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Rights of Withdrawal

Marco Loos

I. Introduction

On 8 October 2008 the European Commission adopted the Proposal for a Directive on Consumer Rights (hereafter: the 'Proposal'; CR Dir.).¹ This framework-directive is intended to be the climax of the work on the revision of the consumer acquis. It builds in particular on the Green Paper on the Review of the consumer acquis² and the more than 300 reactions the Commission received on the Green Paper. These responses were especially originated from the side of businesses and, to a lesser degree, of consumer groups, government agencies on national and local level, practice lawyers, academicians and others.³ The most important conclusion the Commission drew from these responses was that a large majority of the respondents preferred a horizontal instrument in which terms were to be regulated in a uniform manner, such as the notions of 'consumer' and 'trader'. That instrument was to apply to both national and cross-border transactions and should be accompanied by amendments to the existing directives for those areas where sector-specific measures were deemed necessary.⁴ The responses clearly pointed in the direction of *full* harmonisation. Consumer organisations, however, generally preferred the current approach of minimum harmonisation, which offers Member States the possibility to introduce or maintain rules that are more favourable to consumers.⁵ The Commission took up the follow-up energetically: it adopted the Proposal for

¹ Proposal for a consumer rights directive of the European Parliament and of the Council on consumer rights of 8 October 2008, COM (2008) 614/4. The proposal can be downloaded at http://ec.europa.eu/consumers/rights/cons_acquis_en.htm.

² Green Paper on the Review of the consumer acquis of 8 February 2007, COM (2006) 744 final.

³ Commission staff working document, Report on the outcome of the public consultation on the green document on the review of the consumer acquis (hereafter: Review of consumer acquis document). This working document did not receive a COM-number. It can be downloaded at http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/index_en.htm.

⁴ See Review of consumer acquis document, p. 3-4.

⁵ See Review of consumer acquis document, p. 4. See on the Green Paper and the responses thereto extensively M.B.M. Loos, *Review of the European Consumer Acquis*, Sellier. European law publishers, Munich, 2008.

a Consumer Rights Directive only one year after the preliminary report on the responses to the Green Paper was published. The Proposal is based on the full harmonisation approach preferred by the majority of respondents to the Green Paper, implying that Member States cannot maintain or adopt provisions diverging from those laid down in the Directive.⁶ The full harmonisation of the right of withdrawal in distance and off-premises contracts is thought to contribute to the better functioning of the business to consumer internal market⁷, while ‘striking the right balance between a high level of consumer protection and the competitiveness of enterprises’,⁸ as is required by Article 153(1) and (3)(a) EC Treaty. In the eyes of the Commission, that high level is indeed achieved.⁹

In the Green Paper, the European Commission drew the attention to, amongst other things, the regulation of the various rights of withdrawal, which are included in several directives, and the requirements for invoking these rights. The Commission wondered whether the cooling-off periods should be harmonised across the consumer acquis, how the right of withdrawal should be exercised, and which costs should be imposed on consumers in the case of withdrawal.¹⁰ From the responses to the Green Paper, the Commission concluded that there is a strong support for tightening-up and systematising the consumer acquis, amongst others in the area of the regulation of the rights of withdrawal.¹¹

In this paper I will examine whether the harmonisation effort undertaken is successful, whether the right choices are made in the Proposal, and whether, as the European Commission indicates, the right balance between a high level of consumer protection and the competitiveness of enterprises is indeed achieved.

II. Characteristics and Development of the Right of Withdrawal

Rights of withdrawal and the associated cooling-off periods are fairly new concepts in private law. Although traces of a right of withdrawal may already be found in a proposal for a statutory *Reurecht* for buyers in hire-purchase

⁶ Explanatory memorandum to the proposal for a consumer rights directive, COM (2008) 614/4, p. 3.

⁷ Cf. Recital (5) of the preamble to the proposal for a consumer rights directive.

⁸ Cf. Recital (5) of the preamble to the proposal for a consumer rights directive. In this sense also the Explanatory memorandum, p. 2.

⁹ Explanatory memorandum, p. 3.

¹⁰ Green Paper, p. 12, 20-22.

¹¹ See the executive summary in the Review of consumer acquis document, p. 3.

schemes in 1891,¹² it was not until the late 1960s and the early 1970s before a right of withdrawal was first laid down in legislation.¹³ The right of withdrawal is usually meant to protect a consumer from making rash decisions: during a relatively short cooling off-period, the consumer may go back on his decision to conclude a contract, sometimes even if that contract has already been performed by the parties. The counterpart to the contract, typically a trader (i.e. a professional seller or service provider), is not given such possibility. When the consumer does exercise his right of withdrawal, all contractual obligations are extinguished.¹⁴

At European level, the right of withdrawal was introduced by the Doorstep Selling Directive.¹⁵ Since then it has been included in Directives on Life Assurance,¹⁶ Timeshare,¹⁷ Distance Selling,¹⁸ Distance Marketing of Financial Services,¹⁹ and, recently, Consumer Credit.²⁰ It should be noted,

¹² Cf. the proposal by Heck, published in the proceedings of the 21st German Lawyers day of 1891, 2nd. Volume, p. 180-182.

¹³ Legislation in Germany and the Netherlands introducing a right of withdrawal date back to 1969 in Germany (*Auslandinvestment-Gesetz*, concerning *inter alia* the sale of foreign investmentshares) and 1973 in the Netherlands (*Colportagewet*, concerning a regulation of doorstep selling contracts).

¹⁴ Cf. case C-423/97, ECJ 22 April 1999, *ECR* 1999, I-2195 (Travel Vac SL/Anselm Sanchís), nos. 57-58.

¹⁵ Doorstep selling directive, i.e. Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, *OJ* 1985, L 372/31.

¹⁶ Second life assurance directive, i.e. Council Directive 90/619/EEC of 8 November 1990 on the coordination of laws, regulations and administrative provisions relating to direct life assurance, laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 79/267/EEC, *OJ* 1990, L 330/50. I will deal with the directive only occasionally.

¹⁷ Timeshare directive, i.e. Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, *OJ* 1994, L 280/83. A new Timeshare Directive was adopted shortly before this contribution went to print: Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts, *OJ* 2009, L 33/10. In the remainder of the text I will refer to both the existing and the new directive.

¹⁸ Distance selling directive, i.e. Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, *OJ* 1997, L 144/19.

¹⁹ Distance marketing of financial services directive, i.e. Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance

however, that the directives use different terms to indicate the right of withdrawal.²¹ Member States sometimes have additional cooling off-periods in areas that are not or not yet (fully) harmonised.²² Moreover, occasionally extra-legal (contractual) rights of withdrawal have developed in contractual practice. A common example is the commercial practice in retail shops that a good may be returned in exchange for the contract price or a credit note if it does not satisfy the buyer's needs. These national and extra-legal rights of withdrawal will, however, be disregarded in this paper as they are of minor importance only to the debate on the regulation of rights of withdrawal at the European level.

The right of withdrawal gives the consumer the right to unilaterally go back on his decision to conclude a contract. As such, it is a far-reaching instrument, protecting one party from another party by restricting the binding nature of the contract. It is, therefore, at odds with the principle of *pacta sunt servanda*, which is commonly regarded as one of the pillars of contract law. That principle maintains that when parties have concluded a contract, they are bound to uphold their word and are required to perform their part of the

marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, *OJ* 2002, L 271/16.

²⁰ Consumer credit directive, i.e. Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, *OJ* 2008, L 133/66.

²¹ The directives speaks of the right to 'renounce' the effects of the contract (art. 5 para. 1 of the doorstep selling directive), of the right to 'cancel' the contract (art. 15 para. 1 of the second life assurance directive) or of the right 'to withdraw' from the contract (art. 5 para. 1 of the existing timeshare directive, art. 6 para. 1 of the new timeshare directive, art. 6 para. 1 of the distance selling directive, and art. 6 para. 1 of the distance marketing of financial services directive). In German, the directives use terms such as 'zurücktreten' and 'widerrufen'; in French, terms such as 'le droit de renoncer', 'le droit de résilier' and 'le droit de rétraction' are used. The diverging terms do not imply a difference in meaning, but are rather the expression of a lack of a unitary system of European contract law, cf. J. Büßer, *Das Widerrufsrechts des Verbrauchers. Das verbraucherschützende Vertragslösungsrecht im europäischen Vertragsrechts*, Peter Lang: Frankfurt am Main/Berlin/Bern/Bruxelles/New York/Oxford/Wien, 2001, p. 123.

²² An example is the right of withdrawal for a consumer-buyer of a house in art. 7:2 of the Dutch Civil Code. This right of withdrawal is somewhat atypical, as it applies irrespective whether the seller is a professional or also a consumer. Other peculiarities include the extreme short cooling off-period (3 working days) and the fact that not the dispatch, but the receipt principle applies as regards the timeliness of the notice of withdrawal. See for a critical evaluation of the Dutch regulation Jac. Hijma, 'Bedenktime in het contractenrecht', in: Jac. Hijma, W.L. Valk, *Wettelijke bedenktijd*, preadviezen Nederlandse Vereniging voor Burgerlijk Recht, Kluwer: Deventer, 2004, with references.

contract. The right of withdrawal appears to affect the binding force of a contract in its core. It should be noted, however, that the principle of *pacta sunt servanda* is not without its limitations. For centuries, exceptions have been made to it, in particular when one of the parties was not able to freely determine whether it wishes to be bound by that contract. In the view of Canaris, the right of withdrawal may be seen as just another example of the fact that the formal and material notions of freedom of contract need not always coincide, as already follows from more familiar instruments as fundamental mistake, deceit and fraud. In this view, the right of withdrawal is not really at odds with the principle of *pacta sunt servanda*, as the 'pactum', on which the binding nature of the contract is based, is not really founded on freely determined consent by the consumer.²³ Nevertheless, given its far-reaching nature, the use of such an instrument needs justification.²⁴ Obviously, whether a right of withdrawal is justified is a matter of legal politics and ethics:²⁵ justification for such an instrument is normally reflected in the function that the legislator wishes it to fulfil. The function it is to fulfil, however, does of course influence the answers to the questions of how long the cooling-off period should last and how the consumer is to effect his withdrawal in case he decides to make use of his right, as these affect the effectiveness of the right of withdrawal and, therefore, contribute to the answer to whether the use of the instrument of a right of withdrawal as such is actually justified.

III. The Duration of the Cooling-off Period and the Need for Further Harmonisation

1. Diverging lengths of the cooling-off period

The lack of coherence of European consumer law is much debated. One of the most debated examples pertains to unification of the right of withdrawal and the associated cooling-off period.²⁶ One of the main problems is that the

²³ Cf. C.-W. Canaris, 'Wandlungen des Schuldvertragsrechts, Tendenzen zu seiner 'Materialisierung'', *Archiv für die civilistische Praxis* 200 (2000), p. 344. Cf. also Büßer (2001), p. 133-134; Th.M.J. Möllers, 'Europäische Richtlinien zum Bürgerlichen Recht', *Juristenzeitung* 2002, p. 130; W.L. Valk, 'Wanneer is een bedenktijd gerechtvaardigd?', in: Jac. Hijma, W.L. Valk, *Wettelijke bedenktijd*, preadviezen Nederlandse Vereniging voor Burgerlijk Recht, Kluwer: Deventer, 2004, no. 39.

²⁴ Cf. Canaris (2000), p. 345; Valk (2004).

²⁵ Valk (2004), no. 2.

