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**The legal position of a web-shop that contracts with its customers on a B2C basis and the suppliers of the goods on a B2B basis**

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LLM Commercial and Company Law Masters Thesis



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## **ABBREVIATIONS**

B2B – Business-to-business

B2C – Business-to-consumer

BEUC - Bureau Europeen des Unions de Consommateurs (The European Consumers' Organisation)

CFR – Common Frame of Reference

CISG – United Nations Convention on Contracts for the International Sales of Goods

CRD – Consumer Rights Directive

CUE – United Nations Convention on the Use of Electronic Communications in International Contracts

EU – European Union

GPR – Green Paper on the Review on the Consumer Acquis

Rome-I – Rome-I Regulation

TEU – Treaty on the European Union

TFEU – Treaty on the Functioning of the European Union

The Commission – European Commission

The Council – The Council of the European Union

The Parliament – The European Parliament

## ABSTRACT

Stricter protection is afforded in favour of the consumer rather than the business who runs the online web-shop i.e. the seller, which leaves the latter in a risky position. E-commerce consumer protection laws exist because consumers who buy “in the dark” have little knowledge about the products end-result until it is delivered to their homes.<sup>1</sup> Thus, in order to protect the consumer, there exists an obligation on the web-shop to provide the consumer with the possibility to cancel the contract in the event that the purchaser decides to exercise their right to return the item.<sup>2</sup> As a result, the web-shop who has contracted with the customer has to fill in an “empty seat”<sup>3</sup> and accept the cancelled good. The CRD affords rights to the consumer to return goods to the online retailer within 14 days of the purchase, without any justification. The consumer has a contract with the retailer and not the manufacturer and cannot use their right of withdrawal against the manufacturer. The reason to why the consumer cannot enforce his rights against so as to receive a remedy from the manufacturer is due to the legal phenomena known as privity of contract.

The lack of bargaining power of the consumer gives the consumer certain rights where they are entitled to withdraw their contract with the web-shop. *“The right of withdrawal is therefore intended to offset the disadvantage for the consumer resulting from a distance contract by granting him an appropriate period for reflection during which he can examine and test the goods acquired.”*<sup>4</sup> However, the right of withdrawal does put the web-shop who contracts on a b2b and b2c basis respectively, in a risky position as it has obligations in both contracts.

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<sup>1</sup> E Hall, ‘Cancellation rights in distance-selling contracts for services: exemptions and consumer protection’ [2007] JBL 684

<sup>2</sup> Idem

<sup>3</sup> Ibid

<sup>4</sup> Case C-489/07 *Pia Messner v Firma Stefan Krüger* [2009] ECR I- 07315, paras 20 -22

## 1 Introduction

The development of trade practices over the past two decades has contributed to reduced prices of goods and their swifter supply in terms of both domestic and international trade,<sup>5</sup> partly due to the introduction of electronic commerce (hereinafter-e-commerce) and electronic data interchange (hereinafter-EDI). E-commerce can be defined as “*any form of business or administrative transaction or business information exchange which is executed using information or communications technology*” or over the internet, using a computer or a smartphone etc.<sup>6</sup> Contracts of sale of goods can be concluded over the internet at the click of a button irrespective of where the parties are established. These contracts have to be determined by International or European Union law since they are usually concluded between consumer/business and business/manufacturer where the former is termed as a business-to-consumer (hereinafter-B2C) transaction and the latter as a business-to-business (hereinafter-B2B) transaction.<sup>7</sup> The European Union Commission implemented the Consumer Rights Directive<sup>8</sup> (hereinafter-CRD) so as to facilitate consumer protection throughout the European Union (hereinafter-EU) which was aimed at benefitting cross-border e-commerce trade. The CRD was partly implemented so as to increase e-commerce and online shopping in the internal market and lower barriers to online trade in the internal market. The need for reform was brought about so as to complete the internal market due to linguistic, logistical and regulatory barriers.<sup>9</sup> The CRD does not make a sharp distinction between B2B and B2C transactions yet seeks to create a coherent regulatory framework achieving harmonized consumer law throughout the EU. Previously, disparities in consumer protection throughout the European Union existed as a result of a maximum harmonisation which entailed that EU Member States governments were allowed to implement varying consumer protection clauses in their national laws. However, this is not the case anymore due to the introduction of the CRD. Commissioner Viviane Reding stated in June 2011, when The European Parliament by a majority voted in favour of the adoption of CRD;

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<sup>5</sup> Carole Murray, *Schmitthoff: The law and practice of international trade*, (12<sup>th</sup> edn, Sweet & Maxwell 2012) 909

<sup>6</sup> *idem*

<sup>7</sup> M Foss and L Bygrave, ‘International consumer purchases through the Internet: Jurisdictional issues pursuant to the European Law’ (2000) 8(2) IJLIT 100

<sup>8</sup> Directive of the European Parliament and of the Council 2011/83 on consumer rights [2011] (Consumer Rights Directive) OJ L304/64

<sup>9</sup> Commission (EC), ‘*Impact Assessment Report Accompanying the Proposal for a Directive on Consumer Rights*’ (Staff Working Document) COM (2544) 614 final, 8 October 2008

*“This is a good day for Europe’s 500 million consumers. Today’s adoption of the new EU Consumer Rights Directive will strengthen consumer rights by outlawing Internet fraudsters who trick people into paying for horoscopes or recipes that appear to be offered for free. Shoppers will no longer be trapped into buying unwanted travel insurance or car rentals when purchasing a ticket online. And everyone will have 14 days if they wish to return goods bought at a distance, whether by internet, post or phone.”*<sup>10</sup>

Hence, online sale of goods from an e-commerce perspective as opposed to general sale of goods in high-street shops is a field which is rather new and remains to be scrutinised from a legal point of view.

### 1.1.1 Significance of research

Before the introduction of electronic commerce, sale of goods took place mostly in high street shops where a buyer had the opportunity to examine the product before purchasing it. Now the purchaser has the possibility to purchase a product online, “in the dark” and at the click of a button. Thus, trade has become easier than ever before. Due to e-commerce, consumers now have a wider choice of shopping at lower prices from the comfort of their home or work. Consumers can now compare prices of goods from a wide range of offers and suppliers respectively i.e. e-commerce consumer shopping provides “*speed, convenience and competitive pricing.*”<sup>11</sup> However, the risks for consumers to shop online relate to matters such as “*product information, protection of privacy, cross-border delivery and after-sale support, returns and payments, trustworthiness of the website [etc]*”.<sup>12</sup> Furthermore, consumer protection is needed in case the goods that they have ordered online arrive damaged, do not arrive at all or do not meet their expectations.

Conversely, risks are also posed by online businesses who have to pay the costs of compliance with different consumer national laws in case of a dispute, higher cost of delivery, and after-sale service. In relation to consumer contracts, conflict of law rules, the rules on cancellation rights, returns, and guarantees are implemented differently in Member states which poses another hindrance for online stores. E-commerce on a B2C basis entails that the buyer and the seller do not meet face-to-face and enter a business relationship with the help of an e-commerce contract. In order to protect the buyer, the seller must provide the consumer with a minimum level of product information.

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<sup>10</sup> EU press release of 23 June 2011, MEMO/11/450 < [http://europa.eu/rapid/press-release\\_MEMO-11-450\\_en.htm](http://europa.eu/rapid/press-release_MEMO-11-450_en.htm) > accessed 7 March 2016

<sup>11</sup> Kevin Rogers, *The Law and the Internet* (1<sup>st</sup> edn, Palgrave Macmillan 2011) 60

<sup>12</sup> Commission (EC), ‘*Report on Cross-Border E-Commerce in the EU*’ SEC(2009) 283 final

The seller has the duty to deliver the product to the consumer who in turn has to pay the price for it when making the order online. The product can only be inspected by the distance consumer when it is delivered to their home and after they have paid the price for the product, Now that the parties are bound by the contract the buyer, thanks to EU legislation, has the opportunity to return the product by being given the right of withdrawal. The right of withdrawal grants the consumer with the right to unilaterally withdraw from the contract by restricting the binding nature of the distance contract.<sup>13</sup>

### 1.1.2 Problem statement

The national laws on consumer transactions of Member States in the EU, prior to the implementation of the CRD remained fragmented where the Member States only needed to comply at a maximum level with the EU laws on consumer transactions. The effects of the maximum harmonisation was that the businesses which were selling online showed reluctance to sell cross-border to consumers and buyers on the other hand lacked consumer confidence whilst purchasing cross-border which also led to reduced transactions on a B2C level and B2B level.<sup>14</sup> Certain issues need to be addressed when examining the position of web shops and their reluctance to sell goods cross-border. Firstly, from a trader's perspective who wishes to sell cross-border, they will have to incur legal and other compliance costs since they are obliged to adhere to the consumer protection laws of the consumers country of destination. As a consequence the trader may resort to raising the price of the goods. Conversely, from the consumers perspective, they feel insufficiently protected when purchasing a good abroad from a web-shop and this fear is paramount if the good turns out to be defective and the customer being unaware of the form of redress to seek. Fraud and criminal activity has increased due to the "veil of anonymity" between the end-user and web-shop. Most website operators have standard terms and conditions in place which must be accepted before placing an order online which aid businesses to limit the risks that pose them. Due to these fears the domestic online shopping is increasing whereas cross-border online shopping is declining.

There exists three main reason to why the EU Commission felt the need to intervene and introduce the CRD. Firstly, to minimise the differences in Member States contract law and achieve maximum harmonization. Secondly, to end the legal fragmentation that exists between the national consumer

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<sup>13</sup> Marco Loos, 'Rights of Withdrawal' in Geraint Howells and Reiner Schulze (eds), *Modernising and Harmonising Consumer Contract Law*, (Sellier 2009)

<sup>14</sup> Commission (EC), 'Impact Assessment Report Accompanying the Proposal for a Directive on Consumer Rights' (Staff Working Document) COM (2544) 614 final, 8 October 2008

contract laws and thirdly to increase consumer confidence.<sup>15</sup>

### 1.1.3 Research question

Investigate the legal position of a web-shop who contracts on the basis of a B2B contract with the manufacturer and on the basis of a B2C contract with its customers.

### 1.1.4 Research Aims

- To outline the legal framework revolving e-commerce, and consumer protection within the European Union (the CRD).
- To clarify the legal framework in relation to online sale of goods which occur at a B2C level.
- To clarify the legal framework in relation to sale of goods and a B2B level.

### 1.1.5 Chapter outline

Chapter 1 will provide the reader with the general overview of the speculation revolving e-commerce trade. Consumer protection under the CRD will be introduced which is essential in facilitating e-commerce shopping on a B2C level.

Chapter 2 will introduce the legal framework and scope of the CRD as well as contractual requirements of both parties to the sale of goods contract.

Chapter 3 will outline discuss the consumers right of withdrawal in distance contacts and the discussion revolving abuse of the right given to consumers withdrawal provided by the CRD

Chapter 4 discusses the obstacles pertinent to web-shops in e-commerce sale of goods and proves that they are in a weak position when they want to return a good to the manufacturer after a distance contract has been cancelled by the consumer.

Chapter 5 Concludes the study by proving that a web-shop is indeed less favoured vis a vis the manufacturer on a B2B contract and vis a vis the consumer on a B2C contract.

