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C. Right of withdrawal

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I. Introduction

Another aspect common to some of the Directives within the focus of this study is a right of withdrawal granted to the consumer in certain situations and certain contracts. In this part of the study, we examine the current status of withdrawal rights in the 8 Directives, and consider whether there is room for improvement. In order to establish clear, concise and coherent terminology the term “withdrawal” is used in this study even in those cases where the English version of the Directives uses other terms.

II. Existing withdrawal rights in the acquis

1. Doorstep Selling Directive

On the right of withdrawal, this Directive does not contain much more than what is set out in Art. 4 (duty to inform consumer about this right), Art. 5 (content and basic effect of right to withdraw), Art. 6 (mandatory law clause) and Art. 7 (unravelling of the contract). The terminology used is rather incoherent: “right of cancellation” (recital 5, Art. 4(1); Art. 5(2)), “right to renounce” (Art. 5(1)), “right of renunciation” (Art. 7).

2. Package Travel Directive

Directive 90/314 contains no right of withdrawal. Even when marketed via distance selling, package travel contracts are normally excluded from the withdrawal right granted under Directive 97/7 (Art. 3(2) 2nd indent of this Directive).

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3. Unfair Contract Terms Directive

No reference to a right of withdrawal exists within this Directive.

4. Timeshare Directive

Besides an extensive catalogue of information duties, Directive 94/47 contains a right of withdrawal in Art. 5 (partially also called “right to cancel”, see also “cancellation and withdrawal” in the 2nd and 13th recital; “right to cancel or withdraw” in Art. 7 and in lit. (l) of the Annex). This right is flanked by a duty to inform the consumer about his right (Art. 3, Art. 4 and lit. (l) of the Annex), a prohibition of advance payments during the withdrawal period (Art. 6), an extension of the withdrawal to cover credit agreements related to the timeshare contract (Art. 7), some basic provisions on the unravelling of the contract (Art. 5(3) and (4)), a mandatory law clause (Art. 8) and a provision protecting the consumer in case of a choice of law clause (Art. 9).

5. Distance Selling Directive

Directive 97/7 contains a right of withdrawal in Art. 6. There is also a duty to inform the consumer about this right (Art. 4, Art. 5), an extension of the withdrawal to cover related credit agreements (Art. 6(4)), some basic provisions on the unravelling of the contract (Art. 6(2)), a mandatory law clause (Art. 12(1)) and a provision protecting the consumer in case of a choice of law clause (Art. 12(2)).

6. Price Indications Directive

There is no reference to a right of withdrawal in this Directive.

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7. Injunctions Directive

No reference to a right of withdrawal. The Directive is relevant to the extent that it provides a mechanism to deal with a failure to grant the withdrawal rights regulated in other Directives, e.g. Directive 85/577, Directive 94/47 and Directive 97/7.

8. Consumer Sales Directive

This Directive contains no withdrawal right.

9. Other directives outside the scope of this study

Directive 2002/65 contains a right of withdrawal in Art. 6. There is a duty to inform the consumer about this right (Art. 3, also requiring the supplier to inform the consumer about the absence of a withdrawal right), an extension of the withdrawal to cover related (credit) agreements (Art. 6(7)), some basic provisions on the unravelling of the contract (Art. 7), a mandatory law clause (Art. 12(1)) and a provision protecting the consumer in case of a choice of law clause (Art. 12(2)).

Directive 2002/83 contains in Art. 35(1) a right to cancel an individual life-assurance contract. Directive 2002/65 refers to this cancellation right in Art. 6(1).¹ The policy holder must be informed about this right according to Art. 36(1) and Annex III (A) of Directive 2002/83. The Directive also provides some very basic rules on the effect of cancellation and on the unravelling of the contract (Art. 35(1)).

Directive 87/102 does not grant right of withdrawal to the consumer, but the annex refers under 1.2. (vii) to a “cooling-off period, if any”. By contrast, the proposals for a revision of the Directive contains a right of withdrawal.

