The EU Digital Consumer Law and Its Scope of Application:
A Special Focus on the Right of Withdrawal

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<tr>
<td>ADR</td>
<td>Alternative Dispute Resolution</td>
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<td>B2C</td>
<td>Business-to-consumer</td>
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<td>C2C</td>
<td>Consumer-to-consumer</td>
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<tr>
<td>CJEU</td>
<td>Court of Justice of the European Union</td>
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<td>CRD</td>
<td>Consumer Rights Directive 2011/83/EU</td>
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<td>DSD</td>
<td>Distance Selling Directive</td>
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<td>E-contract</td>
<td>Electronic Contract</td>
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<td>EU</td>
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<td>Treaty on the Functioning of the European Union.</td>
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Chapter 1

Background and General Introduction

1.1. Background of the Study

The advancement in technology has necessitated the introduction of digital marketing by means of internet. In fact, the internet is the world’s fastest growing commercial market place.\(^1\) Thus, the European Union (hereafter EU) has been very aware about the importance of developing a separate legal scheme to regulate this new area of innovation. Of course, the common principles of regular sales contract law on goods and services also apply to electronic contracts (hereafter e-contracts). However, the law governing rights of digital consumers covers some extra issues peculiar to e-contracts.\(^2\)

Obviously, in most contractual relationships, disputes can be triggered by contracts themselves. This situation always necessitates the need for applying corresponding legal norms that can keep the contractual relationships function smoothly. As it happens in regular sale of goods and services contracts, consumers in e-contract may face defective goods or digital contents, which do not comply with the description of the order thereof. For some reasons, consumers may not also like some goods after purchasing them. Their desire to purchase goods by electronic means relies on the information received from the trader, as long as they are not able to a physical inspection of such goods under purchase.

To strike the balance between the consumers’ lack of physical inspection of goods they are purchasing and encouraging a wider use of digital marketing fundamentally, EU law has protected such consumers by providing a right of withdrawal from such contracts even without the need to provide reasons.\(^3\) Of course, both the consumer and the trader have respective rights and obligation that subsequently result from a specific right of withdrawal. For instance, a consumer is supposed to return the goods to the trader or anyone authorized by him, whereas the trader is required to reimburse all payments to the consumer.\(^4\)

Having a legal framework that applies to disputes of e-contracts is important to assist the new paradigm of information economy. Of course, the nature of disputes arising between parties in

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\(^1\) Andrew D Murray, “Entering into Contracts Electronically: The Real W.W.W,” p. 1
e-contracts does not highly involve court proceedings to resolve. Disagreements may involve in daily transactions between consumers and traders, but not all these cases are cost wise if taken to a court of law. Some of the disputes have very small economic damage. Given the effective dispute, settlement is parties’ negotiation or an alternative dispute settlement (hereafter ADR); the digital consumers’ law gives a protection to consumers to the level of instituting an action in a court of law. However, this protection does not apply to all consumers who are using the digital medium for their transactions. The EU Consumer Rights Directive 2011/83/EU (hereafter CRD) offers a protection to consumers that only interact with traders by means of contracts concluded electronically. Hence, consumer-to-consumer (hereafter C2C) interactions are excluded from the application of the CRD whatever an electronic the contractual relationship that exists between them is. To make it worse, not all consumers that involve in a transaction with traders are subjects of the consumers’ protection. The consumer needs to be a natural person for the protection to take effect.  

As far as the right of withdrawal is concerned, EU legislature seems pretending to grant such a right for the digital consumers for two basic assumptions. The first one is to empower the consumer as an active actor in the online market. The second is to protect the consumer as the weaker party of such a contractual relation. Thus, maximizing a high level of consumer protection in the digital market is the core objective of EU’s digital consumer law.

Regardless of the nature of substances contained in the rules, the EU already has the consumer protection laws in place to safeguard the interests of consumers in the digital market. With the rapid advancements in technology every time, however, there is still a need to make sure that EU laws are protecting digital consumers in a way that compliments the purpose of mobilizing wide use of electronic transactions. Particularly, consumers’ right of withdrawal from distance selling and off-premises contracts have to supposedly be holistically applicable to all digital consumers who engage in purchasing goods and services through an electronic means.

7 Ibid.
Taking lack of physical inspection of goods while purchasing\(^8\), an immediacy of clicking the agreement electronically at the seller’s website, or many other reasons attributable for challenges of digital transactions, the law protects consumers more favorably. Not to mention, such difficulties happen to all consumers in the digital transaction. However, the law targets to protect only those consumers who interact with traders. This study analyzes as to what satisfactory reasons does that law holds in particularizing the protection to consumers of a specific category and exclude the rest with a particular reference to the right of withdrawal.

1.2. Introducing the Problem and Scope of the Study

1.2.1. Statement of the Problem and Research Questions

According to the EU laws, a consumer purchasing goods from a distance sale and off-premises contracts has the right of withdrawal from e-contract within 14 calendar days.\(^9\) However, the digital consumers’ law does not extend the same protection to those consumers interacting with non-traders. For instance, the right of withdrawal from e-contract on sale of goods is not workable to contracts concluded between a consumer and another consumer through the medium of online shopping sites. At the same time, for the law to take effect, the digital consumer has to be a natural person. Such narrowing down of the scope of digital consumers’ law application, in effect, lags the objective of encouraging people to a wider use of e-contracts as it is more efficient and economically advisable.

On the other hand, the growing application of digital communication for transaction purposes has eased and positively influenced people’s daily lives. Consequently, various transactions undertake electronically by the information society everyday. To help the growth of a digital economy and protect consumers’ digital rights, EU has enacted laws that are facilitative of such interactions. Given the relevance of such laws that helps to achieve a high level of protection for digital consumers, the subject matter is regulated very restrictively. This situation yields even more confusing negative state of management to the sector in the enforcement arena.


\(^9\) See CRD, Art. 9.
As electronic communications play a significant role in individuals’ lives, some of people’s regular electronic transactions through the medium of internet should interest the of EU Member States. Regardless of absence of new legal schemes that can regulate such transactions, quite tremendous marketing interactions involve through the internet medium. Despite this reality, protecting digital consumers in the rapidly developing online marketing remains to have exclusive nature.

Thus, this study aspires to analyze the need for new legal atmosphere that safeguards all digital consumers with some common rights, which in effect boost the continuity of legally protected digital transactions in the growing online market platforms.

Equally important, this thesis also analyzes the legal rationales that help the EU legislature to balance the weight towards itemizing a better protection to digital consumers who interacts only with traders. At the same time, the analysis examines the status quo of exclusiveness of the law in treating the relationship between two different consumers interacting online each other. Worth to mention, the growing use of digital marketing interactions among consumers themselves through the help of online shopping sites has to be intervened by a new law a little different from laws regulating the regular sales contracts to purchase goods or services from physical stores. As one can easily understand, the risks that all digital consumers face in any online transactions are quite tremendous. To particularize, a digital transaction via online shopping service sites also recalls for various legal concerns regardless of whom the consumer interacts with (whether he/she is a trader or a casual seller). Considering a protection to specific group of digital consumers (business-to-consumer interactions) and setting aside other consumers may not play a significant role in enabling the use of technology, which helps to tread an overall economic growth.

EU’s digital consumer right is a law granting a protection to users of e-contracts. In its nature, the law is part of a public law that devotes itself for the benefit of the public (EU community). Then, a singular application of EU’s digital consumer law to only business-to-consumer domain by excluding other combinations questions the real end of EU’s consumer protection framework.

Eventually, the analysis suggests an introduction of all-inclusive legal platform at least to a minimum baseline to protect all digital consumers on certain common aspects.

For the analysis purpose, the relevant provisions of the Consumer Rights Directive 2011/83/ EU are briefly discussed.

In addressing the above issues, the study has the following main research question:

➢ Does the existing EU Consumer Rights Directive address all relevant issues related to digital consumers?
➢ Does the digital consumers’ right holistically materialize its purposes by targeting at consumers interactions with traders only?
➢ How does the limited scope of the EU CRD to only business-to-consumer (hereafter B2C) interactions help to achieve high-level protection to digital consumers?
➢ Can the interaction between digital consumers and traders represent the bigger picture of the proper functioning of internal market?