## 1.2 Speculation revolving e-commerce trade

A buyer purchasing goods over the internet and concluding a contract with the seller entails that both of the parties have contractual obligations in relation to each other. On the other hand, a web-shop, i.e. a business commits itself to an additional contract by purchasing goods from the manufacturer, and thereby a B2B contract it concluded. The web-shop acting in the capacity of an intermediary in his own right is put in a risky position since they have a returned good that they do

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<sup>15</sup> Commission (EC), 'Impact Assessment Report Accompanying the Proposal for a Directive on Consumer Rights' (Staff Working Document) COM (2544) 614 final, 8 October 2008

not have any use of. Hence, the aim of this research will be to clarify the difficult position of the web-shop and what the available remedies are available when the customer returns goods which the web-shop has little use of. E-commerce barriers in relation to cross-border and domestic trade has widened due to barriers that face cross-border online trade. Between 2006 and 2008, 30% of EU consumers bought at least one item online in comparison to 6% who purchased it cross-border.<sup>16</sup> Various legal instruments such as the Consumer Rights Directive (hereinafter-CRD)<sup>17</sup>, Brussels I,<sup>18</sup> UNCITRAL,<sup>19</sup> E-commerce directive<sup>20</sup> determine the law on internet sales. Yet, of greatest importance to this research is the CRD which was enacted by the European Union Commission on the 13<sup>th</sup> of June 2014, and introduces a horizontal instrument on consumer rights throughout the EU. The contract that the web-shop concludes with supplier of the goods is a B2B contract which entails both the parties have equal bargaining powers and positions. Both parties may be businesses, one of which for example is a manufacturer and the other a wholesaler, or between a wholesaler and a retailer. On the other hand, the other contract between business and consumer is concluded between the end-user and web-shop where the former does not have equal bargaining powers who is visiting the website to buy the product and the webshop which is selling the product to earn profits.<sup>21</sup>

Now, it is the web-shop which is left in a difficult position since they have to suffer the financial toil of having a recently returned product which they have no use of.<sup>22</sup> In essence, the web-shop

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<sup>16</sup> Commission (EC), ‘*Report on Cross-Border E-Commerce in the EU*’ SEC(2009) 283 final

<sup>17</sup> Directive of the European Parliament and of the Council 2011/83 on consumer rights (Consumer Rights Directive) [2011] OJ L304/64

<sup>18</sup> Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) [2001] OJ L12/16

<sup>19</sup> UNCITRAL Model Law on Electronic Commerce (1996)

<sup>20</sup> Directive of the European Parliament and of the Council 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) [2000] OJ L178/1

<sup>21</sup> Vinod Kumar, ‘BUSINESS TO BUSINESS (B2B) AND BUSINESS TO CONSUMER (B2C) MANAGEMENT’ (2012) 3(3) IJCT

<<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.299.8382&rep=rep1&type=pdf>> accessed 7 March 2016

<sup>22</sup> Z Akhtar, ‘Distant selling, e commerce and company liability’ [2012] 33(11) ECLR 497

concludes two separate contracts, one with the supplier on a B2B basis and another one with the prospective consumer on a B2C basis.

The lack of bargaining power of the consumer gives the consumer certain rights where they are entitled to withdraw their contract with the web-shop. *“The right of withdrawal is therefore intended to offset the disadvantage for the consumer resulting from a distance contract by granting him an appropriate period for reflection during which he can examine and test the goods acquired.”*<sup>23</sup>

## 2 Background

It is the contract terms between seller and producer on a B2B basis and between seller and consumer on a B2C basis which defines the rights and duties of the parties who are bound to the contract. Standard contract terms facilitate commercial certainty and are beneficial for consumers. However, in consumer contracts the sellers and suppliers are entitled to define their own contract terms which confers them another advantage without having to individually negotiate them with the consumers. It is for the purpose of harmonising consumer laws on this matter and diminishing unfair contract terms that the intervention on EU level is desirable. The directive on unfair contract terms<sup>24</sup> introduces the concept of “good faith” so as to prevent sellers and consumers to circumvent any imbalances of their respective rights and obligations. Terms that are unfair are enshrined in the directive and do not bind any of the parties where the consumers are favoured in the event of ambiguous contract terms. Article 3(1) of the Unfair contract terms directive reads:<sup>25</sup> *“A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.”*

National authorities of EU member states are required to enforce consumer rights and urge that businesses do not use unfair contract terms practices.

As a result of the right of withdrawal, the consumer is placed on a similar level as a face-to-face buyer. During the cooling-off period the consumer may reject the product if it does not meet their expectations due to their lack of knowledge of the product when they place an order online. In this way consumer confidence in e-commerce sales has increased. It is cumbersome for consumers to

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<sup>23</sup> Case C-489/07 *Pia Messner v Firma Stefan Krüger* [2009] ECR I- 07315, paras 20 -22

<sup>24</sup> Council Directive (EC) 93/13 on unfair terms in consumer contracts (Unfair contract terms directive) [1993] OJ L95/29

purchase goods online yet businesses have to face 28 different national laws. The desire to remove obstacles in relation to cross-border trade is one of the reasons for the introduction of the right of withdrawal. More online contracts will be concluded with higher consumer confidence and eventually more cross-border trade between businesses will take place. If the consumer is allowed to rethink his decision then the disadvantages of purchasing goods online would reduce. Some scholars argue that; “[it] seems unlikely that harmonisation of private law will result in a (substantive) increase in cross-border contracts, as other barriers such as diverging tax rates and different languages are not taken away. 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”.<sup>26</sup>

## 2.1 Importance of harmonisation

The EU commission ensures that that consumer laws are harmonised at EU level through introducing various important EU legislative initiatives whilst letting national authorities some legislative rights to advise on consumer issues.

In order to reduce negotiation and learning costs, harmonised law in relation to cross-border transactions in B2C sales is desirable.<sup>27</sup> Also, different contract laws may become costly on a B2B level and on a B2C level which may lead to competition. If the parties to a contract are settled in different member states then they have to negotiate which countries national law will govern their transaction. Whereas the CRD must be adopted by EU member states, the Commission's proposal for a Common European Sales Law (CESL)<sup>28</sup> which applies to consumer transactions is an optional legal instrument and Member states may choose to incorporate it into their national laws. The CESL covers business B2C contracts and B2B contracts and was adopted by the European Commission in October 2011. Businesses in the EU Member states may choose for the set of rules stated in the CESL to “co-exist” with their national laws for B2C contracts. BEUC<sup>29</sup> is not in favour of such an optional instrument as it is an inappropriate tool for regulating consumer contract law.<sup>30</sup>

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<sup>26</sup> Marco Loos, ‘Rights of Withdrawal’ in Geraint Howells and Reiner Schulze (eds), *Modernising and Harmonising Consumer Contract Law*, (Sellier 2009) 55

<sup>28</sup> Proposal for a regulation of the European Parliament and of the Council 2011/084 on a Common European Sales Law [2011] COM 2011/0635 Final

<sup>29</sup> Bureau Europeen des Unions de Consommateurs (The European Consumers’ Organisation)

## 2.2 Increasing consumer confidence

Stricter protection is afforded in favour of the consumer rather than the business who runs the online web-shop i.e. the seller, which leaves the latter in a risky position. E-commerce consumer protection laws exist because consumers who buy “in the dark” have little knowledge about the products end-result until it is delivered to their homes.<sup>31</sup> Thus, in order to protect the consumer, there exists an obligation on the web-shop to provide the consumer with the possibility to cancel the contract in the event that the purchaser decides to exercise their right to return the item. As a result, the web-shop who has contracted with the customer has to fill in an “empty seat” and accept the cancelled good.

A view by Dr Rott<sup>32</sup> is that distance selling is advantageous for both parties since the consumer does not have to travel and saves money whereas the trader will save money by not having to maintain a shop. Further, the consumer will be able to test the goods before being bound to the contract, yet the downside is that they bear the costs for returning the goods to the seller. On the other hand the seller usually has to take the risk that where the goods are damaged or lost in transport, he will have to bear the loss for refunding the consumer. Where the seller is transporting the goods to the consumer, the seller is also liable for any damage to the goods during delivery, provided that he has not insured against any perils with the manufacturer or carrier of the goods.<sup>33</sup>

Thus, the Court of Justice of the European Union has concluded “*that it is settled case-law that derogations from the rules of European Union law for the protection of consumers must be interpreted strictly.*”<sup>34</sup> EU member states sellers are required to guarantee that the goods that they provide are in conformity with the contract of sale for a period two years after their delivery.<sup>35</sup> If

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<sup>31</sup> E Hall, ‘Cancellation rights in distance-selling contracts for services: exemptions and consumer protection’ [2007] JBL 683

<sup>32</sup> P Rott, ‘The balance of interests in distance selling: Case-note on Pia Messner v Firma Stefan Krüger’ 18(1) ERPL 188

<sup>33</sup> idem

<sup>34</sup> Case C-489/07 *Pia Messner v Firma Stefan Krüger* [2009] ECR I- 07315, paras 32

<sup>35</sup> Directive of the European Parliament and of the Council 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees (Consumer sales directive) [1999] OJ L171/12, article 5

the goods do not conform to the contract of sale then the consumers can ask for the goods to be repaired, replaced, and reduced in price or for the contract to be rescinded.<sup>36</sup>

### 2.3 Sale of goods requirement

In order to ascertain whether there has occurred sale of goods between two businesses, the requirement of a valid contract of sale of goods must exist i.e. a valid B2B contract must be concluded and the formal requirements must be met therein. As the topic of sale of goods is extensively broad and covers contracts such as delivery, insurance, bills of lading the analysis for present purposes will be restricted to in what circumstances a web-shop may return goods to the manufacturer. The choice of law between the businesses of contracting states must be established and may be governed by various international legislative instruments such as the United Nations Convention on Contracts for the International Sale of Goods (hereafter-CISG) 1980<sup>37</sup> or Sale of Goods Act 1979<sup>38</sup> (hereafter-SoGA) which only applies to English Law. For the purpose of simplification we will assume that both businesses in the current scenario, i.e. the manufacturer and the web-shop respectively, are based in two different contracting states.

The relevant legislation that applies to international contracts of sale of goods, provided that it is the choice of legal instrument between parties whose place of businesses are in different states is the CISG 1980 (art.1).<sup>39</sup> A valid contract for the sale of goods must satisfy the requirements of an offer by the supplier and must be "*sufficiently definite and indicate the intention of the offeror to be bound in case of acceptance.*"<sup>40</sup> Conversely, the offeree must indicate his assent to an offer by accepting it by means of a statement or conduct<sup>41</sup> Under English Law, the Sale of Goods Act 1979 governs the law of sale of goods relating retailers and manufacturers for the benefit of the

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<sup>36</sup> Directive of the European Parliament and of the Council 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees (Consumer sales directive) [1999] OJ L171/12, article 3(2)

<sup>37</sup>United Nations Convention on Contracts for the International Sale of Goods 1980 available at >[http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html)< accessed 12 March 2016 (CISG)

<sup>38</sup> Sale of Goods Act 1979 available at > <http://www.legislation.gov.uk/ukpga/1979/54>> accessed 12 March 2016 (SoGA)

<sup>39</sup> United Nations Convention on Contracts for the International Sale of Goods 1980 (CISG)

<sup>40</sup> Idem article 14(1)

<sup>41</sup> Idem article 18(1)

consumers and anyone purchasing products in the sale of goods chain. When a retailer sells a good(s) they enter into an agreement or contract with the consumer. The Sale of Goods Act 1979 (SGA 1979) implies additional statutory terms into the sale contract for the benefit of the consumer in addition to any express terms agreed by both parties at the time the contract is made. The consumer has statutory legal rights against the retailer and the retailer has other statutory legal rights against the manufacturer of the goods. The consumer may raise his statutory legal rights against the seller yet not the manufacturer due to privity of contract. Article 35 of SoGA 1979 on the conformity of the goods and third party claims states *“(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.*

*(2) Except where the parties have agreed otherwise[...]. “*

Furthermore, article 41 CISG 1980 states that *“The seller must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim.”* Thus third parties to the contract for the sale of goods such as the consumer may not raise a claim against the manufacturer. In a contract for sale of goods *“a) the goods ordered should be described without ambiguity; (b) the purchase price and the terms of payment should be stated; and(c) the terms of delivery should be set out, including instructions for packing and invoicing, transportation and Insurance.”*<sup>42</sup>The goods must be of satisfactory quality which is a condition which is implied into all contracts of sale.<sup>43</sup>

The general principle under English Law is that where a buyer i.e. the web-shop in the current case, has accepted the goods he may not be eligible to reject them.<sup>44</sup> Also, the buyer has to be given the opportunity to examine the goods before accepting them and ascertaining whether they are in conformity with the contract.<sup>45</sup> Acceptance can take place in many forms. Also, the buyer may request for repair of the goods under an arrangement with the seller so long as it is within a reasonable time limit<sup>46</sup> and that would not amount to acceptance of the property that passes in the

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<sup>42</sup> Carole Murray, *Schmitthoff: The law and practice of international trade*, (12<sup>th</sup> edn, Sweet & Maxwell 2012)59

<sup>43</sup> Sale of Goods Act 1979 article 14(2)

<sup>44</sup> Sale of Goods Act 1979 article 35

<sup>45</sup> Sale of Goods Act 1979 article 35(2)(a)

<sup>46</sup> Sale of Goods Act 1979 article 35(4)

goods.<sup>47</sup> Where the seller is at fault, the buyer will not have the right to reject the goods in the event that the breach of condition is so slight that it would be unreasonable to do so, unless the contrary is agreed on in the contract.<sup>48</sup>

#### 2.4 Valid e-contract requirement

“Distance contracts” regulate the laws that bind the two parties who have concluded a contract which occurs not face to face but at a distance. It is important to determine the laws that apply to a contract. Also, what effect do the local consumer laws have on the information given on the exporter’s website? The terms and conditions of the offer on the website of the seller must be clearly stated and only after having read and accepted those terms will the customer be able to progress to accepting a formal offer. For distance contracts, the consumer must be explicitly informed of the moment at which payment is required, by the indication *“order with an obligation to pay”*.<sup>49</sup> Traders are also prohibited from pre-ticking boxes for the acceptance of additional paid goods or services, failing which consumers cannot be charged for such extra costs.<sup>50</sup>

The UNCITRAL Model Law on Electronic Commerce states that

*“an offer and the acceptance of an offer may be expressed by means of data messages. Where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose.”*<sup>51</sup>

An obligation on Member States to ensure that their legal system allows for contracts to be concluded electronically,<sup>52</sup> which requires Member States to screen their national legislation to eliminate provisions which hinder the electronic conclusion of contracts. This means that member states introduce into their legislation a horizontal provision stipulating that contracts concluded by electronic means which have the same legal validity as contracts concluded in writing. Thus, contracts concluded by electronic mean should be able to fulfil the requirement of contracts being in writing.

