

University of Neuchâtel

Law Faculty

# **The Statutory Right of Withdrawal in E-Commerce**

## **Comparative Study of European Law and Swiss Law**

Master Thesis  
Orientation Business and Tax Law

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## II. ABBREVIATIONS

AJP	Aktuelle Juristische Praxis
Art.	Article(s)
BGBL	Bundesgesetzblatt
BOCE	Bulletin officiel du Conseil des Etats (Official Gazette of the Council of States)
BOCN	Bulletin officiel du Conseil National (Official Gazette of the National Council)
CCA	Federal Act on Consumer Credit of 23 March 2001 (Consumer Credit Act, CCA) (RS 221.214.1)
CC-N	Control Committee of the National Council
CESL	Common European Sales Law
cf.	confer
chap.	chapter(s)
CLA-S	Committee for Legal Affairs of the Council of States
CO	Federal Act on the Amendment of the Swiss Civil Code of 30 March 1911 (Part Five: The Code of Obligations) (RS 220)
CPC	Swiss Civil Procedure Code of 19 December 2008 (Civil Procedure Code, CPC) (RS 272)
CRD	Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ 2011 L 304/64 (Consumer Rights Directive)
DCFR	Draft Common Frame of Reference
ECJ	European Court of Justice
ed.	edition

e.g.	exempli gratia (“for example”)
ESJ	European Scientific Journal
EU	European Union
euvr	Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht
f.	and the following (page, paragraph, article, etc.)
Fed. Cst.	Federal Constitution of the Swiss Confederation of 18 April 1999 (Fed. Cst.) (RS 101)
FF	Feuille Fédérale (Federal Gazette)
ff.	and the following (pages, paragraphs, articles, etc.)
fig.	figure
FRC	Fédération romande des consommateurs
ibid.	ibidem (“at the same place[s]”)
i.e.	id est (“that is”)
jipitec	Journal of Intellectual Property, Information Technology and E-Commerce Law
JKR	Jahrbuch des Schweizerischen Konsumentenrechts
JZ	JuristenZeitung
lit.	littera
No.	numero (number)
OJ	Official Journal of the European Union
p.	page
para.	paragraph(s)
PCA	Parliamentary Control of the Administration
PILA	Federal Act on Private International Law of 18 December 1987 (Private International Law Act, PILA) (RS 291)
pp.	pages
RS	Recueil systématique du droit fédéral (Classified Compilation of Federal Law)
SJ	Semaine judiciaire
TF	Tribunal fédéral (Swiss Federal Court)

UCA                      Federal Act on Unfair Competition of 19 December 1986 (Unfair  
Competition Act, UCA) (RS 241)

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Synthesis of the results of the consultation procedure regarding the Draft Federal Act on Electronic Commerce, November 2002, available at <<http://www.ejpd.admin.ch/content/dam/data/bj/wirtschaft/gesetzgebung/archiv/e-geschaeftsverkehr/ve-ber-bges.pdf>>.

WÖLFLE Ralf / LEIMSTOLL Uwe, *E-Commerce-Report Suisse 2014: Le commerce en ligne en Suisse du point de vue des fournisseurs*, 05.06.2014, available at <<https://www.datatrans.ch/fr/e-commerce-report/commandes>>.

## **PRELIMINARY NOTE**

In the present thesis, use of feminine gender is generic and applies to both women and men with the sole intent to facilitate the reading.

## 1. INTRODUCTION

Over the last years, e-commerce has significantly developed<sup>1</sup>. This relatively new purchasing method offers numerous advantages as compared to traditional trade, in particular making shopping easier; due to the lack of physical and temporal boundaries of the Internet, online purchases can be made wherever a connection is available and outside of the usual and restrictive opening hours. Accordingly, domestic sales and international trade have been increasingly conducted over the Internet for the last decade, making online shopping more and more popular to such a point that nowadays, e-consumption has become an integral part of the daily life of many consumers<sup>2</sup>.

E-commerce has undeniably been beneficial to the global economy and society, notably by bringing new opportunities and by simplifying the process of shopping and trading<sup>3</sup>. Nonetheless, the unique particularities attached to e-commerce also created new challenges and gave rise to various consumer-related issues<sup>4</sup>; the vast majority of contracts concluded online are non-negotiated contracts, offered to the consumer at distance on a 'take-it-or-leave-it' basis and without the possibility for her to directly see the co-contracting party or the object of the sale<sup>5</sup>.

In order to address the risks accompanying e-commerce, different consumer-protective instruments may be applied. In the area of contract law, these notably include information duties and the right of withdrawal<sup>6</sup>. The right of withdrawal is commonly meant to protect a party who, in a particular context or a particular type of contract, is deemed to require protection<sup>7</sup>. It is typically used in consumer contracts to protect the consumer from making rash decisions, by giving her the possibility during a relatively short 'cooling-off period', to go back on her decision to conclude a contract<sup>8</sup>. Such an intervention in the binding force of the contract aims at compensating the unequal positions of co-contracting parties<sup>9</sup>.

In Europe, consumers enjoy a statutory right to change their mind on purchases made online within 14 days. Swiss law does not provide e-consumers with a similar mandatory right although many attempts to change the law on this point have been undertaken over the past years. The Swiss Parliament once again turned down a project aiming at introducing such a statutory right in e-commerce no later than this year. This raises the questions of why the Swiss authorities keep on refusing to amend the

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<sup>1</sup> As an example, in Switzerland, the sales of physical goods through e-commerce increased by 14% between 2012 and 2013. In Germany, online sales of physical products increased by 41.7% during the same time period (cf. WÖLFLE/LEIMSTOLL, *E-Commerce-Report Suisse 2014: Le commerce en ligne en Suisse du point de vue des fournisseurs*, p. IX).

<sup>2</sup> WANG, preface; LOOS/HELBERGER/GUIBAULT/MAK, p. 730.

<sup>3</sup> WANG, p. 7.

<sup>4</sup> E-commerce may give rise to many specific consumer-related issues due to the nature of the Internet. However, due to the restricted number of pages allowed, the present thesis only focuses on certain contractual aspects of consumer protection in e-commerce. Therefore, particular topics such as the protection of personal data, unfair commercial practices or credit card issues, which could all be the subject of an individual work, are not covered in the following pages.

<sup>5</sup> LOOS/HELBERGER/GUIBAULT/MAK, p. 735.

<sup>6</sup> BINDING/PURNHAGEN, p. 187, No. 4f.

<sup>7</sup> LOOS/HELBERGER/GUIBAULT/MAK, p. 738.

<sup>8</sup> LOOS (2009), p. 239.

<sup>9</sup> DELLI COLLI/RUSTERHOLZ, p. 3, No. 2.

legislation on this topic to bring it in line with European law, and more fundamentally whether a right of withdrawal is appropriate in the context of e-commerce.

The present thesis will attempt first and foremost to explain, in light of the European and Swiss legislations, what is the right of withdrawal, in which context and circumstances this instrument is used and why it may or may not be relevant to make it mandatory in e-commerce. In analyzing the related differences in these two aforementioned legislations, we will not neglect to also provide the reader with an insight of the main differences between European and Swiss laws as regards general e-consumer protection.

We will first introduce a few essential concepts by explaining the notions of e-commerce (chap. 2.1), consumer contract law (chap. 2.2) and the right of withdrawal (chap. 2.3). We will then analyze the related European and Swiss laws in these areas. For each of these legislations, we will start by sketching the contours of the consumer-protective regulations applicable in e-commerce (chap. 3.1 and chap. 4.1) before studying more thoroughly the particular instrument of the right of withdrawal (chap. 3.2 and chap. 4.2). We will then draw a general comparison of European and Swiss laws as regards e-consumer protection (chap. 5.1) and analyze in greater detail the arguable pros and cons of enacting a statutory right of withdrawal in e-commerce (5.2). Finally, we will end the present thesis by giving some thoughts on possible law amendments that could improve the position of Swiss consumers on a broader level (chap. 5.3).

## 2. INTRODUCTION TO THE NOTIONS OF E-COMMERCE, CONSUMER CONTRACT LAW AND THE CONCEPT OF RIGHT OF WITHDRAWAL

### 2.1 E-COMMERCE

#### 2.1.1 E-Commerce definition

‘E-commerce’ or ‘electronic commerce’ can be defined as “*any transaction completed over a computer-mediated network that involves the transfer of ownership or rights to use goods or services*”<sup>10</sup>. This notion basically covers all forms of electronic transactions<sup>11</sup>. Depending on the actors involved in the transaction process, different types of e-commerce activities may be distinguished: transactions between businesses (business-to-business or B2B), those between suppliers and consumers (business-to-consumer or B2C), those between consumers (consumer-to-consumer or C2C) and those between businesses and government (business-to-government or B2G)<sup>12</sup>. Due to its concern with consumer protection, the present thesis focuses on B2C transactions only.

#### 2.1.2 E-Commerce phenomenon

Over the last decade, the ever-increasing use of the Internet has led to an “e-commerce boom”, making commercial transactions progressively quicker and easier<sup>13</sup>. Many reasons explain this enthusiasm for concluding contracts online. First and foremost, by shopping online, the consumer is not constrained by time or space, since purchases may be made at any time 24/7 and from anywhere, for example from home, at work or even on the move<sup>14</sup>. Another reason for this growing interest toward e-commerce is that consumers, when contracting online, lower their costs of searching for goods and services as well as they save time and energy, since purchases are made only by clicking on a button<sup>15</sup>. Thanks to the Internet, consumers face no difficulty to compare products and prices of different providers and may even ask for “objective” advice on consumer forums. Last but not least, e-commerce substantially widened the range of products available to consumers and at the same time extended the size of traders’ markets<sup>16</sup>; the former gained access to goods and services that were previously beyond their geographical or financial reach and the latter are now able to target buyers who were previously unattainable<sup>17</sup>. The speed, efficiency and reduced costs of e-commerce lowered entry barriers, reduced the price of goods and services, expanded existing markets and created new ones<sup>18</sup>. For that matter, it

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<sup>10</sup> FRAUMENI/MANSER/MESENBOURG, *Government Statistics: E-Commerce and the Electronic Economy*, paper presented to the Federal Economic Statistics Advisory Committee (US), 15.06.2000.

<sup>11</sup> Federal Consumer Affairs Bureau website, section ‘Electronic commerce’.

<sup>12</sup> *Ibid.*; METZ/MICKLITZ/SPINDLER/YANG/WANG/WU, p. 2.

<sup>13</sup> WANG, preface.

<sup>14</sup> METZ/MICKLITZ/SPINDLER/YANG/WANG/WU, p. 2; DICKIE, p. 6.

<sup>15</sup> METZ/MICKLITZ/SPINDLER/YANG/WANG/WU, p. 2.

<sup>16</sup> DICKIE, p. 6.

<sup>17</sup> *Ibid.*

<sup>18</sup> WANG, preface; DICKIE, p. 5f.

can be expected that the constant technological innovations (e.g. smartphones, connected TVs and smartwatches) will maintain, if not increase, this tendency for online transactions<sup>19</sup>.

### 2.1.3 Contractual Issues faced by Consumers in E-Commerce

Every stage of an e-commerce transaction presents contractual risks to consumers<sup>20</sup>. During the *pre-contractual stage*, they might be misled about the products or services offered and their pricing, the contractual terms or even about the identity of the trader<sup>21</sup>. Indeed, since transactions are carried out in a virtual environment where face-to-face contact is nonexistent, consumers conclude contracts without ever seeing the counterparty<sup>22</sup>. Hence, a consumer contracting online only knows the trader through the virtual image that she wishes to project<sup>23</sup>. Similarly, e-consumers do not always have access to all the product information they need before the contract is concluded and they do not have the opportunity to see nor examine directly the item before buying it<sup>24</sup>. Furthermore, considering the ease of contracting and the virtual method of payment, there is a significant risk that the contract is concluded hastily and without much thought<sup>25</sup>. During the *contractual stage*, consumers may face irregularities related to contract terms such as missing information or use of pre-checked boxes<sup>26</sup>. Finally, during the *post-contractual stage*, products or services might not be delivered or delivered damaged and consumers may face challenges to return the goods<sup>27</sup>.

These e-consumer-related issues call for the intervention of consumer law, in order to rebalance the consumer's position. The next chapter aims at discussing the need for, and purposes of consumer contract law.

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<sup>19</sup> WÖLFLE/LEIMSTOLL, *E-Commerce-Report Suisse 2014: Le commerce en ligne en Suisse du point de vue des fournisseurs*, p. IX.

<sup>20</sup> As the present thesis focuses on contractual aspects only, we do not address other e-commerce-related issues like payment security, protection of personal data, spamming, etc.; BINDING/PURNHAGEN, p. 187, No. 2.

<sup>21</sup> BINDING/PURNHAGEN, p. 187, No. 2.

<sup>22</sup> METZ/MICKLITZ/SPINDLER/YANG/WANG/WU, p. 2; WANG, p. 13.

<sup>23</sup> Report of the Control Committee of the National Council "*La protection du consommateur dans le commerce électronique: aspects contractuels et protection des données*", 09.11.2004, FF 2005 4689, p. 4692.

<sup>24</sup> Report of the Committee for Legal Affairs of the Council of States, Parliamentary initiative 06.441 of Pierre Bonhôte "*Pour une protection du consommateur contre les abus du démarchage téléphonique*", 14.11.2013, FF 2014 893, p. 896; DONAUER/MÖRI, p. 346; SCHMID, p. 190.

<sup>25</sup> Report of the Committee for Legal Affairs of the Council of States, Parliamentary initiative 06.441 of Pierre Bonhôte "*Pour une protection du consommateur contre les abus du démarchage téléphonique*", 14.11.2013, FF 2014 893, p. 896; SCHMID, p. 190.

<sup>26</sup> BINDING/PURNHAGEN, p. 187, No. 2.

<sup>27</sup> BINDING/PURNHAGEN, p. 187, No. 2.

## 2.2 CONSUMER CONTRACT LAW

Consumer law can be defined as the body of rules whose direct purpose is the protection of consumers<sup>28</sup>. In the present thesis<sup>29</sup>, ‘consumer’ means *any natural person who intends to enter into a contract or who contracts with a trader for purposes that are outside the scope of her trade, business, craft or profession*<sup>30</sup>. The notion of ‘trader’ is used as the counterpart of the consumer in a contract, and means<sup>31</sup> *any natural or legal person who intends to enter into a contract or who contracts with a consumer for a purpose that can be regarded as part of her trade, business, craft or profession*<sup>32</sup>.

*Generally speaking*, consumer law pursues several purposes, including the health and safety of consumers as well as their economic, legal or political interests<sup>33</sup>. *Contractually speaking*, consumer law primarily focuses on the protection of the consumers’ economic interests and aims at “contractual justice”<sup>34</sup>. The main purpose of consumer contract law is thus to address the structural imbalances between economic operators<sup>35</sup>. Indeed, when procuring goods and services to satisfy their private needs (food, clothing, leisure, etc.), consumers usually contract with traders, who are mostly professionals and industrially organized<sup>36</sup>. This inequality of bargaining power results in a structurally weak position of consumers, who often have neither the knowledge nor expertise nor economic power of their co-contracting party, which leads them to accept the conditions imposed upon them by traders<sup>37</sup> and allows the latter to obtain unfair advantages<sup>38</sup>. Consequently, consumer contract law intends to correct this inequality by establishing additional protection for consumers, considered to be the “weak” contracting party, in order to achieve fair and equal contractual practices<sup>39</sup>. In doing so, consumer contract law partly restricts the principle of contractual freedom<sup>40</sup> in favor of the increase of contractual justice<sup>41</sup>.

Among the specific measures and instruments that aim at protecting consumers, it is the institution of the right of withdrawal that will be the focus of our attention. Hence, before addressing the related European and Swiss legislations (chap. 3 and 4), we will briefly introduce the concept of the right of withdrawal in the following chapter.

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<sup>28</sup> MARCHAND (2012), p. 15.

<sup>29</sup> Unless another legal definition is relevant in accordance with the context, for instance when the Directive 2011/83/EU on consumer rights (CRD) applies.

<sup>30</sup> Definition inspired by that of CARRON, itself inspired by the definition provided in Art. 2 para. 1 CRD (cf. CARRON, p. 104, No. 16).

<sup>31</sup> Unless another legal definition is relevant in accordance with the context, for instance when the CRD applies.

<sup>32</sup> Definition inspired by Art. 2 para. 2 CRD and the consumer definition of CARRON (cf. CARRON, p. 104, No. 16).

<sup>33</sup> CARRON, p. 104, No. 17; BRUNNER (2004), p. 8f.; PICHONNAZ (2008), p. 60f.

<sup>34</sup> CARRON, p. 104f., No. 17; BRUNNER (2004), p. 9; PICHONNAZ (2008), p. 62f.