1.2.2. Scope and Limitation of the Study

This study focuses on examining how the existing status quo of B2C digital contracts sufficiently contributes a proper functioning of the internal market of EU in distance selling and off-premises contracts whereas the rest of digital consumers are left unprotected. Thus, the study limits itself to analyzing how the existing scope of digital consumers’ Directive 2011/83/ EU materializes its very objectives.

The study also limits itself to examining how certainly and clearly the CRD regulates any potential dispute within EU laws catalogue as long as full harmonization of the consumer laws cannot be realistically perfect.

For purposes of simplicity, the study focuses on consumers’ right of withdrawal in e-contracts within the framework of EU digital consumer law. This scope limitation to EU digital consumers’ right of withdrawal in e-contracts is made on purpose with a view to further discussing return of goods to the trader and reimbursement of payments back to the consumer. Unlike purchasing goods from a store, the right of withdrawal from contracts concluded by electronic means also involves the application of some more legal intricacies regarding costs that is subsequently incurred within the process of a digital transaction. Issues relating to these transaction costs are also analyzed.
In the course of discussing the EU digital consumers’ right of withdrawal, who are already covered by the CRD provision, the issue of the rights of other consumers who are excluded by the directive is briefly considered. Absence of accessible ongoing court cases that recalls C2C litigation creates a difficulty to demonstrate the legal issues very well.

1.3. Research Methods

Legal research is mainly a process of identifying and revealing necessary information that supports legal decision-making. All these may involve finding primary sources, secondary sources or any non-legal information that supports the outcome of the research. In the whole process the contribution of this study can be manifested by the construction of truth from the existing facts.

Obviously, a research method is highly dependent on the research questions that need to be answered. Depending on the nature of the research questions, this research uses descriptive legal research method to critically examine and analysis the scope of EU digital consumer laws and their substantive position regarding withdrawal from contracts concluded by electronic means. Most importantly, the strict application of maximum harmonization regime with regard to the period of limitation of exercising the right of withdrawal and the rest of consumer rights will be analyzed.

Thus, the descriptive approach of the study primarily explains and clarifies EU Consumer Rights Directive rules with a particular emphasis to the right of withdrawal from distance selling and off-premises contracts. Along the discussion of the CRD provisions, the major objectives of the consumer protection are examined in reference to the scope and exemptions of the consumer Directive thereof.

Secondly, the study uses a reference to relevant EU consumer related directives in order to analyze and show how the existing EU consumer protection laws have shortcomings in holistically cover all issues concerning digital consumers. In this study the relevant provisions of the CRD takes the central stage of the discussion. Eventually, the analysis remarks the limited scope of application of this Directive regarding digital consumers’ right.

The study also uses books, related journal articles and other researches as supplementary sources from the official site of the EU and other relevant sources that are dedicated for the protection of digital consumers.
Chapter 2

An Overview of the Digital Consumer’s Law

This chapter briefly provides an overview of the nature of digital consumer’s law and the purposes of establishing a legal framework that protects them. It also highlights the commonality between digital consumer rights that come from their digital engagement and other rights that stem from ordinary contractual relations of consumers. For a purpose of convenience, the study focuses on consumers’ right of withdrawal from contracts concluded by electronic means.

The overall social and economic development of societies around the world involves in a continuous interaction with the changing technology. The interaction between the society and the technology has increased the need for digital marketing. Again, the digital marketing invites intervention of a law that regulates the rights of digital consumers very well if it’s functioning should run smoothly and sustainably.

The term consumer is a technical nomenclature for specific groups under the CRD. It concerns persons engaging in digital transactions by means of contracts concluded electronically. Thus, it is wise to make note that not all persons involving in contracts concluded by electronic means are considered consumers for the purpose of this directive. Though, the purpose of digital consumers’ right is to make sure that the consumers’ right is highly protected and the functioning of the internal market is properly maintained, some categories of digital consumers are disregarded from the application of the law.

2.1. The Notion of ‘Consumer’ in EU Law

The term ‘consumer’ has a wider usage in its ordinary application. However, the notion of ‘consumer’ in law substantially differs from the concept of ‘consumer’ in the ordinary course of life. The term ‘consumer’ in law has a restrictive definition in order to delimit the kinds of persons entitled to the legal protection dedicated to consumers.

The CRD contains its own definition for the term ‘consumer’. However, this definition is not yet far from vagueness. Accordingly, ‘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. Due to the vagueness of this definition, a single person signing e-contract may enjoy dual personalities as a consumer or a trader depending on the purpose the contract is signed for. Thus, deciding the status of a person as a consumer or trader depends on the purpose of the contract. The purpose of a contract can be referred from the subject involved in the contract. If the contract signed involves business purposes like purchasing an input or whatever that helps the operation of a business, the person is believed to act as a trader. At the same time, a buyer already acting as a trader may still act as a consumer on the same subject if the purpose of the purchase is for private use outside his business.

Most EU Member States have transposed the notion of ‘consumer’ in their contexts. In this regard, some Member States use to interpret and implement laws regarding consumers’ right in the same way provided by this Directive. However, several other Member States have adopted an approach to develop a general definition of ‘consumer’ applicable to all of the transposed segments of EU laws. This is an attempt by Member States to incorporate a general notion for the so-called ‘consumer’ as contained in different EU directives here and there differently.

Precisely, the protection for digital consumers goes only to those consumers who interact with traders digitally. Any kind of consumer that purchases goods from a non-trader or a consumer having legal personality cannot get the protection under the CRD.

The next logical question that flows from the above expression may be regarding who a ‘trader’ is. The same Directive gives functional definition for the term ‘trader’. Accordingly, a ‘trader’ is any natural person or 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 the CRD. Consequently, the consumer’s interaction has to be with a trader who is covered in this Directive in order to benefit from the respective rights covered by the same Directive.

11 See CRD, Art. 2(1).
13 Ibid.
15 See CRD, Art. 2(1).
16 See CRD, Art. 2(2).
According to most EU Directives on consumer rights in general and CRD in particular, the consumer that is protected by law is only the natural person. This explicit reference to natural persons by the Directive clearly excludes legal persons to benefit from the legal protection provided by the same Directive. Hence, no legal person is regarded as consumer for the purpose of the CRD and other Directives. However, in the transposition process of the Directives, EU member states have decided to extend a higher degree of protection and scope of application of consumer rights to legal persons too. This is one step ahead in the progressive development of EU Member States legal atmosphere towards materializing consumers’ right on the ground.

Important to note, the Directive’s purpose of helping the functioning of the internal market by the application of laws apparently fails to alien with its scope. As long as the scope of application for the CRD is narrowed to B2C interactions only, and approaches an exclusion of extra subject matters, the digital internal market cannot holistically function. This time, people’s daily digital transaction to each other is immensely increasing. A clear exclusion of this group of people from the application of the CRD discourages the proper functioning of the internal market. This study, thus, could not find the logic behind restricting the scope of the CRD to B2C and exclude C2C digital transactions from the application of this Directive so long as it constitute a high volume of market functions.

2.2. Nature of Digital Consumers’ Right

The internet has eased access to goods for digital consumers via online shopping. They can choose and buy goods online. However, they are always doubtful on the timely delivery of the goods they purchase, fair dispute resolution mechanisms in cases of fraud from the trader’s side and transparency on the description of the feature of such goods.

Literature dictates that the equality of parties is one of the fundamental principles of private law. This equality of parties presupposes formal equality. At times when a law is aware that parties are basically in unequal setting from the outset, it provides a different legal regime to

17 The definitinal part of the CRD under Art. 2(1) refers to only natural persons.
set them equal. The CRD is a typical instance that furnishes preferential legal protection to the consumer with the assumption that the latter is the weaker party.

As long as digital consumers interact with traders online, they have reasonable expectations on goods they are purchasing. However, technical complexities associated with the nature of a product in its lack of meeting the purpose it is bought for, may create uncertainty to a digital consumer unless legal platforms to back such an interest are put in place. The resulting uncertainty to digital consumers has to be tackled by a law that has the same standing of demonstrating high-level of consumers’ protection.

