that s/he is left with no option than to purchase from the trader. The other case involves contracts for timeshares that the consumer may enter into in a mood of vacation or holiday. The holiday atmosphere, added with intoxicating substances such as alcohol usually taken, significantly reduces the capacity of evaluating important decisions.\textsuperscript{46} Withdrawal rights are aimed at rectifying irrational choices made by consumers in such situations by allowing them to rethink their decision within the prescribed cooling-off periods.

Contracts concluded by consumers via means of distance communication such as the internet also entail disadvantages to vulnerable consumers. Distance sales don’t allow consumers to fully picture the products offered by traders and it is usually difficult to realize whether those products fit to his/her expectations.\textsuperscript{47} It is also nearly impossible to establish the true identity and credibility of the trader as such sales are made without any face-to-face deal. In short,

\textsuperscript{44} Haupt, (n38), P.1138
\textsuperscript{45} \textit{Ibid.}
\textsuperscript{46} Loos, (n9), P. 246
\textsuperscript{47} \textit{Ibid}, PP.246-247
consumers enter into distance sales in the ‘dark’. In mitigating pitfalls of distance sales, withdrawal rights permit consumers to evaluate whether the goods are as advertised and within their expectations. If not, consumers are at liberty to terminate the contract at their will.

Statutory withdrawal rights are also applied in relation to complex contracts which demand special expertise to understand the terms and conditions. Complex consumer contracts include financial contracts such as consumer credit contracts and contract for the purchase of goods and services with which a credit contract is combined and insurance contracts. In such kinds of contracts, consumers need an additional time after the conclusion of the contract to seek objective professional advice and decide on the fate of the contract. Withdrawal rights are hence justified in such kinds of contracts to protect consumers from entering into contracts with onerous terms and conditions.

Apart from the aforementioned legislative rationales discernible in the consumer law of almost all jurisdictions, EU consumer law regime embodies other additional rationales. Clearing barriers to cross-border trade that obstruct the development of the internal market is one example. Consumers are less motivated to engage in cross-border distance contracts as they are not able to picture the goods and ascertain the true identity of the seller. As a result, consumers would incline to purchase items from local markets than surfing the internet to buy from online retailers based in other member states and this in turn hinders the development of the internal market.

With withdrawal rights, it is believed by EU legislators that consumers would be interested in cross-border sales and thereby realize the benefits of the internal market. As can readily be gleaned, this rationale sets consumer protection as an indirect goal to ensue from elimination of barriers to cross-border trade. This rational has however been criticized by commentators for being inadequate to roll out far reaching instruments like withdrawal rights. Marco Loos argues that awarding withdrawal rights is unlikely to increase cross-border contracts unless

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48 John Dickie (1999), *Internet and Electronic Commerce Law in the European Union* (Hart), P.93
49 Loos, (n9), P.249
50 See, for instance, recitals 3 and 4 of DSD 97/7/EC, recitals 3 and 4 of Distance Marketing of Financial Services Directive 2002/65/EC
other restrictive barriers such as divergent tax rates and language differences are taken away.\textsuperscript{51}

Without prejudice to the foregoing, it must however be noted that consumers might still rush into rash and irrational purchase decisions merely because there are overwhelming choices available in the market although the sales are not carried out at a distance or off-premises.\textsuperscript{52} Thus, existence of rights of withdrawal might even be desired in such cases that are likely to render purchase decisions irrational.

\subsection*{2.3.3 Efficiency rationale}

On top of traditional and legislative rationales detailed above, withdrawal rights find justification also from the law and economics discourse. Withdrawal rights are defended for having a clear ‘efficiency’ rationale and do serve as efficiency-enhancing devices. They enhance efficiency in two related aspects. In the first aspect, they play an important allocative efficiency role by remedying irrational consumer behavior in marketplace. Although the economic notion of efficiency presumes that consumers behave rationally in deciding on their choices and preferences cognizant of alternatives, consumers have demonstrated remarkable instability in their preferences depending on the environment under which they make decisions.\textsuperscript{53}

Factors causing instability in choices and preferences are noticeable in certain kinds of transactions already hinted earlier. An oft-cited example is contract for timeshares entered into while consumers are on vacation and away from their daily routines. In such kinds of circumstances, it is likely that consumers might enter into transactions which they may later regret. In hindsight, the value out of the goods already purchased may turn out to be lower after the end of the vacation or the holiday. This is what economist call ‘regret contingency’.\textsuperscript{54}

Consumer irrationality also happens in relation to doorstep sales. Aggressive and manipulative sales techniques of the salesperson are likely to reduce consumers’ risk perception and

\begin{itemize}
\item \textsuperscript{51} Loos, (n9), P.247
\item \textsuperscript{52} Twigg-Flesner and Schulze, (n11), P.130
\item \textsuperscript{53} Rekaiti and Van den Bergh, (n21), P.375
\item \textsuperscript{54} Ibid. Regret contingency refers to the future occurrence of a condition that would motivate breach if these were a cost-free option for the promisor.
\end{itemize}
deny the option to look for alternative products. Nonetheless, consumers may later come to their mind and realize that the product doesn’t fit to their expectations. In the event of the aforementioned scenarios, withdrawal rights are useful in curing irrational consumer behavior by enabling consumers to reconsider the propriety of their purchase decisions. It also effectively deals with costs associated with regret contingency in so far as the cooling-off periods are long enough until the customer realizes his/her irrational decision.

Irrational behavior is not however the only brunt caused by those vending techniques. Such sale methods do also cause another inefficiency problem called ‘situational monopoly’. It is all about the temporary market power on the side of the seller due to the particular situation created by those vending techniques. It represents transaction-specific market power the existence of which is seen as a symptom of market failure.

Deploying aggressive and unfair persuasion techniques, salespersons put consumers in ‘lock-in’ situation leading consumers to believe that it will be more expensive and perhaps impossible for them to find alternative suppliers or products. Ultimately, consumers may end up paying far more than the actual prices of the product, letting the seller earn ‘monopoly rent’. But, if there is a right for consumers to withdrawal from the contract which they would not have concluded had they not been locked-in to, the market failure caused by the situational monopoly could be cured.

The second aspect of the efficiency rationale concerns information asymmetry. The achievement of allocative efficiency hinges on the existence of full information about the contents and consequences of a particular transaction. And, it is nearly impractical that consumers would have full information before and during the conclusion of the contract. Significant information deficiency on the part of consumers is particularly the case while they enter into contracts which involve the purchase of certain types of goods, namely experience and credence goods.

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55 Ibid, PP.376-377  
56 Ibid, P.375  
57 Ibid, P.378  
58 Ibid, P.379  
59 Ibid. Experience goods are those whose quality is cognizable after having consumed or experienced them. Whereas quality of credence goods can’t be discerned by mere usage, it might need to be assessed with the help
The very nature of these goods doesn’t allow consumers to have full information about the goods and whether they are what they wanted to purchase. The major negative consequence of the inability to ascertain the quality of goods is that it leads to deterioration of quality of goods and services in the market. Unable to discern the actual quality, consumers will resort to assume medium quality thereby avoid purchasing high-priced goods of high-quality producers.\(^60\) This in turn forces high quality producers to lower down quality to reduce prices.

In the end, the information asymmetry progressively wipes out good quality goods and supplant with goods of inferior quality.\(^61\) In dealing with this inefficiency conundrum, withdrawal rights relent by awarding adequate cooling-off periods for the consumer to sufficiently ascertain the quality of the goods. It also incentivizes traders to correspond prices with the information value of their products. A trader aware of the costs of withdrawal is likely to disclose relevant information well in advance to the consumer. This way, withdrawal rights create informational symmetry in consumer markets.

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\(^60\)Eidenmuller, (n14), P.9
\(^61\)Rekaiti and Van den Bergh, (n21), P.379
Chapter Three: Auctions in General

3.1. Definitions

Auction has its origin in antiquity and has been one, though not the main, mode of selling goods since time immemorial. Quoting Herodotus, Ralph Cassady traces back the origin of auctions to 500 BC during the Babylonian Empire where good-looking girls were auctioned to the highest bidder. One striking example from ancient auctions is the auctioning of the whole Roman Empire in 193 AD by Praetorian Guards which was won by Didius Julianus only to be an emperor for 2 months.

While being an old institution, defining auction has remained to be a major difficulty both for academics and legislators. Auction is perhaps one of the most unwieldy notions to be subsumed under a single definition. The etymological traces of the term auction don’t also capture all the attributes of auction as we know it today. The term auction is derived from the Latin term *augere* (from *auctio*) literally meaning: ‘to increase’. This reflects English auction which is just, though major, variant of auctions by which the bidding goes upward until only one bidder with the highest bid remains.

Auction typically represents a straightforward way of obtaining money for goods by matching supply and demand at a particular time. It is a unique system of allocating scarce and rare assets based on price making by competition of buyers for the right to purchase. Economists define auction as a market institution led by explicit set of rules that determine resource allocation and prices on the basis of bids from market participants.

Ralph Cassady describes auction as a price-making mechanism in contradistinction with ‘fixed pricing’ and ‘private treaty pricing’. In fixed pricing, also called *take-it-or-leave-it* or posted pricing, prices are fixed by the seller and buyers have the option either to accept or

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63 Ralph Cassady (1967), *Auctions and Auctioneering* (California), P.26
64 *Ibid.*, P.29
66 Brian Harvey and Franklin Meisel (2006), *Auctions Law and Practice* (Oxford), P.4
67 Cassady, (n63), P.2
69 Cassady, (n63), PP.11-14
reject without haggling. Whereas private treaty pricing leaves a room for the parties to negoti-
ate on the price and often initial quotations are made by either of the parties as starting points
for the negotiation. Auction is notably more flexible pricing mechanism by which prices are
tailor-made for each transaction. Simply stated, auction focuses on determining the value of
objects of unknown value while negotiations are about cooperating to create a value.70

3.2. Salient features
Despite the difficulty in defining auction, there are some salient features shared by all species
of auctions as described below:

3.2.1 Market clearing mechanism
One central characteristics of auction is that it is a market clearing mechanism to equate de-
mand and supply.71 Through competition between bidders for particular lots within a specific
period of time and place, it creates ‘demand-supply equilibrium’ by knocking down the good
to the successful bidder. Because the price must be remade for each transaction, competition
over auctioned lots balances the supply and demand and pushes prices to the maximum level.

3.2.2 Explicit price formation
In contrast with posted-price sales and negotiations, the price formation in auctions is explicit
in that the rules that determine the final price are usually well understood by all parties.72
Transparency is a virtue of auctions. Auctions work best when the market is free and when
there are no hidden charges or taxes payable by the buyer.73 Conspicuously displaying condi-
tions of sale is since the earliest times an important feature of auctions.74

3.2.3 Active bidder and passive invitor
Unlike private treaty sales, buyers, as opposed to sellers, play an active role in setting the
price determinant in auctions. Auction is basically a ‘buyer-set’ method of pricing.75 The only

70 Gregory Kersten, Sunil Noronha and Jeffrey Teich(2000), Are All E-Commerce Negotiations Auctions?, CO-
OP’2000, P.6
71 Flavio Menezes and Paulo Monteiro(2005), An Introduction to Auction Theory(Oxford), P.9
72 Ibid, P.9
73 Harvey and Meisel, (n66), P.13
74 Ibid, P.6
75 Ramberg, (n65), P.48
situation where sellers retain control over the price-setting procedure is by fixing a ‘reserve price’, a price below which sales would not take place. In other words, sellers or inviters lose control once they enlisted their goods for sale and are bound to surrender to successful bidders unless they themselves bid.

3.2.4 Pertinent to unique and goods with uncertain valuation

It is generally believed that auctions are preferred when the seller is highly uncertain about the demand for the goods, and when the goods are not standardized or when the market-clearing prices are highly unstable. Goods sold through auction are unique, expensive, and with uncertain equilibrium prices. Rare and unique objects are typically sold in auctions because markets for these objects are likely to be very thin. Auctions are also best suited for sale of goods for which there is no established market. A person wishing to sell antiques, for example, is not certain if he could get the best possible offer in private treaty sales, not to mention the time-consuming nature of the later sale mechanism. Using auctions with lots of bidders vying one another to second the goods, the vendor would be able to get the offer befitting to the actual value of the antiques.

3.2.5 Auctioneer

Auctioneer is the key functionary in auction sales. S/he/it is an agent who sells or offers for sale property on the behalf of a seller. An auctioneer organizes the sale and carry out all behind-the-scene functions such as appraising the property, setting the time and place of sale, publicizing the sale, determining the conditions of sale and displaying the merchandise in advance of the auctioning. The role of auctioneers is however receding with the proliferation of web auctions as most functions of an auctioneer are significantly being replaced by

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76 Ibid, P.53
79 Menezes and Monteiro, (n71), P.9
80 Harvey and Meisel, (n66), P.12
81 Cassady, (n63), P.92
82 Ibid, P.96
softwares and most online auction sites also declare that they are not auctioneers in the traditional sense of the term.83

3.3. Typologies of auctions

Auctions can broadly be categorized as ‘public’ and ‘private’. As the names indicate, public auction is one where anyone interested may attend and register bid whereas private auction is simply a private sale based on auction principles where only a limited number of participants are allowed to participate.84 On top of this general dichotomy of auctions, English, Dutch, Japanese, are the commonest typologies of auctions explained below.

3.3.1 English auction

Also called ascending-bid auction, it is the commonest type of auction by which the auctioneer seeks an initial bid from one of the assembled buyers with the expectation that those interested in the item will bid against one another until all but one highest bidder are nated.85 The auctioneer may also set a reserve price and bidding goes upward until only one bidder with a bid equivalent to or above the reserve price remains. The essential feature of English auction is that at any point in time each bidder knows the level of the current bid86 and that competition is also at its maximum intensity level.87

3.3.2 Dutch auction

Dutch or descending-bid auction stands in converse to English auction in that instead of starting at a relatively low price, and ascend step by step until one highest bidder remains; it follows a descending price pattern.88 The auctioneer calls an initial high price and lowers the price until one bidder accepts the current price.89 At times, one finds a synergy of English and Dutch auction where the ascending-bid principles are first used to set the initial price for the descending process.90

83 eBay, for instance, states in its user agreement(clause3) that it is not an auctioneer.
84 Cassady, (n63), P.8. Audible-bid rotation system by which close circle of bidders submits bids in turn is a typical form of private auction. See, Ramberg, (n65), P.41
85 Ibid, P.57
86 McAfee and McMillan, (n68), P.702
87 Cassady, (n63), P.59
88 Ibid, P.60
89 McAfee and McMillan, (n68), P.702
90 Cassady, (n63), P.76
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3.3.3 Japanese auction

It is also called ‘simultaneous auction’ because all bids are placed by prospective buyers almost at the same time. Once the auctioneer signals the beginning of the auction process all bidders give individual hand signs for each monetary unit.\(^91\) Having read the signs, the auctioneer determines which bidder gave the highest bid and be award the lot. Rules of Japanese auction do not forbid increasing bids within the allotted period of time\(^92\) and this may sometimes blur the distinction between Japanese and ascending-bid auctions.

3.4. Internet auctions and their models

Though heavily reliant on many of the techniques of traditional auctions, internet auctions obviously embrace their own salient features which are often highlighted in terms of their merits by contrast with traditional auctions. On top of enlarging the bidder base by eliminating distance limitation of traditional auctioning and being far less costly, simple and accessible, internet auctioning has relieved participants from the social awkwardness of face-to-face haggling.\(^93\)

It appears that haggling with a seller of a product seems not to be enjoyed by most buyers and some might feel socially awkward to engage in time-consuming haggling. In this sense, standing before a computer, buyers are likely to feel empowered to decide which price is acceptable to them. In a nutshell, the possibility of not being specifically known by the seller, the buyer is likely to seek an offer that best fits his/her demands.

There are generally two business models in the internet auction industry, sometimes referred to as merchant sites and listing sites.\(^94\) Merchant sites are those which act as retailers auctioning merchandises by themselves. Auction sites falling in this category sell goods of their own, and hence do not necessarily serve as a conduit for other sellers. To this end, they cooperate

\(^91\)Ibid, P.64
\(^92\) Ibid.
with brand manufacturers and logistic services from which they acquire merchandises, often new and branded, at a mutually agreed price.95 <bidz.com> is a suitable example.

Listing sites, on the other hand, don’t offer merchandises for sale in their own name, they rather allow sellers to register their listings.96 They just provide the platform for sellers and buyers to carry out transactions. Such sites, often epitomized by eBay, are not involved in the actual exchange of goods auctioned and all the details of payments and shipping are sorted out by the buyer and the seller themselves.97 There are also sites which combine the features of the above models of internet auction, which act as retailers and which do also allow other sellers to list their goods for auctions. Oft-mentioned example is <ubid.com>.