²⁶ See further M.B.M. Loos, *Spontane harmonisatie in het contracten- en consumentenrecht* (inaugural address Amsterdam), Den Haag: Boom, 2006, p. 35-36.

directives that have introduced a right of withdrawal, have very different lengths for the cooling off-period, varying from seven calendar days (doorstep selling), ten calendar days (timeshare),²⁷ seven working days (distance selling), fourteen working days (distance marketing of financial services; consumer credit) up to even thirty calendar days in the case of life assurance contracts. This may lead to confusion for consumers, entrepreneurs and lawyers as to the length of the applicable cooling off-period. Moreover, it causes legal uncertainty in cases where two or more rights of withdrawal are applicable, e.g. in the case of doorstep or distance selling of a timeshare.²⁸

The need for further harmonisation of the rights of withdrawal was confirmed in the responses to the Green Paper, as follows from the staff working document published on the website of the Commission. According to this working document, a clear majority of the respondents showed support for unification of the cooling-off period, including 65% of the consumer organisations, 75% of practitioners, and 20 Member States. According to business stakeholders, the remarkable differences between the national legislation of the Member States impede businesses in cross-border situations in dealing with the right of withdrawal and the duty to properly inform the consumer on the applicable duration of the cooling-off period. Given these comments, it is surprising to note that only 44% of business respondents spoke out in favour of harmonisation of the cooling-off periods.²⁹

In the responses to the Green Paper there is a variation in opinion as to the length of a uniform cooling-off period. In particular, it was suggested from the business side that a uniform period of two weeks would be too long and that too long a period would open the opportunity for consumers to abuse their cooling-off period. Moreover, in such a case the period – during which the consumer would have to ensure that the good would remain as new – would equally be prolonged. Conversely, consumer organisations often argued that the existing cooling-off periods are too short; some argued for even longer periods than two weeks for ‘complicated’ contracts such as timeshare agreements.³⁰ Some Member States favoured a distinction

²⁷ Under the new timeshare directive the consumer will have a cooling-off period of fourteen calendar days, see below.

²⁸ Cf. case C-423/97, ECJ 22 April 1999, *ECR* 1999, I-2195 (Travel Vac SL/Anselm Sanchís), nos. 22, 23 and 26, where the ECJ confirmed that the doorstep selling directive and the timeshare directive may both be applicable to the same contract.

²⁹ Review of consumer acquis document, p. 8.

³⁰ Review of consumer acquis document, p. 8. Cf. also Working document of the Commission, Responses to the consultation on distance selling directive 97/7/EC contained in Communication 2006/514/EC, Summary of responses (hereafter: Distance selling document), p. 9, where it is mentioned that consumer organisations were said to

between two categories of cooling-off periods. For the first category, consisting of the Distance Selling Directive and the Doorstep Selling Directive, a period of ten calendar days is suggested, whereas for the second category a period of fourteen calendar days is preferred. The second category should include at least timeshare agreements, the reason being that the high financial interest and the often long contractual period for these agreements justify a longer cooling-off period.³¹ Why a uniform cooling-off period of fourteen calendar days would not be better – because it is easier to handle and to explain – is not explained. In this respect, one should realise that to one contract both the Doorstep Selling Directive and the Timeshare Directive may apply, as follows from the *Travel Vac*-decision of the ECJ.³² In such a case the question of the actual duration of the cooling-off period pops up again, resulting in the familiar uncertainty which now exists. Moreover, as the difference between ten and fourteen days is not all that great, the added value of a more nuanced system does not seem so great anyway.

One should therefore seriously contemplate introducing a uniform regime for the cooling off-period. A possible disadvantage of such a uniform period could be that it may seem somewhat long for some cases, e.g. where an aggressive sales technique was employed but the undue influence has subsided. Nevertheless, the advantages of having a uniform cooling off-period seem to outweigh the disadvantages thereof.³³ It would therefore seem that, unless there are pressing reasons *not* to introduce a uniform period for all rights of withdrawal, such a uniform period should be opted for.

The European Commission, following the example in Article II. – 5:103(3) of the Draft Common Frame of Reference (DCFR), has indeed opted for a uniform duration of fourteen calendar days (Article 12(1) CR Dir.). One should recognise that the Proposal only applies to the right of withdrawal in distance contracts and off-premises contracts. However, it is clear that the Commission did take other rights of withdrawal – in particular:

prefer a cooling-off period of 14 *working* days, what would amount to about three (calendar) weeks. Business were said to prefer a cooling-off period of 7 (calendar) days. Here, the 'ideal' situation for consumer organisations and businesses apparently differ even more. The Distance selling document, again, has not received a COM-number. It may be downloaded at http://ec.europa.eu/consumers/cons_int/safe_shop/dist_sell/sum_responses_consultation_s_en.pdf (lastly checked on 9 January 2009).

³¹ See, for instance, the reaction of the Netherlands, p. 22. The reactions of the individual Member States and other respondents may be downloaded at http://ec.europa.eu/consumers/rights/responses_green_paper_acquis_en.htm (lastly checked on 7 January 2009).

³² ECJ 22 April 1999, case C-423/97, [ECR] 1999, p. I-2195 (*Travel Vac SL/Anselm Sanchís*), no. 23.

³³ In this sense also Hijma (2004), no. 50.

timeshare, distance marketing of financial services, life assurance contracts, and consumer credit contracts – into account when drafting the provisions of this Proposal: in almost³⁴ all of these contracts, the duration of the cooling-off period is or will be fixed at fourteen calendar days.³⁵

Is the choice for a uniform period actually a correct decision? Or are there good reasons to opt for a different period, taking into account the interests of both the consumer and the trader? In this respect, one should recognise that the cooling-off period should be sufficiently long for the consumer to be able to actually make use of the right of withdrawal. On the other hand, the cooling-off period should not unreasonably burden the trader with uncertainty as to the finality of the contract concluded. In other words: the interests of both parties need to be balanced in such a manner that the trader is not burdened too much, but the consumer is enabled to make up his mind and then to execute a decision to withdraw. Bearing these considerations in mind, let us now turn to the functions that the rights of withdrawal are meant to serve.

2. Functions of the right of withdrawal

A pressing need to continue the existence of differing lengths of the cooling-off period may, of course, follow from the *function* the right of withdrawal is to fulfil. It has already been remarked that the right of withdrawal is meant to protect a consumer from making rash decisions. Yet, the need for such protection differs.³⁶ In the cases of doorstep selling and timeshare, the aim was to protect the consumer from aggressive sales techniques (section III.2.a),³⁷ whereas in the case of distance selling of goods and services, distance marketing of financial services and consumer credit, it was much more the desire to let consumers and businesses benefit more from the

³⁴ The only exception is the case of distance marketing of life insurance contracts, where a cooling-off period of 30 days applies, see art. 6 para. 1 of the distance marketing of financial services directive.

³⁵ Cp. art. 6 para. 1 of the new timeshare directive; art. 6 para. 1 of the distance marketing of financial services directive; art. 14 para. 1 of the consumer credit directive.

³⁶ Büßer (2001), p. 126, rightly argues that a right of withdrawal often has to fulfil several functions at the same time. For instance, in the case of doorstep selling, the protection against aggressive sales techniques may have been the main motive for the introduction of the right of withdrawal, but obviously one can also argue that the consumer is deprived from the possibility to assess the qualities of the goods or service offered at the time of the conclusion of the contract. In this respect, any classification cannot be more than indicative in nature.

³⁷ Cf. the Recitals 3 and 4 of the preamble to the doorstep selling directive and Recitals 7 and 11 of the preamble to the existing timeshare directive.

advantages of the internal market by taking away barriers to cross-border trade (section III.2.b).³⁸ The promotion of the online conclusion of contracts as such could be thought to constitute an independent reason for the introduction or maintenance of a right of withdrawal for distance contracts (section III.2.c). Another ground for the introduction of such a right could be the complex nature of the concluded contract itself and the corresponding need to obtain objective information or advice (section III.2.d).

a) Protecting consumers against aggressive commercial practices

In the case of doorstep selling and timeshare, the seller usually takes the consumer unaware by approaching him at his home or at another locality not perceived as the seller's or service provider's business premises. The seller then may induce the consumer to take a decision he cannot oversee at that moment.³⁹ In such situations, the consumer is not able to make an informed choice as to whether the goods or services offered to him indeed meet his demands. The right of withdrawal then serves to enable the consumer to rethink his earlier decision, which may or may not have been made under the influence of the actions of the trader. This implies that in such cases, a relatively short cooling-off period would in principle suffice, provided that the consumer can indeed reflect on his decision in peace and quiet, i.e. free from possible duress and therefore outside the company of the trader. From that point of view, the period of seven calendar days mentioned in the current Doorstep Selling Directive seems of sufficient length, provided that such a notice is effective when it is dispatched within the cooling off-period. Obviously, a longer cooling-off period would be disadvantageous to traders, but this disadvantage may be outweighed by the advantages of having one uniform duration for the cooling-off period. Where – as is foreseen in the Proposal for a Consumer Rights Directive – the number of form(al) requirements for the conclusion of the contract is much more limited, this may even serve as a counterbalance for a longer cooling-off period.

Where timeshares are concerned, it is much more questionable whether the current cooling-off period of ten or fourteen calendar days is sufficient. In this respect one should realise that timeshare contracts are typically concluded with a consumer who is on holiday and who in practice, often under the influence of the holiday atmosphere (and frequently also of

³⁸ Cf. Recitals 3 and 4 of the preamble to the distance selling directive, Recitals 3 and 4 of the preamble to the Distance marketing of financial services, and Recitals 6 and 7 of the consumer credit directive.

³⁹ Cf. for doorstep selling Canaris (2000), p. 346; G. Reiner, 'Der Verbraucherschützende Widerruf im Recht der Willenserklärungen', *Archiv für die civilistische Praxis* 203 (2003), p. 9-10; Büßer (2001), p. 101, 118; Valk (2004), nos. 16-22. Cf. for timeshare Reiner (2003), p. 10; Valk (2004), no. 24.

intoxicating substances, such as alcohol and drugs), is not always capable of properly evaluating important decisions. In such cases, to be really effective, the cooling-off period probably should only start to run once the consumer is back home. A rule to that extent, obviously, has the drawback that it causes much uncertainty for the trader as to when the cooling-off period has finally started to run and subsequently when it has elapsed. Moreover, the Unfair Commercial Practices Directive,⁴⁰ together with traditional doctrines on absence or vice of consent (in particular: misrepresentation, deceit, fraud and threat) will probably provide sufficient relief for the consumers concerned. In my view, this implies that the possibility that the right of withdrawal will not be effective in all situations cannot justify a different length of the cooling-off period just for timeshare contracts.

b) Taking away barriers to cross-border trade

With regard to distance selling of goods and services it is not so much the need to protect the consumer from existing trade practices, but the (European legislator's) wish to take away barriers that obstruct the development of the internal market.⁴¹ An important psychological barrier in the area of distance selling is the fact that the parties to the contract cannot see each other face-to-face at the moment of conclusion of the contract. Secondly, the consumer often has problems in picturing the goods or service offered.⁴² Furthermore, it will be more difficult for the consumer to better evaluate whether the goods or services offered to him will meet his needs. On the one hand, it is hard to put the necessary questions to the trader. On the other hand, information that is given is often volatile in nature.⁴³ For these reasons, the consumer is thought to be inclined to purchase the goods or services from the trader operating locally instead of surfing on the internet and buying it elsewhere – possibly even abroad. It is thought this disadvantage would diminish or be taken away if the consumer were allowed to rethink his decision when he has the good in his hands. He could then examine whether

⁴⁰ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, *OJ* 2005, L 149/22.

⁴¹ Cf. Recitals 3 and 4 of the preamble to the Distance selling directive, Recitals 3 and 4 of the preamble to the Distance marketing of financial services, and Recitals 6 and 7 of the Consumer credit directive.

⁴² Cf. H.Chr. Grigoleit, 'Besondere Vertriebsformen im BGB', *Neue Juristische Wochenschrift* 2002, p. 1151; Chr. Wendehorst, in: Münch.Komm. no. 4 before § 312b BGB; Büßer (2001), p. 101, 120.