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<sup>47</sup> Sale of Goods Act 1979 article 35(6)(a)

<sup>48</sup> Sale and Supply of Goods Act 1994 article 15(a)

<sup>49</sup> Article 8 of CRD

<sup>50</sup> Article 22 of the CRD

<sup>51</sup> UNCITRAL Model Law on Electronic Commerce 1996, Article 11

<sup>52</sup> Directive of the European parliament and of the council 2000/31 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on Electronic Commerce) [2000] OJ L178/1

*“A contract is concluded when the consumer becomes bound to buy something and the business becomes bound to supply it. The conclusion of a contract is determined by the facts in each case.*

*It is in your interest to make clear to your consumers exactly when a binding agreement will be reached. For example, you need to explain if the contract becomes binding when the customer places the order or only when you confirm that you have accepted their offer to buy. If you are selling in a way that comes within the definition of an information society service in the ECRs, you are also required to explain the technical steps that the consumer has to follow to conclude the contract.”<sup>53</sup>*

Article 10 on the information to be provided before the conclusion of the contract

*“Member States shall ensure[...] clearly, comprehensibly and unambiguously and prior to the order being placed by the recipient of the service:*

- (a) the different technical steps to follow to conclude the contract;*
- (b) whether or not the concluded contract will be filed by the ‘Mere conduit’ service provider and whether it will be accessible;*
- (c) the technical means for identifying and correcting input consists of the transmission in a communication network of errors prior to the placing of the order*
- (d) (d) the languages offered for the conclusion of the contract”*

Also, article 11 of the e-commerce directive provides that:

*“Member States shall ensure, except when otherwise agreed by parties who are not consumers, that in cases where the recipient of the service places his order through technological means, the following principles apply:*

*— the service provider has to acknowledge the receipt of the recipient’s order without undue delay and by electronic means*

*— the order and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed able to access them.*

*2. [...] the service provider makes available to the recipient of the service appropriate, effective and accessible technical means allowing him to identify and correct input errors, prior to the placing of the order.”*

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<sup>53</sup> Office of Fair Trading ‘A guide for businesses on distance selling’ [2008] at 2.22 available at [http://webcache.googleusercontent.com/search?q=cache:http://www.doctrionics.co.uk/pdf\\_files/OFT913%2520DISTANCE%2520SELLING.pdf&gws\\_rd=cr&ei=R4FMV46eK4iwaoCqragE](http://webcache.googleusercontent.com/search?q=cache:http://www.doctrionics.co.uk/pdf_files/OFT913%2520DISTANCE%2520SELLING.pdf&gws_rd=cr&ei=R4FMV46eK4iwaoCqragE)> accessed 15 March 2016

Hypertext is the functionality which prevents a customer from proceeding to the next webpage before having accepted the terms and conditions. For example, does the website constitute an invitation to treat or offer of goods for sale? Where the terms of the website are an invitation to treat, they need to be followed by offer and acceptance. As per recital 39 of the CRD, the trader must “*ensure for distance contracts concluded through websites that the consumer is able to fully read and understand the main elements of the contract before placing his order. To that end, provision should be made in this Directive for those elements to be displayed in the close vicinity of the confirmation requested for placing the order. It is also important to ensure that, in such situations, the consumer is able to determine the moment at which he assumes the obligation to pay the trader.*”<sup>54</sup> Furthermore, the terms and conditions that apply to the contract of sale must be accessible by the consumer so that they can be easily stored and reproduced. <sup>55</sup>Parties to an E-contract do not meet face to face when they conclude a contract. Instead the retailer who is selling its goods or services online advertises its products online where a full catalogue of products are shown offered to consumers who are visiting the retailer’s website.

Whether the catalogue of offers indicate the retailers wish to create an offer or an invitation to treat is a matter of contention. It is presumed that the catalogue on the website are an invitation to treat rather than an offer.<sup>56</sup> Thus, it is presumed that the website visitor would make an offer for an item that he would like to purchase, which the business would accept, as demonstrated in the English jurisdiction systems.<sup>57</sup> For instance, in the case of Entores Ltd. v Miles Far East Corporation, the court reiterated that the contract was concluded when the acceptance was received by the offerors, stating that “[...] *So far as telex messages are concerned, though the dispatch and receipt of a message is not completely instantaneous, the parties are to all intents and purposes in each other’s presence just as if they were in telephone communication, and I can see no reason for departing from the general rule that there is no binding contract until notice of the acceptance was received by the offeror.*”<sup>58</sup> However, where there are difficulties in the transmission, such as technical delay

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<sup>54</sup> CRD recital 39

<sup>55</sup> Office of Fair Trading ‘A guide for businesses on distance selling’ [2008] at 4.6 available at >[http://webcache.googleusercontent.com/search?q=cache:http://www.doctrionics.co.uk/pdf\\_files/OFT913%2520DISTANCE%2520SELLING.pdf&gws\\_rd=cr&ei=R4FMV46eK4iwaoCqragE](http://webcache.googleusercontent.com/search?q=cache:http://www.doctrionics.co.uk/pdf_files/OFT913%2520DISTANCE%2520SELLING.pdf&gws_rd=cr&ei=R4FMV46eK4iwaoCqragE)> accessed 15 March 2016

<sup>56</sup> Kevin Rogers, *The Law and the Internet* (1<sup>st</sup> edn, Palgrave Macmillan 2011)

<sup>57</sup> Fisher v Bell [1961] 1 QB 394

<sup>58</sup> Entores Ltd v Miles Far East Corporation Ltd [1955] 2 QB 327

or human error, the House of Lords have previously stated; “*Some error or default at the recipient’s end which prevents receipt at the time contemplated and believed in by the sender ....No universal rule can cover all such cases; they must be resolved by reference to the intentions of the parties, by sound business practice and in some cases a judgment where the risks should lie.*”<sup>59</sup> Furthermore, the E-commerce directive 2000 article 10(1)(a) states that, where a contract is concluded by electronic means, the service provider must notify the service recipient or consumer of the steps that must be taken in order to conclude the contract. Further, in interchange agreements, the service provider has to communicate to the consumer, in the terms and conditions of the contract of when acceptance is bound to take place. There are various ways in which contract formation may take place in internet sales, where the most common form is “click-wrap” contract, whereby a party visits a website and accepts the terms by clicking on an acceptance button.<sup>60</sup>

## 2.5 Choice of court clause in the event of dispute

Recital 10 of the CRD states that Rome I<sup>61</sup> has priority over the provisions that are stated in the CRD. Thus, the applicable law to a contract must be tried under the Rome I Regulation which, under article 6(1) states that a consumer contract “*shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional (a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or (b) by any means, directs such activities to that country or to several countries including that country, and the contract falls within the scope of such activities*”. Thus, no uniform code on this exists and it is up to the court to decide this. Article 6(5) of the United Nations Convention on the Use of Electronic Communications in International Contracts (UNCITRAL) states that “*the sole fact that a party makes use of a domain name or electronic mail address connected to a specific country does not create a presumption that its place of business is located in that country*”. The national contract law of the consumer where he is habitually resident or where the trader directs such activities or to several countries applies to the contract, unless agreed otherwise by the parties to the contract. Where the parties have chosen to apply different contract law than that of the consumer, that choice may not deprive the consumer of the protection afforded by mandatory provisions of the member state where he is habitually resident. Where the trader directs his website

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<sup>59</sup> Brinkibon Ltd v Stahag Stahl GmbH [1983] 2 AC 34

<sup>60</sup> Carole Murray, *Schmitthoff: The law and practice of international trade*, (12<sup>th</sup> edn, Sweet & Maxwell 2012) 916

<sup>61</sup> Regulation of the European Parliament and of the council 593/2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6

at consumers in a particular member state, the language of consumers. The judgement of the CJEU in the joined cases Peter Pammer and Hotel Alpenhof GesmbH<sup>62</sup> establishes that a website is 'directed' at a specific Member State where the website owner uses different languages or currencies on the website.

### 3 Consumer rights directive

The CRD is an important instrument in B2B sales because it determines the minimum rights of a consumer vis-à-vis the seller. Its aim is to create uniform consumer law throughout the EU member states and addresses B2C sales and seeks to strengthen consumer confidence when shopping online. The aim of the CRD is to “*strike the right balance between a high level of consumer protection and the competitiveness of enterprises*” as is also required by the EC Treaty articles 153(1) and (3)(a) and reiterated in recital 4 of the CRD. National legislatures of the 28 Member states of the EU are still implementing the CRD, yet there exists unresolved issues relating to the B2B sales which needs to be scrutinized. The CRD replaces two existing directives which regulate distance contracts and off-premises contracts<sup>63</sup> and amends unfair terms and consumer sales directives.<sup>64</sup> Significant changes brought about by the CRD which are the main focus of this study relate to the rights of withdrawal for consumers and information obligations for businesses in distance selling conditions. Harmonisation of the rights to withdrawal in distance contracts is paramount for the functioning of the internal market as stated in the preamble<sup>65</sup> and article 1 of the CRD. The CRD does not make changes to the national contract laws of a Member state and leaves autonomy for national legislatures to resolve issues on that matter. The CRD aims at achieving minimum harmonisation on consumer laws<sup>66</sup> within the EU, yet Member States are allowed to adopt a higher level of consumer protection. Member states may derogate or opt-out from some provisions of the CRD which are briefly outlined below.