<sup>35</sup> PICHONNAZ (2008), p. 64.

<sup>36</sup> MORIN, p. 18.

<sup>37</sup> *Ibid.*; BRUNNER (1995), p. 45f.; VIGNERON-APRILE, p. 5f.; HOWELLS/RAMSAY/WILHELMSSON, p. 11.

<sup>38</sup> PICHONNAZ (2008), p. 67.

<sup>39</sup> HOWELLS/RAMSAY/WILHELMSSON, p. 11; MORIN, p. 18.

<sup>40</sup> CARRON, p. 104f., No. 17.

<sup>41</sup> PICHONNAZ (2008), p. 67.

## 2.3 THE CONCEPT OF THE RIGHT OF WITHDRAWAL

### 2.3.1 Main Characteristics of the Right of Withdrawal

*Origin.* The right of withdrawal is quite a new concept in private law; even if the first proposals addressing such a right emerged in the 19<sup>th</sup> century in Germany<sup>42</sup>, it was laid down only in the late 1960s in some European national legislations, namely in Germany and the Netherlands<sup>43</sup>. In recent years, it has emerged as a prominent feature of European contract law, more specifically as a legal instrument protecting consumers<sup>44</sup>.

*Notion.* The right of withdrawal may be defined as the right, exercisable within a limited period, to terminate the legal relationship arising from a contract, without having to give any reason for so doing and without incurring any liability for non-performance<sup>45</sup>.

*Consumer protection.* The right of withdrawal is mainly applicable in the field of consumer law, as a protection for consumers from being bound in situations where they are in a structurally disadvantageous position at the time of the conclusion of the contract<sup>46</sup>. It is designed to give the consumer additional time for reflection in specific situations of contract formation where she is deemed to deserve special protection, for example in doorstep or distance contracts<sup>47</sup>. The counterpart to the contract, typically the trader, is usually not given such a right<sup>48</sup>.

*Derogation from pacta sunt servanda.* As it permits the consumer to unilaterally go back on her decision to conclude a contract, the right of withdrawal is a far-reaching instrument that protects one party from another by restricting the binding nature of the contract<sup>49</sup>. Therefore, it appears to be at odds with the principle of *pacta sunt servanda* (“agreement must be kept”), which is commonly regarded as one of the pillars of contract law<sup>50</sup>.

*Imperative nature.* Since the purpose of the right of withdrawal is to protect the entitled party, i.e. the consumer, the law usually forbids the parties to amend to her detriment the provisions concerning the right to withdraw<sup>51</sup>.

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<sup>42</sup> TERRY, p. 122f.

<sup>43</sup> LOOS (2009), p. 239.

<sup>44</sup> BEN-SHAHAR/POSNER, p. 2f.; LOOS (2009), p. 239f.

<sup>45</sup> DCFR, Full Edition (VON BAR/CLIVE), p. 82; The DCFR (*Draft Common Frame of Reference*) is an academic text (and not a politically authorized text) that contains principles, definitions and model rules in European private law. It sets out the results of a large European research project and can be used as a source of inspiration for suitable solutions for private law questions and for future law reforms.; DCFR, Full Edition (VON BAR/CLIVE), p. 3ff.; Cf. also infra chap. 3.1.2.

<sup>46</sup> DCFR, Full Edition (VON BAR/CLIVE), p. 345.

<sup>47</sup> DCFR, Full Edition (VON BAR/CLIVE), p. 346f.

<sup>48</sup> LOOS (2009), p. 239.

<sup>49</sup> LOOS (2009), p. 241.

<sup>50</sup> *Ibid.*

<sup>51</sup> On the contrary, and for the same reason, contractual amendments more favorable to the consumer should not be prohibited, cf. DCFR, Full Edition (VON BAR/CLIVE), Art. II.-5:101(2) and p. 345 *contra* Art. 4 CRD.

### 2.3.2 Main Features regarding the Exercise of the Right of Withdrawal

*Information duty on the right of withdrawal.* The trader has to inform the consumer about the existence of her right of withdrawal and how it can be exercised<sup>52</sup>. A failure to provide adequate information is sanctioned, for instance by an extension of the withdrawal period or a liability exemption for the consumer<sup>53</sup>.

*Absence of reason.* One of the core characteristics of the right of withdrawal is that no reason needs to be given in order to exercise it effectively<sup>54</sup>. Hence, the consumer is given the right to change her mind or to be disappointed without having to justify<sup>55</sup>. The absence of reason requirement is the pledge of a right easy to exercise and impossible to challenge<sup>56</sup>.

*Withdrawal period.* Since the additional period of reflection granted to the consumer leads to uncertainty for the trader as to whether the contractual relationship will continue to exist and whether restitution will be required, the right of withdrawal is exercisable only within a limited period (the so-called ‘cooling-off period’)<sup>57</sup>.

### 2.3.3 Main Features regarding the Effects of the Right of Withdrawal

*Termination of obligations.* The withdrawal has the effect of terminating the contractual relationship and the obligations of both parties under the contract<sup>58</sup>. It releases both parties from any obligations to perform<sup>59</sup>.

*Restitution of performances.* Following the exercise of the right of withdrawal, each party shall return items received under the contract<sup>60</sup>.

*Liability.* The consumer is usually not held liable for the diminished value of the goods, provided she used reasonable care in inspecting and testing them<sup>61</sup>. When the consumer has not been informed of her right to withdraw, she will generally incur no liability<sup>62</sup>.

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<sup>52</sup> DCFR, Full Edition (VON BAR/CLIVE), Art. II.-5:104; Art. 6 para. 1 lit. h CRD.

<sup>53</sup> Art. 10 para. 1 CRD and Art. 14 para. 2 CRD; DCFR, Full Edition (VON BAR/CLIVE), p. 366.

<sup>54</sup> DCFR, Full Edition (VON BAR/CLIVE), p. 350.

<sup>55</sup> MARCHAND (2012), p. 161.

<sup>56</sup> *Ibid.*

<sup>57</sup> MARCHAND (2012), p. 160; DCFR, Full Edition (VON BAR/CLIVE), p. 354.

<sup>58</sup> DCFR, Full Edition (VON BAR/CLIVE), p. 373.

<sup>59</sup> *Ibid.*

<sup>60</sup> For example, the consumer shall return the goods received and the trader shall reimburse the price paid for these goods; SCHULZE/MORGAN, p. 331; MARCHAND (2012), p. 159.

<sup>61</sup> DCFR, Full Edition (VON BAR/CLIVE), p. 375f.; Art. 14 para. 2 CRD.

<sup>62</sup> DCFR, Full Edition (VON BAR/CLIVE), p. 376; *Ibid.*

### **3. EUROPEAN LAW: THE STATUTORY RIGHT OF WITHDRAWAL AS A KEY INSTITUTION PROTECTING CONSUMERS IN E-COMMERCE**

#### **3.1 GENERAL E-CONSUMER PROTECTION IN EUROPEAN LAW**

##### **3.1.1 Introduction**

In recent years, consumer protection has come more and more into the focus of European legislation<sup>63</sup>. In 2004, a thorough review of the EU Consumer *Acquis* has been undertaken in order to simplify consumer legislation and to create the conditions for a more efficient internal market for consumers<sup>64</sup>. One of the keys to achieve the objective of a functioning internal market was to enhance consumers' confidence, in particular in e-commerce, by providing them a harmonized legal framework and stronger rights in that area<sup>65</sup>.

In the European context, electronic contracts are generally part of a broader category of contracts, known as distance contracts. The notion of 'distance contracts' usually covers all cases where a contract is concluded with the exclusive means of distance communication, such as telephone, mail order, fax or Internet<sup>66</sup>. Put another way, it covers all agreements concluded without the simultaneous physical presence of the contracting parties<sup>67</sup>. Distance contracts are commonly subject to some specific rules requiring, among other things, that consumers receive all relevant information during the contracting process and allowing them to withdraw from the contract within a certain period<sup>68</sup>.

##### **3.1.2 Overview of the main Regulations applicable to Consumer Contracts concluded on the Internet**

In regards to e-consumer protection in contract law, several European directives are of relevance, including the Directive 2011/83/EU on consumer rights (hereinafter: CRD [Consumer Rights Directive])<sup>69</sup> (e.g. regarding information duties and the right of withdrawal), the Directive 2000/31/EC on electronic commerce<sup>70</sup> (e.g. regarding online commercial communications), the Directive 93/13/EC on unfair contract terms<sup>71</sup> (e.g. regarding unfair contract terms in consumer contracts and drafting

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<sup>63</sup> KUNNECKE, p. 426.

<sup>64</sup> *Ibid.*; Proposal for a Directive of the European Parliament and of the Council on Consumer Rights, Explanatory Memorandum, COM(2008) 614 final, Brussels 08.10.2008, p. 2.

<sup>65</sup> Proposal for a Directive of the European Parliament and of the Council on Consumer Rights, Explanatory Memorandum, COM(2008) 614 final, Brussels 08.10.2008, p. 2.

<sup>66</sup> Recital 20 CRD.

<sup>67</sup> DCFR, Full Edition (VON BAR/CLIVE), p. 391f.

<sup>68</sup> *Consumer Confidence in E-Commerce: lessons learned from the e-confidence initiative*, SEC(2004) 1390, Brussels 08.11.2004, p. 4.

<sup>69</sup> Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ 2011 L 304/64.

<sup>70</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), OJ 2000 L 178/1.

<sup>71</sup> Directive 93/13/EC of the Council of 5 April 1993 on unfair terms in consumer contracts, OJ 1993 L 95/29.

requirements), the Directive 99/44/EC on sale of consumer goods and guarantees<sup>72</sup> (e.g. regarding specific guarantees), the Directive 2005/29/EC on unfair business-to-consumer commercial practices in the internal market<sup>73</sup> (e.g. regarding unfair commercial practices) and the Directive 2006/123/EC on services (e.g. regarding information duties)<sup>74</sup>. Alongside with these directives, European projects for uniform law such as the *Draft Common Frame of Reference* (DCFR)<sup>75</sup> and the *Common European Sales Law* (CESL)<sup>76</sup> offer guidance to understand the European approach to consumer contract law.

Since it contains the provisions concerning the right of withdrawal applicable in distance contracts, and thus in e-commerce, the CRD will be the focus of our attention, bearing in mind that, depending on the circumstances, it has to be read in light of other (above-mentioned) regulations.

### 3.1.3 The Consumer Rights Directive

#### 3.1.3.1 Introduction

The CRD was adopted on the 25<sup>th</sup> of October 2011<sup>77</sup>. This directive had to be transposed by Member States in their national laws by the 13<sup>th</sup> of December 2013, whereas the transposition rules had to be applied from the 13<sup>th</sup> of June 2014 for contracts concluded after that date<sup>78</sup>. Originally, the proposal of the CRD intended to merge four existing EU consumer directives into one set of rules: the Directive 97/7/EC on distance contracts<sup>79</sup>, the Directive 85/577/EC on doorstep selling<sup>80</sup>, the Directive 99/44/EC on sale of consumer goods and guarantees and the Directive 93/13/EC on unfair contract terms<sup>81</sup>. According to the original intention of the EU Commission, the CRD should have become the cornerstone of a second generation of consumer contract law directives, whose main characteristic was to step from minimum standard harmonization of the first generation (1980s and 1990s) to full harmonization<sup>82</sup>. However, due to abundant criticism by Member States and legal scholars, the proposal has been seriously limited<sup>83</sup>. Therefore, the CRD as it was finally adopted and which is now applicable focuses essentially on distance and off-premises contracts with a targeted full

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<sup>72</sup> Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ 1999 L 171/12.

<sup>73</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), OJ 2005 L 149/22.

<sup>74</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ 2006 L 376/36.

<sup>75</sup> DCFR, Full Edition (VON BAR/CLIVE).

<sup>76</sup> Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011) 635 final, Brussels 11.10.2011.

<sup>77</sup> OJ 2011 L 304/83.

<sup>78</sup> Art. 28 CRD; TONNER, p. 395, No. 9.2.

<sup>79</sup> Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ 1997 L 144/19.

<sup>80</sup> Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ 1985 L 372/31.

<sup>81</sup> WANG, p. 17.

<sup>82</sup> This means that EU legislation, within its scope, would have left no room for further rules at national level; Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, *EU Consumer Policy Strategy 2007-2013*, COM(2007) 99 final, Brussels 13.03.2007, p. 7; TONNER, p. 395f.

<sup>83</sup> Much of the criticism came from Member States being afraid of losing their influence over consumer law and being obliged to reduce some of their existing law beyond the level of the existing directives; TONNER, p. 396.

harmonization approach, replacing only the first two aforementioned directives<sup>84</sup> and leaving the others<sup>85</sup>, including the minimum standard principle, as they are<sup>86</sup>.

### 3.1.3.2 *The Purpose and the Scope of the Consumer Rights Directive*

The purpose of the CRD is to contribute to a better functioning of the B2C internal market of the European Union, by enhancing consumer confidence in the internal market and reducing business reluctance to cross-border trade, especially for online transactions<sup>87</sup>. To achieve this objective, the CRD updated and modernized existing consumer rights, by adapting them to technological changes, and strengthened provisions in some key problem areas<sup>88</sup>. In particular, it created a single set of core rules applicable to distance contracts<sup>89</sup> and off-premises contracts<sup>90</sup>, thus providing a common legal framework within the European Union<sup>91</sup>.

The application of the CRD is limited to contracts concluded between consumers and traders<sup>92</sup>. The notion of ‘consumer’ is defined in the CRD as “(...) *any natural person who, in contracts covered by this Directive, is acting for purposes which are outside [her] trade, business, craft or profession*”<sup>93</sup>. Although the scope of the CRD is set to be applied to any B2C transactions<sup>94</sup>, a long list of exemptions severely limits its application by excluding many sectors like social services, healthcare, gambling, financial services or immovable property<sup>95</sup>.

### 3.1.3.3 *The Content of the Consumer Rights Directive*

The CRD principally aims at providing consumers with information and a right of withdrawal in distance and off-premises contracts. It also contains provisions dealing with sales and services contracts. After briefly outlining the information requirements (A) and the other obligations (B) to be respected by traders, we will analyze in more detail the right of withdrawal as granted to consumers by the CRD (chap. 3.2).

#### **A) Information Requirements**

Starting from the assumption that an informed consumer is also a confident consumer who is able and willing to conclude transactions regardless of national borders, many pre-contractual information duties to be fulfilled by the trader in distance (and off-premises) contracts have been introduced in Art. 6 para. 1 CRD<sup>96</sup>.

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<sup>84</sup> i.e. the Directive 97/7/EC on distance contracts and the Directive 85/577/EC on doorstep selling.

<sup>85</sup> i.e. the Directive 99/44/EC on sale of consumer goods and guarantees and the Directive 93/13/EC on unfair contract terms.

<sup>86</sup> Except for slight adaptations to the CRD; TONNER, p. 396; Proposal for a Directive of the European Parliament and of the Council on Consumer Rights, Explanatory Memorandum, COM(2008) 614 final, Brussels 08.10.2008, p. 3.

<sup>87</sup> Proposal for a Directive of the European Parliament and of the Council on Consumer Rights, Explanatory Memorandum, COM(2008) 614 final, Brussels 08.10.2008, p. 2.

<sup>88</sup> Such as distance contracts and more particularly electronic contracts; WANG, p. 17.

<sup>89</sup> e.g. contracts concluded on the phone, by mail or on the Internet.

<sup>90</sup> e.g. doorstep contracts or contracts concluded in the street.

<sup>91</sup> Press release of the European Commission, MEMO/11/450, Brussels 23.06.2011; WANG, p. 17f.

<sup>92</sup> Art. 3 para. 1 CRD.

<sup>93</sup> Art. 2 para. 1 CRD.

<sup>94</sup> Art. 3 para. 1 CRD.

<sup>95</sup> Cf. list of Art. 3 para. 3 CRD; TONNER, p. 398f.

<sup>96</sup> Proposal for a Directive of the European Parliament and of the Council on Consumer Rights, Explanatory Memorandum, COM(2008) 614 final, Brussels 08.10.2008, p. 2; KUNNECKE, p. 432.

Art. 6 para. 1 CRD lists no less than twenty obligations regarding information to be provided by the trader, clearly and in a comprehensible manner, to the consumer before the conclusion of a distance contract. The list includes information regarding the main characteristics of the goods and services (lit. a), the identity and the geographical address of the trader (lit. b and c), the total price, i.e. including any additional fee (lit. e)<sup>97</sup>, the arrangements for payment, delivery and performance (lit. g), the existence of after-sales services and legal and commercial guarantees (lit. l and m), the existence or not of a right of withdrawal and the conditions for its exercise (lit. h to k) and various technical details regarding the contract or the object of the purchase, such as the interoperability of digital content with hardware and software (lit. s)<sup>98</sup>. Besides, according to Art. 6 para. 7 CRD, Member States are allowed to maintain or introduce language requirements.