Digital consumers’ right grants a certain set of basic rights to consumers in accessing and using of goods purchased. The right also grants an opportunity to consumers to withdraw from a binding contract concluded electronically without the need to explain reasons to do so. After all, the complex interplay between technology, law and the society (digital consumers) in EU is devised to lead into most effective form of consumer protection.21

Unfortunately, due to various factors contributing to the digital nature of transactions, the European consumer protection law pretends to grant a protection to consumers of natural personality that interact with traders only. As a result, not all digital consumers in EU can enjoy rights protected under the provisions of the CRD. In its nature the law does seem to play an active role in digital contracts, but only on those contracts that involves consumers with traders in a manner and conditions specified by the terms of the Directives.

The EU laws on the digital consumer are very fundamental in protecting digital consumers for disputes arising from digital contracts, but they are more of exclusionary.

2.3. Rationales behind Protecting Digital Consumers

When a law is initiated, it has its own legal, social and economic purposes to realize in the interest of the public. Of course, there can be a difference from a legislation to legislation in prioritizing legal, social or economic objectives.

The very rationale of protecting digital consumers by law covers issues of building the consumer trust, empowerment and protection policy in digital markets. The totality of all these in effect create a channel of interaction between targeted consumers and businesses in real time. Then, devising a legal instrument that helps for the achievement of a high level of consumer protection, which contributes to the proper functioning of the internal market is an instrumental to realize the aforementioned rationally of the digital consumer protection. The CRD is therefore; keen to the build the interlink between a seller who is trust worthy to the consumer and a confident consumer who can hold the internal market functioning continuously and sustainably.

Here, it is proper to raise some points regarding what EU internal market is about. With this in mind, the EU internal market signifies the free movement of goods, services, capital and persons where citizens are free to live, work, study and do businesses. To put it differently, domestic policy areas reserved for EU Member States cannot be realized to the detriment of building the internal market.

When we look the matter in a more practical and down to earth way, achieving high level of consumer protection is not the end objective of the law. Realizing high level of consumer protection is not singularly the objective of the consumer protection law, but the law’s objective is circularly accompanied by maintenance of the healthy market functioning in EU by way of protecting the safety, health and economic interests of consumers.

With the broader objective of ensuring survival of market functioning, establishing a legal framework that protects digital consumers has a tremendous benefit for both the consumers and traders. The benefits can best be expressed in terms of efficiency and effectiveness of satisfying one’s personal desire or doing a business within the information society. The efficiency and effectiveness of digital marketing as compared to traditional forms of purchasing goods or services from the physical store is much higher.


23 Vilija Velyvyte, “the power to shape the internal market: implications of CJEU case law for the EU’s institutional balance”, CYELP 12 (2016), P. 25.

24 Ibid.

From the perspective of consumers, the introduction of a legal framework that grants a protection to them has a main purpose of increasing their digital empowerment. As a result, consumers in EU can build up confidence and trust to transact on the online market without any fear of fraud and mistreatment by traders.

As an extension of increasing digitalization of markets with the presence of the necessary laws regulating its smooth functioning, the law wants to create opportunities of price and item preferences to the customer. As internet has become one of the most important market places to transact in goods, competition between product or service companies is also growing up digitally. As a natural consequence of increased competition, consumers enjoy higher price reduction by businesses. The information society’s continuous use of digital media in the presence of dependable legal framework in turn maximizes the channel of marketing operation and interaction of customers with businesses.

Most importantly, the cost of transacting online is easier as compared to purchasing goods from physical stores. A consumer does not need to drive all the way to a place where he/she can find stores for the goods he wants to purchase. What he/she needs to do is to look into the internet and order the goods online without a need to take any physical action of going to stores. But, this easy digital platform may not eventually workout unless there exists a law that sets some obligations and rights to parties in digital contracts. Digital consumer’s right apparently serves such a purpose of facilitative role in the interactive engagement of consumers and businesses.

On the other hand, laws regulating digital consumers’ right have also something to do in favor of businesses. At least, it shoulders a duty to a consumer to return the goods purchased to the trader in case the former withdraws from a contract concluded electronically.

In general terms, digital consumer rights in EU have the rationales of interacting the consumer with traders in timely, clear and complete contractual information. The laws also go to serve

some more purposes of protecting consumers from unfair contractual terms and practices\textsuperscript{29} by traders.

In short, according to EU’s CRD, digital consumers have two principal rights.\textsuperscript{30} These rights include; the right to information\textsuperscript{31} and the right of withdrawal from e-contracts.\textsuperscript{32} Even though these rights apparently appear to be more general, they have detail implications.

\subsection{2.3.1. Information Requirements}

The EU Directives have devoted a special attention to the information requirements of consumers while transacting electronically. Both the existing CRD and the distance selling Directive 1997/7/EC (hereafter DSD) as now amended by the former, have provisions dealing with the information requirement duty of a trader though their provisions differ on the details of the duty to provide the information.

The information duty requirement under the CRD is lengthy with the intention to confer a full harmonization character to the Convention.\textsuperscript{33} The list of requirements of providing information under CRD is not then a minimum threshold, but a full harmonization and Member States in EU cannot adopt more or less stringent requirements than the one provided by this Directive\textsuperscript{34} as any reduction or addition of another requirement may backfire.

Obviously, consumers’ decision to purchase goods through an electronic communication is susceptible to possible biases that may be urged from the trader’s side. In this regard, the information that can be collected from the trader is the driving force that controls the neutral decision of a consumer. Consumers entirely rely on the information of a trader, as physical inspection of goods is completely impossible as there is no physical access to them in a digital transaction. At the same time, the consumer has to get the necessary confidence on the information supplied from the trader if a digital marketing has to sustain.

The obligation of the trader to provide information is backed by a legal right of the consumer to drop the contract away for anything of his dissatisfaction. With the intention to provide the utmost protection to the consumer’s right and make sure that e-contracts are keeping on track

\begin{itemize}
\item \textsuperscript{30} Joasia Luzak,( 4 September 2014) p. 382.
\item \textsuperscript{31} \textit{Ibid}.
\item \textsuperscript{32} \textit{Ibid}.
\item \textsuperscript{33} See CRD, Art. 6(1).
\item \textsuperscript{34} See CRD, Art. 4.
\end{itemize}
to assist the existing economy, traders are obliged to provide all the necessary information to consumers about goods they are selling.

According to the CRD, the trader has a long list of duties to provide information to the consumer.\(^{35}\) As far as the duty of such information requirement is not complied in accordance with the provisions of this Directive in a plain and intelligible language, the consumer shall not be bound by such a contract.\(^{36}\)

Most importantly, the information requirement seems to be essentially vital for purchase of digital contents. Traders are obliged to reveal the functionality and operability of a digital content to a consumer. The informational reveals on the functionality and operability of the digital content is not a mere presentation of its features. Literally, potential limitation of that particular digital content has to be revealed so that a consumer can be aware of it in advance before deciding to purchase it. This approach applies to both tangible goods and digital contents though the degree of the duty to provide information regarding digital contents seems stricter.

The duty to provide information constitutes the core aspects of protecting consumers’ basic economic interest. In doing that, EU digital consumers’ law grants the protection in two ways. The first one is by urging traders to guarantee adequate information so that consumers are able to make reasoned purchase decisions ahead. The second aspect of the duty to give information is by requiring a fair content of the contract. The consumer is always considered as a weaker party in the e-contract and the law is a watchdog to keep the balance.\(^{37}\)

In a precise expression, the digital consumers’ right has a special interest on the duty to provide information in digital contracts. The trader is not only required to provide the necessary information to the consumer, but the information contained in the contract has to be fair. In the case of doubt regarding the terms of the contract, it has to be interpreted in favor of the consumer.\(^{38}\) This is an approach maintained by EU Directives to assist the consumer as a weaker party in the contractual relation with the trader.

