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Towards an Implementation of
Consumer Protection**

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Consumer Right of Withdrawal: Towards an Implementation of Consumer Protection

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Abstract

In European legislation, consumer is defined as “any natural person who is acting for purposes which are outside his trade, business or profession” (art. 2, lett. *b*, Dir. 93/13/EC) and consumer protection has a big importance in accordance to the goals of common market regulation. Among the various instruments of European law, there is the right of withdrawal (“*ius poenitendi*”) which applies in particular cases. It is the right to cancel the contract for any reason and without penalty. Consumers have the withdrawal right, for example, in distance contracts, doorstep sellings, timeshare and even in insurance, travel and banking contracts. The right of withdrawal operates during a space of time called “cooling off period”, pending this space of time, in fact, customers are given the chance to decide whether changing their mind about the contract or not. In this research, I investigate if this kind of protection is suitable to offer a complete and satisfactory safeguard to consumers towards professional parties. Somehow, in fact, it would be appropriate to extend withdrawal right also for situations in which it is not foreseen by law, in which, nevertheless, it’s necessary to implement consumer defence. This may be the case of contract with unfair terms, in which consumer is not given the chance to cancel the contract but only to ask judicially to void unfair clauses.

Key words: Consumer protection, EU law harmonization, Withdrawal right

Consumerism between Harmonized Law and Communitarian Goals

“Consumerism” is a term which indicates the social and political movement aimed at the vindication of the central role of individuals and of their protection within the organization of modern State¹. Its purpose is to defend consumer rights and to give consumers an active role in the market. The movement took place originally the U.S., in New York City, in particular, in 1936, the first Consumer Union was founded: the organization brought together journalists, engineers, academics and scientists committed to testing products used by consumers. About a decade later, the movement landed in Europe and in 1947, in Denmark, the Consumer Council was created: the first private organization of consumers. In U.S., it’s only in ’60s that the movement turns to achieve practical results on a normative basis. In Europe, during ’70s, in some countries (e.g. Great Britain, France and Germany), many laws protect customers as passive subjects in the mass production and distribution system. In this context, communitarian legislation has a particular importance, since, on the one hand, it’s aimed to protect specifically consumer rights, and on the other hand, it’s aimed to protect the smooth functioning of internal market and of competition. Introducing uniform laws (also) concerning consumer protection, EU aims to eliminate disparities (which cause uncertainty as to which national rules apply) and barriers affecting business and customers. These barriers, as EU legislator² puts it, “increase the cost to business of exercising internal market freedoms, in particular when businesses wish to engage in cross border marketing, advertising campaigns and sales promotions. Such barriers also make consumers uncertain of their rights and undermine their confidence in the internal market”³. Thus, the protection of customers, on a communitarian perspective, is both final and instrumental. In the ever increasing and cross-border market, it is reasonable to assume that harmonized consumer laws constitute a necessity to maintain the freedom of movement and an effective common market within the EU.

A common policy to protect consumers and users of products and services is in fact essential for the functioning of the common market in the interest of the citizens. European consumer policy is aimed, in this perspective, to ensure that the European Union’s consumers draw maximum benefit from the existence of the internal market and play an active role in it.

¹ROSSI CARLEO, L. (ed.), 2012, *Diritto dei consumi. Soggetti, contratti, rimedi*, Torino; ALPA, G., *Consumatore (tutela del) II) Diritto della Comunità europea*, in *Enc. giur. Treccani*, 1995; ID., *Consumatore (tutela del) III) Diritto comparato e straniero*, *ivi*; BENACCHIO, G., 2001. *Diritto privato della Comunità Europea. Fonti, modelli, regole*, Padova; CHINE’, G., *Il consumatore*, in LIPARI, N., 1997. *Diritto privato europeo*, Padova, p. 165 ff.; ZENOVICH, V., *Consumatore (tutela del) I) Diritto civile*, in *Enc. giur. Treccani*, 1995; GAMBINI M., *Il nuovo statuto del consumatore europeo: tecniche di tutela del contraente debole*, in *Giur. merito*, 2004, I, 4, p. 2605 ff.

²See, e.g., Directive 2005/29 concerning unfair business-to-consumer commercial practices in the internal market.

³*Ibidem*.

The assumption of consumer law is the crisis of the concept of freedom of contract, according to which the binding force of contract is based on party autonomy and free consent¹. This concept sees contract as the formal expression of the parties' will, which are individualistically able to fulfill, independently and without any constriction, their agreements and deals, keep their promises and to state (and subsequently modify) the content of the contract, without any external interference by courts or third parties. "By promising, the promissor devotes himself to act in the future in favor of the other contractual party, in this way manifesting his will to plainly comply with his contractual obligation. Consequently, signing a contract has the consequence of binding one party to the other, influencing his future actions and behavior"².

