Contract law as fairness: a Rawlsian perspective on the position of SMEs in European contract law

Klijnsma, J.G.

Citation for published version (APA):
9 Rights of withdrawal

9.1 The CRD and the CESL

Just as pre-contractual information duties, rights of withdrawal in the CESL are very much based on the CRD. As the CRD aims to achieve full harmonisation in this area, the Commission did not want the CESL to differ materially from the CRD. The two instruments, though, differ somewhat in scope. The CRD applies in principle to both sales and service contracts and hence provides a right of withdrawal in both situations, while the CESL only applies to sales and related services contracts. Similarly, both contain rules for ancillary contracts, but in the case of the CESL these only apply to ancillary contracts that fall within the scope of the CESL (Article 46 CESL).

Chapter III Consumer Rights Directive and Chapter 4 CESL deal with the right of withdrawal. Article 9 CRD gives the consumer a right to withdraw from a distance or off-premise contract without having to give any reason. The consumer has a period of 14 days to exercise this right. In the case of a service contract, this period starts the day of conclusion of the contract, while in the case of a sales contract it starts the day the consumer acquires physical possession of the goods. If, however, the trader has not informed the consumer of the consumer’s right of withdrawal as required by the trader’s pre-contractual information duty (Article 6(h) CRD) the withdrawal period is extended to 12 months from the end of the initial withdrawal period (Article 10 CRD). If nevertheless the trader informs the consumer of his right of withdrawal at any point during these 12 months, the withdrawal period will end 14 days after the consumer has received that information. To exercise his right of withdrawal the consumer must notify the trader of his decision (Article 11 CRD). The CRD contains a model withdrawal form to facilitate this notification in Annex I(B). However, the

388 Eidenmüller 2011, p. 5.
390 Previously, the period in case of non-notification, would be unlimited, see ECJ 13 December 2001, Case C-481/99 (Heininger), [2001] ERC I-9945; Loos 2009, pp. 252-253. See also Chapter 8 on pre-contractual information duties.
consumer does not have to use this model form; any unequivocal statement to the trader that the consumer withdraws from the contract suffices.\textsuperscript{391} Member States are prohibited from introducing any formal requirements for the exercise of the right of withdrawal. However, Article 11(4) CRD places the burden of proof of the exercise of the right of withdrawal on the consumer. So generally, it will be beneficial for the consumer to do so on a durable medium.\textsuperscript{392}

The content and manner of exercising your right of withdrawal is materially the same under the CESL as it is under the CRD. The consumer can exercise his right of withdrawal without giving reason by notifying the trader, either through the model withdrawal form (Appendix 2 CESL) or any other unequivocal communication of withdrawal (Article 41 CESL).\textsuperscript{393} A consumer has the same period of 14 days to withdraw from a contract (Article 42 CESL) and again it is the consumer who bears the burden of proof that he has exercised his right of withdrawal. If, however, the trader has failed to comply with his pre-contractual information duty to inform the consumer of his right of withdrawal (ex Article 17 CESL, see also Chapter 8 on information duties) the withdrawal period is extended by 1 year after the end of the initial 14 days. If the trader informs the consumer after all within this one year, the withdrawal period will end 14 days after the consumer has received this information.

Furthermore, the CRD and the CESL both regulate the effects of the exercise of the right of withdrawal. The CRD deals with this issue in Articles 12-15. The most obvious effect is that it terminates the obligations of the parties to perform the contract (or to conclude it in case only an offer has been made) (Article 12 CRD). If, however, (part of) the contract has already been performed, this leaves the trader (Article 13 CRD) and the consumer (Article 14 CRD) with a number of obligations to undo the transaction. The trader is under an obligation to return all payments made by the consumer. Importantly, this also includes normal delivery costs (as opposed to quicker but more costly delivery options).\textsuperscript{394} The trader has to reimburse the consumer without undue