In dealing with whether eBay-type sites are auctioneers, Christina Riefa identifies four categories of online auctions sites the primary criterion being the role played by the intermediary websites. These are: (1) when traditional auctioneers use the internet as an alternate sales channel, (2) when sellers use online auctions sales as an alternate to individual negotiated sales, (3) when websites sell by auctions on the behalf of vendors and (4) when intermediary websites provide the tools to conduct online auctions.98

It must however be noted that there is no crystal clear distinction among the available business models in the current marketplace. Auction sites such as eBay also provide for ‘Buy-It-Now’ alternative sale mechanism at a fixed price other than auctioning. In sum, models of internet auction sites are so dynamic and that any attempt to draw a water-tight demarcation is likely to become rapidly outmoded.

95 Antje Möllenberg(2003), Internet Auctions in Marketing: The Consumer Perspective, Working Paper No. 03/02, P.4
96 Lucking-Reiley, (n94), P.234
97 Ibid.
Chapter Four: Withdrawal Rights and Auctions under Consumer Rights Directive

4.1. Background to the pre-CRD scope of withdrawal rights vis-à-vis auctions

The DSD, guided by minimum harmonization, generally puts auctions outside its scope.\(^99\) Without any definition of what the term auction represents, and with the possibility for member states to maintain or introduce more stringent requirements, the directive has been transposed differently across member states. That community law doesn’t provide for an authoritative notion of auction has created legal uncertainty as to which types of auctions are covered under the directive.\(^100\)

While member states such as France exclude only public auction, not online auctions from the scope of the DSD, other member states such as Holland fully implemented the exclusion.\(^101\) In countries such as Germany, auctions are generally within the scope of the law transposing the DSD but case law has permitted withdrawal rights only in cases of online auctions.\(^102\) The other divergent transposition is to be found in countries such as Belgium where the Art 3(1) exclusion has never been implemented and withdrawal rights do apply to both traditional and internet auctions without any distinction.\(^103\) Whereas in Estonia auctions have been included within the scope of the DSD, but withdrawal right doesn’t apply to online auctions.\(^104\)

The Commission noted that the regulatory fragmentations have created uncertainties as to consumers’ rights.\(^105\) The imprecision of the term auction also leaves unclear whether the so-called e-Bay type auctions should fall under the notion of auction and be exempted from withdrawal right.\(^106\) This uncertainty has said to cause significant consumer complaints as businesses are allowed to circumvent the DSD in member states where electronic auctions are

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\(^{99}\) Art 3(1) cum Art 14, DSD/97/7/EC; Art 3(1)(last par.) reads ‘this directive shall not apply to contracts:– concluded at an auction’. [Emphasis Supplied]


\(^{102}\) Ibid.

\(^{103}\) Ibid.


\(^{105}\) Working document, (n100), P.4

\(^{106}\) Ibid.
kept outside the scope of the directive\textsuperscript{107} Indeed, the regulatory fragmentation caused by the minimum harmonization has equally increased the compliance cost of businesses which, by virtue of the Rome I regulation, must comply with level of protection in the law of other member states where the consumer resides. The resultant effect of higher compliance cost is reluctance of business to trade cross-border thereby reducing consumer welfare.\textsuperscript{108}

Recognizing these problems, the Commission proposed a fully harmonized CRD published in October 2008 following extensive public consultations with multiple stakeholders and impact assessment studies. Among six policy options proposed, the proposed directive adopted policy option 4 by which the notion of auction will clearly be defined but not subject to withdrawal rights.

In addition to embracing auctions in general within the purview of the directive, the proposed directive incorporated definitions of both auction and public auction which read as follows:


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\item Art 2(15)-“\textit{Auction means a method of sale where goods or services are offered by the trader through a competitive bidding procedure which [may] include the use of a means of distance communication and where the highest bidder is bound to purchase the goods or the services. […]}.” Emphasis Supplied
\item Art 2(16)-“\textit{Public Auction means a method of sale where goods are offered by the trader to consumers, who attend [or] are given the [possibility] to attend the auction in person, through a competitive bidding procedure run by the [auctioneer] and where the highest bidder is bound to purchase the goods.” Emphasis Supplied
\end{enumerate}
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Some variations are readily noticeable between the above two definitions. Whilst auction concerns both goods and services, public auction concerns only goods. Auctions may also involve use of means of distance communication such as the internet. Inversely stated, auction doesn’t necessarily involve use of means of distance communication and hence a bidding procedure may still fall within the meaning of auction even without the use of means of distance com-
munication. That is, it clearly embraces not only internet auctions but also equally applies to those auctions carried out offline (in physical spaces) perhaps without an auctioneer.

The definition of public auction also seems to imply the possibility of using means of distance communication as it states that attendance in person is not mandatory and a mere possibility to attend is sufficient. This later aspect of the definition hints the legislative intent to embrace traditional auctions which are streamed online and where real-time bidding is possible for distant bidders. The auctioning is run by the so called auctioneer, who/which conventionally acts as the agent of the seller, is at the center of the definition of public auction. Also notable is that fixed-price sales are not treated as auctions under Art 2(15) even if bidding procedure was an optional means of sale. In this regard, one plausible interpretation is that the law is referring to ‘Buy-It-Now’ options practiced in most internet auctions sites.

While the draft brought auctions within the bounds of the directive, withdrawal rights applied only for public auction. That is, the exception concerned auction as defined under Art 2(15) of the draft CRD. Accordingly, consumers purchasing goods concluded at auctions (internet auctions included) would not be entitled to withdraw. The absence of withdrawal rights from consumer contracts concluded at internet auctions has generated strong criticisms from commentators. It must be noted however that withdrawal right yet applied for consumer contracts at a fixed-price concluded via internet auction sites as fixed price sales didn’t constitute auction within the meaning of Art of Art 2(15) of the draft CRD.

In the draft text of CRD adopted by the Parliament on 23 June 2011, the definition of auction was totally excluded and even the formulation of public auction was slightly changed which reads as:

“‘public auction’ means a method of sale where a good or a service is offered by the trader to consumers, during an event which is physically accessible to the public, through a transpar-

109 Indeed, this can also be read into the background documents. See, working document, (n100), P.163
110 Art 19(1(h)) of draft CRD
111 Riefa, (n104), P.180ff. See also, Christine Riefa and Julia Hornle, The Changing Face of Electronic Consumer Contracts, in Lilian Edwards and Charlotte Waelde (ed.s., 2009), Law and the Internet, P.118
ent, competitive bidding procedure run by a third party (the auctioneer), who, for pecuniary consideration, acts as the trader's agent. [...]” Emphasis Supplied

This definition rectified some limitations of the initial definition of public auction. For instance, it extended the offer to include services and broadened the typology of public auctions to include descending-bid auction. It also clarified on the role of the auctioneer as the agent of the trader.

With regard to the exceptions from withdrawal right, the text was amended to exclude from withdrawal contracts concluded at a public auction, however. The reasons for the U-turn on the exception from withdrawal right from auction to public auction remain shrouded in secret. As shall be seen below, slightly the same rule is pursued by the final text of CRD which defines only public auction and the exception from withdrawal rights also concerns such auctions.

**4.2. The public auction exception and withdrawal rights under CRD**

Condensing the earlier definition in the text adopted by the parliament, the CRD defines public auction as follows:

Art 2(13)- “public auction means a method of sale where goods or services are offered by the trader to consumers, 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” Emphasis Supplied

At the heart of the definition is that the bidding procedure is run by an auctioneer and consumers attend or are given the possibility to attend the auctioning in person. Indeed, the bidding procedure must also be transparent and competitive. This definition apparently applies to the conventional auction systems, often referred to as traditional auctions, by which an auctioneer who acts as the agent of the vendor conducts the auctioning process. Customarily such auctions take place in a physical location, often called auction houses or salesrooms, in the physical presence of at least the buyer and the auctioneer.

113 Ibid, Art 19(1(h))

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With the advance in technology, it has become easily accessible for distant buyers to attend auctions either via television or the internet and register their bids by making phone calls or via the internet in real-time. The above definition of public auction seems also to recognize these modalities of participating in an auction at a distance when it says: ‘...given the possibility to attend the auction in person.’ Yet, clarity is desirable at this point. Also notable is that the successful bidder in public auctions is bound to purchase the goods s/he won at the hammer price. And, therefore, the winning bidder will not be allowed to retract his/her bid once s/he is declared the successful bidder. In fact, one feature of auctions is that the bidder loses control once s/he places his/her bid.

Perhaps one major lacuna of the definition is that it fails to deal with what might be called ‘internet auctioneers’ which hold auctions wholly on the internet as opposed to the conventional ones whose auctions takes place in a physical location. They to some extent share similar roles with traditional auctioneers; or at least they call themselves auctioneers. An example, though based in the US, is Lone Star Auctioneers, Inc. Art 2(13) evidently is premised on traditional auctions which take place in a physical location and doesn’t apply for internet auctioneers.

It is, therefore, unclear whether such online platforms calling themselves as ‘auctioneers’ should be seen through the same lens as those indicated under Art 2(13) and Art 16(k) of the directive so that auctions taking place via these platforms be regarded as public auction with no withdrawal right. That the directive relies on the legal meaning of auctioneers and their roles in the respective laws of member states might tempt one to wonder should a uniform rule on that be included under the CRD. This may particularly be worth pondering point because there is no certainty whether the laws of member states on the matter are uniform as not to lead to regulatory fragmentation and divergent consumer protection once the directive is transposed.

Yet, relying on recital 24 which excludes all auctions via online platform from the definition of public auction, one may plausibly argue that withdrawal is indeed possible. In a way, this

may serve as a disincentive for businesses to adopt internet auctioneering as a business model. But, the obvious has to be stated that the lacuna has to be dealt with due time.

That being said, in what may be termed as a U-Turn of the initial proposal, the CRD excludes from withdrawal right consumer contracts concluded at public auction. Clear rationales for the exclusions are not however provided in the recitals of the directive. Various justifications are however invoked in the literature as to why withdrawal rights should not apply for consumer contracts concluded at public auctions in general. One oft-stated reason is that consumers have the possibility to attend the auction in person and inspect the nature of the good offered for sale.

This applies, at least in principle, to auctions conducted in physical location, or to auctions often called public auctions. Another reason is that auctioneers take possession of the goods sold and they have a number of other duties to the seller as well as thirds parties such as the duty to describe the good accurately and to take a good care of the goods in possession. And, therefore this would be adequate protection to consumers buying at public auctions.

Auctions in general don’t also arguably relent to withdrawal rights as the value of some goods sold over auctions fluctuates very rapidly and withdrawal may defeat the purpose of these contracts. But, it is worthwhile to pose the following important questions: are consumer always adequately protected at public auctions? Should the exclusion under Art 16(k) apply for all public auctions as defined under Art 2(13) of the directive? What are the down-sides of total denial of the withdrawal right from public auction from the consumer protection perspective? These points are examined in what follows.

4.2.1. Why not withdrawal rights for public auctions?
As highlighted above, one rationale for public auction exception is that consumers have the option to inspect the good and even there is a possibility for them to retract bids placed. This, nevertheless, doesn’t seem to be the case, at least in some kinds of public auctions. A good case in point is a typical Dutch auction where the bidder who first shouted ‘Mine!’ will be the

\[\text{\cite{115} Riefa, (n104), P.183} \]
\[\text{\cite{116} Ben-Shahar and Posner, (n17), P.138} \]

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highest winning bidder and will be bound by the contract. There is no possibility of retracting one's bid and the bidder loses control once s/he signaled his bid. The same can be said with regard to Japanese auction where every bidder signals his/her bid simultaneously and the auctioneer decides who paced the highest bid right away.

It has been rightly pointed out that the absence of a chance to reflect upon one's bidding decision is the feature of traditional auctions. Gerald Spindler argues that ‘the rule that the auctioneer awaits until the final acceptance can be declared intends simply to enhance the probability of higher bids’ and hence withdrawal of one’s bid is impossible.\footnote{Gerald Spindler(2005), Internet Auctions Vs Consumer Protection: The Case of Distance Selling Directive, \textit{German Law Journal}, Vol. 6, No. 3, P.730} After all, Art 2(13) of the CRD makes it clear that the successful bidder is bound to purchase the goods s/he bid for and won.

As always, consumers are likely to make rash and irrational bidding decisions while taking part in public auctions. It therefore appears that the justification of rectifying irrational consumer behavior should equally apply in such circumstances and withdrawal right is perhaps justified to remedy such behavior. It must however be noted that I am not advocating for indiscriminate application of withdrawal rights to all public auctions. It rather has to be restricted only to those auctions where retraction of bids is impossible and where consumer irrationality is rampant or likely to occur while carefully taking into account the interests of businesses.

The other justification raised to exclude public auction is that sufficient safeguards are given by auctioneers who have certain responsibilities under the law. This view is to be called into question on two grounds. First of all, it is doubtful if legal obligations of auctioneers are adequate enough to ensure the level of protection envisioned in EU consumer law. The maximum consumers could do upon failure on the part of the auctioneer is to institute legal action which is normally costly and time-consuming. The burden on consumers would rather be onerous when they participate in public auctions via the internet while the auction is physically being conducted in another member state. Conflict of law issues further compound the concerns.
Secondly, the view is based on the assumption that there are laws in member states that regulate the roles and duties of auctioneers, and that the laws are uniform throughout member states. While we acknowledge that auctions are regulated in most member states, if not all, it is uncertain whether the laws of member states are approximately uniform. Needlessly saying, any divergences on the role and duties of auctioneers among the laws of member states would spark another round of fragmentation in consumer protection. The consumer may not receive the same level of protection while purchasing at public auction conducted in auction houses situated in different member states.

The most problematic aspect of the public auction exception under Art 16(k) is that it considerably reduces consumer protection. As discussed earlier, the common practice in the traditional auction industry is that the auctioning process is streamed online and live bidding by distant consumers is possible. As a result, consumer purchasing through this mechanism would not be able to withdraw from the contract. This undoubtedly constitutes significant erosion of consumer protection. The ultimate consequence of this state of affair is that consumers would lose confidence in purchasing cross-border and would perpetuate the incompleteness of the internal market in the auction context.

The mere fact that consumers are given the possibility to attend auctions in person hardly justifies denying withdrawal right. This is so because possibility of attending in person is very subjective, and in certain circumstance consumers may not practically be able to attend the auction in person though they are given the option to do so. It is may be nearly impossible for a consumer in Norway to attend an auction conducted in Greece in person. In fact, there is less incentive for distant consumers to attend auctions in person while there is a possibility to take part in the auctions in remote via the internet. It therefore is hardly justifiable to deny withdraw right for such class of consumers.

Also questionable is whether the exclusion under Art 16(k) concerns ‘private auctions’ which rely on principles of auctions whereby a small group of bidders take part in the auctioning. At the core of the definition of public auction under Art 2(13) is that the bidding procedure being transparent and competitive. Indeed, recital 24 also hints that all what matters is that the bidding procedure is authorized by the law of (some) member states to offer goods or services at a public sale(i.e. so long as the auction is based on principles of law on public auction).
This raises the question whether the exclusion under Art 16(k) also concerns private auctions. The term ‘public’ may, expectedly, come quick to mind not to include private auction and hence withdraw right applies. There are not however clear-cut rules to determine whether a given auction is public or private because at times taking part in an auction may be qualified on different criteria making an otherwise public auction private. Indeed, awarding or denying withdraw right should not hinge on the level of openness and accessibility to the public of the auction procedure. There might be legitimate reasons to award withdraw right in connection with auctions which would otherwise appear to be private. Clearer legislative guidance is thus desirable on this point.

In sum, the public auction exception under article Art 16(k), and of course its definition under Art 2(13) bring along regrettable definitional and terminological ambiguities. As noted above, given the contemporary public auctioning practice, the wholesale exclusion is likely to reduce consumer welfare in the EU/EEA. This concern is compounded because of the maximum harmonization anchored in CRD which to a large extent forbids member states to introduce or maintain more protective measures. For instance, a consumer who takes part in public auction at a distance via the internet would not be entitled to withdraw and member states are left empty-handed that they cannot introduce rules granting such rights.

In mitigating this ambiguity, I suggest changing the terms public auction by other more appropriate terms which adequately reflect the reality on the ground. Perhaps the definition of public auction should make a distinction between auction which takes place in physical location without the possibility of real-time bidding and those with the possibility to do so. The former might be called as ‘real’ or ‘traditional’ auctions and the former as ‘internet-based traditional auctions’. Eliminating the term public from the definition would accordingly lessen uncertainties that may arise in relation to private auction. In that sense, the exception could be restricted only to real auctions. Of real auctions again, as we already remarked earlier, the exception should apply to those types of real auctions where irrational consumer behavior wouldn’t occur.