⁴³ Cf. Recitals 11, 13 and 14 of the preamble to the Distance selling directive.

or not the purchased goods meet his expectations, assess their qualities and the reliability of the seller, and reconsider his initial decision.⁴⁴ However, the element of ex post quality assessment is not possible in the case of distance selling of services, as the right of withdrawal ceases when the service is rendered.⁴⁵ Similarly, in the case of distance marketing of financial services, the right of withdrawal is excluded where the contract has been fully performed by both parties at the express request of the consumer before the cooling-off period has ended.⁴⁶

In any case, for distance contracts the right of withdrawal seems to be aimed at enticing the buyer to engage in cross-border transactions. To my mind, it is doubtful whether that goal justifies the choice for a far-reaching instrument such as the right of withdrawal. An urgent need for protection seems absent here since the consumer will normally not be pressured into concluding a contract. As there is no need to 'cool off', one may wonder whether a cooling-off period should be awarded at all, in any case in the 21st century, where e-commerce has come of age. First of all, it seems unlikely that harmonisation of private law will result in a (substantive) increase in cross-border contracts, as other – arguably more import – barriers such as diverging tax rates and different languages are not taken away.⁴⁷ Although harmonisation will certainly take away some barriers for trade within the internal market, the promotion of the internal market is therefore not a convincing argument to introduce or maintain a right of withdrawal. As a consequence, the idea that the right of withdrawal should remove barriers to trade therefore cannot justify a different length of the cooling-off period just for distance contracts.

c) Promoting the online conclusion of contracts?

One could argue that a separate argument to introduce and maintain a right of withdrawal is actually the promotion of concluding online contracts as such. In fact, most of the arguments put forward in the previous section are actually based on the idea that if more online contracts are concluded, this will (ultimately?) lead to more cross-border contracts.⁴⁸ Looking at it from this angle, one should really focus on taking away barriers for the online conclusion of contracts. In this respect, one should reiterate these barriers:

⁴⁴ Cp. Wendehorst, in: Münch.Komm. no. 4 before § 312b BGB; Valk (2004), no. 26.

⁴⁵ Cf. art. 6, para. 3 of the distance selling directive. Cf. also Büber (2001), p. 138-139.

⁴⁶ Cf. art. 6, para. 2 sub (c) of the distance marketing of financial services directive.

⁴⁷ See in this respect J.M. Smits, 'Europa en het Nederlandse privaatrecht', *Nederlands tijdschrift voor Burgerlijk Recht* 2004, p. 495.

⁴⁸ Promoting the conclusion of contracts through the Internet would therefore *indirectly* enhance the use consumers and businesses make of the internal market.

1. the parties to the contract cannot see each other face-to-face at the moment of conclusion of the contract;
2. the consumer often has problems in picturing the goods or service offered; and
3. it is more difficult for the consumer to evaluate whether the goods or services offered to him will meet his needs.

All of these barriers are, to some extent, valid and true. Yet, this does not seem to be sufficient justification to introduce or maintain a right of withdrawal in distance contracts, as most of the time⁴⁹ it is the consumer himself who decides to make use of this method for concluding contracts: he switches on the computer, directs his browser to the website of a trader, and subsequently orders a specific good or service. This objection applies in particular to goods (and to a lesser extent also to services) that the consumer may also purchase in a regular retail shop, where e-commerce has come of age and has developed into just another sales method. Sometimes, another argument is implicitly brought forward: the introduction or maintenance of a right of withdrawal means that the consumer need not engage in difficulties whether or not the goods delivered or the services rendered are in conformity with the contract, is valid. However, that argument would equally apply to contracts concluded in a regular retail shop. If this is not perceived as a justification to introduce a right of withdrawal also for such 'normal' contracts, there is no reason to accept it as a justification to maintain a right of withdrawal for distance contracts.

The conclusion, therefore, must be that the right of withdrawal is hardly justified in the case of distance contracts. I take it as a fact that there does not seem to be support for abolishing that right. Yet, one should conclude from the above that there is in any case no reason to have a *different* duration of the cooling-off period for just distance contracts.

d) Complex contracts

Another ground for the introduction of such a right could be the complex nature of the concluded contract itself. In particular contracts pertaining or relating to financial services (including consumer credit contracts and

⁴⁹ It may be different in the situation where a consumer is approached directly by the seller or service provider, e.g. in the case of cold calling. One could argue, however, that the problem here is that this situation is not covered by the doorstep selling directive, which would be much more appropriate as similar problems as with 'regular' doorstep selling contracts apply.

contracts where the purchase of a good or service is combined with the conclusion of a credit contract) are often of such complexity that even a well-educated and well-informed consumer can't easily ascertain whether the service provider's offer meets his demands. In such a case, the consumer might need to obtain objective information or advice. Ideally, he would have done so before the contract was concluded, but it may in fact be difficult for an independent adviser to inform or advise a client if the contract itself has not already been concluded and, therefore, it is not yet clear what exactly the content of the consumer's rights and obligations would be. The mere provision of information – e.g. by imposing obligations on the service provider to inform the consumer – would in such a situation not take away the information asymmetry between the parties: the only thing a consumer could do in such a case, is to obtain independent advice elsewhere afterwards and thus to be able to assess the quality of the service offered, and to determine whether that service meets his subjective needs and specific circumstances. In order to be effectively able to do so, the consumer would have to have the possibility to withdraw from the contract if the advice given to him prompts him to do so.

The complex nature of the product offered by the trader could therefore justify the introduction of a right of withdrawal, in particular in the area of financial services. Moreover, such a right would be useful both in case of distance contracts – as is currently provided by the Distance Marketing of Financial Services Directive – *and* in the case of contracts concluded in the offices of such a service provider. In this respect, it is to be noted that in the case of life assurance contracts, the right of withdrawal already applies irrespective of the manner in which the contract is concluded.

As the consumer needs to seek independent advice and advisers knowledgeable in the field may not be found all that easily – and may not be available immediately – the cooling-off period should be sufficiently long in order to be effective. The periods of fourteen calendar days opted for in the Distance Marketing of Financial Services Directive and in the Consumer Credit Directive seem sufficiently long to at least receive timely preliminary advice, provided that the consumer undertakes to obtain advice without too much hesitation.⁵⁰ The period of thirty calendar days accepted for life assurance contracts, on the other hand, seems unreasonably long.

⁵⁰ The service provider should, of course, not be burdened with the fact that a hesitant consumer may not be able to obtain independent advice in time.

3. Conclusion as to the optimal duration of the cooling-off period

It is not easy to establish what an optimal duration for the cooling-off period would be. In deciding on the duration, the differing interests of the consumer and the trader need to be reconciled as much as possible. Moreover, as was argued in section III.1., unless there are pressing reasons *not* to introduce a uniform period for all rights of withdrawal, such a uniform period should be opted for. In the previous section we have identified the reasons for introducing and maintaining the right of withdrawal. In the case of distance selling, it is debatable whether there (still) is sufficient justification to maintain the right of withdrawal. This implies that the optimal duration for the cooling-off period should not take too much account of the distance selling situation in this respect. In the case of doorstep selling, timeshare and complex contracts, a right of withdrawal seems indeed to be justified. The optimal duration for the cooling-off period should therefore respect the needs that follow from the conclusion of such contracts. From this it follows that a cooling-off period of fourteen calendar days is needed but sufficient in the case of complex contracts. Such a period would in most cases also be sufficient for timeshare contracts and certainly for doorstep selling contracts (where a shorter period would probably also have been acceptable). The fourteen calendar days period opted for in Article 12(1) of the Proposal for a Consumer Rights Directive therefore seems to be optimal indeed.⁵¹

IV. Start and end of the cooling-off period

1. The start of the cooling-off period

In order for the right of withdrawal to be effective, the consumer needs to be informed thereof. With the exception of the Second Life Assurance Directive, all directives that have introduced a right of withdrawal include such an obligation for the trader to inform the consumer of his right of withdrawal, albeit that the details differ – especially as regards the consequences of a failure to properly inform. In the Doorstep Selling Directive, the cooling-off period starts when the contract is concluded and the consumer has received written notice from the trader of his right of withdrawal.⁵² Therefore, as the ECJ confirmed in the *Heininger*-case, the cooling-off period does not start before the consumer is informed of his right

⁵¹ In this sense already M.B.M. Loos, The case for a uniformed and efficient right of withdrawal from consumer contracts in European Contract Law, *Zeitschrift für Europäisches Privatrecht* 2007/1, p. 32.

⁵² Cf. art. 5 para. 1 and art. 4 of the doorstep selling directive.

of withdrawal.⁵³ Failure to inform the consumer of his right of withdrawal thus implies that the cooling-off period never starts to run and therefore does not end. As a consequence, the consumer may withdraw from the contract, if need be, even years after the contract was concluded.⁵⁴ National law may, however, provide that the cooling-off period does end when a month has passed after both parties have fully performed their obligations under the contract.⁵⁵ Similarly, in the case of a distance contract pertaining to financial services and in the case of a consumer credit contract, the cooling-off period only starts when the contract is concluded *and* the trader has fulfilled his information duties.⁵⁶ Again, if the information has not been provided, the cooling-off period does not start to run. Under the existing Timeshare Directive the cooling-off period starts when both parties have signed the timeshare contract or a binding preliminary contract, whether or not the consumer was informed of his right of withdrawal or other rights and obligations. A failure to provide the information only leads to a (limited) extension of the cooling-off period.⁵⁷ Under the new Timeshare Directive, however, the cooling-off period only starts to run when the information has been provided.⁵⁸ In the case of distance selling, a division must be made between the sale of goods and the supply of services. In the former case, the cooling-off period starts when the goods are delivered, whereas in the latter case, the cooling-off period already starts when the contract is concluded (and even ends when the contract, with the agreement of the consumer, is performed during the cooling-off period). In both cases, again, the trader's failure to live up to his information duties does not delay the start of the cooling-off period, but does lead to a limited extension of the cooling-off period.⁵⁹

This means that there are at least four possible moments in which the cooling-off period may start:

1. when the contract (or a binding pre-contract) is concluded (existing rule on timeshare; distance selling of services);

⁵³ Cf. ECJ 13 December 2001, case C-481/00, ECR [2001] p. I-09945 (Heininger/Bayerische Hypo- und Vereinsbank AG), nos. 44-48

⁵⁴ In the Heininger case, the consumers withdrew from the contract almost 8 years after the contract was concluded

⁵⁵ Cf. ECJ 10 April 2008, case C-412/06, ECR [2008] n.y.r. (Hamilton/Volksbank Filder)

⁵⁶ Cf. art. 6 para. 1 of the distance marketing of financial services directive and art. 14 para. 1 of the consumer credit contract.

⁵⁷ Cf. art. 5 para. 1 of the existing timeshare directive. The obligation to inform the consumer of his right of withdrawal follows from art. 4 of the directive in conjunction with the Annex sub l.

⁵⁸ Cf. art. 6 para. 2 of the new timeshare directive.

⁵⁹ Cf. art. 6 para. 1 of the distance selling directive.

2. when the trader has performed his main obligation under the contract (distance selling of goods);
3. when the trader has performed his information obligation pertaining to the existence of a right of withdrawal (doorstep selling);
4. when the trader has performed all of his information obligations (distance marketing of financial services; consumer credit; new timeshare rule).

The issue of the starting point of the cooling-off period was not addressed in the responses to the Green Paper. In the reactions to the consultation on distance selling, it was established that the starting point of the cooling-off period was not unambiguous in the case of distance selling. For instance, in the case of distance selling of prepaid mobile phones the consumer purchases both a good (the mobile phone) and a service (the possibility to make use of the phone during a certain period). When does the cooling-off period start: when the phone is delivered or when the contract is concluded? The starting point of the cooling-off period is also unclear when goods are delivered in batches: does the consumer have a right of withdrawal after every individual delivery, or is the delivery of the first or the last good decisive for the cooling-off period to start running?⁶⁰

These questions originate from the fact that the starting point of the cooling-off period differs whether the distance selling contract pertains to the delivery of goods or the supply of services: were the starting point harmonised, these problems could simply cease to exist. As will be explained below, there is no objective justification for a distinction between the starting moments for the delivery of goods and the supply of services on the basis of a distance contract: why should the buyer of goods be allowed to evaluate the purchased goods after having received them, whereas the purchaser of an online service may only do that prior to the performance of the service? In so far as there should be a right of withdrawal for distance contracts, at least the starting moments should be the same. This implies that option 2 (cooling-off period starts when the trader has performed his main obligation under the contract) should be rejected.