\(^{35}\) See CRD, Art. 6(1) (a-t).
\(^{36}\) See CRD, Art. 8(1).
\(^{38}\) Ibid.
2.3.2. Right of Withdrawal

The right of withdrawal from contracts concluded by electronic means was first introduced by the DSD, which was again confirmed by CRD with wide-ranging substantive implications.\(^{39}\) Thus, digital consumers are conferred with a right to withdraw from binding contractual relations within a given timeframe specified by law.\(^{40}\) If the right of withdrawal is not provided as per the duty of information requirements, the consumer may exercise his right of withdrawal in 12 months period from the end of initial withdrawal.\(^ {41}\)

Subsequent to the consumer’s exercise of his right of withdrawal from a contract concluded by electronic means, there arises an obligation and right to him immediately. The obligation is to return the goods within 14 days from the date of withdrawal.\(^ {42}\) On the other hand, a consumer has the right of getting full refund of the price paid.\(^ {43}\) However, not all digital contracts are a subject of withdrawal. There are some exceptions for which the consumers’ right of withdrawal is not applicable.\(^ {44}\)

At the same time, exercising withdrawal right depends on the nature of the contract involved. Most contracts that involve tangible goods have wider possibilities for withdrawal whereas contracts involving purchase of digital contents or services are surrounded by various exceptions to the right of withdrawal.

A detail discussion about consumers’ right of withdrawal is made under Chapter three of this study

2.4. Full Harmonization

Digital consumers have got richer experience and continued growth in this fast growing technology and internet world. The EU information society is not an exception to this. The social and economic developments of EU can be easily affected if there exists any distortion to the management of the digital marketing. A proper scrutiny and management of digital consumer affairs has tremendous implications.

\(^{39}\) See CRD, Art. 9.
\(^{40}\) Ibid.
\(^{41}\) See CRD, Art. 10(1).
\(^{42}\) See CRD, Art. 9(1).
\(^{43}\) See CRD, Art. 13(1).
\(^{44}\) See CRD, Art. 16.
Thus, EU takes competence on the digital consumers’ law and suggests the application of maximum harmonization in most important areas of the law.\(^{45}\) There is a little need to ask concerning why the EU wants to propose full competence on the consumer law if the necessity of full harmonization is confirmed.

The obvious reason of EU’s competence on the legislation of digital consumers law is to keep the internal market function as properly as possible. As long as the internal market functions with the involvement of the free movement of goods, services, capital and persons, anything that maximizes this measure can step into EU laws catalogue. Thus, though EU may not have a legislative competence over some matters, Member States non-compliance to free movement and competition rules can be averted by the judicial interpretation\(^{46}\) of the CJEU.

By and large, literature argues that the introduction of full harmonization under the EU consumers’ law is imperative for the following important justifications.\(^{47}\)

One of the main justifications is avoiding differences in the treatment of consumers among EU Member States, which may otherwise hamper the development of the internal market. Mainly, costly cross-border transactions coupled with different applicable laws may lead to parties not to transact abroad. In that case, unifying national markets by way of full harmonization helps to avoid distortions including issues relating to competition.\(^{48}\)

Secondly, minimum harmonization of EU consumer law leads to the fragmentation of the regulatory framework, which still relegates the mobilization of cross-border transactions.\(^{49}\)

Thirdly, and probably the most important justification is realization of a high level of consumer protection by harmonizing and unifying the consumer law into uniformly applicable one.\(^{50}\)

Given the above reasons by themselves hold water, among others, addition of standards more favorable to consumers theoretically seems contradictory with the concept of full

\(^{45}\) See CRD, Art. 4.
\(^{46}\) Vilija Velyvyte, (2016), P. 25.
\(^{48}\) Ibid.
\(^{49}\) Ibid.
\(^{50}\) Ibid.
harmonization of the CRD\textsuperscript{51} whereas high level of consumer protection at any rate is the starting point for the objective of the consumer law. However, realistically, the addition of common contract law principles like good faith and so forth that are more favorable to consumers cannot affect the full harmonization regime. Regardless of this, rules of more technical nature like exercising the right of withdrawal within 14 calendar days cannot be either shorten or extended.\textsuperscript{52}

This study is concerned with the salient impact of full harmonization regime on the scope limitation of consumer law in general and the right of withdrawal to B2C contracts only. The adoption of full harmonization by setting common area of interest among varying preferences of Member States is a difficult discourse. One of the hidden impact of full harmonization in the effort of searching common interest of varying preferences among Member States is narrowing of the scope of EU consumer laws on limited areas only. The limited application of EU consumer law on certain groups of consumers disregarding the rest seems to have little foundation.

The strict application of full harmonization regime with regard to exercising the right of withdrawal proves legal certainty and uniformity of EU Member States. In fact, this harmonization standard reduces costs and increases cross-border transactions. However, this does not mean that the full harmonization regime is perfectly achievable; rather it is a relative approach to unify applicable consumer laws in the same manner.

\subsection*{2.5. The Way Forward}

The digital consumers’ right of withdrawal from contracts concluded by electronic means is the core right that protects consumers from their rash decisions. However, its scope of application is a subject of various limitations.

In the first place, the limited scope of digital consumers’ right to only B2C combination also limits the application of the right of withdrawal to this category of contractual relation only. Secondly, the word ‘consumer’ is given a functional definition as a result of which some categories of consumers are kicked away from the application of the Directive.

\textsuperscript{51} See CRD, Art. 4.
\textsuperscript{52} Jan Smits, (2010), P.7.
The digital consumers’ right in the digital marketing remains operable in a narrow pipeline. The scope limitation ranges from limiting the applicability of the law by subject matter up to excluding its scope by definition of the relevant terms. Even within the interactions between B2C, some more scope limitations exist as a result of the definitions given to ‘consumer’, ‘trader’ as well as other relevant terms.

As one can notice, digital interaction is dominating today’s online marketing between persons, be it natural or legal. Consumers in this increasing digital transaction need a serious protection.

The EU consumer law theoretically confirms that it devotes itself for a high level of consumer protection. It also pledges a contribution to the proper functioning of the internal market. Though the law wishes such a wide range of objectives, its scope of application for the real consumers in daily digital transactions is very limited. For instance, to be a subject of digital consumers’ right, a consumer should be a natural person. Given that all the elements of the contract and the subjects involved are the same, the digital consumer law does not apply to such a contract if the involved consumer is a legal person. Why legal persons are excluded in the definition for ‘consumer’ can be a subject of further scrutiny. Realistically, great deals of transactions are taking place between legal persons as consumers and traders. In this regard, the CRD should not clearly put a demarcation point of making consumers of legal personality out of play. In this way, the proper functioning of the internal market may not be maintained within this narrow scope. Sooner or later, the scope of application of EU Directives on consumer rights may require reconsidering the inclusion of consumers of legal personality, as their exclusion so far has no strong justifications.

2.6. Summing Up

The discussion in this chapter reveals that the scope of application of digital consumer law is limited to certain groups only. The scope limitation is made at various levels. The first one is by targeting the purpose of the law to regulate only B2C relations. Obviously, this law seems having an interest to the trading activities between a consumer and a trader rather than intervening into people’s individual interactions. This rationale may face a sensible challenge by a different proposal that promotes protection to all consumers without loosing sight of ensuring the proper functioning of the internal market.

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53 See CRD, Art. 1.
Additionally, not every consumer is covered in this category of B2C e-contracts. This also further narrows the application of digital consumers’ law to a limited scope only. Literally, the term ‘consumer’ is not put in place in its ordinary meaning. It is rather given its own functional definition as a result of which the scope of the law is narrowed.

Whatever limited scope it has, the digital consumers law has the very purpose of achieving a high level of consumer protection. This high level of consumer protection aims at contributing a proper functioning of the internal market concerning contracts concluded between consumers and traders. In the developmental discourse of the consumer law, the CRD promotes full harmonization on some important areas. Here the EU consumer laws take a narrow scope of application with a view to give space to national legislations on the rest of consumer rights that fall beyond the reach of EU Directives.

Despite the fact that the existing scope of EU digital consumer law is very exclusive to extend maximum protection to all consumers, it confers undeniable confidence to those who falls within the umbrella of its scope. The startup may play its own role in boosting the culture of digital communication in people’s daily marketing life, which in the other way influences the digital economy positively. As the nature of digital consumers’ right dictates remedies that come from more of the ADR mechanisms, the law should not give much wait on the exclusion, but on the remedial approach that best suits consumers.