118 Note that those terms have already been used in the literature in contradistinction with (online) auctions. See, Riefa, (n101) and Spindler, (n117)
4.3. Auctions via online platforms and withdrawal rights

Although the directive defines public auctions and excludes them from withdrawal rights, it doesn’t clearly regulate internet auctions. Unlike the first draft of the directive which defined auctions and embraced internet auctions, the CRD provides a very vague and ambiguous formulation concerning internet auctions. The fate of internet auctions is randomly tucked away in just a recital which reads partly as:

Recital 24- “The use of online platforms for auction purposes which are at the disposal of consumers and traders should not be considered as a public auction within the meaning of the directive.” [Emphasis Supplied]

This last limb of the recital appears to define what we may call ‘auction via online platforms’ in exclusion of public auctions. That is, all auctions other than public auctions, as defined under Art 2(13), are auctions via online platforms and that withdrawal right applies to the latter. Yet, given that ‘eBay-type’ auctions were benchmarked in the legislative discussions, there is a good chance that the formulation of ‘auctions via online platforms’ under Recital 24 may be understood to embrace only those types of auctions conducted through sites such as eBay. This in turn would mean that all auctions except internet auctions of eBay type are not subject to withdrawal rights.

A closer look at the phrasing of the above quoted limb of recital 24 however reveals to the contrary.119 The apparent standard used to exclude from the ambit of public auction is…” use of online platforms for auction purposes at the disposal of consumers and traders…” [Emphasis Supplied] In so far as the online platform is at disposal of traders and consumers, the use of platforms for auction purposes suffices for the auction not to be regarded as public auction and consequently withdrawal right applies to all consumer contracts concluded at auctions that make use of the internet.

119 One might legitimately ask whether just a recital can be used to broadly interpret or understand the scope of withdrawal right. It is a truism that recitals don’t carry legally binding value in EU law in general. Nevertheless, they can expand the scope and nature of ambiguous provisions of the law. Moreover, there is a conventional wisdom that recitals may create legitimate expectations when operative provisions contradict with each other. As a result, recital 24 interjects to deal with the ambiguities the law leaves in relation to internet and public auctions, and serves an important role in understanding the scope of withdrawal rights. See generally, Tadas Klimas and Jurate Vaičiukaitė(2008), The Law of Recitals in European Community Legislation, ILSA, Vol. 15, No. 1
The wordings are too general in that the degree to which the online platform must be used doesn’t appear to matter. Auctions with any online feature are likely to fall outside the scope of public auction. Of course, a sheer use of the website of traders to provide information about them, their products and contact details doesn’t suffice as the latter clearly fall outside the notion of distance contracts under the CRD. It must go a little beyond this for a contract to fall within the remit of the directive after all.

The immediate consequence then is that the law leaves the scope of public auction to a very narrow set of traditional auctions. This is mainly because most traditional auction houses and auctioneers have embraced the internet as part of the bidding system. Technology has enabled auctioneers and auction houses to extend their consumer base by blending the internet so that a massive contingent of consumers can bid online in real-time which would not otherwise be able to attend the auction in person. Among the leading auction houses, Sotheby’s and Christie’s are notable examples which stream their auctions conducted in physical salesrooms via the internet.

Even those traditional auction houses and auctioneers that don’t stream their auctions live via the internet are assisted by technology companies which stream their auctions via the internet. A good example in this regard is <liveauctioneers.com> which connects auction houses with a global contingent of bidders who might not otherwise be able to participate in remote auctions. <Liveauctioneers.com> links bidders with more than 1,300 auction houses across the world. Therefore, based on recital 24 of the directive all consumer contracts concluded through auctions through these platforms are not public auctions and consumers are entitled to withdraw.

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120 What ‘at the disposal of consumers and traders’ exactly means is also far from clear.
121 Recital 20 (last limb), CRD/2011/83/EU
124 Lately live streaming of events has become common with the emergence of free video streaming platforms such as <ustream.tv>.
126 Ibid.
This is not mentioning the innumerable number of internet auctions sites proper which are mushrooming very rapidly in the contemporary market. With the above noted criteria, all internet auctions fall outside the public auction dominion for the sheer reason that internet has been used for auction purposes. Surveys revealed that there are over 1,600 internet auction sites and this number has probably increased in the past few years. And, withdrawal right applies indiscriminately to all consumer contracts concluded at internet auction sites. As already discussed, there are a number of business models of internet auction and each with its own sui generis features. While some are just listing sites which serve as a platform for buyers and sellers to transact, others are mercantile sites which act as online retailers. The latter types of internet auction sites are more than a platform and the contract is basically concluded between the sites and consumers.

Speaking of internet auctions, there is a common sale mechanism adopted by most listing sites called ‘Buy-It-Now’ as alternative to auction. It allows consumers who don’t want to bid for a given product to buy the same product at a fixed price. In the first draft of directive, this sale method was declared not to constitute an auction, and withdraw right was allowed. The fate of this modality of sale is left undecided under the CRD and it is unclear if withdrawal is possible. The vaguely worded recital 24 doesn’t appear to be of help in this regard. Noting the terms ‘use of online platform for auction purposes’, one might incline to state that since the sale method is part and parcel of internet auction and even an alternate to it, consumers purchasing at fixed price would be entitled to withdraw.

I am of the view that while there is an urgent need to clarify the vagueness that inheres in recital 24, whether withdrawal right should be permitted has to be assessed in light of the purposes of the right and circumstances under which the consumer enters into the contract, and of course its effect on businesses. One potential adverse effect of excluding withdrawal right from Buy-It-Now sale is that businesses may significantly shift their sale model to fixed price sale to avoid the withdrawal right of consumers.

Lest, there doesn’t seem to exist any other reason for not extending the right to such forms of sale. Consumers opting the Buy-It-Now sale are in similar foot as those who choose to participate in the auction. In other words, the sale method used under the same platform should not be a criterion to award or deny withdrawal right. Plus, unlike auctioning withdrawing from a fixed price sale wouldn’t cause disruption to the process as the product can still be reoffered for the equivalent or even higher prices.

That being said, if auctions via online platforms were to be taken just as examples of non-public auctions under recital 24, the scope of withdrawal rights would still be extended to those auctions which may not fall within the meaning of public auctions and auctions via online platforms thereby further broadening the scope withdrawal rights. Nevertheless, as the latter varieties of auctions are currently inexistent in auctioning practice, they are not detailed in this thesis. Yet, it can safely be summed-up that the CRD apparently crafts a regime allowing withdrawal right to a wide array of consumer contracts for the sheer reason that the auction system blends an online element whilst yet it glosses over the fate of other auctioning modalities.

4.4. Withdrawal rights and television auctions

Given that the CRD is not technology neutral, it leaves undecided the fate of auctions conducted via television. The Commission did however aspire to regulate television auctions as generically hinted in the background documents of the CRD.128 Realizing television as one channel of auction, it expressed the concern that unfair competition may sometimes arise in using these means of auction, especially when identical items are auctioned through various TV channels.129 Despite this general statement in the preparatory materials, the adopted CRD has totally omitted the issue of television auctions and their application with regard to withdrawal rights remains unclear.130

Television auctions are generally conducted in three ways. The commonest mode is live televi
casting of auctions being conducted by auction houses in physical locations. In these kinds of

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128 See, Working document, (n100), PP.4, 25, 170. It appears that the Commission was concerned mainly on how well and effectively information could be given to consumers by traders through television.
129 Ibid, P.163
130 This is without prejudice to references made under recital 36 concerning adaptation of information requirements to the technical features of televisions and telephones.
auctions, bidders place bids either through a telephone call or through the internet. This is based on ‘linear TV’ by which bids have to be registered there and then. Secondly, the auction being conducted in a salesroom is transmitted via CCTV to an audience of bidders attending the auction live from nearby rooms and bids are placed by informing the auctioneer.\textsuperscript{131} This is particularly a useful channel to accommodate overflow audiences who could not take part from the main salesroom.\textsuperscript{132}

The recent and the other channel is to stream auctions underway in a physical location through the website of television companies or via the streaming services of other companies, and bids are placed via the internet in real-time. This is not uncommon because most television companies stream their broadcasts through the internet.

This state of affair raises questions in relation to the applicability of the withdrawal rights to television auction. No doubt contracts concluded via television are distance contracts within the meaning of Art 2(3) cum recital 20 of the CRD. Nevertheless, it is unclear whether such contracts concluded at television auctions are subject to withdrawal rights or not. More importantly, it is also uncertain whether auctions streamed online via website of television channels should fall within the ‘auctions via online platform’ definition of recital 24 of the CRD.

Concerning the first and the second variants of television auction, there is a strong reason to treat them within the meaning of public auction under Art 2(13) of the directive. But, whether applying the Art 16(k) exception to telecasted television auction is justified is at best questionable. Since a consumer takes part in a televised auction from a distance, perhaps too distant to attend the auction in person, it is likely that s/he may make rash bidding decision as there is no possibility to picture the goods. As already highlighted, the mere fact that there is a possibility to attend the auction in person without there being an objective possibility from the bidder’s perspective is not a sufficient reason to deny withdrawal right.

The criteria based on which withdrawal right is awarded or denied should not rely too much on such kinds of subjective factors. It must rather be crafted based on nature of the contract,

\textsuperscript{131} Cassady, (n63), P.201
\textsuperscript{132} Ibid.
goods offered for sale and the circumstances under which the consumer enters into the contract. Therefore, withdrawal right appears to be justified in such cases of television auction. The same argument can be made in connection with the third variant of television auction, one that is streamed via the internet. Nonetheless, the ‘use of online platform for auction purposes’ limb of recital 24 may come to exclude those auctions from the definition of public auction and therefore withdrawal right would be applicable. In fact, streamed television auctions may seem similar in feature with streamed traditional auctions so much so that withdrawal is apt.

All be as it may, there is no gainsaying that the directive leaves traces of ambiguity that may be sources of regulatory fragmentation. It is likely that member states realizing the lack of any guidance in the directive may transpose into national laws diverging rules thereby generating fragmentation. Therefore, it desirable to clearly regulate the applicability of withdrawal right to television auctions in general.

4.5. Implications of wider withdrawal rights on contracts concluded at internet auctions

In the foregoing, we uncovered that contrary to initial legislative discussions on the applicability of withdrawal rights to internet auctions; vaguely worded recital 24 of the directive extends the scope of withdrawal rights to a wide array of auctions for the sheer reason that online features are embodied. But, what are the major implications of creating wider of withdrawal right in relation to internet auctions? This section details these ramifications.

A major demerit of ill-designed and broader withdrawal right identified in the law and economics discourse is moral hazard. Moral hazard, also called buyer opportunism, refers to a situation where a buyer deliberately uses the good purchased and returns it back later claiming bad quality.\(^{133}\) It is a practice of obtaining the use value from a good rather than simply learning about it.\(^{134}\) And, the assumption is that once buyers are given the right to withdraw from a contract, they would abuse it and traders would face a moral hazard problem. Similar arguments have been put forward by internet auction sites such as eBay during the public consultation of the proposed CRD. The main tool of mitigating abuse of withdrawal right and moral

\(^{133}\) Rekaiti and Van den Berge, (n21), P.382
\(^{134}\) Ben-Shahar and Posner, (n17), P.138
hazard is requiring consumers to pay for the diminished value of the good, also called depre-
ciation loss.

As per Art 14(2) of CRD, in the event of withdrawal, the consumer shall be obliged to pay for
any diminished value of the goods resulting from handling of the goods other than what is
necessary to establish the nature, characteristics and functions of the goods. Ascertaining de-
preciation loss has never been easy, however. The duration within which goods depreciate
also varies; while some depreciate very quickly perhaps during the cooling-off period, others
show signs of depreciation long after the cooling-off period expired. This dictates to craft a
withdrawal regime that takes full of account of the nature of goods. The directive doesn’t give
a guideline as how should depreciation loses be ascertained.

The ‘...necessary to establish, characteristics and functioning of the goods’ criterion is so
vague and leaves a room for subjective interpretations. Ben-Shahar and Posner exemplify the
problem as:

‘‘...the depreciation of clothes worn to a single party is probably close to zero, which means
that a lawsuit would not be cost-justified, and in effect, people could rent out clothes for free
until they were reduced to threads. ’’135

Given that the CRD provides for a wider withdrawal right especially in relation to auctions
conducted via online platforms and having in mind the huge mass of consumers shopping in
these platforms, the incidence of moral hazard is likely to be exponentially higher. Indeed,
moral hazard created out of overprotective withdrawal regime has another adverse effect: that
would serve as an incentive for consumers not to pay sufficient attention to making the best
choices.136 It may spoil consumer behavior and eliminating the opportunity for them to devel-
op rational purchase behavior. Related to this is that excessive consumer protection may be
inimical to development of market skills which consumers would develop over time.137 In

135 Ibid.
137 Ibid.
fact, not allowing withdrawal right with the view to enhance its ‘educatory’ function is said to have a long-term efficiency benefits.138

At times, moral hazard may be double-sided in that it may also happen on the side of businesses. As noted in the second chapter, withdrawal rights are very much alike warranties. Both have the aim of incentivizing the seller to set a price which is reflective of the quality of the good so that buyers would not resort to returning the good if goods are of good quality. Nevertheless, consumer action has to be monitored especially while handling the product.

The more warranty buyers get, the less they care to avoid possible damages to the good139 and the more return to ensue. In such circumstances, one way sellers could do away with cost of influx of return is to produce low-quality goods. This is what economists call the ‘lemons problem’ which occurs when high-quality producers resort to low-quality goods and which eventually has the potential to shut down the market for the goods. So, unreasonably wider right of withdrawal under CRD may invite the lemons problem whose effect is deleterious not only for businesses but also for consumer welfare.

Related to this is that the CRD leaves a room for withdrawal right to be manipulated by businesses who appear to be ‘hybrid consumers’. As hinted earlier, recital 17 of the directive states that a natural person who enters into dual purpose contracts, partly within and partly outside his trade, should be considered as consumer. The directive also leaves a lee-way, as an exception to the maximum harmonization envisaged, for member states to extend the scope of application of the directive to legal persons(businesses included) which may not be so under the directive.140 And, it flows from this that businesses who wear the mask of consumers may take advantage of withdrawal right. In that sense the far reaching instrument may end up in hands of parties who don’t actually need the protection thereby worsening the moral hazard concern.

138 Eidenmuller, (n14), P.6
140 See, for instance, recital 13 of CRD/2011/EU which partly reads as: ‘[…] member states may decide to extend the application of the rules of this directive to legal persons […] who are not consumers within the meaning of this directive such as […] start-ups or small and medium-sized enterprises[…]’ Emphasis Supplied.
42
Uncertainty and Costs is the other adverse effect. Added with onerous information obligations, withdrawal rights increase the compliance cost of businesses. That the contracts will just have provisional validity until the end of the cooling-off periods, withdrawal right inherently causes delay and uncertainty to traders.\textsuperscript{141} The implication would be rather unfavorable where consumers are at liberty to rescind a wide array of contracts.

More particularly, frequent withdrawal right may turn out to be very costly for those auction sites which don’t charge listing fees and fees chargeable upon selling items.\textsuperscript{142} Apart from disrupting the whole auction platform, withdrawal may seriously affect the revenue base of the sites and ultimately make their continuity difficult. This would defeat the twin objectives of review of the consumer \textit{acquis}; i.e. striking the right balance between a high level of consumer protection and competitiveness of enterprises.

In direct response to extensive withdrawal by consumers, businesses are likely to externalize the onus of withdrawal by translating it into prices.\textsuperscript{143} They would off-set the cost of withdrawal by enlisting goods at a higher (reserve) price. That in turn means consumers would be subject to higher prices while shopping at internet auction sites. It would not only reduce consumer welfare but also it retracts consumers from shopping on the internet. In effect, this would mean consumers would not be able to reap the benefits of the internal market, a problem which the commission set out to solve while reviewing the consumer \textit{acquis}.

Wider withdrawal regime has also the potential to distort competition in consumer markets. As already noted, withdraw rights favor large retailers which maintain huge inventory and which have better creditworthiness to accommodate the cost implications of frequent withdrawal by buyers. And, these large retailers may use it as a way of driving out small retailers which cannot withstand influx of returns from buyers. With this premise, wider and indiscriminate withdrawal right to all internet auction buyers is likely to distort competition in the internet auction market.

\textsuperscript{141} Rekaiti and Van den Berge, (n21), P.383
\textsuperscript{142} Internet auctions sites such as <http://www.onlineauction.com>, <http://epier.com> don’t charge listing fees and final value fees with the view to provide better deals to buyers.
\textsuperscript{143} The Commission acknowledged that some of the proposed legislative changes could have effects on prices and availability. But, it was optimistic that the overall increase in cross-border offers is likely to lower retail prices and increase consumer choice. See, working document, (n100), P.43
This is particularly the case because most sellers in online auction sites are small retailers and, indeed hybrid consumers (which may be treated as consumers under the CRD). If consumers were to be entitled to withdrawal from all auctions in the internet, small retailers unable to live up to increasingly higher rate of withdrawal would be forced to go bankrupt and leave the market. This subsequently enables those large retailers to establish a dominant position in the market which ultimately affects the end consumer who would be subjected to monopoly rents. In this sense, wider rights of withdrawal distort competition in the internet auction industry.