All other options have advantages and disadvantages. Option 1, which implies that the cooling-off period would start upon conclusion of the contract, has the clear advantage of a large degree of certainty as to the start and end of the cooling-off period. Whether or not the consumer is informed of his right of withdrawal is of no relevance as to the starting point; failure to inform the consumer thereof does lead to an extension of the cooling-off period, but that extension is limited by the introduction of a cut-off period.

⁶⁰ Distance selling document, p. 10.

Both measures contribute to legal certainty, which is in the interest of both parties. The drawback of this scenario, however, is that there is a disincentive for the trader to perform his information obligations, as in doing so he may alert the consumer to his right of withdrawal and therefore runs the risk of losing the contract. Options 3 and 4 take away these drawbacks, as the non-observance of the relevant information obligation(s) is effectively sanctioned by delaying the start of the cooling-off period. The disadvantage, obviously, is that a contract could be withdrawn from sometimes long after the parties have started to perform it, as is indicated by the *Heininger*-case. However, one could limit the detrimental consequences thereof by providing, as was done in the *Hamilton*-case, that the right of withdrawal elapses when the contract has been fully performed by both parties and subsequently a relatively short period has elapsed. In such a way, options 3 and 4 serve legal certainty in the same way as does option 1: they provide a clear starting point for the cooling-off period, i.e. when both the contract is concluded and either all information obligations (option 4) or at least the obligation to inform the consumer of his right of withdrawal (option 3) have been performed. Furthermore, they have the advantage that the minimum requirement for a proper functioning of the withdrawal is met: in order for a right of withdrawal to be effective, the consumer needs to be informed thereof.⁶¹

When determining the optimal rule for the Proposal for a Consumer Rights Directive, one should consider that the proposal starts from the perspective of full harmonisation, implying that any national rule protecting the consumer better than the existing minimum rules will have to be abolished. This in itself could be considered an argument against option 1, which should be seen as the absolute minimum of consumer protection in the current European directives. Accepting option 1 would amount to lowering consumer protection for most cases. Secondly, one should consider that option 4 has been adopted in the area of Distance Marketing of Financial Services Directive (2002) and, even more recently, the Consumer Credit Directive (2008) and the 2008 Timeshare Directive. In this respect, it would seem odd to adopt a different rule for other contracts without a convincing argument – which is lacking.

In this respect, the Proposal for a Consumer Rights Directive is simply disappointing: Article 12(2) of the Proposal largely maintains the status quo.⁶² As we saw above, apart from the complications as regards information obligations, this means that the starting point of the cooling-off period is normally at or around the moment the contract is concluded.⁶³ Yet,

⁶¹ Cf. Loos (2007), p. 20-21.

⁶² Cf. art. 12 para. 2 proposal for a consumer rights directive.

⁶³ Under the provisions of the proposal for a consumer rights directive: in the case of distance selling of services at the moment when the contract is concluded (art. 12 para. 2, third sentence), in the case of doorstep selling the signing of the order form or, if the

in the case of distance selling of *goods*, the cooling-off period only starts when the goods are delivered, i.e. when the seller has already performed his main obligations under the contract.⁶⁴ At first glance, this later moment for the start of the cooling-off period seems logical, as the cooling-off period is (also) meant to serve the interests of the consumer to ascertain the nature and the functioning of the goods, which he could not do at the moment of the conclusion of the contract.⁶⁵ However, in the case of other consumer contracts where a right of withdrawal is awarded, the cooling off-period always starts to run around the time of conclusion of the contract. In many of these cases, the consumer will not have received the goods or services within the cooling-off period – so he will not be able to ascertain their nature and whether they function properly – and if he does receive them, he may already have lost his right of withdrawal altogether, as is the case with distance selling of services.⁶⁶ In particular, it is not clear why this argumentation would be valid for distance selling of goods and doorstep ('off-premises') selling of the same goods, where the consumer is not always able to examine the goods prior to the conclusion either. In doorstep selling practices, the consumer is often only shown one or a few samples but is required to order from a catalogue, where products are also offered that were not shown to the consumer in the form of a sample. So what is so special about distance selling of goods that a fundamentally different starting point is chosen here? Is this just reminiscent of a tradition developed at a time when e-commerce was a novelty and needed to be supported by unorthodox instruments in order for consumers to trust in this manner for concluding contracts? We do not know, as the Commission does not substantiate why a difference needs to be made – or continued, to be more precise, as the existing Distance Selling Directive contains the same distinction.⁶⁷ It seems to me, however, that the Commission has failed to seize the moment here to really harmonise the rules on the cooling-off periods.⁶⁸

contract is not signed on paper, the moment the consumer receives a copy thereof (art. 12 para. 2, first sentence). Similarly, in the case of timeshare, distance marketing of financial services and consumer credit, the signing of the contract or a binding precontract (art. 6 para. 2 of the new timeshare directive, art. 6 para. 1 distance marketing of financial services directive, and art. 14 para. 1(a) consumer credit directive).

⁶⁴ Art. 12 para. 2, second sentence, of the proposal for a consumer rights directive.

⁶⁵ See explicitly Recital (22) in the preamble to the proposal for a consumer rights directive.

⁶⁶ Cf. art. 19 para. 1 sub (a) of the proposal for a consumer rights directive.

⁶⁷ Cf. art 6 para. 3 of the proposal for a consumer rights directive.

⁶⁸ Obviously, there are good reasons why the cooling-off period in contracts for the supply of services should not start to run after reception of the service, as in most cases the service cannot be returned or, in the case of software distributed through the internet, the

In the case of doorstep selling, the Proposal does at first glance seem to lead to a new starting point for the cooling-off period. Under the present Directive, the cooling-off period only starts when the consumer is informed of his right of withdrawal.⁶⁹ Under the proposal, the normal starting point will be when the consumer signs the order form.⁷⁰ The order form is described as an instrument setting out the contract terms, to be signed by the consumer⁷¹ and is to contain the standard withdrawal form.⁷² This implies that at the moment when the contract is concluded, the consumer normally will be informed of the existence of the right of withdrawal and the way in which he can exercise this right. If, however, the contract is not concluded on paper, the cooling-off period only starts when the consumer receives a copy of the order form on another durable medium.⁷³ In fact, this means that in reality, the cooling-off period will start for doorstep selling contracts when the trader has performed all of his information obligations. In this respect, the European Commission has therefore opted for option 4.

However, the wording of Articles 10 and 12 CR Dir. raises the question of what is to happen if the order form is on paper, but the consumer is not given a copy thereof. Although the ideas underlying the proposed Directive undoubtedly imply that the consumer is given such a copy, no provision actually requires the trader to do so: the proposal merely requires the order form to contain the required information in plain and intelligible language and in a legible manner, and that the contract is signed.⁷⁴ Moreover, under the present draft, the cooling-off period may even start before the contract is concluded, i.e. in the case where the consumer signs the order form before the trader is legally bound to the contract. In theory, it may even be that the consumer has already lost his right of withdrawal before the contract is ultimately concluded. I assume the European Commission has not intended this. However, as the Proposal explicitly forbids the Member States to impose further formal requirements on the trader,⁷⁵ or – given the full harmonisation purpose of the proposed Directive – to provide that the cooling-off period does not start to run before the contract is concluded, these situations cannot be remedied by the Member States arguing that such measure is necessary for the *effet utile* of the proposed Directive. This

consumer too easily could have made a (then free) copy of the service. But this does not explain why a different rule should apply as regards the supply of goods.

⁶⁹ Cf. art. 5 para. 1 jo. art. 4 of the doorstep selling directive.

⁷⁰ Cf. art. 12 para. 2, first sentence, of the proposal for a consumer rights directive.

⁷¹ Cf. art. 2 sub (11) of the proposal for a consumer rights directive.

⁷² Cf. art. 10 para. 2 of the proposal for a consumer rights directive.

⁷³ Cf. art. 12 para. 2, first sentence, of the proposal for a consumer rights directive.

⁷⁴ Cf. art. 10 paras. 1 and 2 of the proposal for a consumer rights directive.

⁷⁵ Cf. art. 10 para. 3 of the proposal for a consumer rights directive.

implies that if the differing starting points are not harmonised, at least these problems should be remedied by the European Commission.

By largely maintaining the status quo, the Commission has probably chosen the worst option available. The unjustified distinction between the sale of goods and the supply of services on the basis of a distance contract is not taken away. There still is no telling when the cooling-off period starts in the case of the sale of a prepaid phone or the delivery of goods in batches. In addition, the different approach between distance contracts and other ‘off-premises’ contracts is maintained. In other words: in this respect, the review has simply failed.

2. The trader’s breach of information obligations and the end of the cooling-off period

The situation is different where it concerns the end of the cooling-off period; here large differences also exist in the case where the trader has not informed the consumer of his rights. Under the Distance Marketing of Financial Services Directive and the Consumer Credit Directive, as the cooling-off period does not start to run before the information obligations have been met, the consumer might be able to withdraw from the contract long after it has been fully performed by both parties. The same holds true for doorstep selling in so far as the consumer was not informed of his right of withdrawal, albeit that under the *Hamilton*-case a Member State may provide that the right to withdraw ends after a relatively short period has elapsed once both parties have fully performed the contract.⁷⁶ Under the Distance Selling Directive and the existing Timeshare Directive, however, a breach of (any of) the information obligations only implies that the cooling-off period is extended to a maximum of three months (in the case of distance selling)⁷⁷ or to a maximum of three months plus ten days (in the case of timeshare).⁷⁸ Under the new Timeshare Directive, however, the extension will be much longer. If the information on the right of withdrawal has not been provided then the cooling-off period ends when one year and fourteen calendar days have passed after the conclusion of the contract; if other information obligations have not been met then the cooling-off period ends three months and fourteen calendar days after the conclusion of the contract.⁷⁹ The new

⁷⁶ See above.

⁷⁷ Art. 6 para. 1 of the distance selling directive.

⁷⁸ Art. 5 para. 1 of the timeshare directive.

⁷⁹ Cf. art. 6 para. 3 of the new timeshare directive. In fact, para. 3 refers to paragraph 2 as a whole, thus including also limb (b). This would mean that the cooling-off period does not end at the intended date, as it would not have started according to limb (b).

Timeshare Directive seems to have struck the right balance between the interests of both parties: on the one hand, the extension of the cooling-off period by three months in case of breach of 'normal' information obligation seems to provide a proper incentive for the trader to meet these information obligations. Where the consumer is simply left unaware of the existence of his right of withdrawal, a much longer period is offered. An indefinite extension, allowing the consumer to withdraw even years after the contract has otherwise been performed, would not be in the interest of legal certainty and not serve any justified interest on the part of the consumer.

In the Proposal for a Consumer Rights Directive, however, the Commission did not follow the solution introduced in the new Timeshare Directive, nor did it follow the solution adopted under the 2002 Distance Marketing of Financial Services Directive and the 2008 Consumer Credit Directive. Instead, it basically combined the rules in the Doorstep Selling Directive as interpreted by the European Court of Justice in the *Hamilton*-case with the provisions of the Distance Selling Directive: Article 13 CR Dir. provides that the cooling-off period is extended only in the case of a breach of the obligation to inform the consumer of his right of withdrawal. The extension is restricted to three months after the trader has fully performed his other obligations under the contract. Any other breach of the information obligations is not sanctioned by the proposed Directive itself, but – in accordance with the general provision of Article 6(2) CR Dir. – left to the Member States. However, it is unclear whether the restriction of the extension of the cooling-off period to three months also applies if the trader has not only breached his obligation to inform the consumer of his right of withdrawal but also other information obligations. As Article 5(3) CR Dir. explicitly provided that the information to be given under Article 5(1) – including that on the existence of a cooling-off period⁸⁰ – forms an integral part of the contract, the non-performance of the obligation to inform could prevent the operation of the provision on the ending of the cooling-off period.

However, in most cases the Proposal will be less favourable to consumers than is currently the case for both distance selling and doorstep selling contracts. Under the present Distance Selling Directive, any breach of the information obligations leads to an extension of the cooling-off period.⁸¹ Under the Proposal for a Consumer Rights Directive, however, the cooling-off period is extended only if the trader has not informed the consumer of his right of withdrawal.⁸² A breach of any other information obligation is not

Obviously, the reference must be intended to refer to paragraph (1)(a) only, as paragraphs 2 and 3 would otherwise virtually have no meaning.