In addition, Art. 8 CRD determines the formal (information) requirements to be fulfilled by the trader in distance contracts (only), for instance the general rule that the information must be made available to the consumer in a way appropriate to the means of distance communication and in a plain and intelligible language (Art. 8 para. 1 CRD) and the obligation to provide the consumer with a confirmation of the contract concluded on a durable medium (Art. 8 para. 7 CRD). This provision also contains specific rules aiming at the protection of consumers who conclude contracts via the Internet<sup>99</sup>; these include the obligation to provide certain information “*directly before the consumer places [her] order*” (Art. 8 para. 2 CRD) and the obligation for trading websites to indicate clearly, at the latest at the beginning of the ordering process, any delivery restrictions and the means of payments accepted (Art. 8 para. 3 CRD). Moreover, Art. 8 CRD includes the obligation to ensure that the consumer, when placing her order, explicitly acknowledges that she is committing to pay (Art. 8 para. 2 CRD). The button by which the order is placed must be labeled only with the words ‘*order with obligation to pay*’ or a corresponding unambiguous formulation. If these requirements are not met, the consumer will not be bound by the contract or order (Art. 8 para. 2 *in fine* CRD). This provision protects e-consumers against “cost traps”, for example when fraudsters try to trick people into paying for supposedly “free” services, such as horoscopes or recipes<sup>100</sup>. It should be noted that specific restriction on certain information is allowed in Art. 8 para. 4 CRD, when the means of distance communication used allows limited space (e.g. smartphones)<sup>101</sup>. According to Art. 8 para. 10 CRD, Member States cannot impose further formal requirements.

## **B) Additional Requirements**

In addition to provisions regarding information requirements (cf. previous chap.) and the right of withdrawal (cf. following chap.), the CRD provides in Art. 17ff. the following protection to consumers<sup>102</sup>:

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<sup>97</sup> According to Art. 6 para. 6 CRD, the consumer will not have to pay charges or other costs if she was not properly informed thereof before placing the order.

<sup>98</sup> KUNNECKE, p. 433.

<sup>99</sup> TONNER, p. 405.

<sup>100</sup> Press release of the European Commission, MEMO/11/450, Brussels 23.06.2011; KUNNECKE, p. 433.

<sup>101</sup> TONNER, p. 405.

<sup>102</sup> Art. 18 and 20 CRD apply to sales contracts whereas Art. 19, 21 and 22 CRD apply to sales and service contracts (Art. 17 para. 1 and 2 CRD).

*Non-imperative delivery period.* According to Art. 18 CRD, delivery shall be made no later than 30 days from the conclusion of the contract. Nevertheless, parties can agree upon another time period.

*Ban of surcharges for the use of credit cards and hotlines.* Traders are forbidden to charge consumers paying by credit card (or other means of payment) fees that exceed the actual costs of the trader to offer such means of payment (Art. 19 CRD). Similarly, traders who operate telephone hotlines allowing consumers to contact them in relation to the contract cannot charge more than the basic rate for telephone calls (Art. 21 CRD)<sup>103</sup>.

*Passing of risks.* Traders bear the risk for any damage occurring during transportation, unless a carrier was commissioned by the consumer to carry the goods and if this option was not offered by the trader (Art. 20 CRD). In this case, the risks pass to the consumer upon delivery to the carrier.

*Ban of pre-ticked boxes on websites.* Art. 22 CRD forbids the trader to infer from a pre-checked box (i.e. default option which the consumer is required to reject in order to avoid additional content to her order) that the consumer agreed to an extra paid service (e.g. travel insurance)<sup>104</sup>. The consumer's consent to any additional payment must be express, thus prohibiting the use of so-called 'pre-ticked boxes'. In the absence of express consent, additional payments are not due and must be reimbursed to the consumer<sup>105</sup>.

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<sup>103</sup> Press release of the European Commission, MEMO/11/450, Brussels 23.06.2011.

<sup>104</sup> *Ibid.*

<sup>105</sup> Art. 22 CRD; MARCHAND (2013), p. 10, No. 4.

## 3.2 THE STATUTORY RIGHT OF WITHDRAWAL PROVIDED IN THE CONSUMER RIGHTS DIRECTIVE

### 3.2.1 Introduction

Art. 9 CRD provides consumers with a right of withdrawal in distance contracts (and off-premises contracts), including contracts concluded online:

*Article 9 CRD - Right of withdrawal*

*Save where the exceptions provided for in Article 16 apply, the consumer shall have a period of 14 days to withdraw from a distance or off-premises contract, without giving any reason, and without incurring any costs other than those provided for in Article 13(2) and Article 14.*

The reason for granting a right of withdrawal is that, in case of distance sales, the consumer is not able to see the goods before concluding the contract<sup>106</sup>. Hence, a right to withdraw is provided to the consumer in order to allow her to inspect and test the good purchased to the extent necessary to establish the nature, characteristics and the functioning of the product<sup>107</sup>. The right of withdrawal for distance contracts was already provided in the former Directive 97/7/EC on distance contracts<sup>108</sup>. The CRD brought substantial reforms in that area, notably by strengthening consumer rights and by clarifying the prevailing rights and duties, without disregarding traders' interests<sup>109</sup>. The former rules regarding the period, exercise and effects of the right of withdrawal have been revised and fully harmonized, with the objective to enhance B2C transactions within the internal market, in particular in e-commerce<sup>110</sup>.

### 3.2.2 Information on the Right of Withdrawal

Before the conclusion of the contract, the trader is required to provide the consumer, in a clear and comprehensible manner, with certain information regarding her right of withdrawal (Art. 6 para. 1 lit. h to k CRD)<sup>111</sup>. In particular, the trader must inform the consumer of the conditions, time limit and procedures for the exercise of her right of withdrawal as well as of the model withdrawal form set out in Annex I(B) of the CRD (Art. 6 para. 1 lit. h CRD). The trader must also inform the consumer if she has to bear the return costs in case of withdrawal (Art. 6 para. 1 lit. i CRD)<sup>112</sup>. The consequences of failure to provide such information are varied and discussed below in relevant sections<sup>113</sup>.

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<sup>106</sup> Recital 37 CRD.

<sup>107</sup> *Ibid.*

<sup>108</sup> Art. 6 of the Directive 97/7/EC on distance contracts, which provided a minimal withdrawal period of 7 days.

<sup>109</sup> KUNNECKE, p. 434.

<sup>110</sup> Recital 5 CRD.

<sup>111</sup> Art. 6 para. 1 CRD.

<sup>112</sup> In distance contracts, if the goods cannot normally be returned by post due to their nature, the trader shall also provide information as regards the return costs of such goods (Art. 6 para. 1 lit. i *in fine* CRD).

<sup>113</sup> Cf. *infra* chap. 3.2.3.1, 3.2.4.2 and 3.2.4.4.

### **3.2.3 Exercise of the Right of Withdrawal**

#### *3.2.3.1 Cooling-off period*

Art. 9 para. 1 CRD awards the consumer a 14-day period to withdraw from distance contracts. The previous withdrawal period of 7 days has been extended to 14 days with the adoption of the CRD, in order to bring to an end the legal uncertainty and compliance costs caused by the former varying lengths of withdrawal periods previously applicable within the Member States<sup>114</sup>. European e-consumers can therefore change their mind on purchases made online within 14 days. This cooling-off period starts to run the day of the conclusion of the contract in case of service contracts and the day the consumer acquires physical possession of the goods in case of sales contracts (Art. 9 para. 2 lit. a and b CRD). The cooling-off period is extended to 12 months and 14 days if the trader has not clearly informed the consumer about her right as required under Art. 6 para. 1 lit. h CRD (Art. 10 para. 1 CRD) or to 14 additional days if the trader informed the consumer about her right within 12 months from the start of the regular withdrawal period (Art. 10 para. 2 CRD).

#### *3.2.3.2 Notice of Withdrawal*

According to Art. 11 para. 1 lit. a CRD, consumers who wish to withdraw from a contract may use the harmonized model withdrawal form provided in Annex I(B) of the CRD. However, pursuant to para. 2 of the same article and recital 44 CRD, consumers remain free to withdraw in their own words using any means of communication, as long as the withdrawal is unequivocal. Nonetheless since the consumer bears the burden of proof of having withdrawn within the 14-day period, it is in her interest to use a durable medium when communicating her withdrawal<sup>115</sup>. It should be noted that consumers can withdraw from a distance contract without having to give any reason for doing so<sup>116</sup>.

### **3.2.4 Effects of the Right of Withdrawal**

#### *3.2.4.1 Restitution of performances*

The exercise of the right of withdrawal terminates the obligations of the parties. Hence, if a contractual obligation has been performed by a party, it has to be restituted by the counterparty (Art. 12 and 13 CRD). In order to accelerate the withdrawal process, Art. 13 para. 1 CRD requires the trader to reimburse all payments received from the consumer, including the delivery costs, within 14 days of the consumer's withdrawal<sup>117</sup>. Besides, unless the consumer expressly agreed otherwise and provided no additional fee applies, the trader shall reimburse the consumer in the same means of payment used by the consumer in the initial transaction (Art. 13 para. 1 CRD). As a result, reimbursements by voucher are forbidden, unless the consumer has used a voucher when paying or has expressly accepted them<sup>118</sup>. As a countermove, the consumer is required to send back the goods no later than 14 days after

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<sup>114</sup> Recital 40 CRD.

<sup>115</sup> Art. 11 para. 4 CRD and Recital 44 CRD.

<sup>116</sup> Art. 9 para. 1 CRD, provided that all the conditions of Art. 9ff. CRD are respected.

<sup>117</sup> KUNNECKE, p. 434f.; However, the CRD does not provide any indication as to the consequences of the non-compliance of the restitution period (MARCHAND [2013], p. 21, No. 14).

<sup>118</sup> Recital 46 CRD.

having informed the trader about her decision to withdraw (Art. 14 para. 1 CRD)<sup>119</sup>. In order to guarantee restitution with simultaneous performance, the trader may withhold the reimbursement until she has received the goods back or until the consumer has supplied evidence of having sent back the goods (Art. 13 para. 3 CRD)<sup>120</sup>.

### 3.2.4.2 *Returning costs*

The consumer bears the direct costs of returning the goods, unless the trader agreed to bear them or failed to inform the consumer that she has to bear them (Art. 14 para. 1 CRD<sup>121</sup>). Consequently, traders who wish the consumers to bear the costs of returning goods after they change their mind need to clearly inform them about that beforehand<sup>122</sup>. If they fail to provide this information, they would have to pay for the return themselves. Except the returning costs, the trader cannot impose other costs related to the withdrawal such as additional fees or penalties (Art. 14 para. 1 CRD). A contractual provision authorizing the trader, in the event of withdrawal, to charge the consumer with the initial delivery costs (in addition to the returning costs) is therefore not admissible<sup>123</sup>. Nevertheless, when the consumer opted for a type of delivery other than the standard one offered by the trader, the latter can deduct from the amount to reconstitute the additional fees related to this special type of delivery (Art. 13 para. 2 CRD)<sup>124</sup>.

### 3.2.4.3 *Proportionate costs for the service already provided*

The consumer bears no cost for the use of the good or service, except in the following cases (Art. 14 para. 4 CRD)<sup>125</sup>:

- In case of *performance of services or supply of water, gas or electricity*, the consumer has to pay for what she has consumed or for the part of the service she has received, if the trader has provided information on her right of withdrawal and if the consumer has expressly requested that the performance begins before the expiry of the withdrawal period (Art. 14 para. 4 lit. a CRD)<sup>126</sup>.
- In case of *supply of digital content which is not supplied on a tangible medium*, the consumer has to pay the price if she waived her right of withdrawal in compliance with Art. 16 lit. m CRD, which allows her to obtain digital content without having to wait until the end of the withdrawal period (Art. 14 para. 4 lit. b CRD)<sup>127</sup>.

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<sup>119</sup> KUNNECKE, p. 434f.; However, the CRD does not provide any indication as to the consequences of the non-compliance of the restitution period (MARCHAND [2013], p. 21, No. 14).

<sup>120</sup> KUNNECKE, p. 435.

<sup>121</sup> Cf. also Art. 6 para. 1 lit. i and Art. 6 para. 6 CRD.

<sup>122</sup> Press release of the European Commission, MEMO/11/450, Brussels 23.06.2011.

<sup>123</sup> Judgment of the European Court of Justice (Fourth Chamber) of 15 April 2010 – *Handelsgesellschaft Heinrich Heine GmbH v Verbraucherzentrale Nordrhein-Westfalen eV* (Case C-511/08), in application of the Directive 97/7/EC on distance contracts; MARCHAND (2013), p. 19, No. 14.

<sup>124</sup> MARCHAND (2013), p. 19, No. 14.

<sup>125</sup> MARCHAND (2013), p. 20, No. 14.

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid.*

Art. 14 para. 4 lit. a CRD protects each party's interest; on the one hand, the consumer should benefit from her right of withdrawal even when she asked for the provision of services before the end of the cooling-off period<sup>128</sup>. On the other hand, if the consumer eventually exercises her right of withdrawal, the trader should be assured to be adequately paid for the service she has provided<sup>129</sup>.

One can show more skepticism towards the practical usefulness for consumers of Art. 14 para. 4 lit. b CRD, as it is unlikely that a consumer purchasing digital content wishes to wait 14 days to receive it. This solution is nevertheless adequate, as it regulates in a fair manner a specific situation where the withdrawal would be impracticable and sometimes constitutive of abuse. As we will see below (cf. infra chap. 3.2.5.2), the supply of digital content is included in the list of exceptions to the right of withdrawal (Art. 16 lit. m CRD). Art. 14 para. 4 lit. b CRD thus only provides for the cost consequences when the exclusion of the right of withdrawal for the supply of digital content does not comply with the conditions of Art. 16 lit. m CRD (i.e. consumer's prior express consent for the beginning of the performance before the end of the withdrawal period and acknowledgment of the loss of the right to withdraw)<sup>130</sup>.

#### 3.2.4.4 *Liability for damage to the goods*

When the goods are damaged before being returned to the trader, the consumer is liable for the diminished value of the goods if it results from a handling exceeding what was necessary to establish the nature, characteristics and functioning of the goods (Art. 14 para. 2 CRD). Nevertheless, the trader has no right to such indemnity if she has failed to inform the consumer about her right of withdrawal in accordance with Art. 6 para. 1 lit. h CRD (Art. 14 para. 2 CRD). Art. 14 para. 2 CRD offers a certain protection to traders against abuses (e.g. consumers who not only try a garment but also wear it)<sup>131</sup>. However, in case of such abuses, the consumer does not lose her right to withdraw; she is only liable for the diminished value<sup>132</sup>.

#### 3.2.4.5 *Ancillary contracts*

Pursuant to Art. 15 para. 1 CRD, the withdrawal from a distance contract automatically terminates any ancillary contracts, without any cost for the consumer except the ones provided for in Art. 13 para. 2 and 14 CRD<sup>133</sup>.

### 3.2.5 **Exceptions**

The CRD contains many exceptions mentioned in Art. 3 para. 3 CRD (non-application of the CRD) and in Art. 16 CRD (exceptions to the right of withdrawal).

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<sup>128</sup> Recital 50 CRD.

<sup>129</sup> *Ibid.*

<sup>130</sup> Art. 14 para. 4 lit. b (iii) also provides that the consumer bears no cost if the trader failed to provide confirmation in accordance with Art. 8 para. 7 CRD.

<sup>131</sup> Recital 47 CRD.

<sup>132</sup> *Ibid.*

<sup>133</sup> The notion of 'ancillary contract' is defined in Art. 2 para. 15 CRD as "[...] a contract by which the consumer acquires goods or services related to a distance contract or an off-premises contract and where those goods are supplied or those services are provided by the trader or by a third party on the basis of an arrangement between that third party and the trader".

### 3.2.5.1 *Non-application of the Consumer Rights Directive*

Art. 3 para. 3 CRD enumerates contracts to which the CRD is not applicable, like contracts for gambling (lit. c), contracts for tourist services (lit. g and k; e.g. hotel reservations or purchase of flight tickets), contracts for social services (lit. a) or contracts for the supply of foodstuff, beverages or other goods intended for current consumption and delivered by the trader at the consumer's home or workplace on frequent and regular rounds (lit. j)<sup>134</sup>.