According to consumer law, on the other hand, solidarity is at the base of the contract, rather than individualism, "each party has a positive duty to help and cooperate with the other contracting party; that the parties must behave transparently towards one another. Duties to inform must be imposed to produce informed consent and to enable the parties to work together. It follows that the model focusing on duties to inform as means of achieving contractual solidarity, is opposed to that of party autonomy. Linked to evolution towards more solidarity in contracts is the evolution from free consent toward informed consent an evolution that is not only present in general contract law, but also and very prominently in consumer contracts"³.

In this perspective, consumer law is aimed to protect individuals from inappropriate use by a seller or trader (of goods or services) of its freedom to impose either unfair contractual terms or gross disparity in the clauses of contract. In this context, especially in standard form contracts, it's clear that consumers have no chance to negotiate the content of the contract, but only to accept (or not) contractual offers, i.e. they are placed in a "take it or leave it" position.

Beyond the introduction of consumer laws, in Europe, jurists often use the general duty of good faith in order to protect customers against unbalanced contracts. Since '80s, many directives have regulated the most relevant areas concerning consumers' interests worthy of legal protection. We may recall e.g. misleading advertising (directive 84/450/CEE), producer liability (directive 85/374/CEE), doorstep selling (directive 85/577/CEE), unfair terms in consumer contracts (directive 93/13/CEE), timeshare (directive 94/47/EC), distance contracts (directive 97//7/EC), just to mention some well-known rules.

Furthermore, near to this "substantial" rules, national legislators have introduced "process" tools through class actions, which give consumers a new

¹MICKLITS, H.W., STUYCK, J., TERRY, E. (eds.), 2010. Cases, Materials and Texts on Consumer Law. Hart publishing. Oxford and Portland, Oregon, p. 214.

²In argument, see CICORIA, C., The Protection of the Weak Contractual Party in Italy vs. United States "Doctrine of Unconscionability" A Comparative Analysis, in <http://www.uniformterminology.unito.it/downloads/papers/cicoriaprotection.pdf>.

³MICKLITS, H.W., STUYCK, J., TERRY, E. (eds.), 2010. Cases, Materials and Texts on Consumer Law. Cit., p. 214.

way of access to justice, in many ways similar to that foreseen in overseas countries.

European Consumer Laws and Definitions

European Union laws concerning consumer protection are numerous and heterogeneous: there is a substantial discipline given by many directives laying down standards for national legislators. On the other hand, there are national consumer codes which collect all the national rules deriving, in many cases, from European directives, but sometimes go further, as it is e.g. in the case of class actions' discipline which doesn't derive from any EU directive or regulation.

In European consumer law, we find each time a catalogue of normative definitions¹, which are located at the beginning of each legal intervention in order to delimitate the area of its application and also to explain the meaning of the wordings contained in the text.

Also national laws contain definitions, for instance we may recall art. 1321 of Italian civil code, which contains a definition of contract.

In general, these definitions are a description of each legal figure. Defining contracts, Italian legislator aimed to describe a particular kind of agreement to which determined rules are applied and to which some others can't (for example those regulating marriage or testament).

In European law, the adoption of definitions in legal texts has also other specific aims: guarantee high certainty for EU citizens, limit differing and allow uniform interpretations.

In Italian Consumer code ("Codice del consumo": Decreto legislativo 6 September 2005, n. 206), we have several lists of definitions, we find the first in article 3, which defines consumer, association of consumers, trader, producer, product and code. Sometimes, we find the same definition more than once in the text of the Consumer code, with the purpose to indicate each time the area of application of a group of dispositions.

Art. 144 of Italian Consumer code is titled "Aggiornamenti" (updates) and it is a proof of the typical ductility of Consumer law which is due to frequent modifications and integrations. The quick normative evolution of consumer law is testified by this article which doesn't find a match in Italian civil code which assumes to be a normative complete text in its structure.

Italian Consumer code, adopted in 2005, has already been modified several time, for the transposition of the directive concerning unfair commercial practices and for the adoption of the discipline of class actions. Some parts of the Code have been transferred in other law text: consumer credit regulation, for example, once foreseen in Consumer code is now contained in the Testo

¹In argument, as for the role of definition in civil law, see: DELLACASA, M., 2004. Sulle definizioni legislative nel diritto privato. Fra codice e nuove leggi civili. Torino; D'ANGELO, A., 2014. Lezioni di diritto civile. Introduzione al diritto delle obbligazioni, Torino, p. 29 ff.; MARTINO, A., 1975. Le definizioni legislative, Torino.