⁸⁰ Cf. art. 5 para. 1 under (e) of the proposal for a consumer rights directive.

⁸¹ Cf. art. 6 para. 1 of the distance selling directive.

⁸² Cf. art. 13 of the proposal for a consumer rights directive.

sanctioned by an extension of the cooling-off period. Instead, and in line with the general provision of Article 6(2) CR Dir., the sanction for such a breach of an information obligation is left to the Member States. In the case of doorstep selling contracts, consumers will be worse off under the Proposal as it limits the extension of the cooling-off period to three months after the trader has performed his other contractual obligations, whereas currently the cooling-off period would not start to run before the consumer is informed of his right of withdrawal.

V. Abuse of the Right of Withdrawal

The more recent directives have all explicitly provided that the consumer need not state reasons for his withdrawal.⁸³ Article 12(1) CR Dir. merely follows this approach. As a consequence, it is not considered relevant why the consumer wishes to withdraw from the contract. This implies that the consumer may even withdraw from the contract if he could get a better price elsewhere or, after reconsideration, does not like the colour of the goods purchased by way of a distance selling contract. The mere fact that the consumer – for whatever reason – has changed his mind suffices for his withdrawal, provided of course that the right of withdrawal was exercised in good time.⁸⁴ Moreover, where the consumer does state reasons, these need not be taken into account, even if they wrongfully resemble an argument for avoidance based on fundamental mistake or termination for non-performance, as long as it can be assumed that the consumer wants to come back on his decision to conclude the contract.⁸⁵

As we saw earlier, under the Doorstep Selling Directive, the Distance Marketing of Financial Services Directive and the Consumer Credit Directive – as well as the suggested option for the Consumer Rights Directive⁸⁶ – the trader's failure to inform the consumer of his right of withdrawal implies that the cooling-off period has not started to run, implying that the consumer would still be able to withdraw from the contract years later, provided only that the right of withdrawal has not ceased for

⁸³ Cf. art. 5 para. 1 of the existing timeshare directive, art. 6 para. 1 of the new timeshare directive, art. 6 para. 1 of the distance selling directive, art. 6 para. 1 of the distance marketing of financial services directive, and art. 14 para. 1 of the consumer credit directive. The doorstep selling directive keeps silent about the matter.

⁸⁴ Cf. Canaris (2000), p. 346-347, who is of the opinion that this price is not too high, given the advantages from the point of view of legal certainty and result. Valk (2004), nos. 3 and 41, considers this 'overkill', but a logical consequence of the notion of a right of withdrawal as such.

⁸⁵ Cf. Hijma (2004), nos. 43, 59.

⁸⁶ See above, section 4.

another reason.⁸⁷ Whether or not the consumer has a valid reason to withdraw, would not be considered relevant, as he need not state any reasons in the first place. This may be problematic. Imagine, for instance, the situation in which a consumer lawyer buys – on the basis of a distance selling contract – a white refrigerator for the kitchen in his new house. The consumer is not informed of his right of withdrawal, but obviously is aware that he has such a right. Two months after the delivery of the refrigerator he realises that a metallic refrigerator would actually look better in his new kitchen. For that reason, he then wishes to invoke his right of withdrawal. The only reason why he would still be able to do so is the fact that the trader had not properly informed him of the right of withdrawal, even though this particular consumer was well aware he had such a right. In such a case,⁸⁸ one could argue that a court should apply the doctrine of abuse of right or a similar doctrine⁸⁹ in order to prevent the consumer from successfully invoking the right of withdrawal at will.⁹⁰ Community law currently would not stand in the way of the application by a national court of such a doctrine in the case of deceit or abuse of a right originating from a European directive.⁹¹ However, one could argue that in the case of rights of withdrawal, which can be invoked by the consumer at will, the European legislator has taken the possibility of abuse of right for granted. In this view, there would not be any room for the application of such a doctrine.⁹² In my view, in the interest of legal certainty a hard and fast rule allowing consumers to withdraw if the set requirements are met is preferable over a rule that takes individual circumstances pertaining to this particular consumer into account – thus leaving room for litigation over the question

⁸⁷ Most importantly: the case where apart from the information obligations both parties have performed the contract fully, see above, section 4.

⁸⁸ Whether this situation would constitute an exceptional case justifying the disapplication of the right of withdrawal may of course be questioned, but that is beside the point I wish to make here.

⁸⁹ Depending on the national law of the court; one may think of doctrines such as estoppel, *Rechtsverwirkung* and good faith and fair dealing.

⁹⁰ Cf. Ulmer, in: Münch.Komm. no 65 to § 355 BGB; Reiner (2003), p. 27; Hijma (2004), nos. 67-68, who argue that in exceptional cases such doctrines could be applied. In this sense also BGH 19 February 1986, VIII ZR 113/85, *Entscheidungen des Bundesgerichtshofs in Zivilsachen (BGHZ)* 97, 127 under II.4, where the Bundesgerichtshof ruled that a court may only in the case of very limited exceptions (*‘nur in eng begrenzten Ausnahmefällen’*) accept that the consumer abuses his right of withdrawal.

⁹¹ Cf. ECJ 12 May 1998, case C-367/96, *ECR* 1998, I-2843 (Kefalas/Greece).

⁹² Cf. Büßer (2001), p. 137-138, who, however, makes an exception for the situation, described here, where the consumer actually knew of the existence of his right of withdrawal (p. 178-179).

whether or not these individual circumstances justify a restriction of the right of withdrawal in this particular case. In this situation, the costs of (possibly) achieving justice in the individual case are too high in view of the benefits thereof, taking into account that the trader has it under his own control to prevent the prolongation of the cooling-off period by performing his obligation to inform. In my view, the doctrine of abuse of right should therefore not be applied in these cases.

VI. Form Requirements for Withdrawal

Another important matter is how the consumer must express his decision to withdraw from the contract. The current European directives do not provide one uniform answer as to how the consumer is to withdraw from the contract. The Distance Selling Directive and the existing Timeshare Directive only require notification of the withdrawal, but allow the notification to take place by any means as no mention is made of any form requirement, implying that such requirement is not allowed. However, under the Timeshare Directive, where the consumer notifies his withdrawal in writing, the right of withdrawal is considered to have been exercised in good time if the notification is dispatched before the cooling-off period expires.⁹³ From this one may deduce that a notice need not be in writing in order to be effective. The new Timeshare Directive, however, requires a notification on paper or on another durable medium.⁹⁴ Under the Distance Marketing of Financial Services Directive and the Consumer Credit Directive, notification of withdrawal is required by any means that can be proven *in accordance with national law*.⁹⁵ Where national law, as a matter of proof, requires a statement or a statement on a durable medium, the consumer's notice will have to abide with that requirement. At first glance the most restrictive approach is taken by the Doorstep Selling Directive, which provides that the consumer may withdraw from the contract 'by sending notice'.⁹⁶ This does suggest that a written statement is required. However, the ECJ has explicitly ruled that the Directive 'does not preclude a Member State from adopting rules providing that the notice of renunciation provided for by Article 5(1) of the [Doorstep Selling] Directive is *not* subject to any condition as to form'.⁹⁷ The Doorstep Selling Directive dates back from before the emergence of

⁹³ Art. 5 para. 2, second sentence, of the existing timeshare directive..

⁹⁴ Art. 7, first sentence, of the new timeshare directive.

⁹⁵ Cf. art. 6 para. 6 of the distance marketing of financial services directive and art. 14 para. 3 (a) of the consumer credit directive.

⁹⁶ Cf. art. 5 para. 1 of the doorstep selling directive.

⁹⁷ Cf. case C-423/97, ECJ 22 April 1999, *ECR* 1999, I-2195 (*Travel Vac SL/Anselm Sanchís*), nos. 50-52 (emphasis added, ML).

electronic commerce; it is clear that any rule based on this provision should take account of the current possibilities for concluding and ending contracts by electronic means. This implies that a similar rule as adopted in the new Timeshare Directive would then be opted for.

In short, three different rules apply as regards the requirements that may be posed on the notification of the withdrawal:

1. notification of withdrawal is possible by any means (existing timeshare rule; distance selling);
2. notification of withdrawal is possible by any means that can be proven in accordance with national law (distance marketing of financial services; consumer credit);
3. notification of withdrawal should be in writing or on a durable medium (doorstep selling, as amended for the electronic age; new timeshare rule).

The second option implies that the applicable national law is to decide upon the validity of the notification. Such a rule is problematic in cases where the consumer has concluded an international contract without being aware thereof; this may occur in particular in the case of distance contracts. In many cases, such a contract would be governed by the law of the trader, which may impose requirements unfamiliar to the consumer as to the proof of his withdrawal. Even though this is the option chosen in the two most recent directives awarding the consumer a right of withdrawal, it should be rejected as the possible rule for a Consumer Rights Directive. This leaves us with the 'liberal' rule of option 1, and the more stringent option 3.

It is clear from the responses to the Green Paper that there is a need for harmonisation of the manner in which the right of withdrawal is to be exercised. Such a uniform regulation would lead to simplification and legal certainty. Consumer organisations generally prefer not to introduce form requirements as to the notification of withdrawal (the simpler, the cheaper and more effective the right of withdrawal is), implying a preference for option 1. From the business side, and even some consumer organisations, a form that allows for proof of the withdrawal – a registered letter, an e-mail or a fax message – is sometimes preferred (option 3). The European Parliament advocates the introduction of a standard form, drafted in all the official languages of the Community. Such a standard form should serve to meet several concerns of the Parliament: simplifying procedures, saving costs, increasing transparency and improving consumer confidence.⁹⁸ Such a standard form is also suggested in the reactions from consumer organisations

⁹⁸ Review of consumer acquis document, p. 9.

to the distance selling consultation.⁹⁹ The Member States are divided on the matter of form requirements.

The manner in which the consumer may withdraw from the contract has been explicitly regulated in the Draft Common Frame of Reference.¹⁰⁰ Under Article II.-5:102 DCFR, the consumer need only give notice of his wish to withdraw from the contract, without having to specify the reasons for doing so. From Article II.-1:106 DCFR it follows that the notice may be given by any means appropriate to the circumstances and that it becomes effective when it reaches the trader. That is considered to always be the case if the notice is delivered to the trader in person or when it is delivered to the trader's place of business. The drafters of the DCFR thus have chosen in favour of option 1. In the comments to the Acquis Principles, which have formed the underlying data upon which the DCFR is based in this area, this choice is explained by pointing out that it is at least questionable as to whether the introduction of any form requirement could be regarded as an improvement of the *acquis communautaire*. It is acknowledged that the observance of a specific form may help to verify the actual events – which is in the interests of both parties – and as such could help the consumer to prove he has indeed exercised his right of withdrawal. However, such formal requirements make it more complicated for the consumer to withdraw at all. Moreover, the argument that a requirement as to textual form in writing on a durable medium could serve as a proof of the withdrawal is required as false: in fact, 'anything short of a registered letter could fall short of this function' of the form requirement.¹⁰¹ In the view of the drafters of the DCFR and the Acquis Principles, the notice should only serve to inform the trader of the withdrawal. The form of the notice, therefore, should not matter. For that reason, a notice by text message (SMS) sent to a mobile phone number indicated on the trader's business card should suffice for a valid withdrawal.¹⁰² Moreover, returning the subject matter of the contract (e.g. the goods delivered) equally shows the trader that the consumer no longer wishes to be bound by the contract. As a consequence, it should also be considered to be a withdrawal. Therefore, following the example set by Germany,¹⁰³ Article II.-5:102, third sentence, of the DCFR explicitly

⁹⁹ Distance selling document, p. 9.

¹⁰⁰ On the DCFR, see Loos (2008), p. 2-5, with references.

¹⁰¹ Cf. P. Møgelvang-Hansen, E. Terry and R. Schulze, Comments to Article 5:102 Acquis Principles under no. 5, in: Research Group on the Existing EC Private Law (Acquis Group), *Principles of the Existing EC Private Law (Acquis Principles), Contract I, Pre-contractual Obligations, Conclusion of Contract, Unfair Terms*, Munich: Sellier. European Law Publishers 2007, p. 163.