### 3.2.5.2 *Exceptions to the Right of Withdrawal*

Art. 16 CRD lists the numerous exceptions to the right of withdrawal. The catalog of exceptions covers cases where a right to withdraw is deemed inappropriate and comprises<sup>135</sup>:

- service contracts after the service has been fully performed if the consumer agreed to the performance and acknowledged the loss of her right to withdraw (lit. a);
- the supply of goods or services whose price depends on fluctuations in the financial market that cannot be controlled by the trader (lit. b);
- contracts for customized goods (lit. c; e.g. engraved bracelet);
- the supply of perishable goods (lit. d; e.g. food);
- the supply of goods that are not suitable for return due to health protection or hygiene reasons (lit. e; e.g. underwear);
- the supply of goods which are, by nature, inseparably mixed with other items after delivery (lit. f; e.g. fuel);
- the supply of alcoholic beverages whose price has been agreed upon at the time of the conclusion of the contract, whose delivery can only take place after 30 days and whose actual value is dependent on fluctuations in the market that cannot be controlled by the trader (lit. g; e.g. 'vin en primeur', i.e. wine supplied a long time after the conclusion of the contract of a speculative nature<sup>136</sup>);
- contracts where the consumer has specifically requested a visit from the trader for the purpose of carrying out urgent repairs or maintenance (lit. h);
- the supply of sealed audio, video recordings or computer software that were unsealed after delivery (lit. i; e.g. DVDs). This exception permits to avoid abuses from consumers, who could order a good only to copy it and to return it by exercising their right to withdraw<sup>137</sup>;
- the supply of newspaper and other periodicals (lit. j). In these cases, the risk of restitution after reading is high. Yet, although the sale of books could raise the same concern given the 14-day cooling-off period, this situation is not included in the list of exceptions<sup>138</sup>;
- contracts concluded at a public auction (lit. k). However, online public auctions are not concerned by this exception, as the term 'public auction' only implies auctions attended in

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<sup>134</sup> The rationale for the non-application of the CRD depends on the field involved; the provisions of the CRD are either considered to be inappropriate (e.g. immovable property, social services, healthcare) or not necessary due to existing European legislation (e.g. passenger transport services, financial services, package travel and timeshare) (recitals 26ff. CRD); MARCHAND (2013), p. 22, No. 15.

<sup>135</sup> Art. 16 CRD and recital 49 CRD.

<sup>136</sup> Recital 49 CRD.

<sup>137</sup> MARCHAND (2013), p. 23, No. 15.

<sup>138</sup> MARCHAND (2013), p. 22, No. 15.

person<sup>139</sup>. Online auctions are therefore subject to the right of withdrawal, insofar as it concerns a B2C relationship<sup>140</sup>;

- contracts which imply the setting aside of a capacity (lit. l; e.g. hotel bookings or concert tickets). Indeed, in case of withdrawal, the trader may encounter difficulties to fill again this capacity<sup>141</sup>;
- the supply of digital content which is not supplied on a tangible medium if performance has begun with the consumer's consent and acknowledgment of the loss of her right to withdraw (lit. m; e.g. download of music, movies, games or apps). Indeed, once downloaded on the computer of the consumer, digital content can be easily saved or copied.

The protection afforded to consumers by the CRD is somehow weakened by the extensive aforementioned exceptions<sup>142</sup>. Indeed, many sectors fall beyond the protection conferred by the CRD, particularly as regards the right of withdrawal granted to the consumer<sup>143</sup>.

### 3.2.6 Example of Transposition: German Law

#### 3.2.6.1 Introduction

Having studied the features of the right of withdrawal as provided by the CRD, we will now give a concrete example of the transposition of this directive by a Member State, by briefly explaining how the key provisions were transposed in German law, which presents the particularity of influencing both European law and Swiss law.

As previously mentioned, the right of withdrawal has developed above all in the legislation of the European Union<sup>144</sup>. So far, the key aspect of the European directives was the minimum harmonization standard, whereby the Member States could raise the level of protection granted when transposing directives into their national laws<sup>145</sup>. In this context, German legislation used to transpose the directives with considerable 'gold-plating', meaning that it set a much broader scope of application than what was originally foreseen at European level<sup>146</sup>. However, in recent years, European consumer protection legislation has adopted a full harmonization approach<sup>147</sup>. Along these lines, the CRD stipulates the full harmonization of the rules on the right of withdrawal (in off-premises and) in distance contracts concluded between a trader and a consumer<sup>148</sup>. Accordingly, the national laws of the Member States are now all built upon the same common foundation in this area<sup>149</sup>. German legislation had therefore to be amended, in order to comply with the CRD and its full harmonization standard regarding the right of withdrawal<sup>150</sup>.

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<sup>139</sup> *Ibid.*; Recital 24 CRD.

<sup>140</sup> MARCHAND (2013), p. 22, No. 15.

<sup>141</sup> Recital 49 CRD.

<sup>142</sup> MARCHAND (2013), p. 21, No. 15.

<sup>143</sup> MARCHAND (2013), p. 23, No. 16.

<sup>144</sup> Cf. supra chap. 2.3.1; SCHULZE/MORGAN, p. 294.

<sup>145</sup> SCHULZE/MORGAN, p. 295; TONNER/TAMM, p. 277.

<sup>146</sup> SCHULZE/MORGAN, p. 301.

<sup>147</sup> Cf. supra chap. 3.1.3.1; SCHULZE/MORGAN, p. 295; TONNER/TAMM, p. 277.

<sup>148</sup> Art. 4 and Art. 9 to 16 CRD.

<sup>149</sup> SCHULZE/MORGAN, p. 295.

<sup>150</sup> As the CRD provides for full harmonization regarding the right of withdrawal, the German legislator cannot go beyond the regulations provided in the CRD.

The German legislator transposed the CRD by amending the German Civil Code (*Bürgerliches Gesetzbuch*; hereinafter: “BGB”) and the Introductory Act to the German Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuch*; hereinafter: “EGBGB”)<sup>151</sup>. Most of the CRD’s provisions have been transposed in Sections 312ff. and 355ff. BGB and in Art. 246ff. EGBGB<sup>152</sup>. Sections 312ff. BGB contain provisions applicable to all consumer contracts but also specific provisions concerning off-premises, distance and electronic contracts. Sections 355ff. BGB, which transpose Art. 9ff. CRD, contain detailed provisions concerning the right of withdrawal. Art. 246ff. EGBGB contain the information duties provided in Art. 5 and 6 CRD<sup>153</sup>.

### 3.2.6.2 *Key amendments of the Consumer Rights Directive and their adjustment in German law*

In Germany, the provisions on the right of withdrawal (“*Widerrufsrecht*”) in distance contracts are included in the Civil Code, in Sections 355ff. BGB. Below is a highlight of the most important changes introduced in German legislation as regards the right of withdrawal in distance contracts (including e-commerce contracts) in order to bring it into line with the CRD.

*Withdrawal period.* As mentioned above (cf. supra chap. 3.2.3.1), one of the main features of the CRD is the introduction of an EU-wide uniform 14-day withdrawal period<sup>154</sup>. However, as the applicable withdrawal period before the adoption of the CRD was already of 14 days under German law, no amendment was necessary on this point<sup>155</sup>.

*Manner of withdrawal.* Under former German legislation, it was possible for the consumer to withdraw from a contract by sending back the goods to the trader<sup>156</sup>. At present, the mere return of the goods is no longer sufficient, as the consumer must, under the new law, exercise her right to withdraw through an ‘unequivocal statement’<sup>157</sup>. To that end, the trader may provide the consumer with the model withdrawal form of the Annex 2 to Article 246a section 1 (2) sentence 1 number 1 EGBGB or with the possibility to submit other unambiguous declaration of withdrawal on her website<sup>158</sup>.

*Information on the right of withdrawal.* The model instructions on withdrawal in Annex 1 to Article 246a Section 1 (2) Sentence 2 EGBGB have been adapted to fit all the requirements of the CRD<sup>159</sup>. For example, from now on, traders have to inform consumers of the costs involved for returning goods if they want the latter to bear them<sup>160</sup>. Such a specific sanction for the lack of information regarding

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<sup>151</sup> The transposition has been achieved through the adoption of the Act on the Implementation of the CRD (*Gesetz zur Umsetzung der Verbraucherrechterichtlinie und zur Änderung des Gesetzes zur Regelung der Wohnungsvermittlung vom 20. September 2013*), which entered into force on the 13th of June 2014 (BGBl. 2013 I 3642); BUSCH, p. 119.

<sup>152</sup> BUSCH, p. 119.

<sup>153</sup> The lists of information duties contained in Art. 5 and 6 CRD have been “outsourced” by the German legislator to Art. 246ff. EGBGB in order to avoid an overburdening of the BGB with too many technical details (BUSCH, p. 119).

<sup>154</sup> Art. 9 para. 1 CRD.

<sup>155</sup> Former Section 355 (2) BGB and Section 355 (2) BGB; In 2000, the German legislator decided to harmonize the varying withdrawal periods applicable in different situations to one harmonized cooling-off period of 14 days; ROTT, p. 14f., No. 7.

<sup>156</sup> Former Section 355 (1) BGB; DCFR, Full Edition (VON BAR/CLIVE), p. 353; SCHULZE/MORGAN, p. 315f.

<sup>157</sup> Section 355 (1) BGB, which transposes Art. 11 para. 1 CRD; GSELL, p. 811, No. 15; SCHULZE/MORGAN, p. 316.

<sup>158</sup> Section 356 (1) BGB.

<sup>159</sup> SCHULZE/MORGAN, p. 324.

<sup>160</sup> Section 357 (6) BGB and Art. 246a section 1 (2) sentence 1 number 2, which transpose Art. 14 para. 1 and Art. 6 para. 6 CRD.

this point was previously not included within the BGB<sup>161</sup>. This novelty resulted in the introduction of additional information duties for the trader<sup>162</sup>.

*Failure to provide information on the right of withdrawal.* Previously in Germany, a failure to provide the consumer with the required information about her right to withdraw resulted in the withdrawal period running indefinitely<sup>163</sup>. Under the new law, even in the absence of proper information about the right to withdraw, an absolute withdrawal period of 12 months and 14 days applies, starting from the date at which the cooling-off period would normally have begun to run if adequate information about the right to withdraw had been provided<sup>164</sup>. Such a limitation of the cooling-off period is thus new to German legislation and brings to an end the ‘eternal right of withdrawal’ that were previously potentially applicable<sup>165</sup>. In addition, the sanction formerly applicable to traders who did not provide the withdrawal information on time (i.e. at the latest at the conclusion of the contract) is no longer applicable under the new law<sup>166</sup>. Indeed, former Section 355 (2) BGB used to extend the withdrawal period to one month instead of 14 days if the information on the right of withdrawal were provided only some time after the conclusion of the contract. In accordance with the CRD, this rule no longer applies. According to SCHULZE/MORGAN, this lessens the level of consumer protection because of the lack of motivation for traders to provide information prior to the conclusion of the contract<sup>167</sup>.

*Return of performances.* Goods and payments must now be returned within 14 days<sup>168</sup> and the trader is required to use the same means of payment for the refund as the consumer used for the initial transaction<sup>169</sup>. Previously the corresponding provisions only obliged the trader to reimburse the sums paid by the consumer within 30 days<sup>170</sup>. In addition, the trader is now given a right of retention until she receives the goods back or until the consumer proves that she has dispatched them<sup>171</sup>.

*Delivery costs.* According to the new law, the trader has to reimburse the initial regular delivery costs in case of withdrawal<sup>172</sup>. Former Section 357 BGB did not explicitly mention if the trader was authorized or forbidden to charge the consumer with the delivery costs in case of withdrawal<sup>173</sup>. However, following the ECJ decision in *Heinrich Heine*<sup>174</sup>, traders had to reimburse delivery costs as well<sup>175</sup>.

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<sup>161</sup> SCHULZE/MORGAN, p. 328.

<sup>162</sup> Cf. Art. 246a section 1 (2) sentence 1 number 2 EGBGB, which transposes Art. 6 para. 1 lit. i CRD.

<sup>163</sup> Former Section 355 (3) BGB; SCHULZE/MORGAN, p. 327; ROTT, p. 15f.

<sup>164</sup> GSELL, p. 814, No. 15.

<sup>165</sup> DCFR, Full Edition (VON BAR/CLIVE), p. 363; SCHULZE/MORGAN, p. 327; GSELL, p. 814, No. 15.

<sup>166</sup> Former Section 355 (2) BGB; SCHULZE/MORGAN, p. 327.

<sup>167</sup> SCHULZE/MORGAN, p. 327f.

<sup>168</sup> According to Section 355 (3) BGB, this 14-day period starts running upon receipt of the withdrawal declaration (for the trader) and upon dispatch of the withdrawal declaration (for the consumer).

<sup>169</sup> Section 357 (1) BGB and Section 357 (3) BGB.

<sup>170</sup> Former Section 286 (3) BGB and former Section 357 (1) BGB; DCFR, Full Edition (VON BAR/CLIVE), p. 378.

<sup>171</sup> Section 357 (4) BGB.

<sup>172</sup> Section 357 (2) BGB. This provision excludes the reimbursement of additional costs resulting in the consumer’s ‘opting-up’ for a different type of delivery than the most cost-effective standard delivery offered by the trader.

<sup>173</sup> ROTT, p. 23.

<sup>174</sup> Judgment of the European Court of Justice (Fourth Chamber) of 15 April 2010 – *Handelsgesellschaft Heinrich Heine GmbH v Verbraucherzentrale Nordrhein-Westfalen eV* (Case C-511/08).

<sup>175</sup> SCHULZE/MORGAN, p. 334.

*Return cost.* The consumer bears the direct return shipment costs, provided that she was properly informed thereof and that the trader did not offer to bear them<sup>176</sup>. This notably means that the consumer bears the cost of return regardless of the cost of the item<sup>177</sup>. Hence, the so-called ‘€40-rule’ previously applicable in Germany, under which the return costs were borne by traders but could be shifted on consumers if the price of the goods did not exceed €40, has been abolished<sup>178</sup>. Besides, the consumer must no longer pay for the benefit she has gained<sup>179</sup>. This is welcomed, as these former provisions were questionable as to their compliance with the Directive 97/7/EC on distance contracts, which stipulated that the consumer should only be liable for the direct costs of returning the goods<sup>180</sup>.

*Digital content.* Provisions addressing the supply of intangible digital content, in particular regarding of the commencement of the withdrawal period<sup>181</sup> or specific information requirements<sup>182</sup>, have been introduced in conformity with the CRD<sup>183</sup>.

The CRD’s full harmonization approach has the advantage that consumers will receive the same protection throughout the European Union<sup>184</sup>. However, one can observe that in certain particular situations, consumers who live in Germany, which is a Member State that commonly offers a high level of consumer protection<sup>185</sup>, were better off before the transposition of the CRD, for instance as regards the ‘€40-rule’, the ‘eternal right of withdrawal’ and the possibility to withdraw by merely returning the goods. This is partially due to the German legislator’s tendency to ‘gold-plate’ the rules provided in the previous minimum harmonization directives<sup>186</sup> and is probably the price to be paid for uniform European regulations on the right of withdrawal.

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<sup>176</sup> Section 357 (6) BGB.

<sup>177</sup> GSELL, p. 817, No. 18.

<sup>178</sup> Former section 357 (2) BGB; GSELL, p. 817, No. 18; ROTT, p. 22.

<sup>179</sup> Former Sections 357 (1), 346 (1) and 347 BGB; DCFR, Full Edition (VON BAR/CLIVE), p. 379.

<sup>180</sup> Art. 6 para. 1 and 2 of the Directive 97/7/EC on distance contracts: “*The only charge that may be made to the consumer because of the exercise of [her] right of withdrawal is the direct cost of returning the goods*”; DCFR, Full Edition (VON BAR/CLIVE), p. 379.

<sup>181</sup> Section 356 (5) BGB.

<sup>182</sup> Art. 246a section 1 (1) sentence 1 numbers 14 and 15 EGBGB.

<sup>183</sup> Art. 16 lit. m and Art. 6 para. 1 lit. r and s CRD.

<sup>184</sup> LOOS (2010), p. 19.

<sup>185</sup> LOOS (2010), p. 19f.

<sup>186</sup> SCHULZE/MORGAN, p. 338.

## 4. SWISS LAW: ABSENCE OF A STATUTORY RIGHT OF WITHDRAWAL IN E-COMMERCE

### 4.1 GENERAL E-CONSUMER PROTECTION IN SWISS LAW

#### 4.1.1 Introduction

According to the first paragraph of Article 97 of the Swiss Federal Constitution<sup>187</sup>, “[t]he Confederation shall take measures to protect consumers”. To achieve this constitutional mandate, the Swiss legislator followed a sectorial approach, by adopting specific rules intended to fill the gaps present in Swiss law in the field of consumer protection<sup>188</sup>. Accordingly, several laws and ordinances concerning different consumer-related areas have been adopted, notably in doorstep contracts<sup>189</sup>, sale contracts<sup>190</sup>, package travel<sup>191</sup>, unfair commercial practices and consumer information<sup>192</sup>, consumer credit<sup>193</sup> and procedure and international law<sup>194</sup>. These laws do not define the notion of consumer in the same terms; there is thus no uniform definition of the ‘consumer’ under Swiss law as different laws provide for different definitions, which can be either positive or negative, sometimes both<sup>195</sup>.