¹ Directive 2002/65 refers to Directive 90/619, which has been replaced by Directive 2002/83; the withdrawal period of normally 14 calendar days is extended to 30 calendar days in distance contracts relating to life insurance covered by Directive 90/619 (now Directive 2002/83) and personal pension operations.

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10. ECJ case-law with general importance for a right of withdrawal

There are at least three ECJ judgments which may have some importance for a general understanding of a withdrawal right, although they all exclusively apply to Directive 87/577. The C-481/99 - *Heininger*² judgment established that one consequence of non-compliance with the duty to inform the consumer about his right of withdrawal is that the period for withdrawal is extended indefinitely, i.e., the seven-day ‘withdrawal period’ will not commence until the consumer has been adequately informed. The judgments in C-229/04 - *Crailsheimer Volksbank*³ and C-350/03 - *Schulte*⁴ cases also deal, among other issues, with the unravelling of a withdrawn contract.

III. Issues to be considered for a review of the acquis

The withdrawal rights in the Directives have been drafted and enacted one by one. It is nevertheless obvious, that those established earlier have influenced those that followed later . There is a clear tendency in the Directives to follow in the footsteps of the pre-existing withdrawal rights in order to develop the acquis coherently. The main issues regulated in the three withdrawal rights relevant for this study are outlined in the following table.

² ECJ judgment of 13 December 2001, C-481/99 -*Georg Heininger and Helga Heininger v Bayerische Hypo- und Vereinsbank AG* [2001] ECR I-09945.

³ ECJ judgment of 25 November 2005, C-229/04 - *Crailsheimer Volksbank eG v Klaus Conrads, Frank Schulzke and Petra Schulzke-Lösche, Joachim Nitschke* [2005] ECR I-9273.

⁴ ECJ judgment of 25 October 2005, C-350/03 - *Elisabeth Schulte, Wolfgang Schulte v Deutsche Bausparkasse Badenia AG* [2005] ECR I-09215.

No	Issue	Directive 85/577	Directive 94/47	Directive 97/77
1	Length of period	not less than 7 days	within 10 calendar days	at least 7 working days
2	Beginning of period (as to sanctions in case of breach of information obligations see No. 8)	from receipt of notice [unclear: even before conclusion of contract, with the consequence that this period may have expired before the contract is concluded, cf. No. 7 of this table]	both parties' signing the contract or both parties' signing a binding preliminary contract	in the case of goods, from the day of receipt by the consumer in the case of services, from the day of the conclusion of the contract from the day on which the information obligations were fulfilled if fulfilled after the conclusion of the contract
3	Computation of period		if the 10th day is a public holiday, the period shall be extended to the first working day thereafter	
4	Dispatch rule: pure timeliness rule or legal fiction of receipt?	[unclear]: sufficient if the notice is dispatched before the end of period	[unclear, looks more like a legal fiction of receipt]: deadline shall be deemed to have been observed if the notification, if it is in writing, is dispatched	[no provision]
5	Rights and obligations during the period for withdrawal	[no provision]	prohibition of advance payments before the end of the period [unclear whether applicable only with regard to the 10 calendar day period or also to the 3 months plus 10 calendar day period]	[no provision]

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6	<p>Obligation to inform about right of withdrawal (also formal requirements for this information)</p>	<p>written notice of right of cancellation, together with name and address of a person against whom that right may be exercised, notice must be dated and shall state particulars enabling the contract to be identified</p>	<ul style="list-style-type: none"> - in writing (with regard to the contract, which must contain certain information) - in the official language opted for by purchaser 	<ul style="list-style-type: none"> - Information about the existence of right of withdrawal and other information (prior to the conclusion of the contract; and, if necessary, later confirmation in writing or on durable medium, cf. No. 7) - written information on the conditions and procedures for exercising the right of withdrawal
7	<p>Point in time when information about right of withdrawal has to be given</p>	<ul style="list-style-type: none"> - (in the case of Article 1 (1)): at the time of conclusion of the contract; - (in the case of Article 1 (2)): not later than the time of conclusion of the contract; - (in the case of Article 1 (3) and 1 (4)): when the offer is made by the consumer 	<ul style="list-style-type: none"> - provide any person requesting information with a document which shall provide brief and accurate information on lit. (1) of the Annex - any advertising shall indicate the possibility of obtaining the document and where it may be obtained - contract must include the items referred to in the Annex 	<ul style="list-style-type: none"> - in good time prior to the conclusion of any distance contract - confirmation (written or on durable medium) in good time during the performance of the contract, and at the latest at the time of delivery, unless the information has already been given in such form - in any event (in good time during the performance of the contract etc...): written information on the conditions and procedures for exercising the right