Another possible implication of wider withdrawal right is that it has the potential to crowd out the sense of fairness and reciprocity between buyers and sellers. Studies have shown that buyers generally inclined to return purchased items when they realized that they have the statutory withdrawal right even in cases where the goods don’t appear to be of bad quality. In examining whether mandatory withdrawal rights are justified while there are already commercial practices to do so, Jan Smits argues that explicit policy undermines moral altruistic behavior.

While businesses embrace return policies as trust and reputation building mechanism independent of statutory rights, consumers will perceive the beneficial behavior as not being motivated by altruism and leading to decrease in the willingness to reciprocate by not abusing the right. Put simply, consumers would tend to ignore the altruistic aims of traders to build trust by extending generous return policies when they realize that the rights come from the law not from the altruism on the part of traders. In such circumstances rates of withdrawal are to be way higher than before the right is bestowed by law. This diminishes considerations of fairness and reciprocity between buyers and sellers. In lieu of building trust and reputation, businesses would resort to offsetting the influx of returns through price mechanisms.

This concern particularly works in the internet auction marketplace as return policies are commonly used as reputation building tools. Though strictly qualified with conditions, some internet auction sites provide for return options while sellers usually also have similar poli-

144 George Borges and Bernard Irlenbusch(2007), Fairness Crowded Out by Law: An Experimental Study on Withdrawal Rights, JITE163, passim
145 Smits, (n24), PP.8-11
146 Ibid.
cies. For example, <uBid.com> offers a right to return the good purchased for 15 calendar days from the day of receipt subject to 15% restocking fees. More generous return policies are also present. For example, <Bidz.com> on top of guaranteeing that all their listings and items are 100% as described, it offers 100% of the purchase price with any shipping costs of the buyer should goods appear not be as described within 30 days from the day of chase. In the face these business practices, wider rights of withdrawal may therefore turn out to be onerous to internet auction sites and listing sellers.

What is more, extensive withdrawal may even sometimes be unmanageable to consumers. Coupled with extensive information received from the trader, withdrawal right may appear to be unmanageable and even result in information overload. It may not hit its target as consumers are not as rational and driven by self-interest as they are thought to be. This may tempt to question whether withdrawal right has to be designed too extensively as to embrace a wide range of consumer contracts concluded through auction sites.

More importantly, it is necessary to be reminded that withdrawal right is an exception, not the rule so much so that its scope of application should be kept to limited cases of consumer contacts. As an exceptional far reaching instrument, withdrawal right has to be awarded only where the informational rights are less likely to remedy the occurrence of irrational consumer behavior. Otherwise, wider withdrawal right may rather be counter-productive instruments of consumer protection.

The incidence of afore-mentioned adverse ramifications is multiplied by the absence of social awkwardness in internet communications and dealings which we highlighted earlier. Internet users are more relaxed, proactive and sometimes aggressive online than face-to-face communication. This undoubtedly would put businesses engaged in online selling in very disadvantageous position, disrupt their business and ultimately they may be driven out of the mar-

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147 See, Online Auction Sites Comparison where return policy is one item of comparison, available at <http://online-auction-sites.toptenreviews.com/index.html>.
149 See, Return Policy at <http://www.bidz.com/content/returnable at>.
150 Smits, (n24), P.8
151 For an overview of studies on this see, Elizabeth Bernstein(2012), Why We Are So Rude Online, The Wall Street Journal, 1st October.
ket. In the ultimate analysis, care should always be taken in awarding withdrawal rights as it is far reaching instrument with its own adverse implications.

4.6. Towards a pragmatic understanding of the scope of withdrawal rights vis-à-vis auctions

We so far remarked that the scope the right to withdraw vis-à-vis auctions is crafted in such a way that it applies to all kinds of auctions that makes use of the internet as a platform and that the exception concerns all types of public auctions. These features of the withdrawal regime stand at both extremes of the spectrum. By excluding all contracts concluded at public auction, it reduces consumer protection and by awarding to all auction with an online element, it puts the interest of businesses at stake thereby creating uncertainty and raising compliance costs. But, how best and pragmatically the scope of withdrawal rights vis-à-vis auctions must be defined?

It transpires from the leading-up to the adoption of the CRD that the concerns have been the lack of or absence of withdrawal rights from consumer contracts concluded at ‘e-Bay-styled’ online auction sites. Simply stated, e-Bay has been benchmarked in discussing the propriety of extending the reach of withdrawal right. This might even tempt one to read the directive in such a way that all variants of auction but e-Bay-styled are excluded from withdrawal right under the CRD. Nevertheless, the reality on ground of the auction marketplace suggests that e-Bay is just one typology of internet auctioning and the scope withdrawal regime shall take full account of other auction models.

As discussed earlier, e-Bay belongs to what is called ‘listing sites’ which serve as a conduit between sellers and buyers. These types of internet auction sites do not assume any responsibilities for wrongs in the transaction between buyers and sellers. The other major model of internet auction sites is called ‘mercantile sites’ which just are retailers who sell out goods on their own while having deals with manufacturers and producers. Typically, they deal with brand producers and other large traders and bring to consumers discounts and bargains for auctioning. As there is not intermediary in-between, the contract is concluded between the

152 This is of course not to mention auctions that neither are non-public nor auctions via online platforms to which withdrawal rights may well be extended under the directive though such auctions are inexistent in practice.
consumer and the auction sites. Certain auction sites such as <skyauction.com>\(^{153}\), <webstore.com>\(^{154}\) are more than an intermediary as they are involved in the auction transactions. Once the good is knocked-down to a buyer, these mercantile sites directly enter into the contract with the buyer. With this, they commit themselves to contractually set forth rights and obligations.

It is also to be recalled that some auction sites serve both as listing and mercantile sites. A good example is <uBid.com> which has two marketplaces called ‘uBid Direct Marketplace’ and ‘uBid Certified Merchant Marketplace’. The former is when uBid itself is the seller of the products offered whereas the latter is when approved third-party merchants sell products on the Site. While uBid takes full responsibility for all aspects of the transactions on products it offers, the listing merchants takes responsibility for their own offers.\(^{155}\)

Given adverse disadvantages of withdrawal rights already discussed, it appears convincing to cut short the scope of withdrawal rights in relation to the latter types of auction platforms. One prime factor that dominated prior legislative discussions was the lack of any guarantee for consumers in listing sites which just act as a venue. The need for extending the scope of the directive lies on the lack of control by auctions sites such as eBay concerning goods listed and auctioned via the platforms. Mercantile sites do however directly involve in relation to auctioned products, except those offered directly by merchants themselves.

In addition, unlike listing sites, mercantile sites would be regarded as traders within the meaning of the directive, and therefore would be required to provide valuable information. Yet, the exception to this sites should not be based on the nature of the auction site, rather be based on who the seller is and whom the consumer enters the contract with. Accordingly, withdrawal should still be permitted where third part sellers other than the site directly list goods in their own name. This would fairly balance the brunt of withdrawal right in relation to mercantile sites.

\(^{154}\) <webstore.com> has recently ceased its auctioning business.
In addition, awarding withdrawal right to all listing sites can still be called into question. Perhaps a distinction might be drawn based on a set of criteria such as the type of goods sold, the existence or otherwise of return policies and provision of a secure auctioning mechanism. Concerning return policies, there are a good number of listing (and mercantile) sites which allow buyers to return goods which buyers didn’t find satisfactory. There are also occasions where vendors selling via these sites offer a right to return. In such circumstances one might not find the existence of a mandatory withdrawal right justified.

Besides, the type of goods sold should also be taken into consideration in extending withdrawal rights. The nature of goods sold over auction sites varies. It includes, among others, perishable goods and goods whose price fluctuates frequently over a short period of time. Withdrawal in the latter type of sales might result unbearable costs as the price of the goods might have gone below the selling price by the time the cooling-off periods laps. The importance of withdraw rights is also questioned in relation to goods for which there is a secondary market.156 As well known, second-hand goods are commonly offered though internet auctions, especially those sold in the C2C context and reselling upon dissatisfaction didn’t seem to be a major difficulty to buyers.

Noting these aspects of selling via internet auctions, it can safely be stated that even in relation to listing sites the scope of application of withdrawal right must be restricted in relation to a set of goods and/or services offered for sale. This must be a desired policy goal not only because it safeguards the interest of businesses but also it would not result in reduction of consumer welfare. Guided by norms of self-regulation, internet auctions do also provide relatively becoming protection mechanisms for consumers.

There is a growing availability of product reviews and consumer feedback and other reputation mechanisms such as ratings in internet auction sites.157 Moreover, online shopping has become more consumer-friendly and very assistive as many websites use shopping assistants and bot agents to ease shopping. There are also auction sites which provide safer auctioning marketplace. For example, uBid schemes a secure environment for consumers buying from

156 Ben-Shahar and Posner, (n17), P.135
157 Ibid.
listing sellers via its platform called Certified Merchant Marketplace. Per this scheme, only uBid approved third-party merchants sell products on the site. Its user agreement clause 4 partly reads as follows:

“To ensure uBid buyers the ability to shop in a private and secure environment, every uBid Certified Merchant must go through a thorough application process including verification of bank and trade references before they are approved to list products on the Site. uBid Certified Merchants are established businesses (both small and large) whose performances are monitored to ensure that buyers receive the appropriate uBid service levels.”

These scenarios suggest that what would perhaps be an appropriate approach is to craft withdrawal right as a fallback rule which comes into application where return policies are absent. In so doing, the law shall also set forth the minimum level of protection in terms of the cooling-off periods and other supplementary safeguards below which traders’ return policies cannot go below. It must be noted that ‘fallback’ rule is starkly different from ‘default’ rule of withdrawal rights. The later basically crafts withdrawal rights that can be contracted away by the contracting parties.

This proposal is flawed from a consumer protection perspective precisely because there is no certainty that consumer would rationally weigh the impact of contracting out a statutory right. The consumer might be pressured to agree to disregard the statutory right by agreement which s/he may later regret. The appropriate policy option therefore is to set the minimum threshold and let the parties exercise their freedom of contract above that threshold.

159 <cqoute.com>, a listing site, also has a rigorous validation procedure to verify bona fide sellers. See, <http://www.cqoute.com/faq.asp?c=01>.
159 That withdraw right shall be a default rule (in American law) has also been proposed by some authors. See, Ben-Shahar and Posner, (n17), P.116
160 Eidenmuller criticizes the ‘default’ rule proposal as it fails to allocate the decision competence with respect to the desirability of a withdrawal right to the most appropriate party, namely the consumer. See, Eidenmulle, (n14), P.11
161 There is also a proposition to craft withdrawal as an ‘optional’ regime by which withdrawal right would be a statutory option for consumers so that traders will have to offer distance contracts with and without a right to withdraw. Though contracts with withdrawal right are likely to be subject to higher prices than those without, the proposition hopes that competition will reduce it down. See, Eidenmulle, (n14), PP.11-13 But, in markets where there is no effective competition and hence where contracts with withdrawal right are high-priced, withdrawal right would end up being the ‘privilege’ of better-off consumers, not vulnerable consumers.
Although self and co-regulation were excluded by the Commission from the outset for being inappropriate to solve the regulatory fragmentation problem, it is now high-time to rethink their role as far as a right to withdraw is concerned. The already sparsely existing return policies and other consumer friendly auction environments could well be espoused and nurtured through soft nudges from the regulators towards creation of codes of practice by the auction sites themselves. In fact, some internet auction sites are already bound by codes of practice. For instance, <Bidz.com> is certified by BBB online code of online business practices.

Concerning public auctions, the ubiquity of the internet, as already discussed, has abundantly transformed the conventional auctioning processes. Apart from narrow exceptions, most traditional auctions embrace in one way or another online elements. Reasons for awarding withdrawal right to internet auctions apparently are present in traditional auctions in which bidders participate in remote via the internet. And, bidders in those types of auctions are in the same foot as those taking part in internet auction proper. Accordingly, the exception under Art 16(k) should concern only strictly traditional auctions where the buyer appeared and bided in person. Where consumers bid in distance via the internet for an auction taking place in a physical location, withdrawal right is deserved.

Television auctions, as noted above, are not specifically addressed in the directive despite a mention in the background documents. Given that consumers take part both in telecasted auctions and online streamed TV auctions, withdrawal right is justified. It must however be underlined that while permitting withdrawal in the above noted variants of auctioning, due account shall be taken of the type of the contract, nature of goods sold and other relevant considerations.

Concluding Remarks
The grand project of reviewing the consumer acquis culminated with the adoption of a fully harmonized CRD that covers four major areas of EU consumer law. The directive introduces a number of novel consumer-protective rules in line with developments in consumer markets. Of the reforms, the directive resolves the ambiguity concerning the applicability of the dis-

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162 Explanatory Memorandum, (n108), P.8
163 BBB is an online trust forum that sets standards of trust and business codes of conduct and certifies trustworthy businesses. See details at <http://www.bbb.org/us/mission-and-values/>.
tance sale rules to consumer contracts concluded at auctions. Despite this, the directive apparently fails to clearly delineate the scope of withdrawal right in connection with contracts concluded at auctions, be it traditional or internet auctions. This thesis uncovered that the vague formulation of public and internet auctions has ushered in adverse legal ambivalence in the CRD.

It began in the first chapter with a brief outline of the research problem and questions and research methodology employed. The second chapter gave a background on the features, functions and rationales of withdraw rights with the view to critically examine the regime of withdrawal under CRD vis-à-vis auctions. Among others, it has been remarked that while being a crucial tool of consumer protection, withdrawal right is a far reaching instrument and has to be awarded only in exceptional circumstances where consumer interests would be at stake. Features and models of auctions in general and internet auctions in particular have also been succinctly discussed in the third chapter. More importantly, an emphasis has been given to models of internet auction to reveal the definitional and conceptual ambiguities of the scope of withdrawal right vis-à-vis auction in the fourth chapter.

Chapter four of the thesis addressed the main themes of the thesis. It started by recounting the structure of the scope of the withdrawal regime vis-à-vis auction before the adoption of the directive. It pointed out the while the draft CRD defined the notion of both auction and public auction (though with its own lapses), withdrawal right applied to public auction as opposed to the current shape of the directive which denies the right from such auctions. With that background, the public auction exception under Art 16(k) of the directive has meticulously been examined in the light of rationales often put forward for exclusion of public auction and existing traditional auctioning practices.

We questioned the tenability of these justifications given the nature of certain variants of traditional auction which might warrant awarding withdrawal right. We also argued that since traditional or public auctions are largely rendered internet based and remote participation in the auctioning process is now a common practice; right withdrawal right must be awarded in such kinds of public auctions. It is no exaggeration to state that in the near future, people may not find it wise to attend auctions in person while it is far easy to take part in auction via the internet.
The thesis also closely discussed the fate of internet auctions in relation to withdrawal rights under the directive. It has been underscored that the directive created a wider regime of withdrawal rights by defining public auction in exclusion of what I called auction via online platforms. Over and above the concern in not clearly regulating internet auction in the operative provisions, the directive has adopted a very crude approach in defining internet auctions vis-à-vis withdrawal rights.

In line with the contemporary internet auctioning practice, the thesis advocated for a distinction to be made between various models of internet auction, mainly listing and mercantile sites. It has been argued that given that mercantile sites do enter into the contract in their own name and even some of them have embraced consumer-friendly auction environment awarding a far reaching instrument of withdrawal appear to be inept. A brief review on the status, in terms of withdrawal of certain modalities of internet auctioning such as ‘Buy-It-Now’ sales in auction sites has also be made.

We also queried if withdrawal right should apply to all listing sites by pointing out the type of goods sold via these platforms. The thesis also pinpointed the glare omission of television auction under the CRD. Despite a mention in background documents, no mention is of made of television auction under the directive. As it is one common channel of auctioning in consumer markets, we stressed that withdrawal right is deserved in cases of telecasted and streamed television auction as consumers would not be able to inspect and picture the good they purchase.

The various legal and economic ramifications of creating wider regime of withdrawal right have also been examined from consumer protection perspective at length. Among others, implications ranging from the usual dangers of moral hazard, uncertainties and delays to traders to distortion of competition in consumer markets are discussed. Finally, the thesis offered a pragmatic way of crafting withdrawal regime that takes full account of interests of consumers and businesses, and indeed the contemporary auctioning practice.