#### 3.1 Scope of the CRD

Generally, the directive applies to any contracts that are concluded between trader and consumer (article 3 para. 1). The CRD applies to a variety of contracts concluded online yet the focus will be

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<sup>62</sup>Case C-585/08 and C-144/09 Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG [2010] ECR I-12527, paras 92

<sup>63</sup> Directive of the European Parliament and of the Council 97/7/EC on the protection of consumers in respect of distance contracts [1997] OJ L144/19

<sup>64</sup> Council Directive (EC) 93/13 on unfair terms in consumer contracts (Unfair contract terms directive) [1993] OJ L95/29

<sup>65</sup> Recital 5 of the CRD

<sup>66</sup> Article 4 of the CRD

on sales contracts. The definition of a sales contract is “any contract under which *the trader transfers or undertakes to transfer the ownership of goods to the consumer and the consumer pays or undertakes to pay the price thereof, including any contract having as its object both goods and services*”<sup>67</sup> Contracts which cover both sale of goods and services are contracts for, for example “*the purchase of a new kitchen set, including its installation at the consumer’s apartment*”<sup>68</sup> It is important to note that where the real main purpose of the contract is to supply services and not goods then the substance of the contract will be taken into consideration which may be, for example “*those related to the construction of annexes to buildings (for example a garage or a veranda)*”<sup>69</sup> which will be classified as a service contract. The CJEU Marcel Burmanjer<sup>70</sup> stated that the economic activity should be perceived from the context of either the free movement of goods or the freedom to provide services where one of the movements ‘*is entirely secondary in relation to the other and may be considered together with it*’. As per art 2(2) “*trader means any natural person or any legal person, [...] who is acting, [...], for purposes relating to his trade, business, craft or profession in relation to contracts covered by this Directive*”

However, legislative EU instruments regulating areas for which the specific contract is concluded will have priority over the provisions of the CRD. In other words, the e-commerce directive has priority before the provisions of the CRD. Pursuant to article 6 paras 8 the provisions of the CRD would have priority over the information obligations that are stated in the directive on e-commerce, provided that information obligations of the trader are regulated differently in the scope of the information obligations in the latter directive. However, the CRD does allow traders in Member states the right to “*offer consumers contractual arrangements that are more beneficial for them than the protection granted by the CRD, for example by prolonging the length of the cooling-off period granted by the CRD.*”<sup>71</sup>

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<sup>67</sup> Article 2(5) of the CRD

<sup>68</sup> Directorate General Justice Guidance document concerning Consumer Rights Directive 2011/83 available on > [http://ec.europa.eu/justice/consumer-marketing/files/crd\\_guidance\\_en.pdf](http://ec.europa.eu/justice/consumer-marketing/files/crd_guidance_en.pdf)> accessed 12 March 2016

<sup>69</sup> Recital 26 of the CRD

<sup>70</sup> Case C-20/03 *Criminal proceedings against Marcel Burmanjer and Others* [2005] ECR I-4133 paras 34-35

<sup>71</sup> Article 4 of CRD

### 3.1.1 'Opt-out' provisions in relation to the Dutch legal system

As per Article 5(3) of the CRD, Member states may eliminate the application of the CRD where “off-premises” contracts are concerned provided that the consumer’s payment obligation does not exceed 50 euros.

For example, the Dutch legislature has implemented Article 5(3) of the CRD since obliging traders to provide all the required information in such cases imposes significant costs.<sup>72</sup>

In case of “off-premise” contracts, the member states may limit the amount of pre-contractual information obligations that need to be given by the trader to the consumer.<sup>73</sup> The limit on information obligations only apply where a consumer clearly approaches a trader and requests for their services in order to get something repaired or for the purpose of maintenance, both their contractual obligations will be performed immediately provided that the consumers payment obligations do not exceed 200 euros.<sup>74</sup> For example the Dutch legislature has opted-out from implementing the previous provision since this will not generate any cost savings.<sup>75</sup>

### 3.1.2 The notion of ‘Consumer’

The curious definition of “consumer contract” is a contract concluded by a person “for a purpose which can be regarded as being outside his trade and profession” (Brussels Convention, Article 13, Brussels II, Article 15, Rome Convention, Article 5; a similar wording used in Article 2 of the E-Commerce Directive. The notion of consumer has been defined in various legislative instruments such as the Rome I and Brussels I Regulation, which include specific rules for consumer protection and also in the Recital 13 (of the CESL) of the directive gives Member states the choice to extend the notion of “consumer” to “*non-governmental organisations, start-ups or small and medium-sized enterprises*” as indicated above. Under EU law small and medium-sized enterprises (SMEs) are never treated as consumers. However, some Member states have extended that notion of “consumer” to include SME’s such as in the case for Netherlands with a maximum of 49 employees. In France sole traders are protected so long as the business contract does not directly relate to the trader's business activity. In the UK, companies that purchases goods which they do

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<sup>72</sup> Memorie van implementatie van de Richtlijn consumentenrechten p. 6. Proposed art. 6:230h par. 2 sub of the Dutch Civil Code.

<sup>73</sup> CRD article 7 para 4

<sup>74</sup> CRD Article 7 para 4

<sup>75</sup> Memorie van implementatie van de Richtlijn consumentenrechten [footnote 6], p. 6. Proposed art. 6:230h par. 2 sub a of the Dutch Civil Code.

not usually deal with may rely on consumer protection against unfair contract terms.<sup>76</sup> According to the CRD art 2(1), a ‘consumer’ means any natural person who is acting for purposes which are outside his trade, business, craft or profession. When a consumer purchases goods online he concludes a “distance contract”<sup>77</sup> with a “trader under an organised distance sales or service-provision scheme without the simultaneous physical presence of the trader,” with use of distance communication up to and including the time at which the contract is concluded. A good is defined as a “moveable and tangible item” as per article 2(4) of the CRD.

### 3.2 Off-premise contract

Article 6 of the CRD determines the law that is applicable to “off-premise” and “distance contracts”. The directive also applies to “off-premises contracts”<sup>78</sup> where a trader enters into a contract with a consumer away from the former’s place of business, but in the physical presence of the consumer. The CJEU in *Travel-Vac* stated “*As regards the question whether the contract was concluded away from the trader’s business premises, it must be observed that this concept refers to premises in which the trader usually carries on his business and which are clearly identified as premises for sales to the public.*”<sup>79</sup> The “place of business” is interpreted as where the trader carries out its essential decisions or where the central administration is carried out. For example, the judgment of the Court of Justice in *Case C-73/06 Planzer*,<sup>80</sup> states that the “*Determination of a company’s place of business requires a series of factors to be taken into consideration, foremost amongst which are its registered office, the place of its central administration, the place where its directors meet and the place, usually identical, where the general policy of that company is determined. Other factors, such as the place of residence of the main directors, the place where general meetings are held, the place where administrative and accounting documents are kept, and the place where the company’s financial, and particularly banking, transactions mainly take place, may also need to be taken into account.*” Moreover, in relation to off-premises contracts, Member states may adopt stricter requirements than those laid out in the CRD. In off-premises contracts

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<sup>76</sup>Rafal Manko, ‘The notion of consumer in EU law’ in Library of the European Parliament (2013) available at >[http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130477/LDM\\_BRI\(2013\)130477\\_REV1\\_EN.pdf](http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130477/LDM_BRI(2013)130477_REV1_EN.pdf)> accessed 25 April 2016

<sup>77</sup> Article 2(7) of the CRD

<sup>78</sup> Article 2(8) of the CRD

<sup>79</sup> Case C-423/97 *Travel Vac SL v Manuel José Antelm Sanchis* [1999] ECR I-02195, paras 37

<sup>80</sup> Case C-73/06 *Planzer Luxembourg Sàrl v Bundeszentralamt für Steuern* [2007] ECR I-05655, paras 61

Member states may exclude the application of the CRD where the payment obligations of the consumer does not exceed the amount of 50 euros<sup>81</sup>

### 3.3 Rights of withdrawal

The right of withdrawal entails that the consumer may withdraw from a concluded contract with a trader within the time-span of 14 days, which is termed as the “cooling-off period” and is now enshrined in article 9 paragraph 1 of the CRD. The right of withdrawal from a contract previously existed in the Distance selling directive which is now replaced by the CRD. In the event that the consumer wishes to exercise his right to withdrawal electronically, the trader is obliged to provide the consumer with a model withdrawal form on his website<sup>82</sup> where after the trader must immediately send a receipt confirmation of the withdrawal to the consumer<sup>83</sup> via a durable medium, which usually takes the form of an email confirmation. Pursuant to article 2 paragraph 10 of the CRD, a durable medium is defined 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.*”

The trader must provide the consumer with a confirmation of the contract as per article 6 paragraph 1 and all of the information stated therein. The trader has to provide the information under article 6 paragraph 1 as stated under article 7 paragraph 1 to paragraph 2 or article 8 paragraph 7 unless already provided for before on a durable medium. The definition of a 'durable medium' was examined by the Court of Justice in case CJEU case Content Services Ltd<sup>84</sup> concerning the Distance Selling Directive 97/7/EC, which also required confirmation of a distance contract on a durable medium in Article 5(1). It was held by the court that a mere provision of information on a website does not constitute durable medium: “*Article 5(1) of 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 must be interpreted as meaning that a business practice consisting of making the information referred to in that provision accessible to the consumer only via a hyperlink on a website of the undertaking concerned does not meet the requirements of that provision, since that information is neither ‘given’ by that undertaking nor ‘received’ by the consumer, within the meaning of that*

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<sup>81</sup> Article 3(4) of the CRD

<sup>82</sup> Article 11(1) of the CRD

<sup>83</sup> Article 11 (3) of the CRD

<sup>84</sup> Case C-49/11 Content Services Ltd v Bundesarbeitskammer [2012] para 46 available at > <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-49/11>> accessed 30 March 2016

*provision, and a website such as that at issue in the main proceedings cannot be regarded as a 'durable medium' within the meaning of Article 5(1)."* There is nothing in the file to indicate that the seller's website, to which the link sent to the consumer connects, allows that consumer to store information which is personally addressed to him in such a way that he can access it and reproduce it unchanged during an adequate period without the seller being able to amend the content unilaterally."<sup>85</sup>

Thus, a customer may have a personalised account on a retailer's website where the consumer may not unilaterally change the information that the retailer stores, and that would still suffice as a durable medium under the directive. The trader should remain subject to the obligation under Article 8(7) to provide the confirmation of the contract on a durable medium albeit pre-contractual information was provided to the consumer in accordance with Article 8(4). As regards the timing of the confirmation Article 8(7) requires it to be sent 'within a reasonable time after the conclusion of the distance contract'. The confirmation must be provided at the time of the delivery of the goods or before the performance of the service begins, at the latest.

The receipt of withdrawal acts as another layer of protection to the consumer and allows them to prove that they withdrew from the contact within the cooling-off period.<sup>86</sup> It is when the consumer sends their notice of withdrawal which determines the termination of contract and not when the trader receives it.<sup>87</sup> The consequence of exercising the right of withdrawal is termination of contract between trader and consumer.<sup>88</sup> Any other ancillary contract, for example is also extinguished and the rights deriving therein.<sup>89</sup> The trader is obliged to reimburse the consumer within 14 days of the receipt of termination of the contract.<sup>90</sup> In the Heine case<sup>91</sup> it was concluded that the trader is obliged to reimburse the customer with the cheapest standard form of delivery costs, yet this does not include any supplementary costs of delivery for example 24 hour express delivery.<sup>92</sup> The

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<sup>85</sup> C-49/11 Content Services Ltd v Bundesarbeitskammer [2012] para 46 available at > <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-49/11>> accessed 30 March 2016

<sup>86</sup> Article 11(4) of the CRD

<sup>87</sup> Article 11(2) of the CRD

<sup>88</sup> Article 12 of the CRD

<sup>89</sup> Article 15 of CRD

<sup>90</sup> Article 13(2) of the CRD

<sup>91</sup> Case C-511/08 Handelsgesellschaft Heinrich Heine GmbH v Verbraucherzentrale Nordrhein-Westfalen [2010] ECR I-03047

<sup>92</sup> Article 13(2) and recital 46 of the CRD

consumer has the right reimbursement in the same form that they paid for the goods, for example online bank transfer unless the consumer expressly agrees to another method of reimbursement.<sup>93</sup> It was concluded in the case that even where the consumer is “*informed of the amount of the delivery costs prior to concluding the contract cannot neutralise the dissuasive effect which the charging of those costs to the consumer would have on his exercise of his right of withdrawal.*”<sup>94</sup> Also, national legislation which allows for the supplier under a distance contract to charge the costs of delivering the goods to the consumer where the latter exercises his right of withdrawal.”<sup>95</sup>

The consumer is obliged to return the goods to the trader within 14 days of withdrawing from the contract<sup>96</sup> where the costs of return have to be covered by the consumer, unless the trader agrees to bear the costs or, prior to the contract was formed fails to inform the consumer of this.<sup>97</sup> The trader does not need to reimburse the consumer until he has received the goods and, or where he has received a confirmation of the postal receipt of goods.<sup>98</sup> Where it becomes too cumbersome for the consumer to return the goods, for example if they are too big in size or too heavy, the trader must arrange for their pick-up at his own expense.<sup>99</sup>

### 3.4 Cooling-off period

The question as to when the cooling-off period commences differs from the type of contract that has been concluded. In relation to sale of goods the cooling-off period commences from the moment of the delivery of the goods to the consumer and when they acquire physical possession of the goods.<sup>100</sup> However, even the types of goods are categorised, for example; in relation to a bulk of goods being delivered to the customer, the day that the last good is received by him will determine the day that the cooling-off period starts to run.<sup>101</sup> The withdrawal period is extended by

