

The Right to Change Your Mind? Rethinking the Usefulness of Mandatory Rights of Withdrawal in Consumer Contract Law

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1. Introduction

In consumer protection law, frequent use is made of so-called rights of withdrawal. These ‘cooling-off periods’ allow a party to a contract (usually a consumer) to terminate the contract within a certain period after its conclusion. In the last decade, these withdrawal rights mushroomed: not only do many European directives contain such rights, they also figure more and more prominently in private law of national origin. Also in the United States cooling off-periods are well known phenomena.

Interestingly, the effectiveness of withdrawal rights is seldom tested. Although it seems at first glance that these rights are an effective way to protect a consumer against making rash decisions, the question is whether this is really the case. This paper therefore considers the usefulness of withdrawal rights against the purpose these rights intend to fulfil. It first looks at the existing legal rights in Europe and in the United States and at the functions they are supposed to have (section 2). However, in my broad definition of withdrawal rights I cannot limit myself to an analysis of statutory rights only. Consumer transactions are to a very large extent governed by general conditions and it is interesting to see whether standard form contracts grant additional withdrawal rights to consumers (section 3). For the purpose of this paper, it is even essential to know about how retailers deal in practice with customers that are not satisfied with the product or service: this can provide us with insight into the effect of introducing statutory withdrawal rights on the behaviour of consumers (section 4). This in turn leads to an analysis of whether withdrawal rights should be mandatory or optional, at which level of regulation (national or European/federal) they should be granted and whether they should be applicable to *all* consumers or only to certain categories (section 5).

2. Withdrawal Rights in Europe and in the United States

Typical of withdrawal rights is that they allow the cancellation of contracts without giving any reason. Consumers need not explain why it is they want to cancel the contract: they only need to return the good or send the seller a notice of cancellation within the cooling off-period. It is clear that this is an important deviation from traditional contract law, in which the binding force of contracts can only be set aside in exceptional circumstances, such as in case the consent of a party was based on a wrong assumption (‘malformed’) or in case of non-performance or defective performance by the other party. In this respect withdrawal rights are principally different. This section gives a brief overview of existing withdrawal rights in Europe and in the United States.

Most European directives in the field of consumer protection oblige the professional seller or provider of a service to provide the consumer with (often detailed) information on

the good or service and on the rights of the consumer.¹ Such information duties are often complemented by a right of withdrawal. Such a combination of information duties and withdrawal rights can be found in directive 97/7 on distance selling (Art. 6: 7 working days), directive 2002/65 on distance marketing of consumer financial services (Art. 6: 14 calendar days), directive 2002/83 on life assurance (Art. 35: up to 30 days), directive 2008/48 on consumer credit (Art. 14: 14 calendar days) and in directive 2008/122 on timeshare (Art. 6: 14 calendar days²). Directive 85/577 on doorstep selling³ also gives a right of withdrawal to the consumer (Art. 5: 7 days), but does not oblige the seller to give any other information than the existence of this right. The much discussed proposal for a European directive on consumer rights⁴ seeks to harmonise various directives by proposing a uniform set of general information requirements (Art. 5) and one uniform withdrawal period of 14 calendar days (Art. 12), with an extension to three months in case the necessary information is not provided (a sanction already used in several of the existing directives). This period of 14 days is in line with Art. II.-5:103 of the Draft Common Frame of Reference of European Private Law⁵ that devotes a whole chapter to the right of withdrawal.

It should be noted that most European directives only provide minimum norms: member states are allowed to give the consumer more protection in their national law. Thus, when it comes to the withdrawal period of 7 working days in case of distance selling, European member states have implemented this rule in a different way.⁶ Countries like Austria, Belgium and the Netherlands follow the directive, but Italy allows 10 days for withdrawal and Germany, Sweden, Denmark, Finland and Portugal even 14 days.

Apart from the rules of European origin, several European countries have introduced withdrawal rights in areas not covered by European law. One example is provided by Dutch law, that allows the purchaser of a house or an apartment to terminate the contract within three days after the contract was signed and handed over to the buyer.⁷ The explicit aim of this cooling off-period is to allow the buyer to consult an expert and to remedy a rash decision to enter into the contract. An example from German law is the withdrawal right in case of distance education: the student has until 14 days after receiving the first teaching materials to cancel the contract.⁸ Here, the (questionable) aim is to enable the student to obtain a clearer picture of the quality of the course. In French law, two different devices exist. On the one hand, French law recognises a so-called *délai de réflexion*, prohibiting the consumer to accept an offer within a certain time period. Such a period of deliberation exists in case of credit contracts for immovables (10 days), distance education (7 days) and the purchase of immovable property to be used as the private dwelling of the buyer (7 days). On the other hand, French law also allows the withdrawal period *stricto sensu* in the form of the so-called *droit de repentir*. Apart from the topics covered by European legislation (on which France

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¹ Overviews are provided by, e.g., Peter Rott, Information obligations and withdrawal rights, in: Christian Twigg-Flesner (ed.), *European Union Private Law*, Cambridge 2010, 187 ff. and by Marco Loos, Rights of withdrawal, in: Geraint Howells & Reiner Schulze (eds.), *Modernising and Harmonising Consumer Contract Law*, München 2009.