Unico bancario (Decreto legislativo 1 September 1993, n. 385) and the discipline of package travel, package holidays and package tours which is now contained in the Codice del turismo (Decreto legislativo 23 May 2011, n. 79) which is a Code collecting all the rules concerning the touristic sector.

As for the definition of “consumer”, it is contained in art. 3 which repeats the definition contained in art. 2, lett. b) of the Directive 93/13/CEE, concerning unfair clause in consumer contracts.

Consumer is “any natural person who is acting for purposes which are outside his trade, business or profession”. Thus, as first, consumer is only (i) a natural person who (ii) acts for purposes which are outside his trade, business or profession. Also a trader can be considered a consumer, when he/she acts for personal or familiar purposes.

The right of withdrawal

In the mandatory legislation introduced by European institutions to protect consumers, there is the right of withdrawal (“*ius poenitendi*”) which is the right to cancel the contract for any reason and without penalty within a certain period of time after its conclusion¹. It is the right to change one’s mind about a purchase and thus represents an important innovation for contract law, since the binding force of contracts can’t no longer be set aside only in cases where the consent of a party was based on a wrong assumption or in cases of non-performance or defective performance by the other contracting party.

Nevertheless, withdrawal right is not a general right to return goods², since it applies only in particular cases: distance contracts (and distance marketing of consumer financial services), doorstep selling, timeshare, voyage contracts and even in insurance or banking contracts. The right of withdrawal operates pending a space of time called “cooling off period”, during which customer is given the chance to change his mind about the contract. It is a fundamental

¹In argument, among the others, see: PATTI, F.P., *Il recesso del consumatore: l’evoluzione della normativa*, in *Europa e diritto privato*, 2012, 4, p. 1007 ff.; BARCA, A., 2011. *Il diritto di recesso del consumatore*, Milano, 2011; F. RICCI, *Il diritto di recesso o revoca*, in ROSSI CARLEO, L. (ed.), *Diritto dei consumi. Soggetti, contratti, rimedi, cit.*, p. 76 ff.; ZORZI GALGANO, N., 2012. *Il contratto di consumo e la libertà del consumatore*, Padova, p. 363 ff.; SMITH, J.M., *The right to change your mind? Rethinking the usefulness of mandatory rights of withdrawal in consumer contract law*, *Maastricht European Private Law Institute Working Paper n° 2011/01* (www.rechten.unimaas.nl/maastrichtworkingpapers/); EIDENMUELLER, H., *Why withdrawal rights?* Electronic copy available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1660535.

²Although, as some author puts it: «there is a widespread practice that customers can return goods. Many retail shops throughout the world have adopted the policy that customers can do so at will and receive back the contract price or at least a credit note with which they can buy a different product in the same shop. This return policy is often laid down in the general conditions of the retailer. These contractual rights are even so common that the general public in some countries seems to think that there is a ‘general right to return goods’» (see: SMITH, J.M., *The right to change your mind?*, cit., p. 6)

right of consumers, set in order to protect them against contractual unbalance which is considered in *re ipsa* in B2C (business to consumer) contracts.

Consumer right of withdrawal works in specific cases, among which we consider first the “doorstep or extra moenia sellings”, in which, for example, the consumer is caught off guard in an environment (home, a public place such as streets, shopping malls, beaches, sports facilities or public transport) which is not a traditional retail environment and enter into contracts. Thus he can be entitled to withdrawal from the contract, provided that the agreement is not made in business premise. The idea behind this rule is that the consumer has the right to cancel the contract of sale where the point of sale entails an element of surprise for him/her, thus withdrawal rights represent a way to protect customers against rash decisions.

Withdrawal applies also in case of teleshopping, contracts entered into on a website or concluded on telephone, by catalogue order, without the contextual presence of consumer and trader and without the possibility for customers to see and test the goods or services (as it happens in distance contracts). The goal of EU law in the field of distance contracts is to put consumers, who purchase goods or services through distance communication means, in a similar position of consumers who buy goods or services in shops, allowing them to acquire the information they need by inspecting the product after delivery.

In both cases (doorstep sellings and distance contracts) the right to withdrawal is a *ius poenitendi*, i.e. a right to change one’s mind during a cooling off period (which lasts from the conclusion of the contract and the time to exercise withdrawal), during this period, the contract is suspended since it can be cancelled whether consumer turns to exercise the withdrawal right. This right allows consumer to cancel the contract without any penalty and discretionally, it is in fact an instrument introduced by legislator in order to protect consumer as the weak contracting party.