Attention is also drawn to reckon the propriety of self and co-regulation in connection with withdrawal rights vis-à-vis internet auction. Though the commission was pessimistic from the
very outset on the point, it is high time to piggyback toddling yet promising consumer friendly industry practices in the internet auction market. Last but not least, it must be underlined that drafting problems, as exemplified throughout this thesis, witnessed in the CRD have to be dealt away with in due time.
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DIRECTIVES

DIRECTIVE 2011/83/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 25 October 2011


(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

Having regard to the opinion of the European Economic and Social Committee (1),

Having regard to the opinion of the Committee of the Regions (2),

Acting in accordance with the ordinary legislative procedure (3),

Whereas:


(2) Those Directives have been reviewed in the light of experience with a view to simplifying and updating the applicable rules, removing inconsistencies and closing unwanted gaps in the rules. That review has shown that it is appropriate to replace those two Directives by a single Directive. This Directive should therefore lay down standard rules for the common aspects of distance and off-premises contracts, moving away from the minimum harmonisation approach in the former Directives whilst allowing Member States to maintain or adopt national rules in relation to certain aspects.

(3) Article 169(1) and point (a) of Article 169(2) of the Treaty on the Functioning of the European Union (TFEU) provide that the Union is to contribute to the attainment of a high level of consumer protection through the measures adopted pursuant to Article 114 thereof.

(4) In accordance with Article 26(2) TFEU, the internal market is to comprise an area without internal frontiers in which the free movement of goods and services and freedom of establishment are ensured. The harmonisation of certain aspects of consumer distance and off-premises contracts is necessary for the promotion of a real consumer internal market striking the right balance between a high level of consumer protection and the competitiveness of enterprises, while ensuring respect for the principle of subsidiarity.

(5) The cross-border potential of distance selling, which should be one of the main tangible results of the internal market, is not fully exploited. Compared with the significant growth of domestic distance sales over the last few years, the growth in cross-border distance sales has been limited. This discrepancy is particularly significant for Internet sales for which the potential for further growth is high. The cross-border potential of contracts negotiated away from business premises (direct selling) is constrained by a number of factors including the different national consumer protection rules imposed upon the industry. Compared with the growth of domestic direct selling over the last few years, in particular in the services sector, for instance utilities, the number of consumers using this channel for cross-border purchases has remained flat. Responding to increased business opportunities in many Member States, small and medium-sized enterprises (including individual traders) or agents of direct selling companies

should be more inclined to seek business opportunities in other Member States, in particular in border regions. Therefore the full harmonisation of consumer information and the right of withdrawal in distance and off-premises contracts will contribute to a high level of consumer protection and a better functioning of the business-to-consumer internal market.

(6) Certain disparities create significant internal market barriers affecting traders and consumers. Those disparities increase compliance costs to traders wishing to engage in the cross-border sale of goods or provision of services. Disproportionate fragmentation also undermines consumer confidence in the internal market.

(7) Full harmonisation of some key regulatory aspects should considerably increase legal certainty for both consumers and traders. Both consumers and traders should be able to rely on a single regulatory framework based on clearly defined legal concepts regulating certain aspects of business-to-consumer contracts across the Union. The effect of such harmonisation should be to eliminate the barriers stemming from the fragmentation of the rules and to complete the internal market in this area. Those barriers can only be eliminated by establishing uniform rules at Union level. Furthermore consumers should enjoy a high common level of protection across the Union.

(8) The regulatory aspects to be harmonised should only concern contracts concluded between traders and consumers. Therefore, this Directive should not affect national law in the area of contracts relating to employment, contracts relating to succession rights, contracts relating to family law and contracts relating to the incorporation and organisation of companies or partnership agreements.

(9) This Directive establishes rules on information to be provided for distance contracts, off-premises contracts and contracts other than distance and off-premises contracts. This Directive also regulates the right of withdrawal for distance and off-premises contracts and harmonises certain provisions dealing with the performance and some other aspects of business-to-consumer contracts.

(10) This Directive should be without prejudice to Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (1).

(11) This Directive should be without prejudice to Union provisions relating to specific sectors, such as medicinal products for human use, medical devices, privacy and electronic communications, patients’ rights in cross-border healthcare, food labelling and the internal market for electricity and natural gas.

(12) The information requirements provided for in this Directive should complete the information requirements of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (2) and Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) (3). Member States should retain the possibility to impose additional information requirements applicable to service providers established in their territory.

(13) Member States should remain competent, in accordance with Union law, to apply the provisions of this Directive to areas not falling within its scope. Member States may therefore maintain or introduce national legislation corresponding to the provisions of this Directive, or certain of its provisions, in relation to contracts that fall outside the scope of this Directive. For instance, Member States may decide to extend the application of the rules of this Directive to legal persons or to natural persons who are not consumers within the meaning of this Directive, such as non-governmental organisations, start-ups or small and medium-sized enterprises. Similarly, Member States may apply the provisions of this Directive to contracts that are not distance contracts within the meaning of this Directive, for example because they are not concluded under an organised distance sales or service-provision scheme. Moreover, Member States may also maintain or introduce national provisions on issues not specifically addressed in this Directive, such as additional rules concerning sales contracts, including in relation to the delivery of goods, or requirements for the provision of information during the existence of a contract.

(14) This Directive should not affect national law in the area of contract law for contract law aspects that are not regulated by this Directive. Therefore, this Directive should be without prejudice to national law regulating for instance the conclusion or the validity of a contract (for instance in the case of lack of consent). Similarly, this Directive should not affect national law in relation to the general contractual legal remedies, the rules on public economic order, for instance rules on excessive or exorbitant prices, and the rules on unethical legal transactions.

(15) This Directive should not harmonise language requirements applicable to consumer contracts. Therefore, Member States may maintain or introduce in their national law language requirements regarding contractual information and contractual terms.

(16) This Directive should not affect national laws on legal representation such as the rules relating to the person who is acting in the name of the trader or on his behalf (such as an agent or a trustee). Member States should remain competent in this area. This Directive should apply to all traders, whether public or private.

(17) The definition of consumer should cover natural persons who are acting outside their trade, business, craft or profession. However, in the case of dual purpose contracts, where the contract is concluded for purposes partly within and partly outside the person's trade and the trade purpose is so limited as not to be predominant in the overall context of the contract, that person should also be considered as a consumer.

(18) This Directive does not affect the freedom of Member States to define, in conformity with Union law, what they consider to be services of general economic interest, how those services should be organised and financed, in compliance with State aid rules, and which specific obligations they should be subject to.

(19) Digital content means data which are produced and supplied in digital form, such as computer programs, applications, games, music, videos or texts, irrespective of whether they are accessed through downloading or streaming, from a tangible medium or through any other means. Contracts for the supply of digital content should fall within the scope of this Directive. If digital content is supplied on a tangible medium, such as a CD or a DVD, it should be considered as goods within the meaning of this Directive. Similarly to contracts for the supply of water, gas or electricity, where they are not put up for sale in a limited volume or set quantity, or of district heating, contracts for digital content which is not supplied on a tangible medium should be classified, for the purpose of this Directive, neither as sales contracts nor as service contracts. For such contracts, the consumer should have a right of withdrawal unless he has consented to the beginning of the performance of the contract during the withdrawal period and has acknowledged that he will consequently lose the right to withdraw from the contract. In addition to the general information requirements, the trader should inform the consumer about the functionality and the relevant interoperability of digital content. The notion of functionality should refer to the ways in which digital content can be used, for instance for the tracking of consumer behaviour; it should also refer to the absence or presence of any technical restrictions such as protection via Digital Rights Management or region coding. The notion of relevant interoperability is meant to describe the information regarding the standard hardware and software environment with which the digital content is compatible, for instance the operating system, the necessary version and certain hardware features. The Commission should examine the need for further harmonisation of provisions in respect of digital content and submit, if necessary, a legislative proposal for addressing this matter.

(20) The definition of distance contract should cover all cases where a contract is concluded between the trader and the consumer under an organised distance sales or service-provision scheme, with the exclusive use of one or more means of distance communication (such as mail order, Internet, telephone or fax) up to and including the time at which the contract is concluded. That definition should also cover situations where the consumer visits the business premises merely for the purpose of gathering information about the goods or services and subsequently negotiates and concludes the contract at a distance. By contrast, a contract which is negotiated at the business premises of the trader and finally concluded by means of distance communication should not be considered a distance contract. Neither should a contract initiated by means of distance communication, but finally concluded at the business premises of the trader be considered a distance contract. Similarly, the concept of distance contract should not include reservations made by a consumer through a means of distance communications to request the provision of a service from a professional, such as in the case of a consumer phoning to request an appointment with a hairdresser. The notion of an organised distance sales or service-provision scheme should include those schemes offered by a third party other than the trader but used by the trader, such as an online platform. It should not, however, cover cases where websites merely offer information on the trader, his goods and/or services and his contact details.

(21) An off-premises contract should be defined as a contract concluded with the simultaneous physical presence of the trader and the consumer, in a place which is not the business premises of the trader, for example at the consumer's home or workplace. In an off-premises context, the consumer may be under potential psychological pressure or may be confronted with an element of surprise, irrespective of whether or not the consumer has solicited the trader's visit. The definition of an off-premises contract should also include situations where the consumer is personally and individually addressed in an off-premises context but the contract is concluded immediately afterwards on the business premises of the trader or through a means of distance communication. The definition of an off-premises contract should not cover situations in which the
trader first comes to the consumer's home strictly with a view to taking measurements or giving an estimate without any commitment of the consumer and where the contract is then concluded only at a later point in time on the business premises of the trader or via means of distance communication on the basis of the trader's estimate. In those cases, the contract is not to be considered as having been concluded immediately after the trader has addressed the consumer if the consumer has had time to reflect upon the estimate of the trader before concluding the contract. Purchases made during an excursion organised by the trader during which the products acquired are promoted and offered for sale should be considered as off-premises contracts.

(22) Business premises should include premises in whatever form (such as shops, stalls or lorries) which serve as a permanent or usual place of business for the trader. Market stalls and fair stands should be treated as business premises if they fulfil this condition. Retail premises where the trader carries out his activity on a seasonal basis, for instance during the tourist season at a ski or beach resort, should be considered as business premises as the trader carries out his activity in those premises on a usual basis. Spaces accessible to the public, such as streets, shopping malls, beaches, sports facilities and public transport, which the trader uses on an exceptional basis for his business activities as well as private homes or workplaces should not be regarded as business premises. The business premises of a person acting in the name or on behalf of the trader as defined in this Directive should be considered as business premises within the meaning of this Directive.

(23) Durable media should enable the consumer to store the information for as long as it is necessary for him to protect his interests stemming from his relationship with the trader. Such media should include in particular paper, USB sticks, CD-ROMs, DVDs, memory cards or the hard disks of computers as well as e-mails.

(24) A public auction implies that traders and consumers attend or are given the possibility to attend the auction in person. The goods or services are offered by the trader to the consumer through a bidding procedure authorised by law in some Member States, to offer goods or services at public sale. The successful bidder is bound to purchase the goods or services. The use of online platforms for auction purposes which are at the disposal of consumers and traders should not be considered as a public auction within the meaning of this Directive.

(25) Contracts related to district heating should be covered by this Directive, similarly to the contracts for the supply of water, gas or electricity. District heating refers to the supply of heat, inter alia, in the form of steam or hot water, from a central source of production through a transmission and distribution system to multiple buildings, for the purpose of heating.

(26) Contracts related to the transfer of immovable property or of rights in immovable property or to the creation or acquisition of such immovable property or rights, contracts for the construction of new buildings or the substantial conversion of existing buildings as well as contracts for the rental of accommodation for residential purposes are already subject to a number of specific requirements in national legislation. Those contracts include for instance sales of immovable property still to be developed and hire-purchase. The provisions of this Directive are not appropriate to those contracts, which should be therefore excluded from its scope. A substantial conversion is a conversion comparable to the construction of a new building, for example where only the façade of an old building is retained. Service contracts in particular those related to the construction of annexes to buildings (for example a garage or a veranda) and those related to repair and renovation of buildings other than substantial conversion, should be included in the scope of this Directive, as well as contracts related to the services of a real estate agent and those related to the rental of accommodation for non-residential purposes.

(27) Transport services cover passenger transport and transport of goods. Passenger transport should be excluded from the scope of this Directive as it is already subject to other Union legislation or, in the case of public transport and taxis, to regulation at national level. However, the provisions of this Directive protecting consumers against excessive fees for the use of means of payment or against hidden costs should apply also to passenger transport contracts. In relation to transport of goods and car rental which are services, consumers should benefit from the protection afforded by this Directive, with the exception of the right of withdrawal.

(28) In order to avoid administrative burden being placed on traders, Member States may decide not to apply this Directive where goods or services of a minor value are sold off-premises. The monetary threshold should be established at a sufficiently low level as to exclude only purchases of small significance. Member States should be allowed to define this value in their national legislation provided that it does not exceed EUR 50. Where two or more contracts with related subjects are concluded at the same time by the consumer, the total cost thereof should be taken into account for the purpose of applying this threshold.
(29) Social services have fundamentally distinct features that are reflected in sector-specific legislation, partially at Union level and partially at national level. Social services include, on the one hand, services for particularly disadvantaged or low income persons as well as services for persons and families in need of assistance in carrying out routine, everyday tasks and, on the other hand, services for all people who have a special need for assistance, support, protection or encouragement in a specific life phase. Social services cover, inter alia, services for children and youth, assistance services for families, single parents and older persons, and services for migrants. Social services cover both short-term and long-term care services, for instance services provided by home care services or provided in assisted living facilities and residential homes or housing (‘nursing homes’). Social services include not only those provided by the State at a national, regional or local level by providers mandated by the State or by charities recognised by the State but also those provided by private operators. The provisions of this Directive are not appropriate to social services which should be therefore excluded from its scope.

(30) Healthcare requires special regulations because of its technical complexity, its importance as a service of general interest as well as its extensive public funding. Healthcare is defined in Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients’ rights in cross-border healthcare (1) as ‘health services provided by health professionals to patients to assess, maintain or restore their state of health, including the prescription, dispensation and provision of medicinal products and medical devices’. Health professional is defined in that Directive as a doctor of medicine, a nurse responsible for general care, a dental practitioner, a midwife or a pharmacist within the meaning of Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (2) or another professional exercising activities in the healthcare sector which are restricted to a regulated profession as defined in point (a) of Article 3(1) of Directive 2005/36/EC, or a person considered to be a health professional according to the legislation of the Member State of treatment. The provisions of this Directive are not appropriate to healthcare which should be therefore excluded from its scope.

(31) Gambling should be excluded from the scope of this Directive. Gambling activities are those which involve wagering at stake with pecuniary value in games of chance, including lotteries, gambling in casinos and betting transactions. Member States should be able to adopt other, including more stringent, consumer protection measures in relation to such activities.

(32) The existing Union legislation, inter alia, relating to consumer financial services, package travel and timeshare contains numerous rules on consumer protection. For this reason, this Directive should not apply to contracts in those areas. With regard to financial services, Member States should be encouraged to draw inspiration from existing Union legislation in that area when legislating in areas not regulated at Union level, in such a way that a level playing field for all consumers and all contracts relating to financial services is ensured.

(33) The trader should be obliged to inform the consumer in advance of any arrangement resulting in the consumer paying a deposit to the trader, including an arrangement whereby an amount is blocked on the consumer’s credit or debit card.

(34) The trader should give the consumer clear and comprehensible information before the consumer is bound by a distance or off-premises contract, a contract other than a distance or an off-premises contract, or any corresponding offer. In providing that information, the trader should take into account the specific needs of consumers who are particularly vulnerable because of their mental, physical or psychological infirmity, age or credulity in a way which the trader could reasonably be expected to foresee. However, taking into account such specific needs should not lead to different levels of consumer protection.

(35) The information to be provided by the trader to the consumer should be mandatory and should not be altered. Nevertheless, the contracting parties should be able to expressly agree to change the content of the contract subsequently concluded, for instance the arrangements for delivery.

(36) In the case of distance contracts, the information requirements should be adapted to take into account the technical constraints of certain media, such as the restrictions on the number of characters on certain mobile telephone screens or the time constraint on television sales spots. In such cases the trader should comply with a minimum set of information requirements and refer the consumer to another source of information, for instance by providing a toll free telephone number or a hypertext link to a webpage of the trader where the relevant information is directly available and easily accessible. As to the requirement to inform the consumer of the cost of returning goods which by their nature cannot normally be returned by post, it will be considered to have been met, for example, if the trader specifies one carrier (for instance the one he assigned for the delivery of the good) and one price concerning the cost of returning the goods. Where the

Trading websites should indicate clearly and legibly at the latest at the beginning of the ordering process whether any delivery restrictions apply and which means of payment are accepted.

It is important to ensure for distance contracts concluded through websites that the consumer is able to fully read and understand the main elements of the contract before placing his order. To that end, provision should be made in this Directive for those elements to be displayed in the close vicinity of the confirmation requested for placing the order. It is also important to ensure that, in such situations, the consumer is able to determine the moment at which he assumes the obligation to pay the trader. Therefore, the consumer’s attention should specifically be drawn, through an unambiguous formulation, to the fact that placing the order entails the obligation to pay the trader.