\textsuperscript{391} Hall, Howells and Watson 2012, pp. 157-158.
\textsuperscript{392} Hall, Howells and Watson 2013, pp. 157-158.
\textsuperscript{393} Schulze (ed.) 2012, pp. 223-227.
\textsuperscript{394} Hall, Howells and Watson 2012, p. 159.
Rights of withdrawal
delay and no later than within 14 days. However, the trader can withhold reimbursement until he has received the goods or the consumer has sent proof that the goods have been sent back. The consumer, on the other hand, is under an obligation to return the goods to the trader without undue delay and no later than within 14 days. It also means that the consumer bears the costs of returning the goods, unless he was not informed about bearing these costs. An exception to this requirement is when the goods have been home delivered to the consumer at the time of conclusion of the contract in case of an off-premise contract. In this case, it is the responsibility of the trader to collect the goods. Furthermore, the consumer is liable for the diminished value of the goods where this depreciation results from using the goods beyond what is necessary to inspect their condition and performance. However, if the trader has not informed the consumer of his right of withdrawal as required by his pre-contractual information duty (ex Article 6 CRD) the consumer does not bear such costs of diminished value.

In the CESL, the effects of withdrawal are dealt with in Articles 43-46 and although they are not meant to be different from the CRD, they do clarify some issues that remained in doubt in the CRD. Withdrawal terminates the obligations of both parties to perform the contract (Article 43 CESL) and if (part of) the contract has already been performed the trader must reimburse the consumer within 14 days (Article 44 CESL) and the consumer is to return the goods within 14 days (Article 45 CESL). The consumer bears the costs of returning the goods. Furthermore, the consumer is liable for any diminished value that resulted from use other than inspecting the characteristics and performance of the goods. The consumer, however, is expressly not liable to pay compensation for use of the goods (Article 45(4) CESL). As such, the CESL clarifies unequivocally that a consumer is not liable to pay compensation for use of the goods during the withdrawal period (Article 45(4) CESL). Arguably, the current acquis does not completely clarify what the rules require with regard to use-compensation.

The CJEU was confronted with the question whether a trader could claim such

\[396\] Schulze (ed.) 2012, pp. 244-246.
compensation under the Distance Selling Directive in the *Messner*-case. Here the court held that the directive prohibited a compensation for use under national law, unless the consumer had made use of the goods in a manner incompatible with the principles of civil law, such as those of good faith or unjustified enrichment. The CRD, however, does not contain an explicit rule regarding use-compensation, resulting in some uncertainty. The CESL clarifies this by making clear that the consumer is not required to compensate the trader for use.

Finally, we can then compare how consumers and SMEs are treated with regard to rights of withdrawal under both the CRD and the CESL. The comparison between on the one hand the position of consumers and on the other the position of SMEs is remarkably simple in the case of rights of withdrawal. Consumers have the rights as outlined above. However, both the CRD as well as the CESL provide these rights only to consumers. This means effectively that neither the CRD nor the CESL provide a right of withdrawal for SMEs.

### 9.2 Underlying rationales

A right of withdrawal can be seen as a measure of weaker party protection, as it allows consumers to go back on a decision they regret having made with hindsight. It is a procedural way of protecting consumers from (the effects of) their possible mistakes. Specifically, a right of withdrawal can remedy the negative effects of contracts that result from information asymmetry or from a distortion or instability of preferences. These overlap broadly with the category of distance- and off-premise contracts respectively. In the CRD and the CESL, rights of withdrawal for off-premise contracts and for distance contracts are brought together, although these rights were...
originally developed separately and aim at providing remedies for different kinds of problems.\textsuperscript{403}

A right of withdrawal in off-premise contracts aims to protect the consumer from aggressive marketing practices.\textsuperscript{404} The prototypical case of off-premise contracting is door-to-door selling. Here, consumers are often put under psychological pressure to purchase something as a way out, the only way to ‘get rid of’ the salesperson. Furthermore, there is generally an element of surprise in these situations. A right of withdrawal protects the consumer against such practices because it offers a cooling-off period in which the consumer can rethink and renege on the decision.\textsuperscript{405} In other words, a right of withdrawal helps prevent contracts that are based on a distortion of preferences.\textsuperscript{406} Through surprise and psychological pressure aggressive marketing practices can lead a consumer to contract for a product or on terms that are inefficient, i.e. at a higher price than he actually values the product. In this case, such preferences are often restored when the psychological pressure and element of surprise diminish. Hence, in such cases, the cooling-off period afforded by a right of withdrawal allows the consumer to renege on what turned out to be an unwanted exchange.\textsuperscript{407} This rule should be a mandatory one because the pressure can often be extended to giving up a right of withdrawal at the moment of contracting.\textsuperscript{408}