In the whole process of digital transactions, consumers have the right to information and the right of withdrawal. The duty of information requirement is a long list in EU Directives. The trader is then required to comply with that long list of duties to provide information. The right of withdrawal is uniquely a special right that digital consumers enjoy unlike other parties in any binding contractual relations. The motive of the law is to put a burden to traders to provide all the necessary information to the consumers, which the consumer will withdraw from the contract otherwise.

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Chapter 3

Consumers’ Right of Withdrawal

This chapter discusses the very essence of digital consumers’ right of withdrawal from a binding contractual agreement. The chapter briefly reflects the legal effects of consumers’ right of withdrawal in digital transactions. The discussion also addresses how the binding nature of e-contracts can be established in the presence of the right of withdrawal. Thus, the provisions of CRD 2011/83/EU are on the front page of this discussion.

3.1. What is the Right of Withdrawal?

The CRD does not provide any functional definition for the phrase ‘right of withdrawal’. However, in e-contracts, the phrase 'the right of withdrawal' seems applicable without losing its conventional meaning. Thus, the right of withdrawal in contracts concluded by electronic means implies that the consumer is allowed to unilaterally withdraw from the contract by sending the product back to the trader that entitles him to get the paid amount reimbursed.\(^{55}\) It is the basic right of consumer to reinforce their remaining rights in connection to their digital transactions via internet. Thus, the right of withdrawal is a compensating tool to the consumer for not being able to physically inspect the product and his reliance only on the information unilaterally defined by the trader before the purchase.

The effect of exercising the right of withdrawal is restitutioning (terminating) of the obligations of both parties by way of returning the product to the trader and reimbursing all payments to the consumer. According to some researches, the right of withdrawal does not form a contrary approach to the very contract law principle of *pacta sunt servanda*, but soften its effectiveness by giving an alternative chance to consumers to quit from their obligation.\(^{56}\)


3.2. Consumers’ Right of Withdrawal versus Irrevocability Principle

The general applicable rule is that parties to a contract are bound by the terms therein and one of the parties cannot quit without the other party’s agreement.\(^{57}\) Regardless of this general rule, the situation is different when the transaction takes place digitally. The consumer and the trader do not meet in person unlike the ordinary sales contract. The law compliments the consumer’s inability to inspect the goods before purchase by the right of withdrawal.

In most civil law jurisdictions, a contract has to qualify certain formation elements. This includes; consent, legal object, capacity and certain kind of form. Despite the fact that the economics of e-contracts greatly differs from the general contracts, contracts concluded electronically do not basically deviate from the common formation elements of a regular contract.

However, an e-contract is a subject of some more validity tests. Not all e-contracts that qualify the necessary contract formation requirements are valid. The validity of contracts concluded by electronic means can be checked by content control and incorporation control.\(^{58}\) By content control, we mean that unfair terms and conditions contained in the contract should be kicked off. This is with a view to protecting consumers from having legal obligations by the traders’ insertion of unfair terms. At the same time, contracts that do not incorporate the necessary terms and conditions have to be urged to include relevant terms and conditions.

For reasons related to the unfair terms of the digital contract or anything else, a consumer may decide to withdraw from the binding forces of a contract. As long as the nature of the contract allows withdrawal or the right is exercised within the timeframe prescribed by law, the consumer is not required to reason out why he/she is withdrawing from the contract. It is up to the consumer to withdraw or be bound by the contract within the period allowed by the law. The CRD confers the right of withdrawal for the consumer in case the trader contributes to the dissatisfaction of the consumer or the latter is not happy on the goods for reasons other than the traders’ role.

Given the right of withdrawal is most relevant in e-contracts, such a contract is not something totally different from regular contracts. As described above, basic principles applicable to


regular contrasts still apply to e-contracts. However, the principle of irrevocability has differently approached by European digital consumers’ law even for contracts successfully agreed upon.\textsuperscript{59} Of course, a binding force of a contract may be set-aside even in regular contracts on exceptional grounds such as non-performance or defective performance.

With regard to the principle of irrevocability, consumers’ right of withdrawal from contracts concluded by electronic means is an exception. A consumer does not need to explain why he/she is withdrawing from the obligations established by means of contracts concluded electronically. This means, a consumer can withdraw from a contract even for reasons of not liking the goods.\textsuperscript{60} Incorporating this extended right of withdrawal from contracts concluded by electronic means is in fact intended to harmonize the distance selling regulations within EU internal market.\textsuperscript{61} Mainly, the right of withdrawal is a remedy for digital consumers for the breach of the information duties of traders.\textsuperscript{62} However, such withdrawal right has to be exercised with a given cooling-off-period. This counts 14 calendar days from the time the consumer has possessed the goods.\textsuperscript{63}

The right of withdrawal from a contract concluded by electronic means is not available for all online transactions. One has to take note that some online transactions are not naturally suitable for granting a consumer to withdraw from the contract. For instance, orders from a trader to fix or produce a particular dress in the design or specification ordered by the consumer’s preference may not be withdrawn from. The simple rationale for this is not to set a customer into a position that is abusive to a trader in unlimited manner so far as the customer has freely made a rational decision in his own interest. Still, this does not limit the consumer from damages for the defects associated to his/her orders.

To recall, the overall objective of the CRD is achieving a high level of consumer protection and contributing a better functioning of business-to-consumer internal market.\textsuperscript{64} Here, it is sound to pose a question regarding the rationales of the law to target the protection on business-to-consumer interactions, whereas other interactions are left aside. From the fairness


\textsuperscript{60} Luzak, (4 September 2014), 387.

\textsuperscript{61} Luzak, (4 September 2014), 384.

\textsuperscript{62} Zofia Bendnarz, (2016), p. 3.

\textsuperscript{63} \textit{Ibid}.

point of view, all digital consumers should have been given protection in so far as they do not have direct inspection access to the goods they are purchasing.

This study considers three reasons as why all digital consumers have to be protected by law. The first one is the fast growing demand of the society to use digital transactions, which also changes people’s purchasing habit from physical stores into a system of digital one. This interaction may not necessarily involve business-to-consumer only. A consumer may interact with a casual seller through the online shopping sites. As long as this interaction eases life and helps the community to efficiently play within the economy, the law should stand by the side of encouraging wider use of digital communication for the online shopping.

The second one is the need to establish uniformly applicable comprehensive legal framework that protects all digital consumers in the ever-growing online market. An integrated legal framework equally applicable to all consumers can better protect than the law dispersedly formulated.

Thirdly, in most digital transactions, disputes could inevitably arise, but not all cases are taken into a court of law. The most effective means of solving such a dispute is ADR or any other remedies. Obviously, the cost of court proceedings may be more costly than the damage caused in the online shopping if the legal means is the only way of solving disputes.65 In that case, it does not matter if the law theoretically sets a uniform legal platform to all digital consumers to benefit from the law without any exclusion.

Though the CRD is designed with a full harmonization character, it cannot be far from critics for being narrowly applicable in its scope to govern matters concerning digital consumers.

The following discussions briefly describe the CRD provisions and examine its position on consumer’s right of withdrawal from business-to-consumer contracts.

3.3. Digital Consumers’ Right of Withdrawal under the CRD

The CRD provides a right of withdrawal to consumers of a distance or off-premises contracts on various circumstances. The running of the cooling-off period in exercising the right of withdrawal differs from one type of contract to another.66

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66 See CRD, Art. 9(2).
The consumer’s right of withdrawal from distance or off-premises contracts can be exercised without the need to give any specific reasons and without penalties thereof. However, the trader is not required to cover the supplementary costs caused by the consumer’s option. For instance, if the consumer opts to get the reimbursement is a service faster than the standard money transfer, the extra charges in this regard has to be borne by the consumer himself.\(^67\)

In exercising the right of withdrawal, the consumer shall inform the trader as to his decision to withdraw before the expiry of the withdrawal period. The consumer may do this by either filling the model withdrawal form or by making any other unequivocal statement\(^68\) about his decision to withdraw from the contract.