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<sup>93</sup> Article 13(1) of the CRD

<sup>94</sup> Case C-511/08 Handelsgesellschaft Heinrich Heine GmbH v Verbraucherzentrale Nordrhein-Westfalen [2010] ECR I-03047 paras 58

<sup>95</sup> Case C-511/08 Handelsgesellschaft Heinrich Heine GmbH v Verbraucherzentrale Nordrhein-Westfalen [2010] ECR I-03047 paras 60

<sup>96</sup> Article 14(1) of the CRD

<sup>97</sup> Article 14 (11)of the CRD

<sup>98</sup> Article 13 (3) of the CRD

<sup>99</sup> Article 14(1) of the CRD

<sup>100</sup> Article 9(2)(b) of the CRD

<sup>101</sup> Article 9(2)(b)(i) CRD

one year from the time that the initial withdrawal period would have commenced in the event that the trader does not disclose to the customer of the right to withdrawal.<sup>102</sup>

A model withdrawal form must also be provided to consumers.<sup>103</sup> Failure to comply with the right of withdrawal is subject to administrative sanctions of up to EUR 15.000 for individuals and EUR 25.000 for companies.<sup>104</sup>

### 3.5 Information obligation of off-premise and distance contracts

Upon mutual agreement the parties to the contract are allowed to exclude the information duties.<sup>105</sup> Any ambiguities or disparities in relation to the sale of goods contract must be disclosed by the trader before the contract is concluded, so that when the goods are delivered they meet the expectations of the consumer.<sup>106</sup> As per Article 6(9) of the CRD, the trader has the burden of proof to show that his information obligations were fulfilled as towards the consumer. When a contract is concluded by electronic means, the trader is liable to inform the consumer about the latter's obligation to pay, in a clear comprehensible manner and before the consumer places his order (Art 8 para 2 CRD). When a consumer uses the internet to place his order, the trader must make sure that the consumer acknowledges to pay prior to placing the order (Art 8 para 8 sentence 2) and this functionality is usually done at a click of a button which must be "labelled in a an easily legible manner." If the trader breaches the obligation to not disclose pre-contractual information obligations, save for the right of withdrawal by the customer, then the Member states are allowed to determine the sanctions against the trader provided that they are effective, proportional and dissuasive as per article 24 of the CRD.

Also, article 5 of the CRD states the trader must, prior to the conclusion of the contract, disclose the main characteristics of the product, the address and identity of the trader, the price (including taxes), the arrangements for payment and delivery, the existence of a right to withdraw (where applicable), the existence of any after-sales services and guarantees, the duration of the contract, the obligations of the consumer and whether any deposit is required.

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<sup>102</sup> Article 10 para 1 CRD

<sup>103</sup> Article 6(1) of the CRD

<sup>104</sup> Article 24 of the CRD

<sup>105</sup> Article 6(5) of the CRD

<sup>106</sup> Article 6(5) of the CRD

Furthermore, the information given must be “available to the consumer in a way appropriate to the means of distance communication used in plain and intelligible language. In so far as that information is provided on a durable medium, it shall be legible” as per article 8(1) of the CRD. For example, in the Netherlands the sanction for breach of non-disclosure of information obligations allows the consumer to terminate the contract as a result of mistake<sup>107</sup> fraud<sup>108</sup> or a receive compensation for non-performance<sup>109</sup> of contract. The trader might also be fined for unfair commercial practice.<sup>110</sup> Further, the justification for right of the consumer to be informed of the right of withdrawal is that they should not be “disadvantaged” by fact that they were not informed of the right of withdrawal. In other words, a consumer may avoid the payment of compensation where they do not know that they are merely entitled to “test” the goods and not “use” them.<sup>111</sup>

Article 6(1) of the CRD states that consumers are extinguished from the liability to pay for any additional charges, if they are not notified to do so before the contract is conclude, as required by Article 5(1)(c). Recital 12 of the CRD states that the directive shall complete the information requirements of Directive on electronic commerce<sup>112</sup> where “*Member States should retain the possibility to impose additional information requirements applicable to service providers established in their territory.*”

Member states are allowed to impose language requirements in relation to the contractual information in distance and off-premise contracts as per article 6(7) of the CRD. Further, as per the Rome I article 6 traders are required to provide information in the national language of the Member state of the consumer.

### 3.5.1 Delivery

Goods have to be delivered within 30 days of the conclusion of the contract<sup>113</sup> unless agreed otherwise by the parties. Where goods have been delivered late to the consumer, the consumer will

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<sup>107</sup> Art 6:228 of the Dutch civil code

<sup>108</sup> Art 3:44 of the Dutch civil code

<sup>109</sup> Art 6:74 of the Dutch civil code

<sup>110</sup> Art 6:230 par 3 of Dutch civil code

<sup>111</sup> Case C-350/03 Elisabeth Schulte and Wolfgang Schulte v Deutsche Bausparkasse Badenia AG [2005] ECR I-9215

<sup>112</sup> Directive of the European Parliament and of the Council 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1 (Directive on electronic commerce)

<sup>113</sup> Article 18 para 1 of the CRD

be allowed to terminate the contract. Unless the delivery within the 30 days is essential and unless seller has refused to deliver the goods, the consumer has to give the trader additional time to perform the contract.<sup>114</sup> The risk in relation to the goods passes when the consumer or a third party indicated by the consumer gets physical possession of the goods.<sup>115</sup> Where the carrier of the goods is commissioned by the consumer and that option was not offered to the trader, the passing of the risk takes place when the carrier receives possession of the goods.<sup>116</sup>

If a web-shop has terms and conditions on their webpage which contravene with EU law then the web-shop must amend these so as to put these in line with EU law. For example, in 2003, the company Virgin Wines Online terms and conditions stated that a consumer that the goods sold on their website were non-refundable and that cancellation of the product could only be effective if such a measure was done via email or a phone call. Another term stated that in certain contracts, delivery could take over 30 days. Virgin Wines were obliged to change these terms following an approach by the Office of Fair Trading.<sup>117</sup>

#### 4 Discussion

As previously addressed in Chapter 2, the CRD affords rights to the consumer to return goods to the online retailer within 14 days of the purchase, without any justification. The consumer has a contract with the retailer and not the manufacturer and cannot use their right of withdrawal against the manufacturer. The reason to why the consumer cannot enforce his rights against so as to receive a remedy from the manufacturer is due to the legal phenomena known as privity of contract, discussed in detail below. Where the retailer has received the goods he may not return them to the manufacturer or any other intermediary in the chain of contracts, unless otherwise agreed between the parties to the contract. The only circumstances in which the retailer may return the goods is when they are faulty or are not of satisfactory quality<sup>118</sup> or where there exists a consumer product guarantee stating that where the consumer wishes to withdraw from their contract, the manufacturer will accept the returned goods. Consumer product guarantees are promises by manufacturers that they will repair or replace the product free of charge, where it turns out to be faulty.<sup>119</sup> Yet, this is

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<sup>114</sup> Article 18 para 2 of the CRD

<sup>115</sup> Article 20 of the CRD

<sup>116</sup> *idem*

<sup>117</sup> OFT Press Release ‘Virgin Wine gives consumers a fairer deal online 14 May 2003’ Available at <[http://www.of.gov.uk/news/press/2003/pn\\_58-03](http://www.of.gov.uk/news/press/2003/pn_58-03)> accessed 30 March 2016

<sup>118</sup> SoGA 1979 article 14(2)(b)

<sup>119</sup> Adams, ‘Giving consumers a remedy in internet sales of goods’ [2011] 4 JBL 379

highly unlikely to occur since it would be very costly and cumbersome for manufactures to accept returned goods from consumers. However, in relation to technological products such as mobile phones or washing machines, some retailers wish to insert a condition into the contract with the manufacturer that the latter will repair or replace the product where a product has turned out to be defective during the two year guarantee period.<sup>120</sup> As mentioned earlier, EU member states sellers are required to guarantee that the goods that they provide are in conformity with the contract of sale for a period two years after their delivery.<sup>121</sup> However, the retailers must pay for a product insurance and raise the price of the product or alternatively the consumer pays for an extended warranty clause which entitles the latter to have the product replaced or repaired within a certain timeframe in the event that the product has turned out to be defective within two years of the purchase as per EU law unless otherwise stated in the manufacturer's warranty.<sup>122</sup>

Under Directive 1999/44/EC on consumer goods and associated guarantees, is to give consumers a minimum two years guarantee for all goods which imposes a *“a retailer could be held liable for all 'non-conformities' (i.e. defects) which manifest in the good within two years from delivery”*. Goods will usually not last for 2 years, however it simply provides that consumer goods must conform to the sales contract at the time of delivery. If the defect becomes apparent within the first six months of purchase, it will be presumed to have existed at the time of delivery, otherwise this will be for the consumer to prove.

#### 4.1 Passing of risk to the consumer

The risk of returning the goods when the consumer withdraws from the contract is determined by national laws of the consumer's place of delivery and the CRD is silent on that matter.

National laws may for example, provide that the risk during the return of the goods lies with the consumer once it is transferred to him upon delivery in accordance with Article 20. Therefore the consumer ought to take reasonable care when returning the goods by choosing the right transport or postal service provider so that the burden of proof does not lie on the consumer. In the event that the consumer withdraws from the contract without having taken physical possession of the goods for example by refusing to take delivery the trader is bound to continue to bear the risk for any loss or damage done to the goods since no transfer of risk on the consumer would have taken place as

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<sup>120</sup> Idem

<sup>121</sup> Directive of the European Parliament and of the Council 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees (Consumer sales directive) [1999] OJ L171/12, article 5

<sup>122</sup> Winterbottom v Wright [1842] 152 English Rep 405

per article 20 of the CRD.<sup>123</sup> However, Member States may not make it difficult excessively difficult for the consumer to exercise his rights in the event that they want to withdraw from the contract, for example making them liable to compensate the seller when goods are lost in transport. Transport is inherent and a part and parcel of distance selling and therefore there seems to be little reason to why the consumer should bear the cost for damage occurred to the goods outside of their own home when they have not even gotten physical possession of the goods.<sup>124</sup> Article 3 of Directive 1999/44/EC on sale of consumer goods and associated guarantees states that the

*“1. The seller shall be liable to the consumer for any lack of conformity which exists at the time the goods were delivered.*

*3. A remedy shall be deemed to be disproportionate if it imposes costs on the seller which, in comparison with the alternative remedy, are unreasonable“*

#### 4.2 Abuse of the right of withdrawal

Recital 47 of the CRD states that consumers can withdraw from the contract regardless of how the goods have been handled during the withdrawal period: *“Some consumers exercise their right of withdrawal after having used the goods to an extent more than necessary to establish the nature, characteristics and the functioning of the goods. In this case the consumer should not lose the right to withdraw but should be liable for any diminished value of the goods [...] In order to establish the nature, characteristics and functioning of the goods, the consumer should only handle and inspect them in the same manner as he would be allowed to do in a shop. For example, the consumer should only try on a garment and should not be allowed to wear it. Consequently, the consumer should handle and inspect the goods with due care during the withdrawal period.”* However, in these cases Article 14(2) makes the consumer liable *“for any diminished value of the goods resulting from the handling of the goods other than what is necessary to establish the nature, characteristics and functioning of the goods”*

One study conducted by Borges on the effects of cooling-off period states that *‘one should expect that there is a considerable difference in withdrawal behaviour depending on whether they are voluntarily granted by sellers or whether they are imposed by law. If the seller voluntarily offers a withdrawal right to the buyers this might be perceived by them as a generous act and they might*

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<sup>123</sup> Directorate General Justice Guidance document concerning Consumer Rights Directive 2011/83 [2014] (at 6.4.4) available on > [http://ec.europa.eu/justice/consumer-marketing/files/crd\\_guidance\\_en.pdf](http://ec.europa.eu/justice/consumer-marketing/files/crd_guidance_en.pdf)> accessed 12 March 2016

<sup>124</sup> Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group) *‘Principles, Definitions and Model Rules of European Private Law’* Common frame reference Art II at 5:105(3)(b) available at >[http://ec.europa.eu/justice/policies/civil/docs/dcfr\\_outline\\_edition\\_en.pdf](http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf)> accessed 17 March 2016

*feel inclined to reciprocate by not exploiting the seller too much. On the other hand a withdrawal right imposed by law would provide the buyers with an entitlement to exert this right. Additionally, it would deprive the seller of showing “friendly” intentions and thereby buyers might not see the need to be considerate of the seller.*<sup>125</sup>

In relation to goods being damaged during the cooling-off period, first the CJEU must determine the type of goods in question. In relation to car hire, the Office of Fair Trading produced guidance for businesses who sell vehicles through distance means of communication. Since a car may depreciate in value right after sale and registration, it is unlikely to affect the physical condition of the car and thus car hire companies are liable for refund during that period in the event of cancellation of contract by the customer. However, where the consumer does not take reasonable care of the car he is liable to pay damages for any loss ensued as a result of that damage to the car.