In the case of distance-selling, the consumer is protected from making a mistake in buying goods that he has not tested, i.e. on the basis of incomplete information. This is especially the case for goods that need to be tested before the consumer can determine their value, e.g. clothes have much more value to a consumer when they actually fit, which the consumer can only ascertain after trying them on.\textsuperscript{409} Entering into contracts with incomplete information can lead to market failures. If the consumers are unable to test the goods in terms of quality, the market will not function properly because

\textsuperscript{403} In the Doorstep Selling directive and Distance Selling Directive, see Schulze 2010, pp. 13-14.
\textsuperscript{404} Loos 2009, pp. 247-248.
\textsuperscript{405} See Eidenmüller 2011; Wagner 2010.
\textsuperscript{406} Eidenmüller 2011, pp. 16-18.
\textsuperscript{407} Eidenmüller et al. 2011, pp. 1100-1101.
\textsuperscript{409} Eidenmüller 2011, pp. 8-9.
traders will not be able to compete on quality and competition will thus drive the quality of supply into a race to the bottom. By allowing the consumer to send back goods after trying them, the information asymmetry will be minimized and the consumer will be protected. 410 Finally, a right of withdrawal could protect consumers against complex contracts like contracts for financial services, which they might not have understood properly. 411

9.3 Are the differences between consumers and SMEs justified?

In the comparison above we have seen that neither the CRD nor the CESL allow for a right of withdrawal for SMEs whatever the situation. Can the principles that underlie a right of withdrawal for consumers justify the exclusion of SMEs? The right of withdrawal aims at protecting against either the effects of a rash decision or the effects of a decision made due to incomplete information. Are SMEs relevantly different in these respects?

With regard to the latter question the answer is a resounding ‘no’. A right of withdrawal makes it possible for buyers to test goods they have purchased without a prior chance to investigate those goods. The need for such testing does not disappear when you are purchasing something for your business. 412 This might very well be the case even for large businesses. Large businesses, however, might be expected to suffer less from information asymmetry because they have the resources to investigate more in depth the characteristics of the goods in question. 413 The same cannot be said of SMEs. They will generally not be able to test goods purchased in distance selling

410 Of course, this is only the case where the depreciation costs are not prohibitively high, see Ben-Shahar and Posner 2011. That is why it makes sense to exclude for example contracts for the purchase and sale of fruit from the rights of withdrawal. However, from an economic perspective it is not clear why this right of withdrawal should be a mandatory right. See Wagner 2010, pp. 58-60; Eidenmüller 2011, pp. 9-14. Sellers can, and often do, offer a right of withdrawal even if it is not legally required. By making this right mandatory, however, in effect you force some consumers to insure other consumers.
411 Loos 2009, p, 251.
412 Eidenmüller, p. 23.
413 Posner, p. 145.
contracts and hence are in a similar position as consumers. Accordingly, there does not seem to be a good reason for distinguishing between consumers and SMEs with regard to a right of withdrawal in distance selling.

A similar argument can be made with regard to the protection against rash decisions. The reason for distinguishing between consumers and businesses here rests on the assumption that while consumers are irrational and mistakes when put under pressure, businesses do not suffer from such irrationality.\textsuperscript{414} For large businesses this might be based on an expectation of their experience and the possibility to hire staff whose primary task is to handle sales people. SMEs, however, generally do not enjoy that possibility. Individuals running an SME are not suddenly immune to psychological pressure simply because they are commercial actors. Again, they are very much in the same position as consumers in this regard.\textsuperscript{415} One could still claim that, because of the nature of such commercial activity, SMEs should not be protected like consumers, but as I argued above in Chapter 3.4, that is not a persuasive argument either.

So, importantly, the way in which rights of withdrawal function as weaker party protection applies similarly to SMEs as they do to consumers. Hence, the underlying rationales of rights of withdrawal do not provide compelling reasons to differentiate between consumers and SMEs. Given the role of categorical weaker party protection in contract law as fairness, then, an exclusion of SMEs from this category with regards to rights of withdrawal is unjustified from a Rawlsian perspective.

\textsuperscript{414} Eidenmüller, p. 22.
\textsuperscript{415} This was a point of contention in the \textit{Di Pinto} case, where the Commission actually favoured the application of the doorstep selling directive to all businesses, but this was rejected by the Court. See ECJ 14 March 1991, Case C-361/89 (\textit{Di Pinto}), [1991] ECR I-1189, paras. 18-19.