### 3.4. Form of Withdrawal

With regard to the standard form of declaring withdrawal from e-contracts, there are two opinions by literature. Some people argue that withdrawal from an online contract is free of any form requirement.\(^69\) This implies that consumers may withdraw from such a contract in whatever form they want. In this case, consumers should bear in mind that they have a burden of proof regarding their exercise of the right of withdrawal within the right time.\(^70\) Thus, it is wise to note that the form of their declaration of the right of withdrawal is traceable for evidence purposes.

On the other hand, some people argue that withdrawal has to be made either by using the model withdrawal form or by making unequivocal statement setting out the decision of withdrawal.\(^71\) This argument further substantiates that unequivocal statement cannot be made in a form other than by writing.\(^72\) According to this argument, withdrawal from online contracts has to be made in writing and there is no exception to this. They also argue by making an authoritative reference to the provision of the CRD. Accordingly, the CRD provides two options of exercising the right of withdrawal. These are using the model withdrawal form that may be annexed to the online contract or by making an equivocal

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\(^67\) See CRD, Art. 13(2).

\(^68\) See CRD, Art. 11(1)(a)(b).

\(^69\) Luzak, (4 September 2014), 388.

\(^70\) Ibid.


\(^72\) Ibid.
statement, which shows the withdrawal from the contract. Any deviation from the requirements of the law for both the trader and the consumer is an act against the full harmonization regime of the EU consumer law. Thus, the declaration of the right of withdrawal should be in writing if the provisions of the CRD are to be complied.

Of course the law regarding declaration of withdrawal from the online contract by unequivocal statement looks vague whether such a statement has to be in writing or not. If the consumer declares a statement orally, it may be subjected to equivocality unless he proves that the declaration of his withdrawal was unequivocal. This study inclines to the side that withdrawal from online contract is free of form requirements. The wording of the provision of the CRD, which reads as ‘any other unequivocal statement’, does not recall an incorporation of a particular form. This rather implies that the consumer is free from using a written form as long as he proves not only exercising his right in due time, but also his declaration is unequivocal. Again, the requirement of full harmonization of the EU consumer laws in general and the right of withdrawal from digital contracts in particular is for the benefits of the consumer from possible confusion that results from differentiated application of the laws. As a result, it may not be appropriate to view the concept of full harmonization from the perspective of the acts of the consumer in exercising his right of withdrawal.

In order to make sure that the right of withdrawal is effectively exercisable, the CRD provides an information duty on traders. In particular, the trader should provide the information to the consumer regarding the existence of the right of withdrawal, conditions, time limit and procedures in exercising it in a given e-contract. The effect of breaching the information duty to provide the right of withdrawal by the trader is prolongation of the cooling-off period to up to 12 months to run.

The most important remark in this study is the scope of application of the right of withdrawal in such e-contracts. The right of withdrawal can only exist if goods are bought for private use. Obviously, the trader has to be a business entity (a company), but not a private person. What is the prevailing logic of limiting the scope of digital consumer’s right in general and the right of withdrawal in particular traps the attention of this study.

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73 See CRD, Art. 11(1) (a) (b).
3.5. The Scope of the Right of Withdrawal in Online Contracts

The scope of application of a law is important to exactly figure out its subject. The scope of application of the right of withdrawal in e-contracts is the mirror image of the digital consumer law’s scope of application. Accordingly, the scope of application of the right of withdrawal is limited to B2C aspects of contracts. The B2C aspects of contracts may include off-premises contracts (a kind of contract concluded outside the trader’s business area) and distance contracts (contracts concluded by means of any form of distance communication).

Basically, the CRD applies to on-premises contracts (contracts other than distance or off-premises)\(^\text{75}\) in connection to the information requirement duties of the trader. However, the consumer can exercise the right of withdrawal in cases of distance or off-premises contracts.\(^\text{76}\)

In the further look, the right of withdrawal is limited to the digital consumers purchasing goods for personal uses from either privately owned or public business entities, but not private persons. Thus, the subject matter of the right of withdrawal in digital consumers’ law is the B2C contract. Consequently, the right of withdrawal in the CRD applies not to any other transactions other than the B2C contracts. Furthermore, the product has to be bought from the Member State of EU for the right of withdrawal to be exercisable.

A right of withdrawal cannot protect a product bought from abroad, due to the reason that the Directive’s requirement of full harmonization of consumer laws does not work out outside EU Member States. Accordingly, a product bought from outside EU cannot fall within the scope of this law as the conflict of laws between the country where the product is bought and EU digital consumer laws cannot be hindered by full harmonization regime of this Directive.

The most important new addition of the CRD from its predecessors is the extended right of withdrawal for consumers from 7 working days to 14 calendar days.\(^\text{77}\) According to this law, this right can only be exercised within 14 calendar days after physically receiving the product or in case of service the day of the conclusion of the contract. If the consumer is not able to exercise his right of withdrawal within the timeframe subscribed by law, his right can be hindered by an issue of period of limitation.

\(^{75}\) See CRD, Art. 5(1).  
\(^{76}\) See CRD, Art. 9(1).  
\(^{77}\) See CRD, Art. 9(2).
3.5.1. The right of Withdrawal for Tangible Goods

Exercising the right of withdrawal is dependent on the subject matter involved in a particular contract. As a result, online contracts for the purchase of tangible goods are the major targets of withdrawal rights.

However, the right of withdrawal is not the sole option for the consumer if he still for some reasons, wants to posses the tangible goods. In fact, a consumer may probably want to use the tangible good after a slight repair or modification. At times, he may wish to get a full replacement of the same kind of product instead of withdrawing from the contract. Such options of the consumer are protected by what we call it ‘commercial guarantee’.78

At the same time, the consumer has to be left with his own preference of either exercising his right of withdrawal or seek for repair (replacement). There is no mandatory rule that a consumer should follow in maintaining his best preference.

3.5.2. The right of Withdrawal for Digital Contents and Service Contracts

Dominantly, purchase of digital contents from the digital market and service contracts falls in the exception list of consumers’ right of withdrawal. This is a result of the very nature of digital contents and service contracts. Once they are sold or service is rendered, the seller of the digital content79 or the service provider80 cannot bar the misuse of such a product or service by someone else or the consumer himself. Therefore, the best option is to protect the seller or service provider from such a practical challenge by not allowing the consumer to exercise his right of withdrawal. At the same time, once the digital content is sold or a service is provided, a consumer is somehow derived an advantage that cannot be dragged back.

However, the mere fact that the contract between the consumer the trader is for the purchase of digital contents or service provision alone cannot disable the right of withdrawal. In such circumstances, the consumer has to give prior consent and acknowledge that he will lose his right of withdrawal once the contract has been fully performed or performance of the contract has begun in his expressed consent.81

78 See CRD, Art. 2(14).
79 See CRD, Art. 16(m).
80 See CRD, Art. 16(a).
81 See CRD, Art. 16.
3.6. Legal Effects of Withdrawal for Consumers

Terminating of an e-contract by means of the right of withdrawal is not without effect. Once the right of withdrawal is successfully made, there are some legal effects that immediately follows. The main legal consequence of exercising the right of withdrawal is restitution (termination) of the legal obligations that stems from the contract.\textsuperscript{82} In the process of terminating the obligation and rights that was already established by the contract, two important engagements need to involve by the consumer and the trader. These are the obligation of the consumer to return the goods\textsuperscript{83} to the trader and the obligation of the trader to reimburse\textsuperscript{84} all payments to the consumer. The complications of returning goods to the trader and reimbursing the consumer also recall the application of tremendous legal intricacies.

The termination of the obligation of both parties may include performance of the distance or off-premises contract\textsuperscript{85} or concluding the distance or off-premises contract in case when an offer was made by the consumer.\textsuperscript{86} In short, the point of consumer’s withdrawal from the e-contract hinders both parties from any further proceeding except involving into the restitution agenda.