² Art. 5 of directive 94/47 on timeshare (now repealed) contained a period of 10 calendar days.

³ Several national jurisdictions already provided for withdrawal rights in case of doorstep selling in the 1970's.

⁴ COM (2008) 614 final.

⁵ Christian Von Bar, Eric Clive & Hans Schulte-Nölke (eds.), *Principles, Definitions and Model Rules of European Private Law*, München 2009. The German BGB (§ 355 (1)) gives a similar period of 'two weeks.'

⁶ See Communication on the Implementation of Directive 1997/7 on the Protection of Consumers in Respect of Distance Contracts, Brussels 21 September 2006.

⁷ Art. 7:2 Dutch Civil Code ('bedenktijd'), introduced in 2003.

⁸ § 4 I Fernunterrichtsschutzgesetz of 1976 ('Widerrufrecht'). This right was preceded by the Auslandsinvestmentgesetz of 1969, creating a withdrawal right in contracts for certain foreign investments.

often had rules before they were adopted by the European legislator), French law allows consumers to withdraw from (for example) settlements entered into by victims of traffic accidents and from contracts with marriage agencies.⁹

In the United States, cooling off-periods are also well known, even though their number at the federal level is fairly limited. The two most important examples of federal rules are the 3-day cooling off-rule of the Federal Trade Commission and the similar rule of the Truth in Lending Act.

The FTC-rule¹⁰ dates back to 1972 and allows the buyer to cancel a purchase of \$25 or more within three business days in case the sale takes place at the buyer's home or at a location that is not the seller's permanent place of business (such as a hotel, convention centre or restaurant). The salesperson must inform the consumer about the cancellation right at the time of sale and give him two copies of a cancellation form. This federal rule can best be compared with the European withdrawal right in case of door-to-door contracts. It does not apply to distance contracts: contracts concluded by mail or telephone (or online) are explicitly excluded. The rule is also not applicable to e.g. sale of real estate, new cars and arts or crafts sold at fairs. After cancellation, the seller has ten days to refund the money.

Under the well known Truth in Lending Act of 1968,¹¹ the consumer also has three business days to rescind the contract, in this case a consumer credit transaction involving a security interest in the consumer's principal dwelling (unless the loan is not intended primarily for personal family purposes or the loan is a purchase money loan (i.e. for the purchase of a home)). As in European consumer law, this period is extended in case the lender does not adequately inform the consumer of the right to rescind.

In addition to these two federal rules, many states have their own 'cancellation laws.' A brief survey of the law of the State of New York¹² reveals that consumers have withdrawal rights under State law if they (to name a few examples) buy automobiles, conclude a contract with a professional seller over the telephone, lease or buy subdivided land or contract with a credit service business, a health club, an emergency response service or a dating service. In many other states, similar rights exist or even more withdrawal rights are accepted. Thus, the State of California¹³ not only allows cancellation of the contract in most of the cases in which New York allows it, but also in case of mobile telephone contracts, funeral contracts, electric service contracts, dental service contracts, many types of insurance contracts, service contracts for used cars, home appliances and new motor vehicles services and contracts of credit repair and mortgage foreclosure consultants and with dance studios. Also contracts for services in the areas of discount buying, employment counselling, immigration and job listings are governed by cooling off-periods ranging from 3 to 60 days.

The above makes abundantly clear how widespread statutory withdrawal rights actually are. This makes it important to ask what is the justification for the use of such rights.¹⁴ Scrutiny of the motives used by legislators in both Europe and the United States reveals that usually two different motives exist to allow the consumer some time for reconsideration of the contract. Both motives are based on the idea that the consumer needs to be protected. The first type of protection is against a lack of psychological strength, the second against a lack of informational strength.¹⁵ A lack of psychological strength is there if the other party makes use of aggressive sales techniques (such as in doorstep sales), taking the consumer by surprise: even if a consumer would have all the information it needs, it could

⁹ Cf. Terré/Simler/Lequette, *Droit Civil: Les Obligations*, 8. éd., Paris 2002, p. 266 ff.