During the last decades, consumer protection has greatly evolved in Switzerland, notably under the influence of European law and through the process of ‘autonomous transposition’ of some EU directives<sup>196</sup>. However, despite its promising start and some successful changes, the legislative trend to protect consumers somewhat lost pace in recent years as the Federal Council and the Parliament buried various projects aiming at harmonizing Swiss consumer law with European standards<sup>197</sup>.

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<sup>187</sup> Federal Constitution of the Swiss Confederation of 18 April 1999 (Fed. Cst.) (RS 101).

<sup>188</sup> MORIN, p. 20.

<sup>189</sup> Art. 40a ff. CO.

<sup>190</sup> Art. 6a and Art. 210 para. 4 CO.

<sup>191</sup> Federal Act on Package Travel of 18 June 1993 (RS 944.3).

<sup>192</sup> Federal Act on Unfair Competition of 19 December 1986 (Unfair Competition Act, UCA) (RS 241); Federal Act on Consumer Information of 5 October 1990 (RS 944.0); Ordinance on the Indication of Prices of 11 December 1978 (OIP) (RS 942.211).

<sup>193</sup> Federal Act on Consumer Credit of 23 March 2001 (Consumer Credit Act, CCA) (RS 221.214.1).

<sup>194</sup> Swiss Civil Procedure Code of 19 December 2008 (Civil Procedure Code, CPC) (RS 272); Federal Act on Private International Law of 18 December 1987 (Private International Law Act, PILA) (RS 291); Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matter, concluded on 30 October 2007 and entered into force for Switzerland on 1<sup>st</sup> January 2011 (Lugano Convention) (RS 0.275.12); CARRON, p. 105, No. 18.

<sup>195</sup> According to Art. 3 CCA, a consumer is any natural person who enters into a contract of consumer credit for a purpose which can be regarded as outside her trade or profession; According to Art. 120 para. 1 PILA, a consumer is the party who concludes a contract for everyday consumption, which is intended for her personal or family needs and which is not related to her trade or profession; According to Art. 32 para. 2 CPC, a consumer is the party who concludes a contract for everyday consumption, which is intended for her personal or family needs and which has been offered by the other party in connection with her trade or profession; According to Art. 40a CO, a consumer is the party who concludes a contract relating to goods and services intended for her personal or family use; MARCHAND (2012), p. 28; BRUNNER (1995), p. 33ff.; SCHMID, p. 190; CARRON, p. 102ff.; MORIN, p. 18.

<sup>196</sup> For example the adoption of the constitutional basis (Art. 31<sup>sexies</sup> of the former Fed. Cst. which became the current Art. 97 Fed. Cst.), of the UCA of 1986, of the PILA of 1987, of the package of measures “Swisslex” of 1992 (including the CCA and Art. 40a ff. CO) and of the revision of the CCA in 2001; CARRON, p. 98, No. 1; PICHONNAZ (2008), p. 48f.

<sup>197</sup> CARRON, p. 98, No. 1; Cf. infra chap. 4.2.2.

#### **4.1.2 Overview of the main Regulations applicable to Consumer Contracts concluded on the Internet**

Swiss law does not provide for specific legislation protecting consumers in e-commerce, except some topical provisions of the Unfair Competition Act (hereinafter: UCA)<sup>198</sup>. Indeed, the Swiss Parliament and Government are generally quite reluctant to adopt specific internet-related regulations<sup>199</sup>. Nor does Swiss law, unlike European law, provide for specific rules regarding distance selling<sup>200</sup>. Therefore, as a general principle, online transactions are governed by the same rules that apply in offline transactions<sup>201</sup>. A contract concluded on the Internet is thus subject to ordinary rules (e.g. the General part of the Code of obligations [hereinafter: CO]<sup>202</sup> concerning the formation of contracts, the traditional sale provisions of the Special part of the CO in case of a sale contract or the Federal Act on Consumer Credit [hereinafter: CCA]<sup>203</sup> if payment facilities are offered to the consumer)<sup>204</sup>, in addition to the specific internet-related provisions contained in the UCA.

Since e-commerce evolves in the general legal context, it would be pointless to list all the rules applicable to an electronic contract<sup>205</sup>. Of particular importance for the present thesis are the UCA and the CO. Indeed the UCA, in addition to the provision regarding unfair contract terms (Art. 8 UCA), contains specific rules relating to the Internet: Art. 3 para. 1 lit. o UCA deals with the prohibition of ‘spamming’ (i.e. advertising by e-mail without the consent of the recipient) and Art. 3 para. 1 lit. s UCA deals with the requirements that a trader must fulfill when offering her products through e-commerce. This last provision, as it reflects some of the information requirements contained in the EU Directive 2000/31/EC on electronic commerce and in the CRD, is the subject of a short analysis in the following chapter. For its part, the CO is relevant in numerous respects, including the formation of the contract (General part of the CO) and the provisions concerning sales contracts (Art. 184ff. CO). It also contains specific provisions on the right of withdrawal applicable to certain types of contracts (Art. 40a ff. CO). As we will see below (cf. *infra* chap. 4.2.1), these do not include contracts concluded online.

#### **4.1.3 Information Requirements of Art. 3 para. 1 lit. s UCA**

Art. 3 para. 1 lit. s UCA contains specific pre-contractual information obligations for traders making offers by means of e-commerce. This quite recent provision was part of the 2012 revision of the UCA, which aimed in particular to improve the protection of consumers (and competitors) against unfair trade practices and to enhance transparency in commercial offers<sup>206</sup>. Art. 3 para. 1 lit. s UCA is a

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<sup>198</sup> Federal Act on Unfair Competition of 19 December 1986 (Unfair Competition Act, UCA) (RS 241); BÜHLMANN, p. 119.

<sup>199</sup> WIDMER, p. 132.

<sup>200</sup> Except the general Art. 5 CO concerning the offer in the parties’ absence; MARCHAND (2013), p. 6, No. 4.

<sup>201</sup> BÜHLMANN, p. 119.

<sup>202</sup> Federal Act on the Amendment of the Swiss Civil Code of 30 March 1911 (Part Five: The Code of Obligations) (RS 220).

<sup>203</sup> Federal Act on Consumer Credit of 23 March 2001 (Consumer Credit Act, CCA) (RS 221.214.1).

<sup>204</sup> MARCHAND (2013), p. 3f., No. 3; CHERPILLOD GIACOBINO, p. 393.

<sup>205</sup> MARCHAND (2013), p. 4, No. 3.

<sup>206</sup> Art. 3 para. 1 lit. s UCA entered into force on the 1<sup>st</sup> of April 2012 (RO 2011 4909); Message of the Federal Council regarding the amendment of the Unfair Competition Act, 02.09.2009, FF 2009 5539, p. 5540; MÜLLER/RISKE, p. 3f., No. 3; LANGER (2012), p. 26.

partial incorporation of the 2001 Draft on a Federal Act on Electronic Commerce<sup>207</sup>, whose purpose was the creation of an euro-compatible regulation strengthening consumer protection in e-commerce (cf. *infra*. chap. 4.2.2.2)<sup>208</sup>.

According to Art. 3 para. 1 lit. s UCA, whoever offers goods, works, or services by means of electronic commerce is required to<sup>209</sup>:

1. clearly and completely indicate her identity and contact address, including an e-mail address;
2. indicate the different technical steps that lead to the conclusion of the contract;
3. provide appropriate technical means allowing a customer to identify and correct input errors prior to the placing of an online order; and
4. acknowledge the receipt of the customer's order without undue delay and by electronic means.

As an exception, these requirements do not apply to contracts concluded via voice telephony or exclusively through the exchange of e-mails or by similar means of communication (Art. 3 para. 2 UCA)<sup>210</sup>. These requirements are materially equivalent to certain information requirements set out in the EU Directive 2000/31/EC on electronic commerce, in particular Art. 5 para. 1 lit. a to c, Art. 10 para. 1 lit. a and c and Art. 11 para. 1 and 2 of this directive<sup>211</sup>.

The purpose of the information requirements set out in Art. 3 para. 1 lit. s UCA is to reinforce confidence in e-commerce and to improve transparency in electronic transactions<sup>212</sup>. The need for greater transparency derives from the absence of premises or physical staff presence, which must be compensated by a clear identification of the trader and explanations about the manner the contract is concluded<sup>213</sup>. Therefore, through pre-contractual legal obligations imposed on the trader, Art. 3 para. 1 lit. s UCA aims at rebalancing, notably in favor of consumers, the knowledge gap of average buyers on the internet<sup>214</sup>. By strengthening confidence in e-commerce, these requirements not only serve the interests of purchasers, but the ones of serious and trustworthy traders as well<sup>215</sup>.

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<sup>207</sup> Federal Act on Electronic Commerce (partial amendments of the Code of obligations and of the Unfair Competition Act) (consultation process), Draft, January 2001.

<sup>208</sup> MÜLLER/RISKE, p. 25, No. 60; LANGER (2012), p. 26.

<sup>209</sup> Unofficial translation of Art. 3 para. 1 lit. s UCA; BÜHLMANN, p. 119.

<sup>210</sup> BÜHLMANN, p. 119.

<sup>211</sup> Explanatory Report on the Draft Federal Act on Electronic Commerce, January 2001, p. 29; MÜLLER/RISKE, p. 30, No. 75.

<sup>212</sup> MÜLLER/RISKE, p. 27, No. 64; BOCE 2010 929, p. 932; Explanatory Report on the Draft Federal Act on Electronic Commerce, January 2001, p. 8.

<sup>213</sup> MÜLLER/RISKE, p. 27, No. 65; KUT/STAUBER, p. 9, No. 53.

<sup>214</sup> MÜLLER/RISKE, p. 27, No. 66; JÖRG, p. 287f.

<sup>215</sup> Explanatory Report on the Draft Federal Act on Electronic Commerce, January 2001, p. 29.

## 4.2 ABSENCE OF A STATUTORY RIGHT OF WITHDRAWAL IN E-COMMERCE: THE SUCCESSION OF UNSUCCESSFUL DRAFT AMENDMENTS

### 4.2.1 The Right of Withdrawal under Swiss Law

Contrary to European law, there is no statutory right of withdrawal for contracts concluded online under Swiss law. Besides since specific regulation for distance contracts is inexistent in Switzerland, a general right of withdrawal for these kind of contracts is not provided<sup>216</sup>. Swiss legislation only offers such a right sporadically in certain fields<sup>217</sup>. For the time being, Swiss law confers a right of withdrawal only in case of doorstep sales (Art. 40e CO), consumer credit contracts (Art. 16 CCA) and marriage or partnership brokerage contracts (Art. 406d fig. 5 CO)<sup>218</sup>. In addition, according to Art. 9 para. 1 and 2 CO, an offer (or acceptance) may be withdrawn if the withdrawal reaches the offeree (or the recipient of the acceptance) before the offer (or acceptance) does. However, given the immediacy of Internet-based communications, this provision has no practical relevance in e-commerce<sup>219</sup>. It should be noted that Art. 40ff. CO, which provide consumers a right to withdraw within 7 days following a doorstep sale or similar contracts (e.g. contracts concluded in the street or at workplace) if the price exceeds 100 Swiss Francs, do not apply by analogy as these situations are not comparable to e-commerce<sup>220</sup>. Indeed, in doorstep sales, the consumer has to deal with the psychological pressure exercised by the trader in a face-to-face interaction and her position is most of the time weakened by the surprise effect of such contracting methods<sup>221</sup>. Hence in Switzerland a right of withdrawal in e-commerce only exists on a contractual basis, for instance if the trader provides for it in her general terms and conditions.

### 4.2.2 Unsuccessful Draft Amendments which intended to grant a Statutory Right of Withdrawal to E-Consumers

#### 4.2.2.1 Introduction

The absence of a right of withdrawal in e-commerce is not representative of an unintended gap in the law<sup>222</sup>. On the contrary, during the last fifteen years, this issue, and more generally the issue of the enactment of specific legislation regulating distance contracts, has been subject to many discussions at the federal level<sup>223</sup>. The concern about consumer protection in the context of e-commerce was raised in Switzerland in the early 2000s<sup>224</sup>. The emergence of new methods of commercialization like e-commerce had transformed the process of concluding and executing contracts<sup>225</sup>; contracting without any physical meeting of the parties and purchasing goods and services across national borders had

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<sup>216</sup> STAUDER/STAUDER, ad intro. art. 40a-40f CO, No. 2.

<sup>217</sup> DONAUER/MÖRI, p. 339.

<sup>218</sup> MARCHAND (2012), p. 162f.

<sup>219</sup> CHERPILLOD GIACOBINO, p. 416.

<sup>220</sup> LANGER (2009), p. 84.

<sup>221</sup> DELLI COLLI/RUSTERHOLZ, p. 2, No. 1; LANGER (2009), p. 84.

<sup>222</sup> STAUDER/STAUDER, ad intro. art. 40a-40f CO, No. 2; LANGER (2009), p. 83.

<sup>223</sup> STAUDER/STAUDER, ad intro. art. 40a-40f CO, No. 2.

<sup>224</sup> MARCHAND (2012), p. 162.

<sup>225</sup> Explanatory Report on the Draft Federal Act on Electronic Commerce, January 2001, p. 6.

started to become more and more common<sup>226</sup>. In response to these changes of habits and the accompanying new risks for consumers, reviews of the law governing the legal relationship between traders and consumers were undertaken to prevent that e-commerce turns harmful to consumers<sup>227</sup>. Accordingly, several draft amendments involving the introduction of a right of withdrawal in e-commerce have been considered by different Swiss authorities. However, they eventually all failed to be adopted. They are summarized below.

#### 4.2.2.2 *Draft Federal Act on Electronic Commerce (2001)*

On the 17<sup>th</sup> of January 2001, the Federal Council launched a consultation process regarding a Draft Federal Act on Electronic Commerce<sup>228</sup>. This draft was intended to improve consumer protection and essentially focused on three areas: the introduction of a right of withdrawal for consumers within 7 days from the conclusion of a distance contract (including contracts concluded on the Internet), the introduction of provisions more favorable to the purchaser in sales contracts and new requirements for transparency in the contracting process of distance contracts, in particular in e-commerce<sup>229</sup>. However during the consultation process, the proposal and more specifically the introduction of the right of withdrawal sparked diverging reactions<sup>230</sup>; consumers' circles welcomed the proposed amendments, sometimes wishing they would go even further in protecting consumers<sup>231</sup>. Conversely, economic circles and the right-wing political parties did not take kindly the idea of a right to withdraw in online purchases<sup>232</sup>. In particular, they contended that this possibility would leave the door open to breaches of contractual provisions and considered unjustified the assimilation of online contracts to doorstep contracts, since in the former case, the consumer suffers no particular pressure and can quietly compare different offers<sup>233</sup>. In November 2005, given the persistent hostility expressed by the business community, the Federal Council abandoned the draft, invoking various reasons, in particular that the right of withdrawal would constitute kind of a guardianship of the legislator over consumers, that it would entail additional costs for sellers and thus higher prices for consumers, and that e-commerce, despite the absence of a right to withdraw, had so far developed positively in Switzerland<sup>234</sup>.

#### 4.2.2.3 *Parliamentary Initiative of Simonetta Sommaruga (2005)*

On the 15<sup>th</sup> of December 2005, the then parliamentarian Simonetta Sommaruga submitted a parliamentary initiative entitled "*Amélioration de la protection des consommateurs. Contrats conclus à distance et garantie*"<sup>235</sup>. This initiative aimed at strengthening consumer protection in distance contracts and essentially reflected the proposed amendments of the Draft Federal Act on Electronic Commerce abandoned in 2005. It also took into account the evaluation of the Control

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<sup>226</sup> Explanatory Report on the Draft Federal Act on Electronic Commerce, January 2001, p. 6f.

<sup>227</sup> Explanatory Report on the Draft Federal Act on Electronic Commerce, January 2001, p. 4f.

<sup>228</sup> MÜLLER/RISKE, p. 25, No. 60; Press release of the Federal Department of Justice and Police, 17.01.2001.

<sup>229</sup> Explanatory Report on the Draft Federal Act on Electronic Commerce, January 2001, p. 4.

<sup>230</sup> Press release of the Federal Department of Justice and Police, 09.11.2005.

<sup>231</sup> Press release of the Federal Department of Justice and Police, 09.12.2002; Synthesis of the results of the consultation procedure regarding the Draft Federal Act on Electronic Commerce, November 2002, p. 7ff.

<sup>232</sup> Press release of the Federal Department of Justice and Police, 09.12.2002; Synthesis of the results of the consultation procedure regarding the Draft Federal Act on Electronic Commerce, November 2002, p. 29ff. and 43ff.