In timeshare contracts, the *ius poenitendi* is based on the contractual asymmetry (supposed) inherent in B2C contracts between contractual parties.

Furthermore, consumers can cancel the contract in case of variation of the price by the trader or in case of modification of one or more elements of the contracts, as it occurs in bank and voyage contracts.

It can be noted that once European directives only provided minimum norms: member states were allowed to give the consumer more protection in their national law, while with the directive 2011/83/EU on consumer rights, we have a full harmonization, which means in principle that the national parliaments lack the opportunity to modify or exclude the new provisions and the law laid down in the directive itself. The previous directives (on distance and doorstep sellings) “have been reviewed in the light of experience with a view to simplifying and updating the applicable rules, removing inconsistencies and closing unwanted gaps in the rules. That review has shown that it is appropriate to replace those two Directives by a single Directive. This Directive should therefore lay down standard rules for the common aspects of distance and off-premises contracts, moving away from the minimum

harmonization approach in the former Directives whilst allowing Member States to maintain or adopt national rules in relation to certain aspects”¹.

The Directive 2011/83/EU and new rules for withdrawal

The full harmonization status of the Directive is central to its stated objective of contributing to the better functioning of the European Union’s internal market. The importance of this purpose is witnessed by the imperative nature of the Directive which says “If the law applicable to the contract is the law of a Member State, consumers may not waive the rights conferred on them by the national measures transposing this Directive. Any contractual terms which directly or indirectly waive or restrict the rights resulting from this Directive shall not be binding on the consumer” (art. 25)², while in art. 4 we find a full harmonization clause: “Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive”³.

The transposition of directive 2011/83/EU in Italy has been within the decreto legislativo 21 February 2014, n. 21 (entered into force on 26 March 2014)⁴. The new rules introduce several important changes in the current regulations, by way of new provisions in existing Consumer Code, as for distance contracts, off-premises sales and also agreements entered into in business premises. The new provisions foresee extended rights of withdrawal (also for the case of information omission) and extensions of information requirements for distance contract and off-premises agreement, but also for agreements entered into in business premises. Consumers are protected against “cost traps” on the Internet since traders have to disclose the total cost of the product or service, as well as any extra fees. With the new norms, pre-ticked boxes are banned across the European Union. This mean that online traders will have to disclose the total cost of a product - including fees - and customers will have to actively opt-in to extras.

Traders must refund consumers for the product within 14 days of the withdrawal. This includes the costs of delivery. In general, the trader will bear the risk for any damage to goods during transportation, until the consumer takes possession of the goods. Consumers will be provided with a model withdrawal form which they can (but are not obliged to) use if they change their mind and wish to withdraw from a contract concluded at a distance or at the doorstep. This will harmonize the way to withdraw, wherever a consumer has concluded a contract in the EU. Traders can’t charge consumers more for paying by credit card (or other means of payment) than what it actually costs the trader to offer such means of payment. If traders want the consumer to bear

¹See Directive 2011/83/EU, *whereas* n. 2.

²In argument, see BRAVO, F. I contratti a distanza nell’evoluzione del diritto privato europeo, in ALPA, G. (ed.) 2014. I contratti dei consumatori, Milano, p. 548.

³*Ibidem*.

⁴For a comment, see: CUFFARO, V. Nuovi diritti per i consumatori: note a margine del d. lgs. 21 febbraio, 2014, n. 21, in *Corriere giuridico*, 2014, 6, p. 745 ff.

the cost of returning goods after they change their mind, they have to clearly inform consumers about that beforehand, otherwise they have to pay for the return themselves. Traders must clearly give at least an estimate of the maximum costs of returning goods bought by Internet or mail order before the purchase, so consumers can make an informed choice before deciding whether and from whom to buy.

Information on digital content must also be clearer, including about its compatibility with hardware and software and the application of any technical protection measures. Consumers have a right to withdraw from purchases of digital content, such as music or video records, but only up until the moment the package is materially open.

Common rules for traders will allow to trade all over Europe easier. These include: 1) A single set of core rules for distance contracts (sales by phone, post or Internet) and off-premises contracts in the European Union, creating a level playing field and reducing transaction costs for cross-border traders, especially for sales by Internet; 2) Standard forms for businesses: a form to comply with the information requirements on the right of withdrawal; 3) Specific rules for small businesses and craftsmen. There will be no right of withdrawal for urgent repairs and maintenance work. Traders who are requested by consumers to carry out repair and maintenance work in their home of a value below €200 are exempted from some of the information requirements.