The current varying lengths of the withdrawal periods both between the Member States and for distance and off-premises contracts cause legal uncertainty and compliance costs. The same withdrawal period should apply to all distance and off-premises contracts. In the case of service contracts, the withdrawal period should expire after 14 days from the conclusion of the contract. In the case of sales contracts, the withdrawal period should expire after 14 days from the day on which the consumer acquires physical possession of the goods. Where multiple goods are ordered by the consumer in one order but are delivered separately, the withdrawal period should expire after 14 days from the day on which the consumer acquires physical possession of the last lot or piece.

In order to ensure legal certainty, it is appropriate that Council Regulation (EEC, Euratom) No 1182/71 of 3 June 1971 determining the rules applicable to periods, dates and time limits (1) should apply to the calculation of the periods contained in this Directive. Therefore, all periods contained in this Directive should be understood to be expressed in calendar days. Where a period expressed in days 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 the period in question.

The provisions relating to the right of withdrawal should be without prejudice to the Member States’ laws and regulations governing the termination or unenforceability of a contract or the possibility for the consumer to fulfil his contractual obligations before the time determined in the contract.

If the trader has not adequately informed the consumer prior to the conclusion of a distance or off-premises contract, the withdrawal period should be extended. However, in order to ensure legal certainty as regards the length of the withdrawal period, a 12-month limitation period should be introduced.

Differences in the ways in which the right of withdrawal is exercised in the Member States have caused costs for traders selling cross-border. The introduction of a harmonised model withdrawal form that the consumer may use should simplify the withdrawal process and bring legal certainty. For these reasons, Member States should refrain from adding any presentational requirements to the Union-wide model form relating for example to the font size. However, the consumer should remain free to withdraw in his own words, provided that his statement setting out his decision to withdraw from the contract to the trader is unequivocal. A letter, a telephone call or returning the goods with a clear statement could meet this requirement, but the burden of proof of having withdrawn within the time limits fixed in the Directive should be on the consumer. For this reason, it is in the interest of the consumer to make use of a durable medium when communicating his withdrawal to the trader.

As experience shows that many consumers and traders prefer to communicate via the trader's website, there should be a possibility for the trader to give the consumer the option of filling in a web-based withdrawal form. In this case the trader should provide an acknowledgement of receipt for instance by e-mail without delay.

In the event that the consumer withdraws from the contract, the trader should reimburse all payments received from the consumer, including those covering the expenses borne by the trader to deliver goods to the consumer. The reimbursement should not be made by voucher unless the consumer has used vouchers for the initial transaction or has expressly accepted them. If the consumer expressly chooses a certain type of delivery (for instance 24-hour express delivery), although the trader had offered a common and generally acceptable type of delivery which would have incurred lower delivery costs, the consumer should bear the difference in costs between these two types of delivery.

Some consumers exercise their right of withdrawal after having used the goods to an extent more than necessary to establish the nature, characteristics and the functioning of the goods. In this case the consumer should not lose the right to withdraw but should be liable for any diminished value of the goods. In order to establish the nature, characteristics and functioning of the goods, the consumer should only handle and inspect them in the same manner as he would be allowed to do in a shop. For example, the consumer should only try on a garment and should not be allowed to wear it. Consequently, the consumer should handle and inspect the goods with due care during the withdrawal period. The obligations of the consumer in the event of withdrawal should not discourage the consumer from exercising his right of withdrawal.

The consumer should be required to send back the goods not later than 14 days after having informed the trader about his decision to withdraw from the contract. In situations where the trader or the consumer does not fulfil the obligations relating to the exercise of the right of withdrawal, penalties provided for by national legislation in accordance with this Directive should apply as well as contract law provisions.

Certain exceptions from the right of withdrawal should exist, both for distance and off-premises contracts. A right of withdrawal could be inappropriate for example given the nature of particular goods or services. That is the case for example with wine supplied a long time after the conclusion of a contract of a speculative nature where the value is dependent on fluctuations in the market (‘vin en primeur’). The right of withdrawal should neither apply to goods made to the consumer's specifications or which are clearly personalised such as tailor-made curtains, nor to the supply of fuel, for example, which is a good, by nature inseparably mixed with other items after delivery. The granting of a right of withdrawal to the consumer could also be inappropriate in the case of certain services where the conclusion of the contract implies the setting aside of capacity which, if a right of withdrawal were exercised, the trader may find difficult to fill. This would for example be the case where reservations are made at hotels or concerning holiday cottages or cultural or sporting events.

On the one hand, the consumer should benefit from his right of withdrawal even in case he has asked for the provision of services before the end of the withdrawal period. On the other hand, if the consumer exercises his right of withdrawal, the trader should be assured to be adequately paid for the service he has provided. The calculation of the proportionate amount should be based on the price agreed in the contract unless the consumer demonstrates that that total price is itself disproportionate, in which case the amount to be paid shall be calculated on the basis of the market value of the service provided. The market value should be defined by comparing the price of an equivalent service performed by other traders at the time of the conclusion of the contract. Therefore the consumer should request the performance of services before the end of the withdrawal period by making this request expressly and, in the case of off-premises contracts, on a durable medium.

Similarly, the trader should inform the consumer on a durable medium of any obligation to pay the proportionate costs for the services already provided. For contracts having as their object both goods and services, the rules provided for in this Directive on the return of goods should apply to the goods aspects and the compensation regime for services should apply to the services aspects.

The main difficulties encountered by consumers and one of the main sources of disputes with traders concern delivery of goods, including goods getting lost or damaged during transport and late or partial delivery. Therefore it is appropriate to clarify and harmonise the national rules as to when delivery should occur. The place and modalities of delivery and the rules concerning the determination of the conditions for the transfer of the ownership of the goods and the moment at which such transfer takes place, should remain subject to national law and therefore should not be affected by this Directive. The rules on delivery laid down in this Directive should include the possibility for the consumer to allow a third party to acquire on his behalf the physical possession or control of the goods. The consumer should be considered to have control of the goods where he or a third party indicated by the consumer to allow a third party to acquire on his behalf the physical possession or control of the goods.

With other items after delivery. The granting of a right of withdrawal to the consumer could also be inappropriate in the case of certain services where the conclusion of the contract implies the setting aside of capacity which, if a right of withdrawal were exercised, the trader may find difficult to fill. This would for example be the case where reservations are made at hotels or concerning holiday cottages or cultural or sporting events.

On the one hand, the consumer should benefit from his right of withdrawal even in case he has asked for the provision of services before the end of the withdrawal period. On the other hand, if the consumer exercises his right of withdrawal, the trader should be assured to be adequately paid for the service he has provided. The calculation of the proportionate amount should be based on the price agreed in the contract unless the consumer demonstrates that that total price is itself disproportionate, in which case the amount to be paid shall be calculated on the basis of the market value of the service provided. The market value should be defined by comparing the price of an equivalent service performed by other traders at the time of the conclusion of the contract. Therefore the consumer should request the performance of services before the end of the withdrawal period by making this request expressly and, in the case of off-premises contracts, on a durable medium.

Similarly, the trader should inform the consumer on a durable medium of any obligation to pay the proportionate costs for the services already provided. For contracts having as their object both goods and services, the rules provided for in this Directive on the return of goods should apply to the goods aspects and the compensation regime for services should apply to the services aspects.

The main difficulties encountered by consumers and one of the main sources of disputes with traders concern delivery of goods, including goods getting lost or damaged during transport and late or partial delivery. Therefore it is appropriate to clarify and harmonise the national rules as to when delivery should occur. The place and modalities of delivery and the rules concerning the determination of the conditions for the transfer of the ownership of the goods and the moment at which such transfer takes place, should remain subject to national law and therefore should not be affected by this Directive. The rules on delivery laid down in this Directive should include the possibility for the consumer to allow a third party to acquire on his behalf the physical possession or control of the goods. The consumer should be considered to have control of the goods where he or a third party indicated by the consumer to allow a third party to acquire on his behalf the physical possession or control of the goods.

With other items after delivery. The granting of a right of withdrawal to the consumer could also be inappropriate in the case of certain services where the conclusion of the contract implies the setting aside of capacity which, if a right of withdrawal were exercised, the trader may find difficult to fill. This would for example be the case where reservations are made at hotels or concerning holiday cottages or cultural or sporting events.

On the one hand, the consumer should benefit from his right of withdrawal even in case he has asked for the provision of services before the end of the withdrawal period. On the other hand, if the consumer exercises his right of withdrawal, the trader should be assured to be adequately paid for the service he has provided. The calculation of the proportionate amount should be based on the price agreed in the contract unless the consumer demonstrates that that total price is itself disproportionate, in which case the amount to be paid shall be calculated on the basis of the market value of the service provided. The market value should be defined by comparing the price of an equivalent service performed by other traders at the time of the conclusion of the contract. Therefore the consumer should request the performance of services before the end of the withdrawal period by making this request expressly and, in the case of off-premises contracts, on a durable medium.

Similarly, the trader should inform the consumer on a durable medium of any obligation to pay the proportionate costs for the services already provided. For contracts having as their object both goods and services, the rules provided for in this Directive on the return of goods should apply to the goods aspects and the compensation regime for services should apply to the services aspects.
In the context of sales contracts, the delivery of goods can take place in various ways, either immediately or at a later date. If the parties have not agreed on a specific delivery date, the trader should deliver the goods as soon as possible, but in any event not later than 30 days from the day of the conclusion of the contract. The rules regarding late delivery should also take into account goods to be manufactured or acquired specially for the consumer which cannot be reused by the trader without considerable loss. Therefore, a rule which grants an additional reasonable period of time to the trader in certain circumstances should be provided for in this Directive. When the trader has failed to deliver the goods within the period of time agreed with the consumer, before the consumer can terminate the contract, the consumer should call upon the trader to make the delivery within a reasonable additional period of time and be entitled to terminate the contract if the trader fails to deliver the goods even within that additional period of time. However, this rule should not apply when the trader has refused to deliver the goods in an unequivocal statement. Neither should it apply in certain circumstances where the delivery period is essential such as, for example, in the case of a wedding dress which should be delivered before the wedding. Nor should it apply in circumstances where the consumer informs the trader that delivery on a specified date is essential. For this purpose, the consumer may use the trader's contact details given in accordance with this Directive. In these specific cases, if the trader fails to deliver the goods on time, the consumer should be entitled to terminate the contract immediately after the expiry of the delivery period initially agreed. This Directive should be without prejudice to national provisions on the way the consumer should notify the trader of his will to terminate the contract.

In addition to the consumer's right to terminate the contract where the trader has failed to fulfil his obligations to deliver the goods in accordance with this Directive, the consumer may, in accordance with the applicable national law, have recourse to other remedies, such as granting the trader an additional period of time for delivery, enforcing the performance of the contract, withholding payment, and seeking damages.

In accordance with Article 52(3) of Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market (1), Member States should be able to prohibit or limit traders' right to request charges from consumers taking into account the need to encourage competition and promote the use of efficient payment instruments. In any event, traders should be prohibited from charging consumers fees that exceed the cost borne by the trader for the use of a certain means of payment.

Where the goods are dispatched by the trader to the consumer, disputes may arise, in the event of loss or damage, as to the moment at which the transfer of risk takes place. Therefore this Directive should provide that the consumer be protected against any risk of loss of or damage to the goods occurring before he has acquired the physical possession of the goods. The consumer should be protected during a transport arranged or carried out by the trader, even where the consumer has chosen a particular delivery method from a range of options offered by the trader. However, that provision should not apply to contracts where it is up to the consumer to take delivery of the goods himself or to ask a carrier to take delivery. Regarding the moment of the transfer of the risk, a consumer should be considered to have acquired the physical possession of the goods when he has received them.

Persons or organisations regarded under national law as having a legitimate interest in protecting consumer contractual rights should be afforded the right to initiate proceedings, either before a court or before an administrative authority which is competent to decide upon complaints or to initiate appropriate legal proceedings.

It is necessary that Member States lay down penalties for infringements of this Directive and ensure that they are enforced. The penalties should be effective, proportionate and dissuasive.

The consumer should not be deprived of the protection granted by this Directive. Where the law applicable to the contract is that of a third country, Regulation (EC) No 593/2008 should apply, in order to determine whether the consumer retains the protection granted by this Directive.

The Commission, following consultation with the Member States and stakeholders, should look into the most appropriate way to ensure that all consumers are made aware of their rights at the point of sale.

Since inertia selling, which consists of unsolicited supply of goods or provision of services to consumers, is prohibited by Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market ('Unfair Commercial Practices Directive') (2) but no contractual remedy is provided therein, it is necessary to introduce in this Directive the contractual remedy of exempting the consumer from the obligation to provide any consideration for such unsolicited supply or provision.


It is appropriate for the Commission to review this Directive if some barriers to the internal market are identified. In its review, the Commission should pay particular attention to the possibilities granted to Member States to maintain or introduce specific national provisions including in certain areas of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (2) and Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (3). That review could lead to a Commission proposal to amend this Directive; that proposal may include amendments to other consumer protection legislation reflecting the Commission's Consumer Policy Strategy commitment to review the Union acquis in order to achieve a high, common level of consumer protection.

Directives 93/13/EEC and 1999/44/EC should be amended to require Member States to inform the Commission about the adoption of specific national provisions in certain areas.

Directives 85/577/EEC and 97/7/EC should be repealed.

Since the objective of this Directive, namely, through the achievement of a high level of consumer protection, to contribute to the proper functioning of the internal market, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.

In accordance with point 34 of the Interinstitutional agreement on better law-making (4), Member States are encouraged to draw up, for themselves and in the interests of the Union, their own tables, which will, as far as possible, illustrate the correlation between this Directive and the transposition measures, and to make them public.

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I
SUBJECT MATTER, DEFINITIONS AND SCOPE

Article 1

Subject matter

The purpose of this Directive is, through the achievement of a high level of consumer protection, to contribute to the proper functioning of the internal market by approximating certain aspects of the laws, regulations and administrative provisions of the Member States concerning contracts concluded between consumers and traders.

Article 2

Definitions

For the purpose of this Directive, the following definitions shall apply:

(1) 'consumer' means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession;

(2) 'trader' means any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession in relation to contracts covered by this Directive;

(3) 'goods' means any tangible movable items, with the exception of items sold by way of execution or otherwise by authority of law; water, gas and electricity shall be considered as goods within the meaning of this Directive where they are put up for sale in a limited volume or a set quantity;

(4) 'goods made to the consumer’s specifications' means non-prefabricated goods made on the basis of an individual choice of or decision by the consumer;

(5) 'sales contract' means any 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, including any contract having as its object both goods and services;

(6) ‘service contract’ means 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;

(7) ‘distance contract’ means any contract concluded between the trader and the consumer under an organised distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded;

(8) ‘off-premises contract’ means any contract between the trader and the consumer:

(a) concluded in the simultaneous physical presence of the trader and the consumer, in a place which is not the business premises of the trader;

(b) for which an offer was made by the consumer in the same circumstances as referred to in point (a);

(c) concluded on the business premises of the trader or through any means of distance communication immediately after the consumer was personally and individually addressed in a place which is not the business premises of the trader in the simultaneous physical presence of the trader and the consumer; or

(d) concluded during an excursion organised by the trader with the aim or effect of promoting and selling goods or services to the consumer;

(9) ‘business premises’ means:

(a) any immovable retail premises where the trader carries out his activity on a permanent basis; or

(b) any movable retail premises where the trader carries out his activity on a usual basis;

(10) ‘durable medium’ means any instrument which enables the consumer or the trader to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored;

(11) ‘digital content’ means data which are produced and supplied in digital form;

(12) ‘financial service’ means any service of a banking, credit, insurance, personal pension, investment or payment nature;

(13) ‘public auction’ means a method of sale where goods or services are offered by the trader to consumers, 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;

(14) ‘commercial guarantee’ means any undertaking by the trader or a producer (the guarantor) to the consumer, in addition to his legal obligation relating to the guarantee of conformity, to reimburse the price paid or to replace, repair or service goods in any way if they do not meet the specifications or any other requirements not related to conformity set out in the guarantee statement or in the relevant advertising available at the time of, or before the conclusion of the contract;

(15) ‘ancillary contract’ means a contract by which the consumer acquires goods or services related to a distance contract or an off-premises contract and where those goods are supplied or those services are provided by the trader or by a third party on the basis of an arrangement between that third party and the trader.

Article 3

Scope

1. This Directive shall apply, under the conditions and to the extent set out in its provisions, to any contract concluded between a trader and a consumer. It shall also apply to contracts for the supply of water, gas, electricity or district heating, including by public providers, to the extent that these commodities are provided on a contractual basis.

2. If any provision of this Directive conflicts with a provision of another Union act governing specific sectors, the provision of that other Union act shall prevail and shall apply to those specific sectors.