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8	Sanctions in case of breach of this (and other) information obligation	<ul style="list-style-type: none"> - MS shall ensure appropriate consumer protection measures - ECJ Heining: period does not begin before information 	<p>extension of period:</p> <ul style="list-style-type: none"> - (up to 3 months delay) 10 calendar day period begins with receipt of information, - otherwise, 3 months, plus 10 calendar days - no defrayal of expenses 	of withdrawal,	<p>extension of period</p> <ul style="list-style-type: none"> - (up to 3 months delay): 7 working day period begins with receipt of information, - otherwise, 3 months plus 7 working days, beginning 0 in the case of goods, from the day of receipt by the consumer, o in the case of services, from the day of conclusion of the contract.
9	Exercise of right of withdrawal, particularly formal requirements	<ul style="list-style-type: none"> - in accordance with the procedure laid down by national law. 	<ul style="list-style-type: none"> - without giving any reason - notify the person whose name and address appear in the contract by means which can be proved in accordance with national law in accordance with the procedures specified in the contract pursuant to point (l) of the Annex. 	without giving any reason	
10	Effect of withdrawal for contractual	<ul style="list-style-type: none"> - renounces the effects of the 	[no general provision]	[no general provision]	[no general provision]

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	<p>obligations</p> <p>- releasing the consumer from any obligations under the cancelled contract</p>			
11	<p>Effect of withdrawal with regard to credit agreements</p> <p>[no provision]</p>	<p>- if the price is fully or partly covered by credit granted by the vendor, or</p> <p>- if the price is fully or partly covered by credit granted to the purchaser by a third party on the basis of an agreement between the third party and the vendor,</p> <p>the credit agreement shall be cancelled, without any penalty</p> <p>MS shall lay down detailed arrangements to govern the cancellation of credit agreements.</p>	<p>- if the price of goods or services is fully or partly covered by credit granted by the supplier, or</p> <p>- if the price is fully or partly covered by credit granted to the consumer by a third party on the basis of an agreement between the third party and the supplier,</p> <p>the credit agreement shall be cancelled, without any penalty</p> <p>MS shall determine the detailed rules for cancellation of the credit agreement.</p>	
12	<p>Rules for the unravelling of the contract after withdrawal</p>	<p>legal effects shall be governed by national laws, particularly regarding the reimbursement of payments for goods or</p>	<p>purchaser must defray only those expenses which, in accordance with national law, are incurred as a result of</p>	<p>- without penalty</p> <p>- supplier shall be obliged to reimburse the sums paid by the</p>

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	services provided and the return of goods received	the conclusion of and withdrawal from the contract and which correspond to legal formalities which must be completed before the end of the 10 calendar day period; such expenses shall be expressly mentioned in the contract	consumer free of charge. Such reimbursement must be carried out as soon as possible and in any case within 30 days. - only charge: direct cost of returning the goods.
13	Relation of withdrawal to other remedies [no provision, but the ECJ Travel Vac case, C-423/97, illustrates, that the Directives may be applicable in parallel to one another]	In addition to the possibilities available to the purchaser under national laws on the nullity of contracts	The provisions of this Directive shall apply insofar as there are no particular provisions in rules of Community law governing certain types of distance contracts in their entirety. Where specific Community rules contain provisions governing only certain aspects of the supply of goods or provision of services, those provisions, rather than the provisions of this Directive, shall apply to these specific aspects of the distance contracts.