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The leading case on the issue of depreciation of value of the goods during the cooling-off period is the Messner case where Mrs Messner, the defendant, bought a second-hand laptop over the internet for 278 euros. After having used the laptop for eight months, it became defective. The right of withdrawal within 14 days of the conclusion of the contract was allowed on the website of the seller, yet another term stated that the consumer has to pay compensation for any depreciation of the goods from the day of purchase to its return.

Initially, Mrs Messner would have had the right of withdrawal of 14 days yet under German Law as per para § 355 of the BGP, yet she never received effective notice of her right of withdrawal before the purchase. The question arose as to whether Ms Messner was allowed a refund pursuant to returning the laptop to the seller after having used it for eight months. Under German Law the seller must inform the consumer of their right “*in writing by a clearly formulated notice of his right of withdrawal which makes clear to him his rights in accordance with the requirements of the means of communication used and which also states the name and address of the person to whom withdrawal is to be declared*” as per § 355 of the BGP. Where the distance consumer has not received effective notice on their right of withdrawal pursuant to § 357 paragraph of the BGP their right of withdrawal will not be extinguished. The European Court of Justice decided that the

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<sup>125</sup> Georg Borges & Bernd Irlenbusch, ‘Fairness Crowded Out by Law: An Experimental Study on Withdrawal Rights’ JITE [2007] 163

<sup>126</sup> OFT Guidance Cars and other vehicles sold by distance means: Guidance on compliance [2005] page 8 available at: >[http://www.of.gov.uk/shared\\_of/reports/consumer\\_protection/oft689.pdf](http://www.of.gov.uk/shared_of/reports/consumer_protection/oft689.pdf)> accessed 30 March 2016

consumer's right of withdrawal would only be effective where they do not have to pay for any additional costs of returning the goods other than the direct costs of sending the goods back to the trader. The CJEU concluded "*it is for the Member States to determine the other conditions and arrangements following exercise of the right of withdrawal.*" Yet, it may not "*affect the efficiency and effectiveness of the right of withdrawal. Such would, for example, be the case if the amount of compensation, such as that referred to in the previous paragraph, were to appear disproportionate in relation to the purchase price of the goods at issue or also if the provision of national law were to place on the consumer the onus of proving that he did not use those goods during the period for withdrawal in a manner which went beyond what was necessary to permit him to make effective use of his right of withdrawal.*"<sup>127</sup> The reasoning behind the courts judgement is that the consumer should not fear that they are liable to reimburse the trader when shopping online and should be given the chance to test the goods, as is now incorporated in the CRD. If the supplier were to be compensated by the consumer than that would undermine the objectives of consumer protection. However, only when [the consumer] has made use of the goods acquired under a distance contract "*in a manner incompatible with the principles of civil law, such as those of good faith or unjust enrichment*",<sup>128</sup> will he have to reimburse the trader. As per Article 14(2) of the CRD, which states; "*The consumer shall only be liable for any diminished value of the goods resulting from the handling of the goods other than what is necessary to establish the nature, characteristics and functioning of the goods. The consumer shall in any event not be liable for diminished value of the goods where the trader has failed to provide notice of the right of withdrawal.*"<sup>129</sup> Thus, this can be used as a defence mechanism for the online retailer when rejecting to reimburse the consumer for the mishandling of the goods. Hence, the online retailer will be allowed to deduct money form refunds where goods show sign of use or unreasonable handling leading to diminished value.<sup>130</sup> Further, the question as to whether the consumer is liable to pay compensation to the seller for the

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<sup>127</sup> Case C-489/07 *Pia Messner v Firma Stefan Krüger* [2009] ECR I- 07315 paras 27

<sup>128</sup> Case C-489/07 *Pia Messner v Firma Stefan Krüger* [2009] ECR I- 07315 paras 25-26

<sup>129</sup> Article 14 (2) of the CRD

<sup>130</sup> Department for business and innovation skills '*Consumer Rights Act: Guidance for business*' (2015) available at

>[https://www.businesscompanion.info/sites/default/files/The%20sale%20and%20supply%20of%20goods\\_ALL\\_BIS\\_GOODS\\_GUIDANCE\\_SEP15.pdf](https://www.businesscompanion.info/sites/default/files/The%20sale%20and%20supply%20of%20goods_ALL_BIS_GOODS_GUIDANCE_SEP15.pdf) < accessed 30 March 2016

use of those defective goods until their replacement with new goods is admissible under national law, was deemed inadmissible as ruled in the *Quelle* case.<sup>131</sup>

The reason for holding the consumer strictly liable for any diminished value of the goods is that “*new goods may be turned into second hand goods*”<sup>132</sup> and where the consumer is not informed of their right of withdrawal they are only liable for the breach of *diligentia quam in suis*. However, the limit to the extent of damage done to the goods by the consumer is a matter of contention. As stated by the CJEU that it is crucial to give the consumer a cooling-off period without there being the need for the consumer to worry about the compensating the trader as a result of having tested the goods since “*the efficiency and effectiveness of the right of withdrawal would be impaired if the consumer were obliged to pay compensation simply because he had examined and tested the goods acquired under a distance contract.*”<sup>133</sup> It is contended that the consumer may abuse the right of withdrawal for using the good rather than merely testing it when purchasing at distance which would not be allowed in a high-street shop.<sup>134</sup> Thus they could rent a frock for a wedding ceremony or read a book free of charge.<sup>135</sup> The CRD has been criticised for the fact that there is no obligation on traders to give consumers a warning that there exists an obligation on the consumer to not use the goods beyond testing, or to “*indicate where the testing ends and use begins, and to give a figure of how expensive the use beyond testing could be.*”<sup>136</sup> Thus, traders are free to defining what constitutes “use” in their terms and conditions on their website which may entail that a consumer would have to return the goods in their original packaging, which may lead the consumer to thinking that they are simply not entitled to withdraw from the contract. It is argued that such a term should be classified as an unfair contract term which virtually would undermine the purpose

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<sup>131</sup> Case C-404/06 *Quelle AG v Bundesverband der Verbraucherzentralen und Verbraucherverbände* [2008] ECR I-02685

<sup>132</sup> P Rott, ‘The balance of interests in distance selling: Case-note on *Pia Messner v Firma Stefan Krüger*’ 18(1) ERPL 188

<sup>133</sup> Case C-489/07 *Pia Messner v Firma Stefan Krüger* [2009] ECR I- 07315 paras 24

<sup>134</sup> P Rott, ‘The balance of interests in distance selling: Case-note on *Pia Messner v Firma Stefan Krüger*’ 18(1) ERPL 188

<sup>135</sup> *idem*

<sup>136</sup> *Idem*,189

of the consumer's right of withdrawal.<sup>137</sup> In the Heine case<sup>138</sup> the ruling of the Messner case<sup>139</sup> was reiterated where the CJEU stated that the German courts could not prevent consumers from using their right of withdrawal where an online retailer refused to reimburse the consumer for the delivery costs. " *[The Directive] must be interpreted as precluding national legislation which allows the supplier under a distance contract to charge the costs of delivering the goods to the consumer where the latter exercises his right of withdrawal*"<sup>140</sup> Member states must refrain from making it impossible or excessively difficult for the consumer to exercise his rights.<sup>141</sup> An example of this would be if the amount of compensation is disproportionate to the actual value of the goods that the consumer has paid for.<sup>142</sup> Another example is when the consumer has to prove that he has tested the goods and not "used" them.<sup>143</sup>

The DG Justice Guidance document concerning Directive 2011/83/EU of June 2014 states that "*the diminished value of the goods can consist, in particular, of the cleaning and repairs cost and, if the goods can no longer be sold as new, the objectively justified loss of income for the trader when disposing of the returned good as second-hand good.*"<sup>144</sup> Further guidance states that consumers testing has to be assessed on a case-to-case basis in the event of dispute.

A point of reference is, for example:

- Before purchasing audio/video and recording equipment, the consumer would normally be able to test the image or sound quality;
- Trying on a garment in a shop would not involve the removal of the manufacturer's tags;

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<sup>137</sup> Marco Loos, 'Rights of Withdrawal' in Geraint Howells and Reiner Schulze (eds), *Modernising and Harmonising Consumer Contract Law*, (Sellier 2009) 34

<sup>138</sup> Case C-511/08 *Handelsgesellschaft Heinrich Heine GmbH v Verbraucherzentrale Nordrhein-Westfalen* [2010] ECR I-03047

<sup>139</sup> P Rott, 'The balance of interests in distance selling: Case-note on Pia Messner v Firma Stefan Krüger' 18(1) ERPL 188

<sup>140</sup> Case C-511/08 *Handelsgesellschaft Heinrich Heine GmbH v Verbraucherzentrale Nordrhein-Westfalen* [2010] ECR I-03047 paras 59

<sup>141</sup> C-261/95 *Rosalba Palmisani v Istituto nazionale della previdenza sociale* [1997] ECR I- 4025 at para 27

<sup>142</sup> P Rott, 'The balance of interests in distance selling: Case-note on Pia Messner v Firma Stefan Krüger' 18(1) 188 ERPL 190

<sup>143</sup> Case C-489/07 *Pia Messner v Firma Stefan Krüger* [2009] ECR I- 07315 paras 27

<sup>144</sup> Directorate General Justice Guidance document concerning Consumer Rights Directive 2011/83 [2014] (at 6.4.4) available on > [http://ec.europa.eu/justice/consumer-marketing/files/crd\\_guidance\\_en.pdf](http://ec.europa.eu/justice/consumer-marketing/files/crd_guidance_en.pdf)> accessed 12 March 2016

- The consumer would not normally be able to practically test household appliances, such as kitchen appliances, the actual use of which unavoidably leaves traces;
- The consumer would not be able to configure software on a computer; hence reasonable costs for any resetting of such equipment would also constitute diminished value.<sup>145</sup>

The consumer is further protected by the legislation on sales and Consumer sales directive where the consumer should be able to open the packaging to access the goods. Opening the packaging of the goods may only occur if similar goods are normally displayed in shops in unpacked condition and thus damage caused by merely opening the packaging does not make the trader eligible for compensation. For example, any protective films applied to the goods may only be removed where it is strictly necessary to test the goods.<sup>146</sup> However, some sellers stipulate in their contract terms that any good that is being returned needs to be in its original packaging which many may think is an unfair contract term.<sup>147</sup>

Issues such as issues the diminished value of goods are subject to the general contract and procedural laws of Member States, as referred to in Article 3(5) and the CRD is silent concerning these matters. Member states are given the choice to ask for charge for the compensation from the consumer for the damage or may reduce the any refund that is owed to the consumer as a result of diminished value.<sup>148</sup>

#### 4.3 Balance of interests

In the case of *EasyCar (UK) Ltd v Office of Fair Trading*<sup>149</sup> the reference for a preliminary ruling on the interpretation of Article 3(2) of Directive 97/7/EC on the protection of consumers in respect of distance sales arose. Accordingly, article 3(2) of the Directive 97/7/EC states that the right of withdrawal does not extend ”to contracts for the provision of accommodation, transport, catering or leisure services, where the supplier undertakes, when the contract is concluded, to provide these

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<sup>145</sup> *idem*

<sup>146</sup> *idem*

<sup>147</sup> Marco Loos, ‘Rights of Withdrawal’ in Geraint Howells and Reiner Schulze (eds), *Modernising and*

*Harmonising Consumer Contract Law*, (Sellier 2009) 34

<sup>148</sup> Directorate General Justice Guidance document concerning Consumer Rights Directive 2011/83 [2014] (at 6.1) available on > [http://ec.europa.eu/justice/consumer-marketing/files/crd\\_guidance\\_en.pdf](http://ec.europa.eu/justice/consumer-marketing/files/crd_guidance_en.pdf)> accessed 12 March 2016

<sup>149</sup> Case 336/03 *Easycar (UK) Ltd v Office of Fair Trading* [2005] ECR I-01947

*services on a specific date or within a specific period*'. EasyCar was a self-drive car hire undertaking where the company's customers can book cars offered for hire only via the internet on the model of "book-early and pay less". The model would enable competitive pricing and a win-win situation for both the customer and EasyCar. The plaintiff in the case decided to withdraw from contract of booking a car online on EasyCar's website.