¹⁰ Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations, 16 CFR Part 429.

¹¹ Consumer Credit Protection Act, 15 U.S.C. §§ 1601-1693r. See § 1635 for the cooling off-period.

¹² A complete overview is available at <<http://www.nyconsumer.gov/clahm/contracts.htm#end24>>.

¹³ See the overview at <http://www.consumer.ca.gov/publications/legal_guides/k-6.shtml>.

¹⁴ See, e.g., Pamaria Rekaiti & Roger Van den Bergh, Cooling-Off Periods in Consumer Law, *Journal of Consumer Policy* 23 (2000), 373.

¹⁵ Cf. Jac. Hijma, *Wettelijke bedenktijd*, Deventer 2004, p. 20 and Günter Reiner, Der verbraucherschützende Widerruf im Recht der Willenserklärungen, *AcP* 203 (2003), p. 9 ff.

still be psychologically forced to enter into the contract. A lack of informational strength is a more frequent phenomenon: in certain types of contracts, it is impossible for the consumer to have an accurate picture of the product that is being sold or of the reliability of the other party (such as in distance contracts). In the view of many legislators, a withdrawal right can be used to remedy such an information asymmetry: it allows the consumer to acquire the information it needs by (e.g. in case of distance contracts) checking the product after delivery. Both motives fit in with the traditional goal of consumer protection: to protect the consumer against a party that is economically superior and better informed. This begs the question to what extent withdrawal rights are indeed effective in fulfilling this function. Before this question is discussed, however, we will first look at contract practice on the right to return goods.

3. Non-Statutory Rights of Withdrawal: Contract Practice on the Right to Return Goods

Apart from the statutory rights discussed in the previous section, there is a widespread practice that customers can return goods: many retail shops throughout the world have adopted the policy that customers can return goods at will and receive back the contract price or at least a credit note with which they can buy a different product in the same shop. This return policy is often laid down in the general conditions of the retailer. These contractual rights are even so common that the general public in some countries seems to think that there is a 'general right to return goods.'¹⁶ Surprisingly little empirical material exists to test how widespread these return policies really are. Part of this paper is therefore a very modest survey of return policies of shops as can be discerned from the general conditions these shops use. Although the data are not (yet) representative for the entire retail practice, they do give a fair impression of existing return policies.¹⁷

My survey is based on the general conditions of 32 shops that consumers visit regularly: they concern supermarkets, department stores, pharmacies and sellers of clothing, furniture, electric appliances, toys and books. My initial survey is primarily based on the general conditions these companies use in the Netherlands, but these conditions are compared with those of shops in some other countries (notably Belgium and Germany). I am aware of the fact that in order to be representative for the whole of Europe, this survey needs to be extended to shops in other countries, but at the moment my only purpose is to have an impression of retail practices in some countries. I distinguish between general conditions for online sales and for 'normal' sales.

For online sales, most Dutch companies make use of the model general conditions that were drafted in cooperation between the professional organisation of retailers in the Netherlands and the most important Dutch consumer association.¹⁸ These conditions are highly influenced by European directive 97/7 on distance contracts. Although the directive prescribes a minimum cooling off-period of 7 working days, the model conditions allow consumers to withdraw from the contract within 14 days. The majority of Dutch shops have adopted this model, although about half of the shops I looked at have extended this period to 30 days. This practice does not seem to differ from other European countries, but does seem less lenient than the policy of retail shops in the United States: there, it is no exception that the return period is 180 days (despite the fact that, in most States, no statutory withdrawal rights exist for online contracts).

¹⁶ Several American websites on consumer rights therefore contain a warning that no such general right exists.

¹⁷ This does not mean that withdrawal rights do not also exist for other types of contract. One important example from Dutch law can be found in the model general conditions of the Dutch association of insurers, providing for a cooling off-period of 7 days in insurance contracts.

¹⁸ These general conditions of the 'Nederlandse Thuiswinkel Organisatie' were drafted in cooperation with the 'Consumentenbond' under the auspices of the 'Coördinatiegroep Zelfreguleringsoverleg' of the 'Sociaal-Economische Raad' and introduced in 2009.

The survey also confirms our perception that withdrawal rights exist on a large scale in case of regular sales in shops. Only one shop in the sample of 32 did *not* allow the consumer to return the goods and either receive reimbursement of the contract price or a credit note.¹⁹ But differences do exist as to the length of the cooling off-period: most shops allow 14 days, followed by a significant number of shops that allow their customers to return goods within 30 days or (in the case of an internationally active seller of furniture) even 90 days. Four shops use a period of 8 days and one big Dutch supermarket even allows a right to return goods without specifying any time limit. Again, this practice does not seem to differ too much from practices in Belgium and Germany whereas in the United States the period appears to be longer in case of contracts with large retailers (in which case periods of 90 or even 180 days are not exceptional).