<sup>233</sup> *Ibid.*

<sup>234</sup> Press release of the Federal Department of Justice and Police, 09.11.2005.

<sup>235</sup> Parliamentary initiative 05.458 of Simonetta Sommaruga "*Amélioration de la protection des consommateurs. Contrats conclus à distance et garantie*", 15.12.2005.

Committee of the National Council of 2004<sup>236</sup> (cf. infra chap. 4.2.2.4), which showed that the level of protection for e-consumers was lower than for traditional consumers. The initiative focused on the regulation of distance contracts, on the improvement of the law regarding warranty and on the introduction of a general right of withdrawal for all distance contracts (including contracts concluded on the Internet) in order to compensate the lack of physical contact between the parties, the consumer's inability to conduct a visual inspection of the purchased goods and to ensure Swiss consumers a protection equivalent to the one enjoyed by European consumers<sup>237</sup>. Despite the support of the Council of States<sup>238</sup>, the National Council, following the recommendations of its Committee for Legal Affairs<sup>239</sup>, brought the initiative to an end as it considered the legal consumer protection in force sufficient<sup>240</sup>.

#### 4.2.2.4 *Parliamentary Initiative of the Control Committee of the National Council (2006)*

On the 18<sup>th</sup> of September 2006, a parliamentary initiative entitled "*Commerce électronique. Améliorer la protection du consommateur*" was submitted by the Control Committee of the National Council (hereinafter: CC-N)<sup>241</sup>. As its name suggests, this initiative aimed at the improvement of consumers' rights in e-commerce, particularly through the introduction of a right of withdrawal similar to the one provided in the European legislation. The initiative was filed in the following context: in 2003, the CC-N mandated the Parliamentary Control of the Administration (PCA) to evaluate consumer protection in e-commerce<sup>242</sup>. The results of this evaluation clearly showed that in practice, the specificities of e-commerce did not allow consumers to benefit from a protection equivalent to the traditional trade protection<sup>243</sup>. On the 9<sup>th</sup> of November 2004, the CC-N published its final report<sup>244</sup>, addressing several recommendations to the Federal Council (which was already considering various findings and conclusions of the CC-N under the Draft Federal Act on Electronic Commerce) in order to improve consumer protection. Following the decision of the Federal Council to abandon its draft in 2005 (cf. supra chap. 4.2.2.2), the CC-N, considering that existing legislation did not provide sufficient guarantees for the protection of e-consumers, decided to launch its own parliamentary initiative<sup>245</sup>. Among other things, the CC-N required new provisions to be introduced to grant e-consumers more transparency, a right to repair (or replacement) in case of defects of the purchased

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<sup>236</sup> Final Report of the Parliamentary Control of the Administration (PCA) "*Commerce électronique: évaluation de la protection du consommateur en Suisse*", 13.05.2004, FF 2005 4709.

<sup>237</sup> Parliamentary initiative 05.458 of Simonetta Sommaruga "*Amélioration de la protection des consommateurs. Contrats conclus à distance et garantie*", 15.12.2005.

<sup>238</sup> Parliamentary sessions of 02.06.2008 (BOCE 2008 369, p. 371) and of 10.06.2009 (BOCE 2009 635, p. 637).

<sup>239</sup> Reports of the Committee for Legal Affairs of the National Council regarding the parliamentary initiatives 05.458 and 06.441 of 26.06.2009 and of 20.06.2008.

<sup>240</sup> BOCN 2009 1643, p. 1645; Report of the Committee for Legal Affairs of the National Council regarding the parliamentary initiatives 05.458 and 06.441, 26.06.2009, p. 4.

<sup>241</sup> Parliamentary initiative 06.457 of the Control Committee of the National Council "*Commerce électronique. Améliorer la protection du consommateur*", 18.09.2006.

<sup>242</sup> Report of the Control Committee of the National Council "*La protection du consommateur dans le commerce électronique: aspects contractuels et protection des données*", 09.11.2004, FF 2005 4689, p. 4694.

<sup>243</sup> Final Report of the Parliamentary Control of the Administration (PCA) "*Commerce électronique: évaluation de la protection du consommateur en Suisse*", 13.05.2004, FF 2005 4709, p. 4724.

<sup>244</sup> Report of the Control Committee of the National Council "*La protection du consommateur dans le commerce électronique: aspects contractuels et protection des données*", 09.11.2004, FF 2005 4689.

<sup>245</sup> Parliamentary initiative 06.457 of the Control Committee of the National Council "*Commerce électronique. Améliorer la protection du consommateur*", 18.09.2006.

goods and a right of withdrawal<sup>246</sup>. Due to the strong international dimension of e-commerce, the CC-N considered the introduction of a right to withdraw like a necessary measure to protect Swiss consumers, particularly to ensure equal treatment with European consumers<sup>247</sup>. However, on the 20<sup>th</sup> of December 2007, the National Council, following the recommendation of its Legal Committee<sup>248</sup>, decided not to proceed with the proposed amendments, putting forward the same arguments used by the Federal Council for the abandonment of its draft in 2005<sup>249</sup>.

#### 4.2.2.5 *Parliamentary Initiative of Pierre Bonhôte 2006 (2014 Draft Amendment of the Code of Obligations)*

On the 21<sup>st</sup> of June 2006, the then parliamentarian Pierre Bonhôte submitted the parliamentary initiative “*Pour une protection du consommateur contre les abus du démarchage téléphonique*”<sup>250</sup>. Originally and as its title indicates, the initiative only intended to strengthen consumer protection in regards to telephone solicitation, in particular by giving consumers a right to withdraw in these situations. It has been approved by both the Council of State and the National Council in 2009, even if the latter accepted it in extremis, only by the casting vote of its president<sup>251</sup>. In response to the initiative approbation, the Committee for Legal Affairs of the Council of States (hereinafter: CLA-S) adopted in 2013 a report and a draft amendment of the CO<sup>252</sup>. In its draft, the CLA-S proposed to introduce a general right of withdrawal for all distance contracts (i.e. including not only contracts concluded on the phone but also contracts concluded on the Internet)<sup>253</sup> as an extension to the corresponding right already offered to consumers in doorstep contracts (Art. 40a ff. CO) and in order to strengthen consumer protection against the risks deriving from these contracting methods<sup>254</sup>. In addition, the CLA-S suggested an extension of the withdrawal period from 7 to 14 days to match the cooling-off period of European law<sup>255</sup>. In its opinion issued in 2014, the Federal Council expressed its support to the draft amendment and to the introduction of a general right of withdrawal for distance contracts<sup>256</sup>. During the parliamentary sessions that followed, the Council of States first gave its approbation regarding the right of withdrawal in e-commerce contained in the draft amendment<sup>257</sup>.

<sup>246</sup> *Ibid.*

<sup>247</sup> Parliamentary initiative 06.457 of the Control Committee of the National Council “*Commerce électronique. Améliorer la protection du consommateur*”, 18.09.2006.

<sup>248</sup> Report of the Committee for Legal Affairs of the National Council regarding the parliamentary initiative 06.457, 14.09.2007.

<sup>249</sup> BOCN 2007 2053; Report of the Committee for Legal Affairs of the National Council regarding the parliamentary initiative 06.457, 14.09.2007.

<sup>250</sup> Parliamentary initiative 06.441 of Pierre Bonhôte “*Pour une protection du consommateur contre les abus du démarchage téléphonique*”, 21.06.2006.

<sup>251</sup> BOCE 2008 369, p. 371; BOCN 2009 1643, p. 1645.

<sup>252</sup> Report of the Committee for Legal Affairs of the Council of States, Parliamentary initiative 06.441 of Pierre Bonhôte “*Pour une protection du consommateur contre les abus du démarchage téléphonique*”, 14.11.2013, FF 2014 893; Draft amendment of the Code of obligations (Revision of the Right of Withdrawal), FF 2014 923.

<sup>253</sup> Art. 40a para. 1 and Art. 40c CO of the Draft amendment of the Code of obligations (Revision of the Right of Withdrawal), FF 2014 923.

<sup>254</sup> Report of the Committee for Legal Affairs of the Council of States, Parliamentary initiative 06.441 of Pierre Bonhôte “*Pour une protection du consommateur contre les abus du démarchage téléphonique*”, 14.11.2013, FF 2014 893, p. 896f.

<sup>255</sup> Art. 40j para. 1 CO of the Draft amendment of the Code of obligations (Revision of the Right of Withdrawal), FF 2014 923.

<sup>256</sup> Opinion of the Federal Council regarding the Report of the Committee for Legal Affairs of the Council of States, Parliamentary initiative 06.441 of Pierre Bonhôte “*Pour une protection du consommateur contre les abus du démarchage téléphonique*”, 14.03.2014, FF 2014 2883.

<sup>257</sup> BOCE 2014 613, p. 619.

However, following the reprobation of the National Council on this point<sup>258</sup>, the Council of States, on the 2<sup>nd</sup> of December 2014, eventually decided to remove the right of withdrawal for e-consumers from the draft<sup>259</sup>, thus burying all hope of seeing such a right laid down in Swiss legislation in the near future. Once again, the arguments against the right to withdraw in e-commerce (individual responsibility of e-consumers, existence of contractual rights to withdraw offered by certain e-traders, etc.) carried more weight in the legislative balance. Therefore, after nine years of fierce disputes between parliamentarians and numerous twists and turns, the right of withdrawal in e-commerce eventually never saw the light.

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<sup>258</sup> BOCN 2014 1587, p. 1589.

<sup>259</sup> BOCE 2014 1134, p. 1138. The draft amendment has then been entirely revised to encompass only the right of withdrawal for contracts concluded on the phone and the general withdrawal period remained extended to 14 days. This new (greatly) shortened draft amendment has been adopted by both Councils on the 19<sup>th</sup> of June 2015 (FF 2015 4409). The referendum deadline expires on the 8<sup>th</sup> of October 2015. The introduction of a right of withdrawal for telephone solicitation under Swiss law is to welcome with the same intensity as the time necessary (nine years) to agree on it is to reprobate.

## 5. COMPARISON BETWEEN SWISS LAW AND EUROPEAN LAW: APPROPRIATE E-CONSUMER PROTECTION THROUGH THE STATUTORY RIGHT OF WITHDRAWAL?

### 5.1 MAIN DIFFERENCES BETWEEN EUROPEAN AND SWISS LEGISLATIONS

The chart below highlights some of the main differences between the European and Swiss legislations as regards general e-consumers protection<sup>260</sup>.

	<b>European Law</b>	<b>Swiss Law</b>
Statutory right of withdrawal	Yes (Art. 9 para. 1 CRD)	No Only on contractual basis
Period requirement as regards the restitution of performances in case of withdrawal	14 days (Art. 13 para. 1 and Art. 14 para. 1 CRD)	No period specified by the law
Form of the withdrawal	Model withdrawal form or unequivocal statement (Art. 11 para. 1 CRD lit. a and b)	No specific form required
Delivery period	30 days (Unless otherwise agreed) (Art. 18 para. 1 CRD)	No period specified by the law
Information on the main characteristics of the product	Yes (Art. 6 para. 1 lit. a CRD)	No
Extra fees	Disclosure of the total cost of the product or service, including any extra fees (Art. 6 para. 1 lit. e and para. 6 CRD)	Specific information requirements in the Ordinance on the Indication of Prices (OIP) as regards certain extra fees <sup>261</sup>
Ban of telephone surcharges	Yes (Art. 21 CRD)	No
Ban of surcharges for the use of specific means of payment	Yes (Art. 19 CRD)	No
Passing of risks	The risks of loss or damage are generally transferred to the consumer only when she takes possession of the goods (Art. 20 CRD)	The risks of loss or damage are generally transferred to the consumer at the conclusion of the contract (Art. 185 para. 1 CO) or when the trader hands the good over for shipping if the purchased object is defined only in general terms (Art. 185 para. 2 CO)
Ban of pre-ticked boxes on websites	Yes (Art. 22 CRD)	No
Specific information requirement on digital content	Yes (Art. 6 para. 1 lit. r and s and Art. 16 lit. m)	No

<sup>260</sup> Comparative chart of the FRC, June 2014; Press release of the European Commission, MEMO/11/450, Brussels 23.06.2011; MARCHAND (2012), p. 177ff. and 192ff.; MARCHAND (2013), p. 10, No. 4 and p. 16ff.; LANGER (2009), p. 70ff.

<sup>261</sup> Cf. for example the requirements of Art. 4 para. 1 (goods), 10 para. 2 (services) and 11c (air travel) OIP.

Information on arrangements for payment, delivery and performance	Yes (Art. 6 para. 1 lit. g CRD)	No
Information on the existence of after-sales services and legal and commercial guarantees	Yes (Art. 6 para. 1 lit. l and m CRD)	No
Price transparency	Obligation to ensure that the consumer explicitly confirms the commitment to pay when placing an order (Art. 8 para. 2 CRD)	Obligation to indicate the price of value added services in a clearly visible and easily legible manner at the place where the offer must be accepted or in its immediate vicinity and with the wording "paying order" or a similar unequivocal wording (Art. 11a <sup>bis</sup> OIP) <sup>262</sup>
Further information requirements	Other information requirements of the CRD and of the Directive 2000/31/EC on electronic commerce, for instance information on the languages offered for the conclusion of the contract (Art. 10 lit. d of the Directive 2000/31/EC on electronic commerce), on applicable codes of conduct to which the trader subscribed (Art. 10 para. 2 of the Directive 2000/31/EC on electronic commerce) and on the duration of the contract or the conditions for termination if the contract is open-ended (Art. 6 para. 1 lit. o CRD)	No corresponding information requirements

It is obvious from this chart that European e-consumers enjoy a significantly more substantial legal protection than the Swiss ones. Trader's obligations in Europe are much more extensive, developed and precisely determined than in Switzerland, where the freedom of contracts and the principle of good faith are prevalent and generally considered sufficient to rule e-commerce<sup>263</sup>. European law notably requires traders to provide consumers with a huge amount of specified information<sup>264</sup>. However, one might wonder about the effectiveness of such abundant requirements<sup>265</sup>; consumers might indeed feel overwhelmed under such a flood of information and most of the time do not even take the time to read (all of) it before concluding the contract<sup>266</sup>. Voices have been raised to question the relevance of the European interventionism and to disapprove a similar approach under Swiss law<sup>267</sup>. In light of the general reticence toward a more regulated framework, notably at the legislative level, it appears that Swiss (e-)consumer protection legislation will keep its simplicity and flexibility to the greatest extent possible.

<sup>262</sup> Art. 11a<sup>bis</sup> OIP has been introduced on the 1<sup>st</sup> of July 2015. It is inspired by Art. 8 CRD and aims at increasing price transparency for services offered on the Internet.

<sup>263</sup> MARCHAND (2013), p. 17, No. 11; SCHMID, p. 198f.

<sup>264</sup> Cf. for instance the full catalog of Art. 6 CRD and Art. 10 of the Directive 2000/31/EC on electronic commerce.

<sup>265</sup> MARCHAND (2013), p. 17, No. 11.

<sup>266</sup> MARCHAND (2013), p. 32, No. 35.

<sup>267</sup> MARCHAND (2013), p. 31, No. 31; DELLI COLLI/RUSTERHOLZ, p. 14f., No. 50; *contra* PICHONNAZ (2006), p. 340; MORIN, p. 39ff.; DONAUER/MÖRI, p. 349f.

## 5.2 IS IT NECESSARY TO INTRODUCE A STATUTORY RIGHT OF WITHDRAWAL IN E-COMMERCE UNDER SWISS LAW?

### 5.2.1 Main Arguments in favor of a Right of Withdrawal in E-Commerce

As we have observed throughout the previous pages<sup>268</sup>, many arguments can be made for or against a right of withdrawal in e-commerce. The main arguments in favor of such a right are the following:

*Impossibility to see the purchased object before concluding the contract.* First of all, the right to withdraw in e-commerce may be justified by the fact that the consumer's visualization of the product is only virtual<sup>269</sup>; she cannot directly see nor examine the good ordered before concluding the contract<sup>270</sup>. Consequently, the contractual parties do not have the same information at their disposal since the consumer only has access to reduced information that has been carefully selected by e-traders and which may be presented in a more favorable light<sup>271</sup>. At their receipt, goods and services purchased might turn out to be very different from what had been pictured or promised<sup>272</sup>. Hence, the right of withdrawal permits to counteract the structural and informational imbalance between the parties, by allowing the consumer time for further consideration, the possibility to obtain additional information and the opportunity to get away from contractual obligations without having to give reasons<sup>273</sup>.