Information Requirements and Right to Withdrawal

In the common market, there is a (specific) duty of disclosure for traders in order to protect consumers, allowing them to neutralize the information asymmetry. Thus consumers have at their disposal a range of instruments and networks providing them with reliable information and helping to resolve any difficulties they may encounter in the EU¹. In the *acquis communautaire*, in fact, there is a strong emphasis on informed consent and on information provisions as a mean of protecting the weak contracting party².

One of the purposes of the directive 2011/83/EU on Consumer Rights is also to clarify and harmonize pre-contractual information. This allows traders to know what information they must provide, irrespective of who they sell to and, in the meanwhile, consumers have full information in the common market. The provisions on pre-contractual information allow consumers to make a genuinely considered judgment with regard to their purchases; they are a deciding factor for consumers when making their choices and affects both consumer interests and their confidence in the products and services circulating within the internal market. The new rules contains core information to be provided by traders prior to the conclusion of consumer contracts, which are distance, off-premises contracts or not. Member States may add on further

¹DI DONNA, L. I rimedi nella fase precontrattuale, in ALPA, G. (ed.) 2014. I contratti dei consumatori, cit., p. 297 ff.

²MICKLITS, H.W., STUYCK, J., TERRY, E. (eds.), 2010. Cases, Materials and Texts on Consumer Law, cit., p. 214.

information requirements in their national law. The new rules lay down the information requirements for distance and off-premises contracts, including information about the functionality and interoperability of digital content. They regulate the right of withdrawal (length of the withdrawal period, procedure and effects of the withdrawal), including a standard withdrawal form that must be provided by traders and may be used by consumers to notify the withdrawal from the contract.

In case of omission of information on the right of withdrawal (since the trader has not provided the consumer with the information required by law), the withdrawal period expires 12 months later from the end of the initial withdrawal period, while if the trader has provided the consumer with the information provided by law within 12 months from the day of the conclusion of the contract, the withdrawal period expires 14 days after the day upon which the consumer receives the information, as determined by the directive 2011/83/EU.

The aim of this harmonized law is to reduce compliance costs, increase legal certainty; while the enhanced consumer confidence may facilitate cross-border trade and a fairer balance between consumer and business rights may incentivize trade.

Towards New Kinds of Regulation

Withdrawal rights represent a significant erosion of the *pacta sunt servanda* principle; they grant an option to withdraw since the consumers entitled to the right can withdraw from an agreement, but they are not forced to withdraw nor commit to the execution of the agreement¹.

If we consider the reasons that justify the introduction of consumer withdrawal in the EU, we may consider that these cases can be seen as arbitrary and reductive, since they suppose sometimes the surprise of the consumer (the lack of psychological strength) or the impossibility for the consumer to have an accurate picture of the product (lack of informational strength), but they ignore the general asymmetry existing in all B2C contracts. For this reason, apart from the mandatory EU law about consumer right of withdrawal, there is a widespread practice that customers can return goods. Many traders throughout the world have adopted the policy that customers can cancel the contract at will and receive back the price or a credit note with which they can buy a different product in the same shop². This return policy is often laid down in the general conditions of the retailer. This phenomenon can be seen as a sort of harmonization deriving from commerce self-regulation, which is aimed to create trust and to enhance the willingness of the buyer to purchase products³.

¹EIDENMUELLER, H., *Why withdrawal rights?*, cit., p. 4.

²SMITH, J.M., *The right to change your mind? Rethinking the usefulness of mandatory rights of withdrawal in consumer contract law*, cit., p. 6.

³*Ibidem*.

An Interplay of Unfair Contracts Clauses and Withdrawal Rights Regulation

In this perspective, we may ask how to implement the legal status quo and protect consumer beyond the cases just seen, i.e. if there could be room for other cases of withdrawal. We know that withdrawal can be allowed only in the cases foreseen by consumer law and if the contract is not one of those regulated, there is no possibility for consumers to exercise withdrawal right in order to protect their interests. We may find a lack of protection for consumers, since there is no possibility to cancel the contract in case of unfair dealing of the other contracting party. It doesn't seem foolish the idea to consider the opportunity of a new form of protection for consumers, allowing them to exercise withdrawal right in case of contract with gross disparity.

This could be a withdrawal for genetic reasons aimed to protect consumers against risks and liabilities deriving from unfair dealing without having to ask judicially to void the contract or each clause.

This kind of provision in case of unbalanced contracts may perform also an important role of deterrence in the market since it may work as an incentive for traders to behave fairly, because it could be used directly by consumers without judicial intervention.

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