The abundant granting of withdrawal rights to consumers in general conditions, even if there is no statutory need to do so (either because there is no statutory right at all or only for a shorter time period), raises the interesting question how the introduction of mandatory law in this field influences the voluntary behaviour of business in allowing consumers to return goods. This is part of the more general question how effective mandatory withdrawal rights actually are: the next section therefore considers the usefulness of withdrawal rights against the purposes these rights intend to fulfil.

4. The Effectiveness of Statutory Withdrawal Rights: On the Crowding Out of Reciprocity

We saw in the above that withdrawal rights have the function of remedying a lack of psychological or informational strength on the part of the consumer. It is not difficult to see that this function will not always be satisfied in all of the applications mentioned in section 2: is common knowledge that it depends very much on the type of contract, the length of the cooling off-period and the further design of the right whether the granting of the right will be successful.²⁰ Thus, it is well established that a mandatory information duty combined with a withdrawal period may simply be too much: this cannot only drive suppliers of goods out of the market, the extra effect of a withdrawal right *next* to extensive duties to give information does not add much to help the consumer to make up his mind because of the risk of an information overload. In case of financial services (like insurance products or credit agreements), a cooling off-period will not help either because the possible consequences of such products will often only become clear after a long time. In other cases (such as the 3 days cooling off-period in case of the purchase of a house in Dutch law), it is difficult to see how, within such a brief period, any extra information can be gathered that was not already available before the purchase. In case of distance contracts, however, withdrawal rights are useful, not because they would protect a weaker party but simply because they allow the consumer to inspect the product and decide whether it really wants to purchase it.²¹ It is also well known that the granting of withdrawal rights presumes that consumers are rational, driven by self-interest and willing to enforce their rights,²² all presumptions criticised in behavioural studies. This can have the effect that this type of protection is not primarily used by those who need it most (because they are not in a position to exercise their rights), but mostly by consumers who do not need the protection anyway.

¹⁹ In this case, the shop gives as a reason why no such right exists that it concerns an 'outlet' (note that other outlet stores were part of the survey, but still allow a right to return products).

²⁰ Cf. e.g. H.-W. Micklitz, N. Reich & P. Rott, *Understanding EU Consumer Law*, Antwerp 2009, p. 198 ff.; Rekaiti & Van den Bergh, o.c., p. 380 ff.

²¹ See on the various goals of consumer protection K. Cseres, *Competition Law and Consumer Protection*, Alphen aan den Rijn 2006.

²² On the rationality of the average consumer: ECJ 16 July 1998, C-210/96 (Gut Springenheide), repeated in many other cases. See on this presumption e.g. J. Jacoby, Is it rational to assume consumer rationality?, *Roger Williams University Law Review* 2000, p. 81 ff.

It is questionable whether the (European) legislator is aware of these problems and does in fact design withdrawal rights in the best possible way. In addition, there is another and more serious problem with statutory withdrawal rights: it can be questioned whether the granting of these rights in statutes is a good thing at all. We saw in section 3 that many retailers grant withdrawal rights voluntarily, so also in cases where no legal obligation exists to do so. These contractual rights are not in any way motivated by the reasons why statutory rights exist: if consumers buy a product in a shop, they are not considered to be taken by surprise or to lack information about the product. It is therefore likely that there is another reason why retailers grant these rights: they do so to create trust with their customers. Next to giving warranties, engage in advertising and participate in labelling schemes, allowing a customer to return the product can help to create trust in this particular seller.²³ The contractual practice of granting withdrawal rights in the absence of a legal duty to do so therefore casts doubt on the motivation of retailers to allow consumers to withdraw from the contract and therefore on the usefulness of mandatory legislation in this area. Apparently, imposing mandatory withdrawal rights is based on the assumption that behaviour of parties is driven by self-interest and that granting a withdrawal right is not in line with such self-interest. But the correctness of this view is doubtful: if creating trust is indeed the motivating factor for a party to grant a withdrawal right, this trust building process would be undermined if the legislator imposes statutory withdrawal rights. I will now argue that this ‘crowding out’ effect is likely to occur.