3.6.1. Obligation to Return

The obligation to return the goods or services is a natural consequence of withdrawal from a contract concluded electronically. As long as the consumer withdraws from the binding forces of the contract, he must return the goods received from the trader. However, if the trader does not inform the consumer about the obligation to return the goods up on exercising the right of withdrawal or if the trader informs him to pick up the goods by himself, the consumer may await until the trader picks the goods.\textsuperscript{87} Otherwise, a consumer is required to return the goods to the trader within 14 days from the day of their delivery.\textsuperscript{88}

Important to note, consumers are obliged to compensate traders for the diminished value of the goods when withdrawing from e-contracts. The consumer shall not be liable for the

\textsuperscript{82} See CRD, Art. 12.
\textsuperscript{83} See CRD, 14(1).
\textsuperscript{84} See CRD, Art. 13(1).
\textsuperscript{85} See CRD, Art. 12(a).
\textsuperscript{86} See CRD, Art. 12(b).
\textsuperscript{87} Joasia Luzak, (4 September 2014), p. 389.
\textsuperscript{88} See CRD, Art. 14(1).
diminished value of the goods where the trader has failed to provide notice of the right of withdrawal in accordance with the provisions of the CRD.\textsuperscript{89}

In the case of off-premises contracts, the trader shall collect the goods at his own expenses if the goods are of such a nature that they cannot be sent to the trader by post.\textsuperscript{90} This provision also implies that the consumer has to send the goods to the trader within the given deadline if the nature of the goods allows their return by post. Then, the consumer himself bears the costs of the postal charges. Generally, the consumer has to bear the direct cost of returning the goods unless the trader fails to inform the consumer to cover the returning costs or agrees to bear them.

The challenge is assessing the level of the diminished value of the goods in order to estimate the compensation a consumer is required to pay. The CRD does not provide a clear parameter of calculating the diminished value of the goods in cases when the consumer exercises his right of withdrawal. The common way of calculating the diminished value may be negotiation between parties by referring to the market value of the goods after diminishing.

3.6.2. Right to Full Refund

The main obligation of the trader when the consumer withdraws from the e-contract is reimbursement. According to the provisions of the CRD, the trader shall reimburse all payments received from the consumer including the costs of delivery.\textsuperscript{91}

The standard of reimbursement shall be the means of payment the consumer used in the initial transaction unless both parties have agreed otherwise.\textsuperscript{92} If the consumer requests the reimbursement to take effect in a standard other than the one the initial payment is made, then he must bear the extra costs associated to the new mode of reimbursement.

The trader is obliged to cover all costs associated to the reimbursement. For instance, the bank charges to transfer the money have to be borne by the trader.

The trader and the consumer may most probably be from different jurisdictions whose bank payments involve different currencies. One may argue that the provision of the CRD in the

\textsuperscript{89} See CRD, Art. 14(2).
\textsuperscript{90} See CRD, Art. 14(1).
\textsuperscript{91} See CRD, Art. 13 (1).
\textsuperscript{92} See CRD, Art. 13(2).
wording of ‘…using the same means of payment…’\textsuperscript{93} connotes that the trader has to use the same kind of currency the consumer has used. This may not be problematic by itself, but the actual value difference of the money the consumer initially pays and the money the trader is going to reimburse may be highly affected by the volatile exchange rates. Then, the questions arise as to who should bear that difference? The provisions of the CRD do not further explain this practically problematic scenario. From the fairness point of view, the trader should not bear any liability for the diminishing of the value of the money reimbursed to the consumer as a result of the exchange rate variation. This exchange rate volatility may be resulted in the market any time whereas the trader has no way to control it. Thus, the consumer cannot ask reimbursement for the value differences between the money he initially pays and the money received by the reimbursement.

The other most important issue that the CRD has already regulated is regarding the priority order of the obligation between returning goods and getting the reimbursement. The CRD requires the consumer to send back the products and hand them over to the seller or to a person authorized by him to receive them, within 14 days from the day on which he communicates his withdrawal to the trader, unless otherwise the trader has offered to collect the products himself. From the consumer’s point of view, he cannot withdraw from the e-contract and ask for reimbursement immediately. If the right of withdrawal is exercised within the right timeframe, the consumer has to return the goods duly. When the trader has not received the goods back or the consumer has not supplied evidence of having sent them back, the trader may withhold the reimbursement.\textsuperscript{94} Shortly, when the trader has agreed to collect the product by himself, he cannot withhold the reimbursement. He has to reimburse the consumer following the declaration of the withdrawal.\textsuperscript{95}

Apparently, the consumer’s obligation of returning the goods back to the trader comes first if he should enjoy his right of reimbursement of all the costs he paid. At the same time, the trader can refuse to reimburse the consumer until he receives the goods back or the consumer supplies evidence showing that goods are on transit for redelivery back to the trader.

\textsuperscript{93} See CRD, Art. 13(1), Para.2.
\textsuperscript{94} See CRD, Art. 13(3).
3.7. Exceptions from the Right of Withdrawal

Within the scope of application of the right of withdrawal in EU, there still exists exception. EU consumer laws seem to inclining to provide higher standard of protection to digital consumers in e-contracts. For instance, the right of withdrawal is one of most remarkable right of digital consumers. However, this does not mean that all digital contracts are subjects of the consumer’s right of withdrawal. Within the scope of the right of withdrawal, some contracts are excluded from the application of the right of withdrawal. Even though parties to such contracts fall within the scope the right of withdrawal, contracts for social services, healthcare, gambling, immovable property, financial services, package travel, timeshare, and supply of foodstuffs, so and so forth are excluded from the application of the right of withdrawal.

According to the CRD, the right of withdrawal has got an exception when the nature of the goods do not fit appropriate to allow the right of withdrawal. For example, in a service contract, it does not sound logical if the consumer is granted a right of withdrawal after the service is performed.96 Once the consumer has agreed for the performance of the service and such a service is performed accordingly, there is no both legal and natural fairness to accord a right of withdrawal to the consumer and disregard the efforts of the trader. The same reasoning goes to apply for the supply of digital contents (for instance, software downloads).97

On the other hand, supply of goods in the personal specification98 of the consumer takes the right of withdrawal away from him. This may be demonstrated in the following example further. For instance, if a woman ordered a tailor to provide her a wedding dress in her size, there is no way to withdraw from such a contract. Logically, the trader should not bear the market loss as a result of the specification made to a particular person and his withdrawal from such a contract.

Simultaneously, the consumer cannot exercise his right of withdrawal in case of contracts for the supply of goods and services for which the price is dependent on fluctuations in the financial market.99 This restriction of exercising the right of withdrawal is provided by the CRD in order to protect the trader from the possible abuses of the right by the consumer. If

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96 See CRD, Art. 16(a).
98 See CRD, Art. 16(c).
99 See CRD, Art. 16(b).
the law allows every contract to be a subject of withdrawal at any time, consumers would go for withdrawal and when the price fluctuates in their favor. This may destroy the purpose of ensuring the proper functioning of the internal market.

The contract for the supply of goods, which are susceptible for deterioration, cannot be a subject of the right of withdrawal.\(^{100}\) For instance, an order of delivery of food from a hotel cannot be withdrawn from. The same exception applies to the sealed goods, which are not suitable for return due to health related issues.\(^{101}\)

Generally, the CRD provides a long list of exceptions for the consumer’s right of withdrawal from contracts concluded electronically. This a fair approach in order to compromise the proper functioning of the internal market with the motives of the law in standardizing consumers’ higher level protection.

### 3.8. The Way Forward

These days, the major engine of the information economy is the information service.\(^{102}\) Communication through internet in daily transactions forms the most significant role of communication technology on the information economy. Being aware of the role of digital communication on people’s regular purchases, EU has formulated consumer protective law ahead. This consumer protective law is not however applicable to all online transactions. The law has its own specific purposes to meet and applies to a category of consumers specified by law. Such scope limitation is designed to achieve effectively operable law by targeting a protection to vulnerable consumers of the distance communication and enhancing e-commerce. In realizing this, the law contemplates to regulate the preferred interaction between consumers and traders that constitutes the major subject matter in e-commerce.

An integral part of consumer protective right, the right of withdrawal in e-contracts is exercisable up on fulfilment of certain conditions. The applicability of this right in EU Member States is limited in its scope to consumers interacting with traders via internet.

Within the general picture of such limitations in scope, the application of the right of withdrawal is further made a subject of various exceptions. The law has expressly excluded

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\(^{100}\) See CRD, Art. 16(d).

\(^{101}\) See CRD, Art. 16(e).

the application of the consumer’s right of withdrawal from some kinds of contracts in order to create a fair play between consumers and traders in e-commerce.