¹⁰² Cf. S. Leible, J. Pisulinski and F. Zoll, Provisional Comments to Article 1:301 Acquis Principles under no. 3, in: Acquis Group (2007), p. 39.

¹⁰³ Cp. § 355 par. 1 BGB.

provides that returning the subject matter of the contract is considered a tacit withdrawal.¹⁰⁴

Given this – in my view: convincing – choice in favour of option 1, it is at least surprising that the Proposal for a Consumer Rights Directive and the new Timeshare Directive opt in favour of option 3.¹⁰⁵ Moreover, the way in which the Commission has worded the form requirement raises serious problems. According to Article 14(1) CR Dir., the consumer may choose to express his withdrawal in his own words or on a standard withdrawal form to be supplied by the trader, with such order form to meet the requirements of Annex I to the Proposal for a Consumer Rights Directive. Moreover, but apparently only in the case of a distance contract concluded over the internet, the consumer may also make use of an electronic standard withdrawal form on the trader's website if the trader decides to provide for such an additional possibility.¹⁰⁶ Apart from this additional possibility, however, the notification must be given on a durable medium.¹⁰⁷ This notion is defined in Article 2(10) CR Dir as:

any instrument which enables the consumer or the trader to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored.¹⁰⁸

Obviously, this rules out an oral notification. However, much more problematic is that under the current draft of Articles 2 and 14 CR Dir. (and under Articles 2 and 7 of the new Timeshare Directive), a withdrawal may not be notified to the trader by sending an e-mail. It is clear that the e-mail itself is not an instrument, which satisfies the requirements of Article 2 CR Dir. The preamble to the Proposal (Recital 16) further clarifies that:

The definition of durable medium should include in particular documents on paper, USB sticks, CD-ROMs, DVDs, memory cards and the hard drive of the computer on which the electronic mail or a PDF-file is stored'.

¹⁰⁴ In this sense also Article 5:102, third sentence, Acquis Principles.

¹⁰⁵ As indicated above, in the 2008 consumer credit directive a choice in favour of option 2 was made. However, this option should be rejected for the reasons explained above.

¹⁰⁶ Art. 14 para. 2 of the proposal for a consumer rights directive.

¹⁰⁷ Art. 14 para. 1 of the proposal for a consumer rights directive.

¹⁰⁸ Art. 2 under (10) of the proposal for a consumer rights directive. In this sense also art. 2 under (h) of the new timeshare directive.

From this it unequivocally follows that it is not the e-mail itself, but the hard drive of the computer on which the e-mail is stored, that would qualify as 'durable medium'. This, clearly, cannot have been the intention of the European Commission, as even in cases where the contract was concluded electronically, a written statement of a statement on a USB-stick or another medium would be required. If the Commission were to stick with its choice for option 1, it should at least reconsider the wording of Articles 2 and 14 CR Dir. (and Articles 2 and 14 of the new Timeshare Directive), in any case for those contracts that were concluded electronically or where the trader advertises or otherwise has informed the consumer of an address for electronic mail or communication through a website. However, it would be much simpler if the Commission would simply indicate that notice could be given by any means.

If the Commission would not ultimately change its course and choose option 1, the question arises of how to deal with the situation in which the consumer has not met the form requirement but the trader has nevertheless become aware of the consumer's intention to withdraw from the contract within the cooling-off period. This situation may arise, in particular, where the consumer has returned the goods during the cooling-off period to the trader without explicitly withdrawing from the contract. Should such a de facto withdrawal be considered valid even though the form requirement has not been met? In my opinion, this should be the case. The purpose of the form requirement is primarily of an evidentiary nature. The form requirement is not based on the need for protection of a fundamental interest of the trader as such, but only seeks to safeguard the trader's need for a clear, unequivocal statement by the consumer, whereas that objective has apparently been achieved in the particular case at hand. Moreover, maintaining the form requirement rigorously would contradict the purpose of the relevant directive, i.e. the protection of the consumer, who may very well be ignorant of the importance or the meaning of the form requirement. Requiring and maintaining a specific form for the notice of withdrawal would then turn against the consumer, as the trader could invoke the absence of a valid notice – and therefore the fact that the contract remained in force – even in cases where it was undisputed or proven that the consumer had withdrawn from the contract in good time.¹⁰⁹ This is even more pressing in the situation in which the trader had not properly informed the consumer of his right of withdrawal or had not provided the required standard withdrawal form.

VII. Receipt or Dispatch Principle in Case of Written Notice

¹⁰⁹ For this reason, the Dutch government did not introduce a form requirement as regards the notice of withdrawal for the sale of a house to a consumer. Cf. *Bijlage Handelingen Tweede Kamer* 1995/96, 23 095, no. 8, p. 6.

Even when the declaration of withdrawal need not be in written form, in order to be able to prove the (timely) delivery of the notice it will nevertheless often be in the consumer's interest to dispatch his notice of withdrawal in writing.¹¹⁰ However, sending a written notice may lead to difficulties as regards the timeliness of the withdrawal. In many legal systems, a notice becomes effective (only) when it reaches the addressee (receipt principle).¹¹¹ This is usually understood as implying that if a time limit applies as regards the giving of notice, the notice must have become effective before the time limit has elapsed. For the right of withdrawal, this would mean that the notice of withdrawal is only then effective if it is received by the trader within the cooling off-period. This is problematic, in particular, if the cooling-off period is short. It may also be problematic if the period is longer, but the postal services are reputedly slow. This is notoriously the case in cross-border situations, where letters sometimes first are shipped to the capital of the country where the consumer lives, from there to the capital of the country where the trader resides, and from there to the trader himself. Finally, no matter how long the cooling-off period is, the receipt principle will always be problematic if the consumer only decides to make use of his right of withdrawal shortly before the end of the cooling-off period.

Therefore, if the receipt principle were to apply in the case of a right of withdrawal, the period available for timely withdrawal would in practice often be considerably shorter than would appear from the black letter text of the applicable law. Especially in cross-border cases, the receipt principle would endanger the effectiveness of the right of withdrawal. This clearly plays a role in the case of timeshare, where the buyer often lives in a country other than where the contract is concluded, where the seller resides and where the immovable property is located. Not surprisingly, in the original Timeshare Directive, the European legislator set aside the receipt principle and accepted the dispatch principle. Under this principle, the notice is effective when it is dispatched during the cooling off-period,¹¹² provided of course that it eventually reaches the addressee. The same solution had been adopted earlier in the Doorstep Selling Directive¹¹³ and was accepted in the case of distance marketing of financial services,¹¹⁴ and, recently, in the

¹¹⁰ Cf. *Bijlage Handelingen Tweede Kamer* 2001/02, 23 095, no. 14, p. 20 as regards the Dutch withdrawal by a consumer from the sale of a house.

¹¹¹ Cf. the notes to art. 1:303 of the Principles of European Contract Law (PECL). Art. 1:303 PECL also accepts the receipt principle as the main rule, but recognises an exception in the case of non-performance, where the dispatch principle is accepted.

¹¹² Cf. art. 5 para. 2 of the existing timeshare directive and art. 7, third sentence, of the new timeshare directive.

¹¹³ Cf. art. 5 para. 1 of the doorstep selling directive; cf. Bartels/Sander (1998), p. 93-94.

¹¹⁴ Cf. art. 6 para. 6 of the distance marketing of financial services directive.

Consumer Credit Directive.¹¹⁵ Unfortunately, in the case of distance selling – where the promotion of the internal market by removing barriers for cross-border transactions is said to be the reason for introducing a cooling-off period – and the case of life assurance,¹¹⁶ the Directives are silent about the applicability of either the receipt or the dispatch principle. Whereas the Second Life Assurance Directive explicitly leaves both the consequences of a successful withdrawal and the conditions under which the withdrawal is to take place to the national legal systems,¹¹⁷ the Distance Selling Directive simply ignores the matter. As explained above, in many legal systems this could be understood as tacit acceptance by the European legislator of the *receipt* principle for these rights of withdrawal.¹¹⁸ However, if the Consumer Rights Directive were enacted as is now proposed, this possible misunderstanding would be clarified, as Article 12(3) CR Dir. explicitly indicates that the deadline set for the end of the cooling-off period is met ‘if the communication concerning the exercise of the right of withdrawal is sent by the consumer before the end of that deadline’.

VIII. Consequences of Withdrawal

Once the consumer has successfully withdrawn from the contract, performances rendered under the contract must be returned. Even though this principle is recognised in almost all directives, until now the way it is to be realised is largely left to national law.¹¹⁹ The fact that the performance must

¹¹⁵ Cf. art. 14 para. 3 (a) of the consumer credit directive.

¹¹⁶ Unless the distance marketing of financial services directive applies, as it follows from art. 6 of that directive that in that case the dispatch principle would apply.

¹¹⁷ Cf. art. 15 para. 1, third sentence, of the Second life assurance Directive.

¹¹⁸ Indeed, the Dutch government explicitly rejected the dispatch principle for distance contracts. During the parliamentary proceedings of the implementation act, the Dutch government explicitly argued that the receipt principle applies, in accordance with the main rule of national law in art. 3:37 para. 3 BW, cf. *Bijlage Handelingen Tweede Kamer* 1999/2000, 26861, no. 5, p. 23-24; in this sense also Büßer (2001), p. 188-189.

¹¹⁹ Cf. art. 7 of the doorstep selling directive, art. 6 of the existing timeshare directive, art. 6 para. 2 of the distance selling directive, and art. 15 of the second life assurance directive. Only the distance marketing of financial services directive contains an extensive article on the consequences of the withdrawal, cf. art. 7 of that directive. Art. 14 para. 3 (b) of the consumer credit directive indicates that where the consumer withdraws from a consumer credit contract, he must pay back any sums received under the contract with the interest accrued thereon without any undue delay and in any case within 30 days he sent his notice of withdrawal to the creditor. Art. 8 para. 1 of the new timeshare directive only indicates that the withdrawal terminates the obligation of the parties to perform the contract.

be returned entails a risk particularly for the seller of goods, both in the case of distance selling and doorstep selling: the seller is required to reimburse the consumer within thirty days after having received the notification of withdrawal¹²⁰ without being certain whether the consumer returns the goods properly and in good time.¹²¹ Withholding performance of the obligation to pay back the contract price and additional charges until the consumer has returned the goods is not dealt with under the current directives, and it is unclear whether the directives would allow the seller to do so as neither the Doorstep Selling Directive nor the Distance Selling Directive sets a period for performance of the consumer's obligation to return the goods. The Doorstep Selling Directive also is silent on the period within which the trader is to return any payment received from the consumer. The Distance Selling Directive, however, does require the seller to reimburse the consumer within thirty days.¹²² Under the Proposal for a Consumer Rights Directive, the imbalance is restored in two ways. Firstly, the consumer is required to return the goods within fourteen days from the date that he communicates his withdrawal to the seller (Article 17(1) CR Dir.). The seller therefore no longer will need to set a period for performance of the obligation to return the goods before the consumer is put in default. Secondly, until the moment the consumer has returned the goods or has supplied evidence of having sent back the goods,¹²³ the seller may withhold performance of the obligation to reimburse the consumer (Article 16(2) CR Dir.). These provisions are certainly an improvement to the current situation. Article 17(1) CR Dir. does, however, not answer the question of whether the seller must have obtained possession of the goods within that period. In other words: should the goods have been received by the seller within the fourteen day period, or may the consumer hand over the goods to the postal services or a carrier on the last day of the fourteen day period in order to properly perform his obligations under this paragraph? In order to prevent litigation on this question, a specific provision should be added indicating that the consumer need only hand over the goods to the postal services or a carrier within the fourteen day period.

¹²⁰ See art. 6 para. 2 of the distance selling directive. Similarly also art. 16 para. 1 of the proposal for a consumer rights directive.