The starting point is the importance of social norms: social norms control behaviour in spite of legislation.²⁴ It is widely accepted that these social norms are influenced by considerations of reciprocity (or even of fairness in general).²⁵ Behavioural studies clearly shows that behaviour of people and of organisations is therefore not necessarily motivated by self-interest. But altruistic behaviour can be influenced in a negative way by regulation: the intrinsic, ‘other-regarding’, motivation of people is then replaced by extrinsic motivation, leading to opportunistic behaviour. This is a well-known phenomenon, of which many examples exist. In a famous study, Titmuss showed that the voluntary system of blood donation in the United Kingdom led to a large supply of high quality blood than the remunerated system in the United States: paying for giving blood did not lead to an efficient increase in the number of donors.²⁶ Another example concerns an experiment conducted in day care centres in Israel: the introduction of a fine for parents that were late in picking up their children led to a doubling of the number of latecomers.²⁷ This ‘motivational crowding out’²⁸ can be easily explained: in the absence of a ‘formal’ reward or sanction, a person can show its intrinsic motivation to help others or to ‘do the right thing.’ As soon as a monetary reward or a fine is introduced, others will perceive the beneficial behaviour as *not* being motivated by altruism, leading to a decrease in the willingness to act in this way. In the day care experiment, parents simply perceived the fine as the price to be paid for coming late and therefore as much less of a disincentive for coming late than the feeling of acting in the wrong way.

These two examples show that the introduction of an explicit policy or incentive can undermine moral and altruistic behaviour: pre-existing values to act in a socially beneficial way can be compromised.²⁹ Creating mandatory withdrawal rights can have the same effect.

²³ Rekaiti & Van den Bergh, o.c. 380 ff. They also point out that through withdrawal rights retailers get a better picture of how satisfied customers are with their products.

²⁴ Cf. Eric A. Posner, *Law and Social Norms*, Cambridge Mass. 2000.

²⁵ Cf. e.g. Vittorio Pelligra, Trust, Reciprocity and Institutional Design, *AICCON Working Papers* 37-2006.

²⁶ Richard Titmuss, *The Gift Relationship*, London 1970.

²⁷ Uri Gneezy & Aldo Rustichini, A Fine is a Price, *Journal of Legal Studies* 29 (2000), p. 1 ff.

²⁸ See Bruno S. Frey, *Not Just for the Money: An Economic Theory of Personal Motivation*, Cheltenham 1997.

²⁹ See Kenneth J. Arrow, Gifts and Exchanges, *Philosophy and Public Affairs* 1 (1972), p. 343 ff. and Samuel Bowles & Sandra Polania Reyes, Economic Incentives and Social Preferences: A Preference-

In a survey carried out by Borges & Irlenbusch,³⁰ it is investigated whether the provision of rights to protect one party reduces considerations of fairness in the other party. They explain that between 1998 (one year after the directive on distance selling was published) and 2004, the return quota in Germany increased from 24% to 35%. They convincingly relate this increase in the use of withdrawal rights to the crowding out of reciprocity:³¹

‘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 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.’

Their survey shows this is indeed the case: ‘return behaviour’ is influenced by how buyers perceive the seller’s behaviour (as voluntary or as a consequence of applying mandatory rules).

Further evidence for this phenomenon can be found in the general conditions of retailers discussed in section 3. Even in areas where mandatory withdrawal rights exist, retailers usually allow their customers to withdraw from the contract for a longer period than necessary. The most plausible reason why they do so is to build trust and the only way to do this is to *go further* than the statutory rule prescribes. If this reasoning is correct, we should see longer withdrawal periods in general conditions of retailers in those countries where the statutory rule is longer. I found indeed some indications this is the case, but still need to collect further data to draw any conclusions.

The remaining question is what this all means for the design of withdrawal rights. The above does not mean that mandatory withdrawal right should be abolished all together, but it should make us think about the ideal ‘governance system’ of these rights. Such a system should not only try to tackle the problems identified in the beginning of section 4, it should also take into account the importance of reciprocal behaviour and of creating trust between seller and consumer. It has to offer a solution for the crowding out of reciprocity by mandatory rules, trying to avoid conflicts between intrinsic and extrinsic motivations of parties. It should also provide an answer to the question when withdrawal rights should be mandatory or optional, at which level of regulation (at the level of countries/states or at the European/federal level) they should be granted and whether they should be applicable to *all* consumers or only to certain categories. This ideal system will be discussed at the meeting.

based Lucas Critique of Public Policy, *CESifo Working Paper 2734* (2009), p. 3 who point out that there may even be a neurological basis for the counterproductive effects of explicit incentives.

³⁰ Georg Borges & Bernd Irlenbusch, Fairness Crowded Out by Law: An Experimental Study on Withdrawal Rights, *Journal of Institutional and Theoretical Economics* 163 (2007), 84 ff.

³¹ Borges & Irlenbusch, o.c.