*Contracting method calling for impulsive purchases.* The Internet somewhat changed consumption patterns. Contracts can now be concluded within minutes or even seconds, with only a few mouse clicks<sup>274</sup>. The contractual process has been greatly accelerated with e-commerce<sup>275</sup> and this generates risks that a contract is concluded in haste and without much reflection<sup>276</sup>. This may justify the existence of a cooling-off period. In addition, new business practices have emerged; advertising strategies to capture customer's attention, which can be more or less ethical (e.g. spamming, pop-up or Google AdWords), customization of offers adapted to each customer thanks to client's profiles elaborated by new algorithms that track and target their behavior, building of customer loyalty through personal accounts and registration of credit card information, etc<sup>277</sup>. E-traders have many different and elaborate means at their disposal to draw consumers into their net. Moreover, when buying online, e-consumers tend to let their guard down. Indeed, since purchases are often made comfortably from home without the trader's physical presence, consumers end up in a vulnerable position without even noticing it. In this secure environment (at least in appearance), consumers remove all barriers and

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<sup>268</sup> Cf. supra chap. 4.2.2.2 to 4.2.2.5.

<sup>269</sup> DCFR, Full Edition (VON BAR/CLIVE), p. 347.

<sup>270</sup> MARCHAND (2012), p. 181; DONAUER/MÖRI, p. 339 and 346.

<sup>271</sup> Report of the Committee for Legal Affairs of the Council of States, Parliamentary initiative 06.441 of Pierre Bonhôte "*Pour une protection du consommateur contre les abus du démarchage téléphonique*", 14.11.2013, FF 2014 893, p. 896; Explanatory Report on the Draft Federal Act on Electronic Commerce, January 2001, p. 6.

<sup>272</sup> BOCN 2014 1575, p. 1577; BOCE 2014 1134, p. 1135.

<sup>273</sup> DCFR, Full Edition (VON BAR/CLIVE), p. 347; CARRON, p. 135f., No. 117.

<sup>274</sup> Explanatory Report on the Draft Federal Act on Electronic Commerce, January 2001, p. 6.

<sup>275</sup> LANGER (2009), p. 83; LOOS/HELBERGER/GUIBAULT/MAK, p. 738.

<sup>276</sup> Explanatory Report on the Draft Federal Act on Electronic Commerce, January 2001, p. 6.

<sup>277</sup> LANGER (2009), p. 83; BOCE 2014 613, p. 616f.

protections and become all the more sensitive and credulous toward sophisticated marketing methods<sup>278</sup>.

*Equality of treatment between Swiss and European Consumers.* As seen above, consumers in the European Union can withdraw from a distance contract since June 2014<sup>279</sup>. According to the rules governing the applicable law, European consumers, when they purchase on Swiss websites, shall enjoy the same level of protection offered by their national legislation<sup>280</sup>. Therefore, Swiss providers need to grant such a right of withdrawal to consumers located in the European Union. As a consequence, there is currently an inequality of treatment between Swiss and European consumers since the latter are being offered a right to withdraw, but not the former. This situation where Swiss providers grant more extensive rights to customers located in the European Union than to the ones domiciled in Switzerland is difficult to justify and not suitable, in particular given the strong international dimension of e-commerce<sup>281</sup>.

*Simplicity and efficiency of the right to withdraw.* The right of withdrawal reinforces the consumer's position in a simple manner<sup>282</sup>. As compared to common interpellations or judiciary procedures, the right to withdraw can be exercised very easily, without undetermined costs and its consequences are certain and known to both parties. It offers a quick and simple way to back out from the contractual relationship, without bearing the burden to prove that consent was flawed<sup>283</sup>.

*Enhancement of consumer confidence in e-commerce.* The granting of a right to withdraw enhances consumer confidence in e-commerce<sup>284</sup>. A consumer is indeed more likely to buy a good knowing that she has a right to return it in case it does not meet her expectations<sup>285</sup>. Likewise, if consumers are confident toward electronic transactions and encouraged to use such purchasing methods, it favors a good consumption climate, which also brings positive effects for traders and commerce in general<sup>286</sup>.

## 5.2.2 Main Arguments against a Right of Withdrawal in E-Commerce

The main arguments against a right of withdrawal in e-commerce may be summarized as follows:

*Principle of pacta sunt servanda.* As it gives the consumer the possibility to go back on her decision to conclude a contract, the right of withdrawal is at odds with the principle of *pacta sunt servanda*, which

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<sup>278</sup> BOCE 2014 613, p. 616.

<sup>279</sup> Art. 9 CRD.

<sup>280</sup> According to Art. 120 PILA, the law of the State of the consumer's habitual residence applies to consumer contracts. European law provides for a similar rule and also stipulates that a choice of law may not deprive the consumer of the protection to which she is entitled (Art. 6 of the Regulation [EC] No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations [Rome I], OJ 2008 L 177/6).

<sup>281</sup> Report of the Committee for Legal Affairs of the Council of States, Parliamentary initiative 06.441 of Pierre Bonhôte "*Pour une protection du consommateur contre les abus du démarchage téléphonique*", 14.11.2013, FF 2014 893, p. 897.

<sup>282</sup> *Ibid.*

<sup>283</sup> LOOS/HELBERGER/GUIBAULT/MAK, p. 738; LANGER (2009), p. 91.

<sup>284</sup> BOCN 2014 1587, p. 1588.

<sup>285</sup> BEN-SHAHAR/POSNER, p. 5.

<sup>286</sup> BOCE 2014 1134, p. 1135.

is one of the pillars of contract law<sup>287</sup>. It thus appears to affect the binding force of a contract in its core<sup>288</sup>.

*Principle of contractual freedom.* In Switzerland, where contract law is primarily based on the principle of freedom of contract, the right of withdrawal has been considered to constitute a sort of excessive guardianship of the legislator over consumers, who are deemed to be responsible adults, capable of making correct judgments and who make decisions that are in their interest<sup>289</sup>. Hence, the granting of a 'paternalist' right to withdraw is believed to go against this responsible consumer approach, to violate the principle of freedom of contract and to bring uncertainties in the execution of the contract<sup>290</sup>.

*E-commerce is not comparable to doorstep selling.* Due to the lack of surprise of the consumer in online shopping, electronic transactions cannot be compared to doorstep sales<sup>291</sup>. Indeed, the e-consumer orders at home, in a quiet and unpressured environment. She decides to visit the trader's website on her own initiative and can stop the ordering process anytime<sup>292</sup>. There is no seller ringing the doorbell and trying to surprise, amaze and influence her; e-consumers thus do not find themselves in the same vulnerable situation stemming from doorstep selling. Consequently, e-commerce cannot be assimilated to doorstep situations and does not require similar specific rules regarding a right to withdraw<sup>293</sup>.

*Additional costs for both traders and consumers.* The right of withdrawal entails additional costs for traders. The return of goods involves in particular logistic costs relating to the examination, the cleaning and the repacking<sup>294</sup>. These costs would eventually be passed on to consumers, thus inevitably leading to higher prices for goods and services<sup>295</sup>.

*Abuses of the right to withdraw.* Since the right of withdrawal can be invoked at will, abuses are likely to happen. The absence of reason needed to exercise such a right implies that the consumer may withdraw if she does not like the color of the goods, if she finds out she can get a better price elsewhere or even if she actually never intended to keep the goods<sup>296</sup>. From this point of view, the right of withdrawal marks the reign of the capricious consumer<sup>297</sup>. Accordingly, Swiss authorities are afraid of phenomena other countries experienced, where some consumers regularly purchase goods just to test them and became accustomed to ordering things they do not want to keep<sup>298</sup>. In Germany, return rates show that for some online retailers, up to half of everything they sell comes back<sup>299</sup>.

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<sup>287</sup> LOOS (2009), p. 241.

<sup>288</sup> *Ibid.*

<sup>289</sup> Press release of the Federal Department of Justice and Police, 09.11.2005; BOCN 2007 2053.

<sup>290</sup> *Ibid.*

<sup>291</sup> Report of the Committee for Legal Affairs of the National Council regarding the parliamentary initiative 06.457, 14.09.2007.

<sup>292</sup> BOCE 2014 613, p. 615; LANGER (2012), p. 29.

<sup>293</sup> BOCN 2007 2053.

<sup>294</sup> DELLI COLLI/RUSTERHOLZ, p. 12, No. 39; BOCN 2014 1575, p. 1577.

<sup>295</sup> DELLI COLLI/RUSTERHOLZ, p. 12, No. 39f.; Press release of the Federal Department of Justice and Police, 09.11.2005.

<sup>296</sup> LOOS (2009), p. 258f.

<sup>297</sup> MARCHAND (2012), p. 161.

<sup>298</sup> BOCN 2014 1575, p. 1577; DELLI COLLI/RUSTERHOLZ, p. 11, No. 37.

<sup>299</sup> Article of 'The Economist' about online retailing, 21.12.2013; DELLI COLLI/RUSTERHOLZ, p. 12, No. 38.

Likewise, the trend of the so-called ‘Zalando parties’, with consumers ordering garments just for the weekend and with the intention to send it back, tarnishes the benefits of the right to withdraw<sup>300</sup>.

*Lack of necessity of a right to withdraw in e-commerce.* Nowadays, websites provide for adequate information about their products; consumers can zoom and see the goods in detail, have access to many pictures taken from several angles and can compare offers of different providers online<sup>301</sup>. Given this transparency and the availability of sufficient information, the right to withdraw is considered not justified. Besides, e-commerce has developed positively in Switzerland even without law providing for a statutory right of withdrawal. Recent studies showed that Swiss people are some of the most inclined in Europe to buy on e-commerce<sup>302</sup>. Moreover, in the European Union, consumer protection granted by the right of withdrawal is weakened by the fact that it only applies to B2C transactions (and not to C2C transactions) and by the long list of exceptions that excludes many economic sectors from the CRD protection<sup>303</sup>. One could therefore question the necessity of enacting a similar law. Besides, even if Swiss law does not provide for a mandatory right of withdrawal, many companies voluntarily grant their customers a right to withdraw for competitive reasons<sup>304</sup>. Such contractual rights, which do not arise from coercive state intervention, are sufficient and more adequate<sup>305</sup>. Finally, Switzerland is not bound by an international treaty that would provide for the incorporation of European law in this area<sup>306</sup>.

### 5.2.3 Personal Opinion

Both arguments for and against a right to withdraw in e-commerce can be convincing. That is the reason why some national laws offer it and some do not. Indeed, whether a right of withdrawal is justified is first and foremost a matter of legal politics and ethics<sup>307</sup>. Consequently, justification for such a legal instrument is reflected in the function that the legislator wishes to fulfill<sup>308</sup>. In our opinion, such a right should be introduced under Swiss law and we found it regrettable that the Swiss legislator, once again, refused to do so in the amendment of the Code of obligations to come.

Even if it seems to restrict the binding force of a contract, as LOOS wrote, “[...] *the right of withdrawal is not really at odds with the principle of pacta sunt servanda, as the ‘pactum’, on which the binding nature of the contract is based, is not really founded on freely determined consent by the consumer*”<sup>309</sup>. Indeed, given the asymmetry of information in e-commerce, the right of withdrawal ensures that consent given to a contract is informed, free and well thought out<sup>310</sup>. It therefore aims at

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<sup>300</sup> DELLI COLLI/RUSTERHOLZ, p. 13, No. 44; Article of ‘The Economist’ about online retailing, 21.12.2013.

<sup>301</sup> BOCE 2014 1134, p. 1136; LANGER (2012), p. 29; DELLI COLLI/RUSTERHOLZ, p. 13, No. 45.

<sup>302</sup> Study of the Swiss Federal Statistical Office, Chart regarding the international comparison of online shopping and selling 2014.

<sup>303</sup> Art. 3 para. 3 and 16 CRD; MARCHAND (2013), p. 21, No. 15 and p. 23, No. 16.

<sup>304</sup> MARCHAND (2013), p. 23, No. 17; DONAUER/MÓRI, p. 350.

<sup>305</sup> BOCE 2014 613, p. 615.

<sup>306</sup> Press release of the Federal Department of Justice and Police, 09.11.2005.

<sup>307</sup> LOOS (2009), p. 241.

<sup>308</sup> *Ibid.*

<sup>309</sup> *Ibid.*

<sup>310</sup> TERRY, p. 126.

maximizing the chances that the contract concluded is a fair contract and guarantees that the ‘formal’ (i.e. theoretical) and ‘material’ (i.e. effective) notions of freedom of contract coincide<sup>311</sup>.

Although electronic contracts do not present the same risks as doorstep contracts, they nevertheless represent situations where the danger of a rash decision from the consumer is real<sup>312</sup>. Indeed, the consumer can be reached directly at home in an environment where she is more easily influenced<sup>313</sup>. Advertising comes directly to her eyes, on a frequency and intensity higher than ever and is targeted to match her tastes and previous researches. The trader’s ascendancy over the consumer has been enhanced by the Internet, with the corollary of weakening the consumer’s psychological position in a subtle and almost imperceptible manner. Incitation to consumption is everywhere over the Internet and crossing the line between the viewing of an advertising of a product and the purchase of this very product is fabulously easy. Moreover, as electronic transactions are generally made through virtual payment method, the consumer does not even get the chance to be affected by the uncomfortable feeling that money has left her hand. It is therefore justified to rebalance the position of the contractual parties that has been disturbed under the influence of new technologies.

In addition, we saw above that many Swiss traders already provide for a right of withdrawal in their general terms and conditions<sup>314</sup>. Depending on the websites, these rights may be subject to different conditions<sup>315</sup>. As a consequence, it appears that a statutory right to withdraw would not impose an insurmountable charge for traders since many of them already provide for it. On the contrary, it would not only permit a welcomed harmonization of the return terms but also benefit the development of e-commerce in general, by enhancing consumers’ confidence in such a purchasing method. Besides, although the offer of a voluntary right of withdrawal is a competitive argument for a trader<sup>316</sup>, there are plenty other advantages she could provide to her consumers and put forward to seduce them (e.g. quality of products, broad assortment of goods, fair trade, advantageous prices, etc.). Furthermore, the adoption of a statutory right of withdrawal for all distance contracts would ensure equal treatment of Swiss and European consumers<sup>317</sup>.

As a consequence, it is in our view justified to grant consumers a cooling-off period during which they may reconsider the commitments they made, examine the object of the contract, determine how much they actually value the good when all the information is available<sup>318</sup> and if necessary, withdraw from the contract<sup>319</sup>. Indeed, the cost-benefit ratio of a procedure against a trader currently deters consumers to take action when a problem arises<sup>320</sup>. Moreover, the legislation applicable to unfair commercial practices does not give a direct remedy to the consumer as regards the contractual relationship, leaving her with the only effective option of invoking the general rules of the CO<sup>321</sup>. A right of withdrawal

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<sup>311</sup> *Ibid.*; LOOS (2009), p. 241.

<sup>312</sup> Explanatory Report on the Draft Federal Act on Electronic Commerce, January 2001, p. 15.

<sup>313</sup> *Ibid.*

<sup>314</sup> Cf. *supra* chap. 5.2.2.

<sup>315</sup> For instance various cooling-off periods, price refund by cash or voucher, etc.; BEN-SHAHAR/POSNER, p. 4.

<sup>316</sup> DELLI COLLI/RUSTERHOLZ, p. 12, No. 41 and p. 14, No. 50; SMITS, p. 11; MARCHAND (2013), p. 23, No. 17.

<sup>317</sup> DONAUER/MÖRI, p. 349.

<sup>318</sup> BEN-SHAHAR/POSNER, p. 5.

<sup>319</sup> Explanatory Report on the Draft Federal Act on Electronic Commerce, January 2001, p. 15.

<sup>320</sup> Final Report of the Parliamentary Control of the Administration (PCA) “*Commerce électronique: évaluation de la protection du consommateur en Suisse*”, 13.05.2004, FF 2005 4709, p. 4710; LANGER (2009), p. 99.

<sup>321</sup> MARCHAND (2013), p. 15f., No. 8.

similar to the one provided in the CRD would permit consumers to be equally armed in the contractual relationship by simply revoking the contract. Hence, an eventual disappointment at the receipt of the product or an unfair practice from the trader would not leave the consumer without adequate solution and would not have as a regrettable consequence her distrust toward further e-commerce experiences<sup>322</sup>.

Such a right of withdrawal should be introduced in the General part of the CO that deals with the formation of obligations<sup>323</sup>. The withdrawal period should be aligned with the European cooling-off period of 14 days and exceptions to the right of withdrawal shall be provided in situations where it is inappropriate<sup>324</sup>. Contrary to what was laid down in the 2014 draft amendment of the CO, the right to withdraw for distance contracts should not be excluded for goods or services of minor value<sup>325</sup>. Unlike in the CRD, the withdrawal should not be subject to any formal requirement; it should be possible to communicate it by any means appropriate to the circumstances<sup>326</sup>. Hence, sending back the goods or a similar conclusive behavior should be considered sufficient, like in former German law and in the DCFR<sup>327</sup>. Also, the simplicity of the CO should be preserved as far as possible and some tiny details foreseen by European law may be left to the interpretation of the courts<sup>328</sup>. Finally, the provision offering the right of withdrawal should be technologically neutral<sup>329</sup>, for example by providing such a right in case of ‘distance contracts’<sup>330</sup> or ‘contracts negotiated away from business premises’<sup>331</sup> or ‘consumer contracts if the consumer contracted without having the chance to appropriately examine the offered performance or to consider its risks’<sup>332</sup>.