¹²¹ In the responses to the Green Paper, businesses argued that a seller should only be required to return the payment of the price when the good is returned in its original packaging and with the associated parts, cf. Distance selling document, p. 9. Where it is not possible to test the goods without damaging the original packaging, such a requirement would effectively exclude the right of withdrawal, which implies that this requirement should not be accepted. However, apart from that the demand from the business side is of course justified.

¹²² See art. 6 para. 2 of the distance selling directive.

¹²³ E.g. a photocopy of a shipping or postal order.

In the responses to the Green Paper, opinions varied as regards the question of who is to carry the burden of returning goods purchased at a distance. Consumer organisations alleged that withdrawing from a contract should not lead to any costs for the consumer and that it would be efficient if the costs of returning goods bought at a distance were to be borne by the seller. Conversely, some business stakeholders and Member States expressed the view that consumers, regardless of the nature of the contract, should bear the costs of withdrawing from the contract in order to prevent abuse and excesses.¹²⁴ The business world argued that when a consumer buys a good in the brick and mortar-world and wishes to return it, he also must bear the costs of transportation.¹²⁵ Another part of the respondents simply supported the status quo and do not wish to harmonise the matter. These respondents argued that the different sales techniques have different consequences and that sector-specific regulation remains necessary for that reason. Moreover, both groups of respondents argue that if the withdrawal would not cost the consumer anything, this would ultimately lead to a general increase of prices for all consumers, as the costs are ultimately redistributed over all consumers. It should be noted, however, that the Member States that argue in favour of having the consumers pay for returning the goods in case of withdrawal do make an exception for the case where a consumer withdraws from the contract because the goods or services delivered do not conform to the contract.¹²⁶ In my opinion this exception is justified: although it is true that a consumer in the case of a non-conforming good does not immediately have the right to terminate the contract due to the hierarchy of remedies for non-conformity,¹²⁷ it would be rather odd to use this argument to have the consumer cover the costs of returning that non-conforming good if the consumer wants to withdraw from the contract precisely because the good is defective. In this respect, one should bear in mind that the costs of returning the good would burden the seller anyway if the consumer would opt for repair or replacement, as he is entitled to under the Consumer Sales Directive. However, the problem with such a rule is that it would lead to questions of proof whether the good delivered was in conformity with the contract, a question which the consumer in this case exactly tried to escape from. For this reason, a clear rule burdening the consumer with the costs of return of the goods if he chooses to withdraw from the contract seems preferable over a more detailed but in practice mostly unenforceable rule. For this reason, I agree with the choice made in the Proposal for a Consumer Rights Directive.¹²⁸ Of course, where the consumer wishes to avoid these

¹²⁴ Review of consumer acquis document, p. 9-10.

¹²⁵ Distance selling document, p. 11.

¹²⁶ Distance selling document, p. 11.

¹²⁷ Cf. no. 4.3.

¹²⁸ Cf. art. 17 para. 1, second sentence, of the proposal for a consumer rights directive.

costs, he would of course still be entitled to invoke the remedies for non-conformity.

IX. Use of Goods during Cooling-off Period

Harmonising the starting point for the right of withdrawal would have had the additional advantage of not having to deal with the consequences of use of the goods during the cooling-off period, as this use would in most cases have been for a very short period anyway. This would apply as well if option 3 or – preferably – option 4, as set out in section IV were chosen, provided that once both parties have fully performed their other obligations under the contract, the right of withdrawal ends when a relatively short period has elapsed – as was the case in the Hamilton-case. However, as the European Commission has chosen to maintain the status quo, in the case of distance selling of goods the cooling-off period only starts to run once the goods have been delivered. As a consequence, the problem of use of the goods during the cooling-off period becomes more pressing.

At present, it is unclear to what extent the consumer may use the goods during the cooling-off period. In this respect, it should be noted that in many cases, such use would render the good to become second-hand, whereas in some cases – e.g. in the case of software installed on a computer – it is not even possible to prevent the consumer from using the good after withdrawing from the contract and returning the CD-ROM on which the software was located. Nevertheless, as the right of withdrawal – at least also – is meant to enable the consumer to assess the qualities of the goods offered, the consumer must be allowed to test the goods to a certain extent. Obviously, this implies that the consumer may open the packaging, even if this would mean that the goods can no longer be sold to another consumer in the event that this particular consumer makes use of his right to withdraw.¹²⁹ However, where ‘testing’ evolves into simply using the good, the right of withdrawal should lapse.

Given the problems for sellers to resell the goods returned to them after withdrawal from the contract by a consumer, it is understandable that sellers try to minimise the use of delivered goods, which are still susceptible to a right of withdrawal, as much as possible. One way of doing so is by trying to invoke exceptions to the right of withdrawal. Where these exceptions cannot be relied upon by the seller, other evasive techniques are invoked. To defend their interests, some sellers stipulate in their standard contract terms that ‘in the case of return of the goods’ the goods must be returned undamaged and in their original packaging. In any case when the goods were vacuum-packed, this is impossible in practice. Clearly, this practice is at odds with

¹²⁹ Cf. Büber (2001), p. 238-239.

the idea that the cooling-off period, expressed in Recital (22) of the preamble to the proposed Directive, is (also) meant to enable the consumer to ascertain the nature and the functioning of the goods. In such standard contract terms, the notion of 'withdrawal' is explicitly avoided, as in that case the breach of the Directive would have been too obvious, thus leaving room for the interpretation that the clause only pertains to contractual rights of withdrawal or possibly claims for non-conformity. Nevertheless, there is a serious risk that, when confronted with the term, the consumer will simply take it that he is not entitled to withdraw from the contract. For this reason, I think such clauses should be seen as unfair contract terms.

Other techniques primarily centre on the borderline between 'testing' and 'using' the goods delivered. Clearly, there is a risk here that sellers or service providers will try to uniformly define what constitutes 'use' by determining (in standard contract terms) that opening the packaging of the goods amounts to a waiver of the right of withdrawal.¹³⁰ If such a clause were to be accepted, it would in fact become virtually impossible to assess the qualities of the good without causing the right of withdrawal to lapse. Such a provision therefore undermines the consumer's rights under the Distance Selling Directive or the future Consumer Rights Directive and should not be given effect. What is to be considered in this respect is that '(continued) use' cannot be left to the parties, but needs to be determined objectively by a court of law. However, when the seller proves that the consumer has indeed *used* the good (and not only tested it), in my view the consumer should no longer be able to withdraw from the contract, even if he had not been informed of his right of withdrawal.¹³¹ Of course, if the good does not have the qualities the consumer could have expected it to have then the consumer should be able to claim the remedies for non-conformity. However, I fail to understand why he should be able to surpass the requirements for such remedies by invoking the right of withdrawal.

The current practice may, to some extent, have been caused by an omission in the current directives. At present, the Distance Selling Directive and the Doorstep Selling Directive do not indicate what is to happen if the goods are damaged during the cooling-off period. Not surprisingly, in their reactions to the Green Paper businesses insisted on clarifying what claims a seller has when the goods are used.¹³² Business also argued that a consumer should be explicitly required to take proper care of the good as long as it is in his possession.¹³³ There is no reason to object to this particular rule. Such an

¹³⁰ Such clauses are in fact common practice, as is demonstrated by S.E. Bartels, 'Ik doe het toch maar niet.', *Nederlands tijdschrift voor Burgerlijk Recht* 2004, p. 165.

¹³¹ In this sense also art. 7 para 1 of the Italian Doorstep selling Act, as quoted by Büßer (2001), p. 150-151, who disagrees on this point, cf. Büßer (2001), p. 150-152.

¹³² Review of consumer acquis document, p. 9-10.

¹³³ Distance selling document, p. 9.

obligation already exists in many Member States, either as an explicit obligation or as a consequence from general rules of contract law, in particular from the principle of good faith.

In this respect, the DCFR answers to the demands made by the business side, but probably not entirely to its liking. Article II. – 5:105(3) DCFR provides that the consumer need not pay for any diminution in the value to the good delivered under the contract caused by inspection and testing and for any damage, destruction or loss to that good, provided that the consumer used reasonable care to prevent such damage. On the other hand, paragraph 4 of this provision adds that the consumer is required to compensate for any diminution in value caused by normal use, unless the consumer was not properly informed of his right of withdrawal. From this it follows that the consumer may test the good and need not compensate the seller for any loss in value or damage caused by doing so. If the testing of the good implies that he must take the good out of its original packaging without being able to put it back in after testing, he is entitled to do so, provided that he exercises reasonable care in order to prevent unnecessary damage to the good. After all, the fact that he may wish to return the good, requires the consumer to take the justified interests of the seller into account. Moreover, if he *continues* to use the good and later on decides to withdraw from the contract, he is liable for further diminution of the value. Given the fact that the consumer is not liable for the diminution of the value or – provided that he has taken reasonable measures to prevent damage – destruction or loss of or damage to the good during the testing phase, it is up to the seller to prove that the consumer did not exercise proper care or that the diminution of the value was caused by normal use of the good after the testing phase had ended.

The Proposal for a Consumer Rights Directive follows the suggestion in the DCFR by stipulating, in Article 17(2), that in the case of withdrawal, the consumer is not responsible for damage which arises by the inspection and testing of the goods, but that he is liable to pay damages if he continues to use the goods after the nature and the functioning of the goods have been ascertained and as a result of the continued use, the goods diminish in value. Moreover, if the consumer had not been properly informed of his right of withdrawal, he may not be held liable for the diminished value, the article provides.¹³⁴ The wording of Article 17(2) CR Dir. is, however, not easy to read. Perhaps it would be better if the text were replaced by that of Article II. – 5:105(3) and (4) DCFR, which substantively contain the same rules but are written in language that is easier to understand.

X. Exceptions to the Right of Withdrawal

¹³⁴ Art. 8 para. 2 of the new timeshare directive is to the same extent.

All directives awarding the consumer a right of withdrawal also list extensive exceptions to that right. Most of the exceptions listed in the Proposal for a Consumer Rights Directive already feature in the existing Distance Selling and Doorstep Selling Directives, with the notable and somewhat surprising exception of *vins de primeur* ('early wines') in the case of distance selling,¹³⁵ insisted on by businesses who were afraid of speculating consumers, and by the United Kingdom, which is all the more surprising given the fact that this country most likely imports more of these wines than it exports.¹³⁶ Apart from the exception to the right of withdrawal in the case of a distance contract for the supply of services,¹³⁷ which was touched upon in section IV.2, I will not deal with these exceptions themselves. The exceptions appear to have been deemed specific for the different modes for contracting and are not harmonised: Article 19(1) CR Dir. lists the exceptions in the case of distance contracts, with paragraph 2 of the article listing those for doorstep selling contracts.¹³⁸

Article 19(3) CR Dir. makes clear that the parties are free to agree not to apply the exceptions to the right of withdrawal that are listed in the previous two paragraphs. Article 19(3) thereby reaffirms the principle of party autonomy. Where the parties have chosen to not apply the exceptions listed in Article 19(1) or (2), the other provisions regarding the right of withdrawal will probably apply as well, including the dispatch principle (Article 12(3) CR Dir.) as regards the timeliness of the withdrawal and the provisions of Articles 16 and 17 CR Dir. as regards the mutual obligations of the parties to return the performances rendered. On the basis of the wording of Article 19(3), it seems clear that the same does not apply for mere *contractual* rights of withdrawal.

XI. Concluding Remarks

¹³⁵ Art. 19 para. 1 sub (d) of the proposal for a consumer rights directive.

¹³⁶ See, for references to the responses on the consultation pertaining to the revision of the distance selling directive, M.B.M. Loos, *Review of the European Consumer Acquis*, Sellier. European law publishers, Munich, 2008, p. 45-46.

¹³⁷ Art. 19 para. 1 sub (a) of the proposal for a consumer rights directive.

¹³⁸ Some changes are made, though. For instance, the exception of the right of withdrawal for goods that 'by reason of their nature, cannot be returned' (art. art. 6 para. 3, third indent, of the distant selling directive) is not reproduced in the proposal for a consumer rights directive. R. Becker and C. Föhlisch, 'Von Dessous, Deorollern und Diabetes-Streifen. Ausschluss des Widerrufsrechts im Fernabsatz', *NJW* 2008, p. 3751-3756, however, argue that the current exception should actually be enlarged as to also cover, for instance, underwear, deodorant sticks and medicines.