3. This Directive shall not apply to contracts:

(a) for social services, including social housing, childcare and support of families and persons permanently or temporarily in need, including long-term care;

(b) for healthcare as defined in point (a) of Article 3 of Directive 2011/24/EU, whether or not they are provided via healthcare facilities;

(c) for gambling, which involves wagering a stake with pecuniary value in games of chance, including lotteries, casino games and betting transactions;
(d) for financial services;

(e) for the creation, acquisition or transfer of immovable property or of rights in immovable property;

(f) for the construction of new buildings, the substantial conversion of existing buildings and for rental of accommodation for residential purposes;

(g) which fall within the scope of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (1);

(h) which fall within the scope of 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 (2);

(i) which, in accordance with the laws of Member States, are established by a public office-holder who has a statutory obligation to be independent and impartial and who must ensure, by providing comprehensive legal information, that the consumer only concludes the contract on the basis of careful legal consideration and with knowledge of its legal scope;

(j) for the supply of foodstuffs, beverages or other goods intended for current consumption in the household, and which are physically supplied by a trader on frequent and regular rounds to the consumer’s home, residence or workplace;

(k) for passenger transport services, with the exception of Article 8(2) and Articles 19 and 22;

(l) concluded by means of automatic vending machines or automated commercial premises;

(m) concluded with telecommunications operators through public payphones for their use or concluded for the use of one single connection by telephone, Internet or fax established by a consumer.

4. Member States may decide not to apply this Directive or not to maintain or introduce corresponding national provisions to off-premises contracts for which the payment to be made by the consumer does not exceed EUR 50. Member States may define a lower value in their national legislation.

5. This Directive shall not affect national general contract law such as the rules on the validity, formation or effect of a contract, in so far as general contract law aspects are not regulated in this Directive.

6. This Directive shall not prevent traders from offering consumers contractual arrangements which go beyond the protection provided for in this Directive.

Article 4

Level of harmonisation

Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive.

CHAPTER II

CONSUMER INFORMATION FOR CONTRACTS OTHER THAN DISTANCE OR OFF-PREMISES CONTRACTS

Article 5

Information requirements for contracts other than distance or off-premises contracts

1. Before the consumer is bound by a contract other than a distance or an off-premises contract, or any corresponding offer, the trader shall provide the consumer with the following information in a clear and comprehensible manner, if that information is not already apparent from the context:

(a) the main characteristics of the goods or services, to the extent appropriate to the medium and to the goods or services;

(b) the identity of the trader, such as his trading name, the geographical address at which he is established and his telephone number;

(c) the total price of the goods or services inclusive of taxes, or where the nature of the goods or services is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated, as well as, where applicable, all additional freight, delivery or postal charges or, where those charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable;

(d) where applicable, the arrangements for payment, delivery, performance, the time by which the trader undertakes to deliver the goods or to perform the service, and the trader’s complaint handling policy;

(e) in addition to a reminder of the existence of a legal guarantee of conformity for goods, the existence and the conditions of after-sales services and commercial guarantees, where applicable;

(f) the duration of the contract, where applicable, or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract;

(g) where applicable, the functionality, including applicable technical protection measures, of digital content;

(h) where applicable, any relevant interoperability of digital content with hardware and software that the trader is aware of or can reasonably be expected to have been aware of.

2. Paragraph 1 shall also apply to contracts for the supply of water, gas or electricity, where they are not put up for sale in a limited volume or set quantity, of district heating or of digital content which is not supplied on a tangible medium.

3. Member States shall not be required to apply paragraph 1 to contracts which involve day-to-day transactions and which are performed immediately at the time of their conclusion.

4. Member States may adopt or maintain additional pre-contractual information requirements for contracts to which this Article applies.

CHAPTER III
CONSUMER INFORMATION AND RIGHT OF WITHDRAWAL FOR DISTANCE AND OFF-PREMISES CONTRACTS

Article 6

Information requirements for distance and off-premises contracts

1. Before the consumer is bound by a distance or off-premises contract, or any corresponding offer, the trader shall provide the consumer with the following information in a clear and comprehensible manner:

(a) the main characteristics of the goods or services, to the extent appropriate to the medium and to the goods or services;

(b) the identity of the trader, such as his trading name;

(c) the geographical address at which the trader is established and the trader's telephone number, fax number and e-mail address, where available, to enable the consumer to contact the trader quickly and communicate with him efficiently and, where applicable, the geographical address and identity of the trader on whose behalf he is acting;

(d) if different from the address provided in accordance with point (c), the geographical address of the place of business of the trader, and, where applicable, that of the trader on whose behalf he is acting, where the consumer can address any complaints;

(e) the total price of the goods or services inclusive of taxes, or where the nature of the goods or services is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated, as well as, where applicable, all additional freight, delivery or postal charges and any other costs or, where those charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable. In the case of a contract of indeterminate duration or a contract containing a subscription, the total price shall include the total costs per billing period. Where such contracts are charged at a fixed rate, the total price shall also mean the total monthly costs. Where the total costs cannot be reasonably calculated in advance, the manner in which the price is to be calculated shall be provided;

(f) the cost of using the means of distance communication for the conclusion of the contract where that cost is calculated other than at the basic rate;

(g) the arrangements for payment, delivery, performance, the time by which the trader undertakes to deliver the goods or to perform the services and, where applicable, the trader's complaint handling policy;

(h) where a right of withdrawal exists, the conditions, time limit and procedures for exercising that right in accordance with Article 11(1), as well as the model withdrawal form set out in Annex I(B); 

(i) where applicable, that the consumer will have to bear the cost of returning the goods in case of withdrawal and, for distance contracts, if the goods, by their nature, cannot normally be returned by post, the cost of returning the goods;

(j) that, if the consumer exercises the right of withdrawal after having made a request in accordance with Article 7(3) or Article 8(8), the consumer shall be liable to pay the trader reasonable costs in accordance with Article 14(3);

(k) where a right of withdrawal is not provided for in accordance with Article 16, the information that the consumer will not benefit from a right of withdrawal or, where applicable, the circumstances under which the consumer loses his right of withdrawal;
(f) a reminder of the existence of a legal guarantee of conformity for goods;

(m) where applicable, the existence and the conditions of after sale customer assistance, after-sales services and commercial guarantees;

(n) the existence of relevant codes of conduct, as defined in point (f) of Article 2 of Directive 2005/29/EC, and how copies of them can be obtained, where applicable;

(o) the duration of the contract, where applicable, or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract;

(p) where applicable, the minimum duration of the consumer’s obligations under the contract;

(q) where applicable, the existence and the conditions of deposits or other financial guarantees to be paid or provided by the consumer at the request of the trader;

(r) where applicable, the functionality, including applicable technical protection measures, of digital content;

(s) where applicable, any relevant interoperability of digital content with hardware and software that the trader is aware of or can reasonably be expected to have been aware of;

(t) where applicable, the possibility of having recourse to an out-of-court complaint and redress mechanism, to which the trader is subject, and the methods for having access to it.

2. Paragraph 1 shall also apply to contracts for the supply of water, gas or electricity, where they are not put up for sale in a limited volume or set quantity, of district heating or of digital content which is not supplied on a tangible medium.

3. In the case of a public auction, the information referred to in points (b), (c) and (d) of paragraph 1 may be replaced by the equivalent details for the auctioneer.

4. The information referred to in points (h), (i) and (j) of paragraph 1 may be provided by means of the model instructions on withdrawal set out in Annex I(A). The trader shall have fulfilled the information requirements laid down in points (h), (i) and (j) of paragraph 1 if he has supplied these instructions to the consumer, correctly filled in.

5. The information referred to in paragraph 1 shall form an integral part of the distance or off-premises contract and shall not be altered unless the contracting parties expressly agree otherwise.

6. If the trader has not complied with the information requirements on additional charges or other costs as referred to in point (e) of paragraph 1, or on the costs of returning the goods as referred to in point (i) of paragraph 1, the consumer shall not bear those charges or costs.

7. Member States may maintain or introduce in their national law language requirements regarding the contractual information, so as to ensure that such information is easily understood by the consumer.

8. The information requirements laid down in this Directive are in addition to information requirements contained in Directive 2006/123/EC and Directive 2000/31/EC and do not prevent Member States from imposing additional information requirements in accordance with those Directives.

Without prejudice to the first subparagraph, if a provision of Directive 2006/123/EC or Directive 2000/31/EC on the content and the manner in which the information is to be provided conflicts with a provision of this Directive, the provision of this Directive shall prevail.

9. As regards compliance with the information requirements laid down in this Chapter, the burden of proof shall be on the trader.

Article 7

Formal requirements for off-premises contracts

1. With respect to off-premises contracts, the trader shall give the information provided for in Article 6(1) to the consumer on paper or, if the consumer agrees, on another durable medium. That information shall be legible and in plain, intelligible language.

2. The trader shall provide the consumer with a copy of the signed contract or the confirmation of the contract on paper or, if the consumer agrees, on another durable medium, including, where applicable, the confirmation of the consumer’s prior express consent and acknowledgement in accordance with point (m) of Article 16.

3. Where a consumer wants the performance of services or the supply of water, gas or electricity, where they are not put up for sale in a limited volume or set quantity, of district heating to begin during the withdrawal period provided for in Article 9(2), the trader shall require that the consumer makes such an express request on a durable medium.
4. With respect to off-premises contracts where the consumer has explicitly requested the services of the trader for the purpose of carrying out repairs or maintenance for which the trader and the consumer immediately perform their contractual obligations and where the payment to be made by the consumer does not exceed EUR 200:

(a) the trader shall provide the consumer with the information referred to in points (b) and (c) of Article 6(1) and information about the price or the manner in which the price is to be calculated together with an estimate of the total price, on paper or, if the consumer agrees, on another durable medium. The trader shall provide the information referred to in points (a), (h) and (k) of Article 6(1), but may choose not to provide it on paper or another durable medium if the consumer expressly agrees;

(b) the confirmation of the contract provided in accordance with paragraph 2 of this Article shall contain the information provided for in Article 6(1).

Member States may decide not to apply this paragraph.

5. Member States shall not impose any further formal pre-contractual information requirements for the fulfilment of the information obligations laid down in this Directive.

Article 8

Formal requirements for distance contracts

1. With respect to distance contracts, the trader shall give the information provided for in Article 6(1) or make that information available to the consumer in a way appropriate to the means of distance communication used in plain and intelligible language. In so far as that information is provided on a durable medium, it shall be legible.

2. If a distance contract to be concluded by electronic means places the consumer under an obligation to pay, the trader shall make the consumer aware in a clear and prominent manner, and directly before the consumer places his order, of the information provided for in points (a), (e), (o) and (p) of Article 6(1).

The trader shall ensure that the consumer, when placing his order, explicitly acknowledges that the order implies an obligation to pay. If placing an order entails activating a button or a similar function, the button or similar function shall be labelled in an easily legible manner only with the words ‘order with obligation to pay’ or a corresponding unambiguous formulation indicating that placing the order entails an obligation to pay the trader. If the trader has not complied with this subparagraph, the consumer shall not be bound by the contract or order.

3. Trading websites shall indicate clearly and legibly at the latest at the beginning of the ordering process whether any delivery restrictions apply and which means of payment are accepted.

4. If the contract is concluded through a means of distance communication which allows limited space or time to display the information, the trader shall provide, on that particular means prior to the conclusion of such a contract, at least the pre-contractual information regarding the main characteristics of the goods or services, the identity of the trader, the total price, the right of withdrawal, the duration of the contract and, if the contract is of indeterminate duration, the conditions for terminating the contract, as referred to in points (a), (b), (e), (h) and (o) of Article 6(1). The other information referred to in Article 6(1) shall be provided by the trader to the consumer in an appropriate way in accordance with paragraph 1 of this Article.

5. Without prejudice to paragraph 4, if the trader makes a telephone call to the consumer with a view to concluding a distance contract, he shall, at the beginning of the conversation with the consumer, disclose his identity and, where applicable, the identity of the person on whose behalf he makes that call, and the commercial purpose of the call.

6. Where a distance contract is to be concluded by telephone, Member States may provide that the trader has to confirm the offer to the consumer who is bound only once he has signed the offer or has sent his written consent. Member States may also provide that such confirmations have to be made on a durable medium.

7. The trader shall provide the consumer with the confirmation of the contract concluded, on a durable medium within a reasonable time after the conclusion of the distance contract, and at the latest at the time of the delivery of the goods or before the performance of the service begins. That confirmation shall include:

(a) all the information referred to in Article 6(1) unless the trader has already provided that information to the consumer on a durable medium prior to the conclusion of the distance contract; and

(b) where applicable, the confirmation of the consumer’s prior express consent and acknowledgment in accordance with point (m) of Article 16.

8. Where a consumer wants the performance of services, or the supply of water, gas or electricity, where they are not put up for sale in a limited volume or set quantity, or of district heating, to begin during the withdrawal period provided for in Article 9(2), the trader shall require that the consumer make an express request.
9. This Article shall be without prejudice to the provisions on the conclusion of e-contracts and the placing of e-orders set out in Articles 9 and 11 of Directive 2000/31/EC.

10. Member States shall not impose any further formal pre-contractual information requirements for the fulfilment of the information obligations laid down in this Directive.

Article 9
Right of withdrawal

1. Save where the exceptions provided for in Article 16 apply, the consumer shall have a period of 14 days to withdraw from a distance or off-premises contract, without giving any reason, and without incurring any costs other than those provided for in Article 13(2) and Article 14.

2. Without prejudice to Article 10, the withdrawal period referred to in paragraph 1 of this Article shall expire after 14 days from:

(a) in the case of service contracts, the day of the conclusion of the contract;

(b) in the case of sales contracts, the day on which the consumer or a third party other than the carrier and indicated by the consumer acquires physical possession of the goods or:

(i) in the case of multiple goods ordered by the consumer in one order and delivered separately, the day on which the consumer or a third party other than the carrier and indicated by the consumer acquires physical possession of the last good;

(ii) in the case of delivery of a good consisting of multiple lots or pieces, the day on which the consumer or a third party other than the carrier and indicated by the consumer acquires physical possession of the last lot or piece;

(iii) in the case of contracts for regular delivery of goods during defined period of time, the day on which the consumer or a third party other than the carrier and indicated by the consumer acquires physical possession of the first good;

(c) in the case of contracts for the supply of water, gas or electricity, where they are not put up for sale in a limited volume or set quantity, of district heating or of digital content which is not supplied on a tangible medium, the day of the conclusion of the contract.

3. The Member States shall not prohibit the contracting parties from performing their contractual obligations during the withdrawal period. Nevertheless, in the case of off-premises contracts, Member States may maintain existing national legislation prohibiting the trader from collecting the payment from the consumer during the given period after the conclusion of the contract.

Article 10
Omission of information on the right of withdrawal

1. If the trader has not provided the consumer with the information on the right of withdrawal as required by point (h) of Article 6(1), the withdrawal period shall expire 12 months from the end of the initial withdrawal period, as determined in accordance with Article 9(2).

2. If the trader has provided the consumer with the information provided for in paragraph 1 of this Article within 12 months from the day referred to in Article 9(2), the withdrawal period shall expire 14 days after the day upon which the consumer receives that information.

Article 11
Exercise of the right of withdrawal

1. Before the expiry of the withdrawal period, the consumer shall inform the trader of his decision to withdraw from the contract. For this purpose, the consumer may either:

(a) use the model withdrawal form as set out in Annex I(B); or

(b) make any other unequivocal statement setting out his decision to withdraw from the contract.

Member States shall not provide for any formal requirements applicable to the model withdrawal form other than those set out in Annex I(B).

2. The consumer shall have exercised his right of withdrawal within the withdrawal period referred to in Article 9(2) and Article 10 if the communication concerning the exercise of the right of withdrawal is sent by the consumer before that period has expired.

3. The trader may, in addition to the possibilities referred to in paragraph 1, give the option to the consumer to electronically fill in and submit either the model withdrawal form set out in Annex I(B) or any other unequivocal statement on the trader’s website. In those cases the trader shall communicate to the consumer an acknowledgement of receipt of such a withdrawal on a durable medium without delay.

4. The burden of proof of exercising the right of withdrawal in accordance with this Article shall be on the consumer.
Article 12
Effects of withdrawal
The exercise of the right of withdrawal shall terminate the obligations of the parties:

(a) to perform the distance or off-premises contract; or

(b) to conclude the distance or off-premises contract, in cases where an offer was made by the consumer.

Article 13
Obligations of the trader in the event of withdrawal

1. The trader shall reimburse all payments received from the consumer, including, if applicable, the costs of delivery without undue delay and in any event not later than 14 days from the day on which he is informed of the consumer's decision to withdraw from the contract in accordance with Article 11.

The trader shall carry out the reimbursement referred to in the first subparagraph using the same means of payment as the consumer used for the initial transaction, unless the consumer has expressly agreed otherwise and provided that the consumer does not incur any fees as a result of such reimbursement.

2. Notwithstanding paragraph 1, the trader shall not be required to reimburse the supplementary costs, if the consumer has expressly opted for a type of delivery other than the least expensive type of standard delivery offered by the trader.

3. 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.