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<sup>322</sup> BOCE 2014 1134, p. 1135.

<sup>323</sup> The 2014 Draft amendment of the CO intended to introduce a right of withdrawal for distance contracts within the framework of the current Art. 40a ff. CO, which already provide for such a right in doorstep contracts (Draft amendment of the Code of obligations [Revision of the Right of Withdrawal], FF 2014 923). The OR/CO 2020, which is a project for a new General part of the Swiss Code of obligations, provides for such a right in its Art. 16ff. for “[w]hosoever concludes a consumer contract without having the chance to appropriately examine the offered performance or to consider its risks [...]” (Art. 16 para. 1 OR/CO 2020 [HUGUENIN/HILTY]).

<sup>324</sup> MARCHAND (2013), p. 23, No. 17.

<sup>325</sup> Art. 40e lit. a of the 2014 Draft amendment intended to exclude the right of withdrawal when the performance of the consumer did not exceed 100 Swiss Francs (Draft amendment of the Code of obligations [Revision of the Right of Withdrawal], FF 2014 923). For its part, the CRD permits Member States to establish a monetary threshold (not exceeding €50) for goods or services of a minor value but only for off-premises contracts (Art. 3 para. 4 and Recital 28 CRD).

<sup>326</sup> DCFR, Full Edition (VON BAR/CLIVE), p. 351.

<sup>327</sup> Former Section 355 (1) BGB; DCFR, Full Edition (VON BAR/CLIVE), Art. II.-5:102(2) and p. 351; Cf. also Art. 40k of the Draft amendment of the Code of obligations (Revision of the Right of Withdrawal), FF 2014 923.

<sup>328</sup> PROBST, ad. Art 16 OR/CO 2020, No. 1f.; STAUDER/STAUDER, ad intro. art. 40a-40f CO, No. 2.

<sup>329</sup> BOCN 2014 1587, p. 1588.

<sup>330</sup> Art. 40a ff. of the Draft amendment of the Code of obligations (Revision of the Right of Withdrawal), FF 2014 923; Art. 9ff. CRD; Art. 40ff CESL (cf. Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM[2011] 635 final, Brussels 11.10.2011).

<sup>331</sup> DCFR, Full Edition (VON BAR/CLIVE), Art. II.-5:201.

<sup>332</sup> Art. 16 para. 1 OR/CO 2020 (HUGUENIN/HILTY).

### 5.3 FURTHER CONCEIVABLE IMPROVEMENTS OF E-CONSUMER PROTECTION IN SWISS LAW

A general right of withdrawal for all distance contracts would offer e-consumers a better protection. However we saw that recently, the Swiss legislator once again decided not to grant such a right under Swiss law<sup>333</sup>. Therefore, given this determination combined with the remarkably long time necessary to (try to) amend the law in Switzerland, it is very unlikely that a right to withdraw for e-consumers will be introduced in the near future. However, as some parliamentarians and authors suggest<sup>334</sup>, other aspects of Swiss consumer protection may and should be improved.

*Information regarding additional costs.* Many consumers are attracted by the low prices indicated on foreign traders' websites. These prices usually only mention eventual shipping fees and it is only after the conclusion of the contract that consumers discover that they also need to pay the Swiss VAT, customs duties and customs clearance costs<sup>335</sup>. Contrary to European law, which prescribes price transparency, notably by requiring traders to disclose additional costs or to make the consumer aware of the existence of such costs if they cannot reasonably be calculated in advance (Art. 6 para. 1 lit. e CRD), Swiss law does not require traders to provide information regarding additional charges that may apply<sup>336</sup>. Hence, bad surprises for e-consumers frequently result from such a lack of information and could be avoided by a similar provision<sup>337</sup>.

*Information regarding the performance of the contract.* European consumers are entitled to information about the payment and the performance and to the delivery of the goods within 30 days (Art. 6 para. 1 lit. g and Art. 18 CRD). In addition, traders have to provide information as regards the contractual and legal guarantees and after-sales service (Art. 6 para. 1 lit. l and m CRD). Although this is essential information for the consumer, no similar requirements exist in Switzerland<sup>338</sup>.

*Transfer of risks.* Pursuant to Art. 20 CRD<sup>339</sup>, the risk of loss or damage of the goods is transferred to the consumer only when she takes possession of the goods<sup>340</sup>. Under Swiss law, the risks are generally transferred to the consumer at the conclusion of the contract (Art. 185 para. 1 CO)<sup>341</sup>. Hence, the Swiss consumer is deprived to claim redress for a defect that occurred between the moment of the conclusion of the contract and the moment of the delivery of the goods<sup>342</sup>. The Swiss system is not only unfair for the consumer but also very complex and thus hard to understand for the average consumer, who

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<sup>333</sup> Cf. supra chap. 4.2.2.5.

<sup>334</sup> LANGER (2012), p. 27ff.; Interpellation 12.3898 of Amarelle Cesla "Plus de sécurité juridique dans le commerce électronique", 27.09.2012; MARCHAND (2013), p. 17, No. 11.

<sup>335</sup> LANGER (2012), p. 28; Interpellation 12.3898 of Amarelle Cesla "Plus de sécurité juridique dans le commerce électronique", 27.09.2012.

<sup>336</sup> Except for some specific requirements, cf. e.g. Art. 4 para. 1, 10 para. 2 and 11c OIP (cf. supra chap. 5.1); LANGER (2012), p. 28.

<sup>337</sup> Interpellation 12.3898 of Amarelle Cesla "Plus de sécurité juridique dans le commerce électronique", 27.09.2012.

<sup>338</sup> *Ibid.*; LANGER (2012), p. 28.

<sup>339</sup> Cf. also Art. 3 para. 1 of the Directive 99/44/EC on sale of consumer goods and guarantees.

<sup>340</sup> However, the risk is transferred upon delivery to the carrier if the carrier was commissioned by the consumer and if that choice was not offered by the trader (Art. 20 *in fine* CRD).

<sup>341</sup> LANGER (2012), p. 28. If the purchased good is defined only in general terms, the moment of the transfer of risks depends on the parties' agreement: the risks are transferred to the consumer when the good is individualized (if the trader only has the obligation to make the good available to the consumer) or when the good is delivered (if the trader has to deliver the good herself) or when the trader hands the good over for shipping (if the trader only has the obligation to hand the good over to a carrier) (Art. 185 para. 2 CO) (MARCHAND [2012], p. 193).

<sup>342</sup> MARCHAND (2012), p. 193.

reasonably expects that she will not bear the risks until the good is delivered<sup>343</sup>. Therefore, rules similar to the European regulations as regards the passing of risks would be more appropriate than the current Swiss provisions.

*Ban of telephone and credit cards surtaxes.* Under European law, the trader is prohibited to charge consumers who pay by a specific means of payment (e.g. credit cards) fees that exceed the actual costs of the trader for such means of payment (Art. 19 CRD). Likewise, hotlines operated by traders for assistance to consumers cannot be overtaxed, i.e. charged beyond the basic telephone rate (Art. 21 CRD)<sup>344</sup>. Similar provisions in Swiss legislation would be fully justified.

*Ban of pre-ticked boxes.* In European law, since the consumer's consent regarding a performance involving any additional payment must be express, the use of pre-checked boxes is prohibited (Art. 22 CRD). An equivalent rule in Swiss law would enhance consumer protection and impose fair practices in e-commerce<sup>345</sup>.

*Uniform definition of the notion of 'consumer'.* Many authors deplore the lack of a uniform definition of the term 'consumer' in Swiss law<sup>346</sup>. Such a definition would facilitate the implementation of consumer protective laws, by drawing up the shape of a common scope<sup>347</sup>. As a proposition, we suggest the following definition, already mentioned above and inspired by European law: “‘consumer’ means any natural person who intends to enter into a contract or who contracts with a trader for purposes which are outside the scope of her trade, business, craft or profession”<sup>348</sup>. Also, in presence of a contract concluded for ‘mixed purposes’, the criterion of ‘preponderance’ should be taken into account<sup>349</sup>; if the trade purpose of a dual purpose contract is so limited as not to be predominant in the overall context, the contract is to be considered as concluded by a consumer<sup>350</sup>. According to MARCHAND, the criterion of ‘*prestation de consommation courante*’ (which could be translated as ‘current consumption use’) should also be added to a uniform consumer definition, in order to avoid the application of protective rules to situations where protection of a weak party is not needed<sup>351</sup>. Even if we understand the legitimate policy behind such a criterion, we share the contrary opinion of PICHONNAZ and FORNAGE: the absence of the element of ‘*prestation de consommation courante*’ should not justify the exclusion of consumer protection if the structural imbalance between the consumer and the trader exists<sup>352</sup>. It is first and foremost this structural imbalance, which permits a party to obtain unfair advantages contrary to contractual justice, that should be the focus of consumer contract law<sup>353</sup>. Moreover, the notion of current consumption varies according to different temporal and local conditions and the appreciation in value of a determined good or service implies making

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<sup>343</sup> MARCHAND (2012), p. 192ff.

<sup>344</sup> MARCHAND (2013), p. 26, No. 20.

<sup>345</sup> MARCHAND (2013), p. 17, No. 11.

<sup>346</sup> MARCHAND (2012), p. 28f.; CARRON, p. 101f., No. 12.

<sup>347</sup> MARCHAND (2012), p. 28.

<sup>348</sup> Cf. supra chap. 2.2.

<sup>349</sup> DCFR, Full Edition (VON BAR/CLIVE), Art. I.-1:105(1) and p. 67.

<sup>350</sup> Recital 17 CRD.

<sup>351</sup> MARCHAND (2012), p. 29; Cf. also Art. 120 and Art. 114 PILA and Art. 32 para. 2 CPC; Decision of the Swiss Federal Court TF 4A\_432/2007, 08.02.2008, recital 4.2.2.

<sup>352</sup> PICHONNAZ (2008), p. 56 and 67.

<sup>353</sup> PICHONNAZ (2008), p. 67.

value judgments about the usual needs of the consumer, which depend on her standard of living<sup>354</sup>. To remove protection from contracts whose value is not low unreasonably restricts the consumer's need for protection and is not in line with European law<sup>355</sup>. Also, it does not permit to determine with certitude contracts covered by consumer law<sup>356</sup>.

*Education of consumers.* Even elaborate regulations are insufficient if consumers do not behave with caution<sup>357</sup>. Consequently, it is essential that consumers be educated on the use of e-commerce<sup>358</sup>. They need to be aware of their rights and responsibilities and where to turn to when they need assistance<sup>359</sup>. Hence the government, businesses, consumer representatives, media and educational institutions should make use of all effective means to educate consumers about e-commerce, to foster informed decision making and to increase traders' and consumers' awareness of the consumer protection framework that applies to their online activities<sup>360</sup>.

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<sup>354</sup> FORNAGE, p. 307, No. 1331.

<sup>355</sup> FORNAGE, p. 307f., No. 1332f.

<sup>356</sup> FORNAGE, p. 310, No. 1336; PICHONNAZ (2008), p. 72.

<sup>357</sup> BINDING/PURNHAGEN, p. 188, No. 7.

<sup>358</sup> *Ibid.*

<sup>359</sup> *Ibid.*

<sup>360</sup> *OECD Guidelines for Consumer Protection in the Context of Electronic Commerce*, p. 19.

## 6. CONCLUSION

It can be seen from the above that the question whether a statutory right of withdrawal is appropriate in e-commerce is largely disputed. Past and ongoing controversies about the merits and demerits of the right to withdraw have fuelled debate between legal scholars, economic actors and parliamentarians. Ultimately, this question is nothing more than an issue for policy-maker to decide on<sup>361</sup>. As a reminder, in Switzerland, a decision on this topic has been taken no later than a few months ago<sup>362</sup>: such a statutory right of withdrawal for distance contracts will not be introduced under Swiss law. Indeed, Swiss authorities, largely influenced by business circles, do not wish to provide a consumer-friendly legislation similar to the European one. As a consequence, differences between European and Swiss consumer protection in this area are not meant to decrease significantly in the near future, even if some welcomed Swiss law amendments might be adopted soon<sup>363</sup>. Accordingly, one can undoubtedly conclude that Swiss e-consumers are offered inferior legal protection as compared to their European neighbors, whether it is in terms of the right of withdrawal, information requirements, rights regarding the performance of the contract and questionable commercial practices.

As stated above, we are of the opinion that Swiss contract law should adapt to the current evolution of European law and its trend to offer effective protection to consumers<sup>364</sup>. We believe that the recent and ever-growing “repulsion” toward the influence of Europe over Switzerland should have its limit when it comes to consumer protection, especially when Swiss consumers’ position and their equal treatment vis-à-vis European consumers is at stake.

Adequate protection could have been easily offered to Swiss consumers through the adoption of a statutory right of withdrawal for all distance contracts. As argued earlier, the right of withdrawal is primarily directed at giving the consumer additional time to reconsider her contractual commitment as compensation for particular disadvantages<sup>365</sup>; in distance contracts, the crucial function of the cooling-off period is to overcome the deficits in information that might have altered the consumer’s rational choice. Accordingly, instead of hurting the principle of *pacta sunt servanda*, it rather serves it by guaranteeing free and enlightened consent on the part of the consumer, and therefore allows her to make effective use of her contractual freedom<sup>366</sup>.

In the absence of a statutory right of withdrawal, when the Swiss consumer is not given a right to withdraw on a contractual basis, the only information about the product she can count on is the one provided by the trader. At the delivery, if the information does not correspond to the reality or if the consumer is not satisfied by the product she concretely sees, she would only have at her disposal the usual legal means of the CO (absence of agreement on an essential term, mistake, etc.) to terminate the contract<sup>367</sup>. Yet, confronted to these relatively complicated legal concepts, to the burden of proof and

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<sup>361</sup> TWIGG-FLESNER/SCHULZE, p. 134.

<sup>362</sup> Abandon of the provisions providing a right of withdrawal for distance contracts in the 2014 draft amendment of the CO (Draft amendment of the Code of obligations [Revision of the Right of Withdrawal], FF 2014 923); BOCE 2014 1134, p. 1138; Cf. supra chap. 4.2.2.5.

<sup>363</sup> For example the introduction in the CO of a right of withdrawal for telephone solicitation.

<sup>364</sup> PICHONNAZ (2006), p. 340.

<sup>365</sup> TWIGG-FLESNER/SCHULZE, p. 146.

<sup>366</sup> STAUDER/STAUDER, ad intro. art. 40a-40f CO, No. 4.

<sup>367</sup> MARCHAND (2013), p. 15, No. 8.

to the costly procedures, whose final result are uncertain, the average consumer will most of the time be deterred to take action against a comparatively impressive trader, especially if the purchased object is of minor value. The risks and efforts are just too important compared to the value involved. Consequently, in these kinds of electronic consumer contracts, the so-called “flexible” provisions of Swiss law, which are deemed to be sufficient, are not helpful to the consumer and are generally not applied by Swiss courts, as no case is submitted to them<sup>368</sup>. Hence, in the e-commerce context, where consumer contracts are not negotiated and where the consumer has no other choice but to accept the trader’s conditions if she wants to acquire a product, the adoption of a statutory right of withdrawal, which is very simple to exercise and not exorbitantly costly, would have been more than appropriate for Swiss e-consumers.

While waiting for consumer protection improvements in Swiss legislation, we can conclude this thesis by expressing three wishes: first, that more and more traders offer a right to withdraw to Swiss e-consumers on a contractual basis and wish that it is provided with conditions similar to European law. Second, that traders and authorities make more effort in order to “educate” the consumer about the usual rules that apply in e-commerce, for instance by providing them crucial information (e.g. regarding additional taxes that may apply and the transfer of risks) and that consumer organizations are given more leeway to act (e.g. by an increase of their financial means). Third, that consumers pay particular attention when shopping online, by at least reading the main and most important general terms and conditions and, whenever possible, by choosing the websites that offer a right of withdrawal. If a consumer decides to acquire a product from a trader not providing such a right, we can only wish her to be ready to accept the concepts of “freedom of contract” and “parties’ autonomy” as they are understood by the Swiss legislator in e-commerce, that is without taking into account the fact that in this field, the contractual balance is broken<sup>369</sup>.

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<sup>368</sup> LANGER (2009), p. 99.

<sup>369</sup> SCHMID, p. 198.