As long as the information communication is increasingly playing a significant role in the life of the information society, the culture of transaction between businesses and consumers as well as other combinations is also sizably increasing. Certainly, online contracts are forming inseparable domain to people’s regular marketing. In this regard, a consumer protection law that broadly applies to all consumers regardless of they are private persons or legal entities may be supposedly inevitable.

The existing platform of consumer protection law does narrow its applicability to consumers of private persons by clearly excluding consumers of legal personality. This narrow scope of application of the consumer protection law could be a result of being shortsighted to the development of digital marketing as nothing else justifies it. This study hopes that the ongoing discourse of developments in consumer protection law will come up with a wider scope of application and protection of most consumers in the tragic developments of online marketing.

In the same token, this study is optimistic that the application of the right of withdrawal from online contracts will at times be exercisable by all consumers of digital marketing subject to certain exceptions that law may so provide.

Developments in the online marketing science dictate the internationalization of businesses and dissemination of through digital medium. In the growing desire of the use of such an online technology, digital consumers’ law is expected to draw wider scope of application accordingly.

3.9. Summing Up

To sum up, the analysis of this study remarks that the scope of application of EU’s consumer protection law is highly restrictive. EU digital consumers’ law shows a sense of promoting higher-level protection to its subjects. However, its application is drawn in a narrow line along with limited scope and various exceptions. This situation pushes some online contracts to be regulated by regular sales contract law as far as the consumer protection law excludes them. The application of consumer’s right of withdrawal is an extension of the general law dedicated for the consumers protection. Hence, it applies to the interaction of online contracting parties, namely; consumers (natural persons) and traders.
Given that, consumer’s right of withdrawal has limited scope of application, it remarks the commitment of EU to promoting consumers role in digital marketing. The protection of the law to consumers by means of the right of withdrawal forms the hard core of consumers’ confidence in making use of digital marketing.

Because of the incorporation of the right of withdrawal, traders use to provide the utmost possible information to consumers not to risk consumers’ withdrawal from the online contract.

In terms of substance, the law protecting consumers seems very aware of the inequality between the consumer and the trader. Thus, it sets the consumer in a safe zone to withdraw from the online contract as per the conditions specified by law. However, there are various digital contracts that are exempted from the application of the right of withdrawal depending the nature of the contract involved between the contracting parties.

By the bad luck of a trader, if a consumer withdraws from the online contract, returning the product to the former and refunding the full price to the later are inevitable consequences.

Full harmonization standard is one of the major characteristics of EU consumer law. Though complete harmonization of EU CRD may be realistically difficult, the law theoretically dictates uniform application of consumer law on major areas of consumer protection across EU.

The consumers’ right of withdrawal does not basically contradict the sense of the traditional contract principle of *pacta sunt servanda*, but it makes this application of this principle less effective.

Generally, EU digital consumer laws tries to regulate e-contracts in a different mode than the conventional contract law approaches. Validly agreed digital contract may risk an eventual termination by means of the consumer’s right of withdrawal. This looks unfair from the perspective of a seller (trader). However, such a withdrawal against prudent sellers is not the desired consequence of the EU consumers’ law, but an incidental consequence in the effort of protecting consumers.
Chapter 4

Conclusion and Recommendation

4.1. Conclusion

Constant development in the area of digital technology is fundamentally changing the way consumers interact with seller. Protecting consumers in this digital market is one of the priorities of European policymakers. As a policy priority, the EU is playing an active role to protect digital consumers who involve in transactions across Member States. With the effort to providing consumer protective legal framework, EU has devised the CRD that applies on its own scope.

The notion of consumer is a contentious issue in EU consumer law. Though this term is contentious, the CRD has given its own functional definition to it by way of which legal persons are clearly excluded from consideration.

Regarding the dispute settlement mechanism, EU has the Court of Justice of the European Union (hereafter CJEU) to interpret law and procedure. However, the nature of consumer rights recommend ADR mechanism for potential disputes between contracting parties. This suggestion naturally stems from the high cost of court litigation which may be incurred for small loses that may be experienced in a particular digital transactions. Given that ADR is the easier means of dispute settlement, a consumer can go for the legal ways of securing his rights provided under the consumer laws of EU.

The scope of the CRD is limited to contracts that involves B2C only. Even with this limited scope of the B2C contract, the CRD has got various exceptions from being applicable to protect the rights of consumers. However, the EU consumer law has a broader aim of protecting consumers from risks that they are unable to tackle it in their individual capacity. Thus, the consumer law empowers consumers’ choice base don accurate and clear information duty of traders, effective protection of their safety and economic interests. The puzzling issue is that most EU digital consumers are excluded from the benefit of the law either explicitly or by technical means.

With the view to promote consumers right choices on pursuing their purchases based on accurate, clear and consistent information, the right of withdrawal is draged into the domain of EU consumer rights. The right of withdrawal ia applicable for digital contracts that involve
both tangible goods and digital contents. However, most contracts that involve purchase of digital contents do enjoy exemptions from consumer rights of withdrawal.

The existing European legislations support the application of full harmonization regime for the digital society of Europe to increase legal certainty and confidence. As a result full harmonization introduces the application of the same rules throughout the whole EU which actually simplifies legal barriers and increase consumer protection. Despite its role in maximizing consumer protection, it is not free from negative contributions. Full harmonization hampers the already existing national legislations which are going beyond the texts of the CRD provisions.

In the course of exercising his rights, if a consumer withdraws from the e-contract for any reason, such withdrawal has the legal effect of restitution. This restitutioning effect of exercising the right of withdrawal can be maintained up on two major obligation of both parties. Thus, the consumer has to return the goods to the trader, whereas the trader has to reimburse all payments made by the consumer.

4.2. Recommendation

The EU is playing its own active role in the process of building a digital market platform that consumers can trust. In fact there has been considerable activity by national legislations of EU Member States to consolidate consumer rights.103

In the effort of regulating consumer rights under EU laws, the main subjects are the natural persons and traders. Of course in cross-border digital marketing, there are barriers for both the consumer and the seller. Thus, establishing regulatory frameworks can highly enhance the confidence for both consumers and traders.104 The CRD has made significant steps towards the foundation of common set of digital transaction rules in general and consumer protective rules in particular.

Given that EU digital consumer law has been driven by the policy priority of establishing European single market, EU consumer laws are designed to have uniform application throughout the region. This has distorted the already established better consumer protective


national laws that are designed according to national policies of individual States. For this reason, EU’s full harmonization regime should remain less stringent in affecting such national laws to a lesser standard of EU level as long as consumers are better treated and protected. Better consumer protective laws of Member States should not bother the EU legislature and consumer rights law in the name of full harmonization.

Concerning the very core point of EU digital consumer laws scope of application, this study suggests the inclusion of all digital consumers without the need to distance them as an outsider. The nomenclature of consumer, designed to include only natural persons as concerns of legal matters of the digital life cannot be justified by anything. In fact, some EU Member States have waived the distinction between legal persons and natural persons and equally treat as consumers, as far as EU consumer rights are concerned. However, EU remains to have a solid position of excluding legal persons from the notion of consumer. This position has to remain lenient as technological advancement is rapidly growing and many stakeholders including legal persons are involving in digital transactions in their legal capacity. The law has to act in a similar vibration to protect legal persons’ digital rights in the same way to natural persons as long as they contribute a positive role for the smooth functioning of internal market of EU.

The other most swapping issue in the concern of the scope of application of digital consumer law is its link to the fully functioning single market of EU. Under this consumers’ scattered rules, bringing and maintaining fully functional European single market may remain to be an ideal imagination. Laws that bare devoted to the protection of EU consumers right has to act realistically in being holistic and comprehensive to the achievement of EU policy priority of single market.

Main actors in the digital marketing are consumers, traders and facilitators of the digital transactions (online shopping sites). The interplay between all these actors has to be regulated in the way that can boost the EU policy priority of maintaining fully functional single market. However, exclusion of C2C transactions from the reach of EU consumer laws can slightly affect high level of consumer protection and the proper functioning of the internal market in one way or another. Thus, an interplay that involves digital consumers should be a subject matter of EU consumer law.
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