Article 14
Obligations of the consumer in the event of withdrawal

1. Unless the trader has offered to collect the goods himself, the consumer shall send back the goods or hand them over to the trader or to a person authorised by the trader to receive the goods, without undue delay and in any event not later than 14 days from the day on which he has communicated his decision to withdraw from the contract to the trader in accordance with Article 11. The deadline shall be met if the consumer sends back the goods before the period of 14 days has expired.

The consumer shall only bear the direct cost of returning the goods unless the trader has agreed to bear them or the trader failed to inform the consumer that the consumer has to bear them.

In the case of off-premises contracts where the goods have been delivered to the consumer's home at the time of the conclusion of the contract, the trader shall at his own expense collect the goods if, by their nature, those goods cannot normally be returned by post.

2. The consumer shall only be 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. The consumer shall in any event not be liable for diminished value of the goods where the trader has failed to provide notice of the right of withdrawal in accordance with point (h) of Article 6(1).

3. Where a consumer exercises the right of withdrawal after having made a request in accordance with Article 7(3) or Article 8(8), the consumer shall 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 shall be calculated on the basis of the total price agreed in the contract. If the total price is excessive, the proportionate amount shall be calculated on the basis of the market value of what has been provided.

4. The consumer shall bear no cost for:

(a) the performance of services or the supply of water, gas or electricity, where they are not put up for sale in a limited volume or set quantity, or of district heating, in full or in part, during the withdrawal period, where:

(i) the trader has failed to provide information in accordance with points (h) or (j) of Article 6(1); or

(ii) the consumer has not expressly requested performance to begin during the withdrawal period in accordance with Article 7(3) and Article 8(8); or

(b) the supply, in full or in part, of digital content which is not supplied on a tangible medium where:

(i) the consumer has not given his prior express consent to the beginning of the performance before the end of the 14-day period referred to in Article 9;

(ii) the consumer has not acknowledged that he loses his right of withdrawal when giving his consent; or

(iii) the trader has failed to provide confirmation in accordance with Article 7(2) or Article 8(7).
5. Except as provided for in Article 13(2) and in this Article, the consumer shall not incur any liability as a consequence of the exercise of the right of withdrawal.

**Article 15**

**Effects of the exercise of the right of withdrawal on ancillary contracts**

1. Without prejudice to Article 15 of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers (1), if the consumer exercises his right of withdrawal from a distance or an off-premises contract in accordance with Articles 9 to 14 of this Directive, any ancillary contracts shall be automatically terminated, without any costs for the consumer, except as provided for in Article 13(2) and in Article 14 of this Directive.

2. The Member States shall lay down detailed rules on the termination of such contracts.

**Article 16**

**Exceptions from the right of withdrawal**

Member States shall not provide for the right of withdrawal set out in Articles 9 to 15 in respect of distance and off-premises contracts as regards the following:

(a) service contracts after the service has been fully performed if the performance has begun with the consumer's prior express consent, and with the acknowledgement that he will lose his right of withdrawal once the contract has been fully performed by the trader;

(b) the supply of goods or services for which the price is dependent on fluctuations in the financial market which cannot be controlled by the trader and which may occur within the withdrawal period;

(c) the supply of goods made to the consumer's specifications or clearly personalised;

(d) the supply of goods which are liable to deteriorate or expire rapidly;

(e) the supply of sealed goods which are not suitable for return due to health protection or hygiene reasons and were unsealed after delivery;

(f) the supply of goods which are, after delivery, according to their nature, inseparably mixed with other items;

(g) the supply of alcoholic beverages, the price of which has been agreed upon at the time of the conclusion of the sales contract, the delivery of which can only take place after 30 days and the actual value of which is dependent on fluctuations in the market which cannot be controlled by the trader;

(h) contracts where the consumer has specifically requested a visit from the trader for the purpose of carrying out urgent repairs or maintenance. If, on the occasion of such visit, the trader provides services in addition to those specifically requested by the consumer or goods other than replacement parts necessarily used in carrying out the repairs, the right of withdrawal shall apply to those additional services or goods;

(i) the supply of sealed audio or sealed video recordings or sealed computer software which were unsealed after delivery;

(j) the supply of a newspaper, periodical or magazine with the exception of subscription contracts for the supply of such publications;

(k) contracts concluded at a public auction;

(l) the provision of accommodation other than for residential purpose, transport of goods, car rental services, catering or services related to leisure activities if the contract provides for a specific date or period of performance;

(m) the supply of digital content which is not supplied on a tangible medium if the performance has begun with the consumer's prior express consent and his acknowledgment that he thereby loses his right of withdrawal.

**CHAPTER IV**

**OTHER CONSUMER RIGHTS**

**Article 17**

**Scope**

1. Articles 18 and 20 shall apply to sales contracts. Those Articles shall not apply to contracts for the supply of water, gas or electricity, where they are not put up for sale in a limited volume or set quantity, of district heating or the supply of digital content which is not supplied on a tangible medium.

2. Articles 19, 21 and 22 shall apply to sales and service contracts and to contracts for the supply of water, gas, electricity, district heating or digital content.

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Article 18

Delivery

1. Unless the parties have agreed otherwise on the time of delivery, the trader shall deliver the goods by transferring the physical possession or control of the goods to the consumer without undue delay, but not later than 30 days from the conclusion of the contract.

2. Where the trader has failed to fulfil his obligation to deliver the goods at the time agreed upon with the consumer or within the time limit set out in paragraph 1, the consumer shall call upon him to make the delivery within an additional period of time appropriate to the circumstances. If the trader fails to deliver the goods within that additional period of time, the consumer shall be entitled to terminate the contract.

The first subparagraph shall not be applicable to sales contracts where the trader has refused to deliver the goods or where delivery within the agreed delivery period is essential taking into account all the circumstances attending the conclusion of the contract or where the consumer informs the trader, prior to the conclusion of the contract, that delivery by or on a specified date is essential. In those cases, if the trader fails to deliver the goods at the time agreed upon with the consumer or within the time limit set out in paragraph 1, the consumer shall be entitled to terminate the contract immediately.

3. Upon termination of the contract, the trader shall, without undue delay, reimburse all sums paid under the contract.

4. In addition to the termination of the contract in accordance with paragraph 2, the consumer may have recourse to other remedies provided for by national law.

Article 19

Fees for the use of means of payment

Member States shall prohibit traders from charging consumers, in respect of the use of a given means of payment, fees that exceed the cost borne by the trader for the use of such means.

Article 20

Passing of risk

In contracts where the trader dispatches the goods to the consumer, the risk of loss of or damage to the goods shall pass to the consumer when he or a third party indicated by the consumer and other than the carrier has acquired the physical possession of the goods. However, the risk shall pass to the consumer upon delivery to the carrier if the carrier was commissioned by the consumer to carry the goods and that choice was not offered by the trader, without prejudice to the rights of the consumer against the carrier.

Article 21

Communication by telephone

Member States shall ensure that where the trader operates a telephone line for the purpose of contacting him by telephone in relation to the contract concluded, the consumer, when contacting the trader is not bound to pay more than the basic rate.

The first subparagraph shall be without prejudice to the right of telecommunication services providers to charge for such calls.

Article 22

Additional payments

Before the consumer is bound by the contract or offer, the trader shall seek the express consent of the consumer to any extra payment in addition to the remuneration agreed upon for the trader's main contractual obligation. If the trader has not obtained the consumer's express consent but has inferred it by using default options which the consumer is required to reject in order to avoid the additional payment, the consumer shall be entitled to reimbursement of this payment.

CHAPTER V

GENERAL PROVISIONS

Article 23

Enforcement

1. Member States shall ensure that adequate and effective means exist to ensure compliance with this Directive.

2. The means referred to in paragraph 1 shall include provisions whereby one or more of the following bodies, as determined by national law, may take action under national law before the courts or before the competent administrative bodies to ensure that the national provisions transposing this Directive are applied:

(a) public bodies or their representatives;

(b) consumer organisations having a legitimate interest in protecting consumers;

(c) professional organisations having a legitimate interest in acting.

Article 24

Penalties

1. Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.
2. Member States shall notify those provisions to the Commission by 13 December 2013 and shall notify it without delay of any subsequent amendment affecting them.

Article 25
Imperative nature of the Directive

If the law applicable to the contract is the law of a Member State, consumers may not waive the rights conferred on them by the national measures transposing this Directive.

Any contractual terms which directly or indirectly waive or restrict the rights resulting from this Directive shall not be binding on the consumer.

Article 26
Information

Member States shall take appropriate measures to inform consumers and traders of the national provisions transposing this Directive and shall, where appropriate, encourage traders and code owners as defined in point (g) of Article 2 of Directive 2005/29/EC, to inform consumers of their codes of conduct.

Article 27
Inertia selling

The consumer shall be exempted from the obligation to provide any consideration in cases of unsolicited supply of goods, water, gas, electricity, district heating or digital content or unsolicited provision of services, prohibited by Article 5(5) and point 29 of Annex I to Directive 2005/29/EC. In such cases, the absence of a response from the consumer following such an unsolicited supply or provision shall not constitute consent.

Article 28
Transposition

1. Member States shall adopt and publish, by 13 December 2013, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of these measures in the form of documents. The Commission shall make use of these documents for the purposes of the report referred to in Article 30.

They shall apply those measures from 13 June 2014.

When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. The provisions of this Directive shall apply to contracts concluded after 13 June 2014.

Article 29
Reporting requirements

1. Where a Member State makes use of any of the regulatory choices referred to in Article 3(4), Article 6(7), Article 6(8), Article 7(4), Article 8(6) and Article 9(3), it shall inform the Commission thereof by 13 December 2013, as well as of any subsequent changes.

2. The Commission shall ensure that the information referred to in paragraph 1 is easily accessible to consumers and traders, inter alia, on a dedicated website.

3. The Commission shall forward the information referred to in paragraph 1 to the other Member States and the European Parliament. The Commission shall consult stakeholders on that information.

Article 30
Reporting by the Commission and review

By 13 December 2016, the Commission shall submit a report on the application of this Directive to the European Parliament and the Council. That report shall include in particular an evaluation of the provisions of this Directive regarding digital content including the right of withdrawal. The report shall be accompanied, where necessary, by legislative proposals to adapt this Directive to developments in the field of consumer rights.

CHAPTER VI
FINAL PROVISIONS

Article 31
Repeals


References to the repealed Directives shall be construed as references to this Directive and shall be read in accordance with the correlation table set out in Annex II.

Article 32

Amendment to Directive 93/13/EEC

In Directive 93/13/EEC, the following Article is inserted:

‘Article 8a

1. Where a Member State adopts provisions in accordance with Article 8, it shall inform the Commission thereof, as well as of any subsequent changes, in particular where those provisions:

— extend the unfairness assessment to individually negotiated contractual terms or to the adequacy of the price or remuneration; or,

— contain lists of contractual terms which shall be considered as unfair,

2. The Commission shall ensure that the information referred to in paragraph 1 is easily accessible to consumers and traders, inter alia, on a dedicated website.

3. The Commission shall forward the information referred to in paragraph 1 to the other Member States and the European Parliament. The Commission shall consult stakeholders on that information.’

Article 33

Amendment to Directive 1999/44/EC

In Directive 1999/44/EC, the following Article is inserted:

‘Article 8a

Reporting requirements

1. Where, in accordance with Article 8(2), a Member State adopts more stringent consumer protection provisions than those provided for in Article 5(1) to (3) and in Article 7(1), it shall inform the Commission thereof, as well as of any subsequent changes.

2. The Commission shall ensure that the information referred to in paragraph 1 is easily accessible to consumers and traders, inter alia, on a dedicated website.

3. The Commission shall forward the information referred to in paragraph 1 to the other Member States and the European Parliament. The Commission shall consult stakeholders on that information.’

Article 34

Entry into force

This Directive shall enter into force on the 20th day following its publication in the Official Journal of the European Union.

Article 35

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 25 October 2011.

For the European Parliament
The President
J. BUZEK

For the Council
The President
M. DOWGIElewicz
ANNEX I

Information concerning the exercise of the right of withdrawal

A. Model instructions on withdrawal

Right of withdrawal

You have the right to withdraw from this contract within 14 days without giving any reason.

The withdrawal period will expire after 14 days from the day _____________.

To exercise the right of withdrawal, you must inform us (________) of your decision to withdraw from this contract by an unequivocal statement (e.g. a letter sent by post, fax or e-mail). You may use the attached model withdrawal form, but it is not obligatory.

To meet the withdrawal deadline, it is sufficient for you to send your communication concerning your exercise of the right of withdrawal before the withdrawal period has expired.

Effects of withdrawal

If you withdraw from this contract, we shall reimburse to you all payments received from you, including the costs of delivery (with the exception of the supplementary costs resulting from your choice of a type of delivery other than the least expensive type of standard delivery offered by us), without undue delay and in any event not later than 14 days from the day on which we are informed about your decision to withdraw from this contract. We will carry out such reimbursement using the same means of payment as you used for the initial transaction, unless you have expressly agreed otherwise; in any event, you will not incur any fees as a result of such reimbursement.

Instructions for completion:

1. Insert one of the following texts between inverted commas:

   (a) in the case of a service contract or a contract for the supply of water, gas or electricity, where they are not put up for sale in a limited volume or set quantity, of district heating or of digital content which is not supplied on a tangible medium: 'of the conclusion of the contract.';

   (b) in the case of a sales contract: 'on which you acquire, or a third party other than the carrier and indicated by you acquires, physical possession of the goods.';

   (c) in the case of a contract relating to multiple goods ordered by the consumer in one order and delivered separately: 'on which you acquire, or a third party other than the carrier and indicated by you acquires, physical possession of the last good.';

   (d) in the case of a contract relating to delivery of a good consisting of multiple lots or pieces: 'on which you acquire, or a third party other than the carrier and indicated by you acquires, physical possession of the last lot or piece.';

   (e) in the case of a contract for regular delivery of goods during a defined period of time: 'on which you acquire, or a third party other than the carrier and indicated by you acquires, physical possession of the first good.'.

2. Insert your name, geographical address and, where available, your telephone number, fax number and e-mail address.

3. If you give the option to the consumer to electronically fill in and submit information about his withdrawal from the contract on your website, insert the following: 'You can also electronically fill in and submit the model withdrawal form or any other unequivocal statement on our website [insert Internet address]. If you use this option, we will communicate to you an acknowledgement of receipt of such a withdrawal on a durable medium (e.g. by e-mail) without delay.'.

4. In the case of sales contracts in which you have not offered to collect the goods in the event of withdrawal insert the following: 'We may withhold reimbursement until we have received the goods back or you have supplied evidence of having sent back the goods, whichever is the earliest.'.
If the consumer has received goods in connection with the contract:

(a) insert:

— ‘We will collect the goods.’; or,

— ‘You shall send back the goods or hand them over to us or … [insert the name and geographical address, where applicable, of the person authorised by you to receive the goods], without undue delay and in any event not later than 14 days from the day on which you communicate your withdrawal from this contract to us. The deadline is met if you send back the goods before the period of 14 days has expired.’

(b) insert:

— ‘We will bear the cost of returning the goods.’

— ‘You will have to bear the direct cost of returning the goods.’

— If, in a distance contract, you do not offer to bear the cost of returning the goods and the goods, by their nature, cannot normally be returned by post: ‘You will have to bear the direct cost of returning the goods. The cost is estimated at a maximum of approximately … EUR [insert the amount];’ or if the cost of returning the goods cannot reasonably be calculated in advance: ‘You will have to bear the direct cost of returning the goods. The cost is estimated at a maximum of approximately … EUR [insert the amount];’ or

— If, in an off-premises contract, the goods, by their nature, cannot normally be returned by post and have been delivered to the consumer’s home at the time of the conclusion of the contract: ‘We will collect the goods at our own expense;’ and,

(c) insert ‘You are only liable for any diminished value of the goods resulting from the handling other than what is necessary to establish the nature, characteristics and functioning of the goods.’

In the case of a contract for the provision of services or the supply of water, gas or electricity, where they are not put up for sale in a limited volume or set quantity, or of district heating, insert the following: ‘If you requested to begin the performance of services or the supply of water/gas/electricity/district heating [delete where inapplicable] during the withdrawal period, you shall pay us an amount which is in proportion to what has been provided until you have communicated us your withdrawal from this contract, in comparison with the full coverage of the contract.’.

B. Model withdrawal form

(complete and return this form only if you wish to withdraw from the contract)

— To [here the trader’s name, geographical address and, where available, his fax number and e-mail address are to be inserted by the trader]:

— I/We (*) hereby give notice that I/We (*) withdraw from my/our (*) contract of sale of the following goods (*)/for the provision of the following service (*),

— Ordered on (*)/received on (*),

— Name of consumer(s),

— Address of consumer(s),

— Signature of consumer(s) (only if this form is notified on paper),

— Date

(*) Delete as appropriate.
## Annex II

### Correlation Table

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To be construed as a reference to

Paragraphs 2 and 11

This Directive