One of the terms on the company's website was that a customer will not be refunded in case the contract was cancelled. The CJEU had to judge whether the term "*contracts for the provision of ... transport ... services*", in Article 3(2) of [the directive], include contracts for the provision of car hire services?' It was held in everyday language the term 'transport service' should not be restricted to simply a service which moves a person from one place to another and should include a method of transport. The outcome of this case is controversial since one school of thought contends that "*the decision in EasyCar focuses more upon the exception, rather the primary aim of the initial Directive, specifically to protect the consumer.*"<sup>150</sup> The majority of consumers in fact do use the internet to book for accommodation, catering, leisure services, holiday or a hotel and to refuse the right for them to cancel from the contract in such circumstances would undermine the protection provided to consumers.<sup>151</sup> On the other hand, an opposing view is that the judgement in EasyCar makes business sense since preventing customers from cancelling such agreements would lead to unreliability, unpredictability and uncertainty amongst e-businesses which in turn would lead to changes in website data.<sup>152</sup> Thus, in this case the CJEU ruled in favour of the business since and not the consumer which is a logical approach.

In order to protect the seller's interests, a defence mechanism from the seller's side in case of litigations initiated by the consumer to protect the seller's interest is demonstrated by the following scenario. Another abuse of the right of withdrawal could be where the person who is aware that he has the right of withdrawal, yet has not been informed by the trader. The consumer could argue, after using the product for many months that they are allowed to be compensated, where in fact they do not wish to use the product anymore. This can be illustrated where a consumer purchases a refrigerator which is silver in colour yet, they start to believe that a white refrigerator would suit their kitchen. A consequence may then be that they wish to withdraw from the contract as a result of the trader being unable to properly inform them of their right of withdrawal. A defence left for

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<sup>150</sup> Kevin Rogers, *The Law and the Internet* (1<sup>st</sup> edn, Palgrave Macmillan 2011) 63

<sup>151</sup> E Hall, 'Cancellation rights in distance-selling contracts for services: exemptions and consumer protection' [2007] JBL 684

<sup>152</sup> *Idem*

the seller would be to go to court and the latter applying the doctrine of abuse of right or doctrine of estoppel, fair dealing, deceit<sup>153</sup> or good faith.<sup>154</sup> Yet the costs for litigation in such cases would be too high for the seller.

There is one problem with the above method of burden of proof which puts the consumer in a weaker position than that of the trader.<sup>155</sup> Specifically, Rott<sup>156</sup> illustrates this issue by arguing that since the consumer has already paid for the goods, he will be entitled to have his payment returned if he withdraws within the cooling-off period. As a consequence, the trader may set his claim against the consumers by deducting the price of the good and return only partial payment for what the consumer had originally paid for. The burden of proof will shift in this respect since now it will be for the consumer to prove that he did not use the goods beyond merely testing them. Since the burden of proof usually rests with the trader, to prove a defect, the consumer will have to initiate the litigation which will obviously entail financial risks for the consumer, “*leaving it in practice to the trader to determine the amount of money that the consumer owes for the use of the goods.*”<sup>157</sup>

Hence, it is important to determine when the testing ends and when the use will ensue?

In an Austrian case<sup>158</sup>, which was not referred for a preliminary ruling to the CJEU, due to the doctrine of *acte clair* as decided by the Austrian Supreme Court, the question arose as to whether a consumer who has used a flat screen television at a distance, for a total of 43.5 hours was allowed to return and get a refund. It was decided that that amount of usage went beyond the necessary time for testing a television set. However, one would be allowed to use a television for a week after purchasing it in a high-street shop, can the same be applied to distance selling? Also, what does mere ‘testing’ constitute? For example, that the television screen suits one’s eyes or merely that it functions? It is argued that proving that goods has been tested is simple for the purchaser to prove, such as the case for technical goods where a clock for usage can be set, as illustrated above, yet this may not be the case for a piece of clothing that has been worn once to an event.

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<sup>153</sup> C-367/96 *Alexandros Kefalas and Others v Elliniko Dimosio (Greek State) and Organismos Oikonomikis Anasygkrotisis Epicheiriseon AE (OAE)* [1998] ECR I-2843

<sup>154</sup> Marco Loos, ‘Rights of Withdrawal’ in Geraint Howells and Reiner Schulze (eds), *Modernising and Harmonising Consumer Contract Law*, (Sellier 2009) 23

<sup>155</sup> P Rott, ‘The balance of interests in distance selling: Case-note on *Pia Messner v Firma Stefan Krüger*’ 18(1) ERPL 188

<sup>156</sup> *idem*

<sup>157</sup> *idem*

<sup>158</sup> OGH, 27/09/2005 *Verbraucher und Recht* (2006):242

Also, the question as to the amount of compensation that the seller owes to the consumer is a matter of contention, which must be resolved by the court. Yet, the assumption is that the trader need only pay the difference in value which should be calculated on the basis of total performance of the good. Thus, “*the actual period of use is to be put in proportion to the (still possible period of use and multiplied by the price*”<sup>159</sup>

#### 4.4 Product liability

Product liability insurance entails that the exporting manufacturer agrees to cover by insurance the risk caused by a defective product. However, this can be very costly for retailers who have to pay the price for such an insurance cover.

#### 4.5 Passing on responsibility for a remedy to a manufacturer

Consumers are entitled to request the seller for a remedy, for a faulty good, provided that there exists a warranty even if the fault has been caused by the manufacturer of the goods. The seller must state so explicitly to the buyer in the contract of sale. It should either be the manufacturer who owes this duty to the consumer or the seller should arrange delivery of the item to the manufacturer<sup>160</sup> Also, the final seller who has a contract with the customer and with the producer is eligible to hold the producer liable if the customer decides to return a defective product.<sup>161</sup> Article 4 of directive 199/44/EC provides that where lack of conformity of the product is caused by the act or omission of the “*producer, a previous seller in the same chain of contracts or any other intermediary, the final seller shall be entitled to pursue remedies against the person or persons liable in the contractual chain.*” National law of the member state shall determine the person who is liable against whom the seller pursues remedies and the relevant action and condition of exercise too.

#### 4.6 Privity of contract

A consumer who does not have a direct contractual relationship with the manufacturer is not entitled to sue the latter as a general rule under tort and contract law. The only circumstance in which a claimant may sue for damage caused by a defective product is when it causes physical harm to the person raising the claim and economic loss or monetary loss is not recoverable by the

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<sup>159</sup> P Rott, ‘The balance of interests in distance selling: Case-note on Pia Messner v Firma Stefan Krüger’ 18(1) 188 ERPL 191

plaintiff.<sup>162</sup> The Winterbottom<sup>163</sup> case is the landmark authority for the “privity of contract” requirement under English Law for the recovery in negligence against a manufacturer due to a defective product. The plaintiff in the case was a mailman who used a vehicle to deliver mail and had an employment contract with a postmaster general who in turn contracted with the defendant, a coach manufacturer. The coach became defective due to a latent defects with the coach and as a result the plaintiff became “lamed for life”. The plaintiff raised a claim against the the coach manufacturer, yet failed. In rejecting the plaintiff’s suit, the Court of Exchequer stressed the absence of privity of contract between the plaintiff and the defendant.

Per Lord Abinger’s opinion, *“if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue.”*<sup>164</sup>

The Contracts (Rights of Third Parties) Act 1999 in its Section 1(1) states that a party has the right to enforce a contract term provided that;

*“1)(a) ... the contract expressly provides that he may; or (b) subject to s.1(2) the term purports to confer a benefit on the third party.” Under s.1(3) in order for the consumer to take advantage of the above stated provision the third party, “must be expressly identified in the contract by name, as a member of a class answering a particular description but need not be in existence when the contract is entered into.”*

The question is whether a third party, the consumer, who is not a party to the original contract that is concluded between two parties, for example manufacturer and the retailer, can be afforded benefit of the contract?<sup>165</sup>

The EU commission has expressed its views on this matter by stating that a consumer should not be given the possibility of cutting across chains of sales contracts so as to enforce a manufacturer’s quality promise. The Commission’s report should be afforded some weight since there would be *“serious problems if we were to apply the 1999 Act so as, e.g. to extend the benefit*

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<sup>162</sup>Carole Murray, *Schmitthoff: The law and practice of international trade*, (12<sup>th</sup> edn, Sweet & Maxwell 2012)

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<sup>163</sup> Winterbottom v Wright [1842] 152 English Rep 402

<sup>164</sup> *Idem* at 405

<sup>165</sup> Law Commission report no 242 ‘*Contracts for the Benefit of Third Parties: Privity of Contract*’ [1996] paras 7.10, available at ><http://onlinelibrary.wiley.com/doi/10.1002/9780470773628.app2/pdf>> accessed 30 March 2016

*of a manufacturer's contract with its immediate purchaser to the ultimate consumer.*"<sup>166</sup> A manufacturer's promises on which a buyer relies in entering into the contract of sale can, of course, give rise to collateral contracts-<sup>167</sup> A written warranty may be given by the manufacturer stating that the provisions of the 1999 Act apply and then the consumer may directly enforce the warranty terms, yet the manufacturer is under no such legal obligation to provide the consumer with a warranty.<sup>168</sup> A written warranty means :“(b) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or(c) any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking ...”<sup>169</sup>

The only time that a consumer may seek damages for the breach of a conformity of a product is when the supplier, warrantor, or service contractor fail to comply with any obligation under a written warranty, implied warranty, or [they] may bring suit for damages and other legal and equitable relief<sup>170</sup> Yet, a manufacturer may also delimit his scope of liability by use of disclaimer stating that once the retailer as accepted the goods he will not be entitled to return them or seek a remedy vis-à-vis the manufacturer.<sup>171</sup>

However some may argue that the dealer is a mere conduit between the manufacturer and the consumer, and the consumer may only seek a remedy against the manufacturer where the dealer [webshop] has gone into liquidation.<sup>172</sup>

*” Courts and scholars alike have recognized that the typical consumer does not deal at arms length with the party whose product he buys. Rather, he buys from a retail merchant who is usually little more than an economic conduit. It is not the merchant who has defectively manufactured the product. Nor is it usually the merchant who advertises the product on such a large scale as to*

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<sup>166</sup> Adams, ‘Giving consumers a remedy in internet sales of goods’ [2011] 4 JBL 379

<sup>167</sup> Shanklin Pier Ltd v Detel Products Ltd [1951] 2 KBD 854

<sup>168</sup> Law Commission report no 242 ‘Contracts for the Benefit of Third Parties: Privity of Contract’ [1996] available at ><http://onlinelibrary.wiley.com/doi/10.1002/9780470773628.app2/pdf>> accessed 30 March 2016

<sup>169</sup> Adams J, ‘Giving consumers a remedy in internet sales of goods’ 2011, JBL, 320

<sup>170</sup> idem, 380

<sup>171</sup> idem, 377

<sup>172</sup> *Kassab v Central Soya* 432 Pa 217; 246 A 2d 848, 853 [1968]

*attract consumers. We have in our society literally scores of large, financially responsible manufacturers who place their wares in the stream of commerce not only with the realization, but with the avowed purpose, that these goods will find their way into the hands of the consumer. Only the consumer will use these products; only the consumer will be injured by them if they prove defective.*"<sup>173</sup>

#### 4.7 Ancillary contract

A liability that the manufacturer has vis-a-vis the web-shop, unless otherwise agreed by the parties is that the product conforms with its description<sup>174</sup> and that there are no latent defects with the product. The consumer may not directly raise a claim against the manufacturer for any defects with the product which is due to privity of contract as previously discussed. When the consumer decides to withdraw from the contract of sale that he has with the web-shop any ancillary contract is also extinguished.<sup>175</sup> It is the final seller who in usual circumstances is liable to the consumer for any lack of conformity resulting from an act or omission by the producer, or any other intermediary in the same chain of contract. It is the final seller who is entitled to pursue remedies against the person or persons liable in the contractual chain and not the buyer.<sup>176</sup> The remedies that the final seller pursues is determined by the national law of the country in question.<sup>177</sup> Under English Law the burden of proof lies with the person pursuing the claim for defect. For example, the consumer has to prove to the retailer that the product was defective at the time of the purchase and the retailer must prove to the manufacturer must prove the same to the manufacturer of the product.<sup>178</sup>

#### 5 Concluding remarks

It is the contract terms between seller and producer on a B2B basis and between seller and consumer on a B2C basis which defines the rights and duties of the parties who are bound to the contract. Standard contract terms facilitate commercial certainty and are beneficial for consumers. However, in consumer contracts the sellers and suppliers are entitled to define their own contract terms which confers them another advantage without having to individually negotiate them with the consumers.