In this concluding section I will address the question of whether, with regard to the rights of withdrawal and the associated cooling-off periods, the Commission has succeeded in reaching the goals it has set in the process of the review of the consumer *acquis*. First, did the Proposal lead to the desired harmonisation of the cooling-off periods and the exercise of the rights of withdrawal? And second, has the European Commission indeed struck the right balance between a high level of consumer protection and the competitiveness of enterprises?

As the following subsections will demonstrate, the answer to the first question is clearly negative; whereas the answer to the second question is not unambiguous. On the basis of the findings in subsections 1-7 I will substantiate these statements in subsections 8 (harmonisation) and 9 (balance of interests).

1. Uniform duration of cooling-off period despite limited scope of harmonisation

The first problem, obviously, is the limited scope of the review as such. While the European Commission originally envisaged a full review of the *acquis*, in 2004¹³⁹ it already restricted its efforts to the review of only eight consumer law directives.¹⁴⁰ However, the Proposal only deals with the content of four consumer law directives. In the area of the right of withdrawal, this implies that the Proposal only pertains to doorstep selling and distance selling of goods and services: in particular the Timeshare Directive, the Distance Marketing of Financial Services Directive and the Consumer Credit Directive are not included in the harmonisation process. It is true that these Directives – including the new Timeshare Directive – appear to have been taken into account when determining the duration of the cooling-off period, but apart from that they largely seem to have been neglected. Where they have been taken into account, harmonisation has indeed largely been achieved: with the exception of the atypical case of life assurance contracts, for all cooling-off periods the duration will be fourteen

¹³⁹ Cf. European contract law and the revision of the *acquis*: the way forward, Communication by the Commission to the European Parliament and the Council of 11 October 2004, COM (2004) 651 final, p. 4.

¹⁴⁰ The directives that were mentioned are the doorstep selling directive, the timeshare directive, the distance selling directive, the package travel directive (directive 90/314/EEC, *OJ* 1990, L 158/59), the unfair contract terms directive (directive 93/13/EEC, *OJ* 1993, L 95/29), the price indication directive (directive 98/6/EC, *OJ* 1998, L 80/27), the injunctions directive (directive 98/27/EC, *OJ* 1998, L 166/51), and the consumer sales directive (directive 99/44/EC, *OJ* 1999, L 171/12).

calendar days. Moreover, in doing so the Proposal seems to strike an optimal balance between the interests of consumers and businesses.

2. No uniform starting point

However, in many more respects the harmonisation seems to have failed. Firstly, and most importantly, the European Commission failed to establish a uniform starting point for the cooling-off period to run. It has ignored the option chosen in the three most recent directives that award a cooling-off period (the 2002 Distance Marketing of Financial Services Directive, the 2008 Consumer Credit Directive, and the 2008 Timeshare Directive) to let the cooling-off period start only when all information requirements have been met. It failed to do away with the unjustified distinction between distance selling of goods and distance selling of services. Moreover, in making the choice between the more consumer-friendly rule in the three most recent directives that award a cooling-off period and the more business-friendly rule in the Distance Selling Directive, it has chosen the latter option.

3. Trader's breach of information obligations and consequences for cooling-off period

Harmonisation has also not been achieved as regards the consequences of a failure by the trader to meet his information obligations. Again, the – consumer-friendly – situation under the Distance Marketing of Financial Services Directive and that under the Consumer Credit Directive seem to have been ignored. The new Timeshare Directive seems to strike a good balance between the interests of both parties by awarding a relatively long cooling-off period in the event that the consumer was not informed of his right of withdrawal and a more limited extension if other information obligations were breached. However, that solution has also been ignored. Instead, the Proposal for a Consumer Rights Directive introduces yet another way to calculate the ending of the cooling-off period, awarding the consumer only then an extension of the cooling-off period if the trader had breached his obligation to inform the consumer of his right of withdrawal. This is clearly a step back in the protection of consumers for both doorstep selling contracts and distance selling contracts. Under the present Distance Selling Directive, any breach of the information obligations leads to an extension of the cooling-off period, whereas under the Proposal for a Consumer Rights Directive the cooling-off period is extended only if the trader has not informed the consumer of his right of withdrawal. In the case of doorstep selling contracts, consumers will be worse off under the Proposal as it limits the extension of the cooling-off period to three months after the trader has performed his other contractual obligations, whereas currently the cooling-

off period would not start to run before the consumer is informed of his right of withdrawal.

4. Form requirement

That there is a need for harmonisation of the manner in which the right of withdrawal is to be exercised is clear from the responses to the Green Paper. However, the Proposal for a Consumer Rights Directive does not bring the necessary uniformity. The solution accepted in the distance marketing of financial services directive and the recent consumer credit directive – notification by any means that can be proven in accordance with national law – is not the right way forward as it burdens consumers (and occasionally businesses) with problems of private international law: it should not differ from country to the next as to whether an oral or electronic withdrawal is possible. In practice, the choice to be made is to allow a notification by any means or only in writing or on a durable medium. The main argument in favour of the latter option – it would be easier to prove whether or not the consumer has withdrawn on time – was already falsified by the drafters of the Acquis Principles. For that reason, the drafters of the Acquis Principles and the DCFR have suggested not to pose any form requirements. This rule may be seen as consumer-friendly, as it will be easier to withdraw from the contract than when a form requirement would apply. The choice in Article 14(1) CR Dir., and the choice in Article 7 of the new Timeshare Directive to require a notification on a durable medium, therefore, is less favourable to consumers. Moreover, under the 2002 Distance Marketing of Financial Services Directive and the 2008 Consumer Credit Directive a different rule applies than under the current Proposal and the 2008 Timeshare Directive. This implies that in this respect, harmonisation has failed. Moreover, given the present wording of Article 14 CR Dir. and the definition of a ‘durable medium’ in Article 2 CR Dir.,¹⁴¹ it is doubtful whether a notification could be sent by e-mail.

5. Dispatch principle

In one area it was not very difficult to achieve harmonisation. Most directives already indicated that if the notice of withdrawal was sent during the cooling-off period then the withdrawal is effective. Only the Distance Selling Directive was silent on this matter. Nevertheless, the current Proposal removes any doubt there may have been in this area and, furthermore, makes clear that the dispatch principle also applies if the notice of withdrawal is not

¹⁴¹ The same problem arises under the new timeshare directive, cf. art. 7 and 2 under (h) of that directive.

in writing, but on another durable medium. Even though this seems self-evident, it is a good thing this is now explicitly laid down in the Proposal for a Consumer Rights Directive.

6. Consequences of withdrawal

Unlike most of the current directives, the Proposal for a Consumer Rights Directive provides clear rules for the unwinding of the contract from which the consumer has withdrawn. Moreover, it contains a clear timeframe within which both parties – i.e. also the consumer – are required to return the performance they received under the contract. This certainly is an improvement of the current situation in which the position of the trader was rather underdeveloped: whereas he was required to return any payments received within a short period, he could only hope that the consumer would do the same. It would, however, be good if a specific provision were to be added indicating that the consumer need only hand over the goods to the postal services or a carrier within the fourteen days period set under Article 17(1) CR Dir.

That paragraph also sets out that the consumer bears the costs of returning the goods under the contract. That provision seems fair, even in the case where the consumer actually withdraws from the contract because the good delivered is not in conformity with the contract. The consumer may of course avoid these costs by simply invoking his rights for non-conformity but is then subjected to the requirements of the sales provisions in the Proposal for a Consumer Rights Directive.

7. Use of goods during cooling-off period

Whereas the current directives do not deal with the question of whether the consumer is liable for any loss in value as a result from the use of the good during the cooling-off period, the Proposal for a Consumer Rights Directive introduces a means for distinguishing the loss in value, which is caused by the mere testing of the goods from that caused by actual using of these goods after the testing phase has ended. Article 17(2) CR Dir. indicates that the consumer is not responsible for the former loss, but that he is liable to pay damages if he continues to use the goods after he has inspected and tested the goods. In substance, this provision seems to strike the right balance between the parties' interests. The wording of the provision could be improved upon, however, as the current text does not seem to meet the requirement of 'plain and intelligible language'. It would be worthwhile to simply copy the corresponding text in the DCFR.

8. Evaluation of the success of the undertaken harmonisation

The aim of harmonisation underlying the whole review of the consumer acquis has certainly not been achieved across the board. Firstly, only a few directives are actually included in the Proposal itself. This implies that in a *formal* sense the harmonisation could not really have succeeded. However, if the European Commission would simply have chosen the same solutions as those accepted in directives not included in the review or suggested changes to these directives where appropriate, harmonisation could still have been achieved *substantively*. Changes to the directives not included in the review – with regard to rights of withdrawal in particular the Timeshare Directive, the Distance Marketing of Financial Services Directive and the Consumer Credit Directive – are not suggested. In this sense, true harmonisation would only be possible if the Proposal for a Consumer Rights Directive would simply follow the solutions accepted in these other directives (and these would not diverge amongst each other). This, however, is only occasionally the case: the acceptance of a uniform cooling-off period of fourteen days and the introduction of the dispatch principle for distance selling contracts – the only Directive where that principle was not yet codified. In certain areas, e.g. the provisions on use of goods during the cooling-off periods, the problems are rather sector-specific and therefore constricted to distance selling and doorstep selling contracts. For these situations the law therefore has also successfully been harmonised.

However, in some of the more important areas, harmonisation has not been achieved at all. First and foremost, this is the case with the starting point for the calculation of the cooling-off period. Secondly, a uniform approach is also missing in the case of the rules for the end of the cooling-off period in the event that the trader had not properly informed the consumer. Finally, the European Commission has failed to unify the rules on the form in which the notice of withdrawal is to be expressed.

In sum, one can only conclude that the harmonisation of rights of withdrawal has failed.

9. Evaluation of the balance between business and consumer interests

The failure of the harmonisation as such does not, of course, mean that the choices made in the Proposal are wrong. Has the European Commission at least struck a good balance between the interests of both consumers and businesses while maintaining a high level of consumer protection? In certain areas this is indeed the case. The uniform duration of the cooling-off periods can be deemed successful in this respect as well. The same applies as regards the rules on the use of goods during the cooling-off period and those pertaining to other consequences of the withdrawal.

However, without stating any reasons for doing so, it has opted for the least consumer-friendly rule as regards the starting point for the calculation of the cooling-off period, largely setting aside the more consumer-friendly rule in the Doorstep Selling Directive *and* ignoring the choice made in the most recent directives in this area (the Distance Marketing of Financial Services Directive, the Consumer Credit Directive, and the Timeshare Directive). Secondly, the consequences of a breach of the trader's information obligations are much less severe than is currently the case under the Doorstep Selling Directive and the Distance Selling Directive, and also much less severe than is the case under the other existing consumer directives. The most remarkable reduction of consumer protection applies in the case of the breach of another obligation to inform than that pertaining to the right of withdrawal: whereas this would lead to an extension of the cooling-off period under the existing Distance Selling Directive, this is not the case under the Consumer Rights Directive. In the case of doorstep selling, the consumer already was only then entitled to an extension if he was not informed of his right of withdrawal, but in that case the cooling-off period did not start (and did not end) before the consumer was informed of that right. Given the fact that under the proposed Directive the consumer may no longer invoke his right if three months have passed after the trader has performed his other obligations under the contract, consumer protection is also reduced here. This is all the more surprising given the consumer-friendly, yet balanced rule in the new Timeshare Directive. Thirdly and finally, the introduction of a form requirement is clearly not in the interest of consumers and is surprising given the choices made in both the recent Distance Marketing of Financial Services Directive and the Consumer Credit Directive, and in the DCFR.

One is therefore left with an ambiguous feeling as to the answer whether the Proposal has struck a good balance between the interests of businesses and consumers. In some areas this indeed seems to be the case, whereas in other areas the interests of businesses clearly seem to have had the overhand. Examples where the interests of *consumers* have had the overhand, however, have not been found. In the end, therefore, the balance seems to be a bit off to the advantage of businesses.