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<sup>173</sup> *Kassab v Central Soya* 432 Pa 217; 246 A 2d 848, 853 [1968]

<sup>174</sup> SoGA Article 13(1)

<sup>175</sup> Article 12 of the CRD

<sup>176</sup> Domke M, 'Products liability insurance' [1962] *Arbitration* 28(3) 120 -122

<sup>177</sup> Directive of the European Parliament and of the Council 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees (Consumer sales directive) [1999] OJ L171/12, article 4

<sup>178</sup> P Rott, 'The balance of interests in distance selling: Case-note on *Pia Messner v Firma Stefan Krüger*' 18(1) ERPL 188

It is for the purpose of harmonising consumer laws on this matter and diminishing unfair contract terms that the intervention on EU level is desirable. The directive on unfair contract terms<sup>179</sup> introduces the concept of “good faith” so as to prevent sellers and consumers to circumvent any imbalances of their respective rights and obligations. Terms that are unfair are enshrined in the directive and do not bind any of the parties where the consumers are favoured in the event of ambiguous contract terms. Article 3(1) of the Unfair contract terms directive reads:<sup>180</sup> “*A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.*”

The UNCITRAL Model Law on Electronic Commerce states that

*“an offer and the acceptance of an offer may be expressed by means of data messages. Where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose.”*<sup>181</sup>

An obligation on Member States to ensure that their legal system allows for contracts to be concluded electronically,<sup>182</sup> which requires Member States to screen their national legislation to eliminate provisions which hinder the electronic conclusion of contracts. This means that member states introduce into their legislation a horizontal provision stipulating that contracts concluded by electronic means which have the same legal validity as contracts concluded in writing. Thus, contracts concluded by electronic mean should be able to fulfil the requirement of contracts being in writing.

The lack of bargaining power of the consumer gives the consumer certain rights where they are entitled to withdraw their contract with the web-shop. “The right of withdrawal is therefore intended to offset the disadvantage for the consumer resulting from a distance contract by granting him an appropriate period for reflection during which he can examine and test the goods

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<sup>179</sup> Council Directive (EC) 93/13 on unfair terms in consumer contracts (Unfair contract terms directive) [1993] OJ L95/29

<sup>181</sup> UNCITRAL Model Law on Electronic Commerce 1996, Article 11

<sup>182</sup> Directive of the European parliament and of the council 2000/31 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on Electronic Commerce) [2000] OJ L178/1

acquired.”<sup>183</sup> Stricter protection is afforded in favour of the consumer rather than the business who runs the online web-shop i.e. the seller, which leaves the latter in a risky position. E-commerce consumer protection laws exist because consumers who buy “in the dark” have little knowledge about the products end-result until it is delivered to their homes.<sup>184</sup> Thus, in order to protect the consumer, there exists an obligation on the web-shop to provide the consumer with the possibility to cancel the contract in the event that the purchaser decides to exercise their right to return the item.<sup>185</sup> As a result, the web-shop who has contracted with the customer has to fill in an “empty seat”<sup>186</sup> and accept the cancelled good. The CRD affords rights to the consumer to return goods to the online retailer within 14 days of the purchase, without any justification. Web-shops have to comply with hurdles such as providing the right information prior to the conclusion of the e-contract in international legislative instruments, such as the CRD or consumer sales directive, which puts them in a risky position. The consumer has a contract with the retailer and not the manufacturer and cannot use their right of withdrawal against the manufacturer. The reason to why the consumer cannot enforce his rights against so as to receive a remedy from the manufacturer is due to the legal phenomena known as privity of contract.

In relation to goods being damaged during the cooling-off period, first the CJEU must determine the type of goods in question. A defence left for the seller would be to go to court and the latter applying the doctrine of abuse of right or doctrine of estoppel, fair dealing, deceit<sup>187</sup> or good faith.<sup>188</sup> Yet the costs for litigation in such cases would be too high for the seller. However, only when “[the consumer] has made use of the goods acquired under a distance contract ”*in a manner incompatible with the principles of civil law, such as those of good faith or unjust enrichment*”,<sup>189</sup> will he have to reimburse the trader. As per Article 14(2) of the CRD, which states; “*The consumer*

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<sup>183</sup> Case C-489/07 *Pia Messner v Firma Stefan Krüger* [2009] ECR I- 07315, paras 20 -22

<sup>184</sup> E Hall, ‘Cancellation rights in distance-selling contracts for services: exemptions and consumer protection’ [2007] JBL 684

<sup>185</sup> *Idem*

<sup>186</sup> *Ibid*

<sup>187</sup> C-367/96 *Alexandros Kefalas and Others v Elliniko Dimosio (Greek State) and Organismos Oikonomikis Anasygkrotisis Epicheiriseon AE (OAE)* [1998] ECR I-2843

<sup>188</sup> Marco Loos, ‘Rights of Withdrawal’ in Geraint Howells and Reiner Schulze (eds), *Modernising and Harmonising Consumer Contract Law*, (Sellier 2009)23

<sup>189</sup> Case C-489/07 *Pia Messner v Firma Stefan Krüger* [2009] ECR I- 07315, paras 25-26

*shall only be liable for any diminished value of the goods resulting from the handling of the goods other than what is necessary to establish the nature, characteristics and functioning of the goods. The consumer shall in any event not be liable for diminished value of the goods where the trader has failed to provide notice of the right of withdrawal.*"<sup>190</sup> Thus, this can be used as a defence mechanism for the online retailer when rejecting to reimburse the consumer for the mishandling of the goods. Hence, the online retailer will be allowed to deduct money from refunds where goods show sign of use or unreasonable handling leading to diminished value.<sup>191</sup> Further, the question as to whether the consumer is liable to pay compensation to the seller for the use of those defective goods until their replacement with new goods is admissible under national law, was deemed inadmissible as ruled in the *Quelle* case.<sup>192</sup>

Another way for the web-shop to be protected is thanks to product liability insurance which entails that the exporting manufacturer agrees to cover by insurance the risk caused by a defective product. Yet, this does not apply to product which has just been returned by a consumer vis- a-vis a distance contract. However, this can be very costly for retailers who have to pay the price for such an insurance cover. A consumer who does not have a direct contractual relationship with the manufacturer is not entitled to sue the latter as a general rule under tort and contract law. The only circumstance in which a claimant may sue for damage caused by a defective product is when it causes physical harm to the person raising the claim and economic loss or monetary loss is not recoverable by the plaintiff.<sup>193</sup>

If a web-shop has terms and conditions on their webpage which contravene with EU law then the web-shop must amend these so as to put these in line with EU law. For example, in 2003, the company Virgin Wines Online terms and conditions stated that a consumer that the goods sold on their website were non-refundable and that cancellation of the product could only be effective if such a measure was done via email or a phone call. Another term stated that in certain contracts,

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<sup>190</sup> Article 14 (2) of the CRD

<sup>191</sup> Department for business and innovation skills '*Consumer Rights Act: Guidance for business*' (2015) available at >[https://www.businesscompanion.info/sites/default/files/The%20sale%20and%20supply%20of%20goods\\_AL\\_BIS\\_GOODS\\_GUIDANCE\\_SEP15.pdf](https://www.businesscompanion.info/sites/default/files/The%20sale%20and%20supply%20of%20goods_AL_BIS_GOODS_GUIDANCE_SEP15.pdf) < accessed 30 March 2016

<sup>192</sup> Case C-404/06 *Quelle AG v Bundesverband der Verbraucherzentralen und Verbraucherverbände* [2008] ECR I-02685

<sup>193</sup> Carole Murray, *Schmitthoff: The law and practice of international trade*, (12<sup>th</sup> edn, Sweet & Maxwell 2012)

delivery could take over 30 days. Virgin Wines were obliged to change these terms following an approach by the Office of Fair Trading.<sup>194</sup>

A view by Dr Rott<sup>195</sup> is that distance selling is advantageous for both parties since the consumer does not have to travel and saves money whereas the trader will save money by not having to maintain a shop. Further, the consumer will be able to test the goods before being bound to the contract, yet the downside is that they bear the costs for returning the goods to the seller. On the other hand the seller usually has to take the risk that where the goods are damaged or lost in transport, he will have to bear the loss for refunding the consumer. Where the seller is transporting the goods to the consumer, the seller is also liable for any damage to the goods during delivery, provided that he has not insured against any perils with the manufacturer or carrier of the goods.<sup>196</sup> Thus, the Court of Justice of the European Union has concluded “*In this connection, it should first be observed that it is settled case-law that derogations from the rules of European Union law for the protection of consumers must be interpreted strictly.*”<sup>197</sup>

In order to protect the seller’s interests, a defence mechanism from the sellers side in case of litigations initiated by the consumer to protect the sellers interest is demonstrated by the following scenario. Another abuse of the right of withdrawal could be where the person who is aware that he has the right of withdrawal, yet has not been informed by the trader. The consumer could argue, after using the product for many months that they are allowed to be compensated, where in fact they do not wish to use the product anymore. This can be illustrated where a consumer purchases a refrigerator which is silver in colour yet, they start to believe that a white refrigerator would suit their kitchen. A consequence may then be that they wish to withdraw from the contract as a result of the trader being unable to properly inform them of their right of withdrawal. A defence left for the seller would be to go to court and the latter applying the doctrine of abuse of right or doctrine

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<sup>194</sup> OFT Press Release ‘Virgin Wine gives consumers a fairer deal online 14 May 2003’ Available at >[http://www.of.gov.uk/news/press/2003/pn\\_58-03](http://www.of.gov.uk/news/press/2003/pn_58-03)< accessed 30 March 2016

<sup>195</sup> P Rott, ‘The balance of interests in distance selling: Case-note on Pia Messner v Firma Stefan Krüger’ 18(1) ERPL 188

<sup>196</sup> *idem*

<sup>197</sup> Case C-489/07 *Pia Messner v Firma Stefan Krüger* [2009] ECR I- 07315 paras 32

of estoppel, fair dealing, deceit<sup>198</sup> or good faith.<sup>199</sup> Yet the costs for litigation in such cases would be too high for the seller.

There is one problem with the above method of burden of proof which puts the consumer in a weaker position than that of the trader.<sup>200</sup> Specifically, Rott<sup>201</sup> illustrates this issue by arguing that since the consumer has already paid for the goods, he will be entitled to have his payment returned if he withdraws within the cooling-off period. As a consequence, the trader may set his claim against the consumers by deducting the price of the good and return only partial payment for what the consumer had originally paid for. The burden of proof will shift in this respect since now it will be for the consumer to prove that he did not use the goods beyond merely testing them. Since the burden of proof usually rests with the trader, to prove a defect, the consumer will have to initiate the litigation which will obviously entail financial risks for the consumer, “*leaving it in practice to the trader to determine the amount of money that the consumer owes for the use of the goods.*”<sup>202</sup>

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<sup>198</sup> C-367/96 Alexandros Kefalas and Others v Elliniko Dimosio (Greek State) and Organismos Oikonomikis Anasygkrotisis Epicheiriseon AE (OAE) [1998] ECR I-2843

<sup>199</sup> Marco Loos, ‘Rights of Withdrawal’ in Geraint Howells and Reiner Schulze (eds), *Modernising and Harmonising Consumer Contract Law*, (Sellier 2009) 23

<sup>200</sup> P Rott, ‘The balance of interests in distance selling: Case-note on Pia Messner v Firma Stefan Krüger’ 18(1) ERPL 188

<sup>201</sup> *idem*

<sup>202</sup> *idem*

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