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The preceding table reveals a number of issues that may require some consideration. The order and numbering of the information laid out below follows the layout of the information presented in the table.

1. Length of period

It is obvious that the different periods cause incoherence within the acquis which may constitute a barrier to trade and an unnecessary burden to businesses. The Commission has already pointed out that it will examine the possibility and desirability of harmonising the existing cooling-off periods.⁵ It also seems that the 14 calendar day period stipulated in Art. 6 of the Directive 2002/65 (apart from life assurance) has been designed as a model for the other rights of withdrawal in the acquis. Therefore, it seems most plausible that the different periods in Directives 85/577, 94/47 and 97/7 should be harmonised in this way. It would have to be considered whether such a harmonised 14 calendar day period should be introduced as a full harmonisation measure. This could help businesses to set up cross-border marketing strategies, particularly in the field of distance selling. As only a few member states have provided longer periods⁶, full harmonisation may seem rather unproblematic from a consumer protection standpoint. However, it would have to be assessed whether in certain cases (in particular with regard to time-sharing) a longer period (one to three months) might be desirable in order to improve consumer protection.

2. Beginning of period

A common feature in all the Directives is that the ordinary (short) period, which is applicable when the business fulfils its information obligations, does not begin before the receipt of the information. In this respect, the acquis is coherent.

⁵ See Statement by the Council and the Parliament at the end of Directive 97/7.

⁶ See the individual reports in Part 2 of this Analysis under A III 2a (Doorstep Selling, e.g. 15 days in MALTA and SLOVENIA); D III 3b aa (Timeshare, e.g. 15 days in CYPRUS, CZECH REPUBLIK, HUNGARY and SLOVENIA; 15 working days in BELGIUM); E III 2c aa (Distance Selling, e.g. 15 days in MALTA and SLOVENIA); perhaps also the one month period in GERMANY in case of delayed information.

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Directives 94/47 and 97/7 require, furthermore, the contract to have been concluded, while Directive 85/577 seems to regulate that in certain cases the period may begin (and even end) before a contract has been concluded (Art. 4 lit. (c)). The Directives are therefore incoherent. Moreover, the (non-) requirement of the conclusion of the contract may lead to unwanted results. On the one hand, a consumer may be interested in withdrawing from an offer before it has been accepted (e.g. in timeshare contracts where sometimes a binding offer is pending for months). It would be odd, if a consumer who is already determined to withdraw, were to wait until the acceptance. On the other hand, it may be dangerous for the consumer if the period is allowed to expire before the conclusion of the contract. This would seem strange and could cause unnecessary communication duties for both parties if a consumer, who has made an offer (binding or non-binding), were forced to withdraw from this purely for reasons of precaution in cases where his offer has not been accepted, and he perhaps even suspects that the offer will never be accepted (e.g. an offer made by a consumer who knows that he may not be considered as creditworthy). This issue could be solved easily by a clarification, that the period never begins before the conclusion of the contract, but that the consumer is also entitled to withdraw from an offer or another binding declaration before the period begins, i.e. before a contract is concluded.

A further requirement for the beginning of the period, only regulated in Directive 97/7, is the receipt of goods to be delivered under the contract. This requirement allows the consumer to examine the goods before deciding whether to withdraw. It is a policy question whether a similar requirement also makes sense for doorstep contracts and, in particular, time-share contracts.

3. Computation of period

The computation of the period is governed by Regulation 1182/71 of 3 June 1971 determining the rules applicable to periods, dates and time limits. Therefore, the express provision in Art. 5(1) 1st indent of the Directive 94/47 is superfluous. It may be useful to refer in future legislation to this regulation, which is perhaps sometimes overlooked.

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4. Dispatch rule

Strikingly, Directive 97/7 is (together with Directive 2002/83) the only Directive which does not contain a dispatch rule. Even the later Directive 2002/65 comprises such a rule in Art. 6(6). This seems to be an error which should be removed.

As already indicated in the table, the wording of the existing dispatch rules is non-uniform and also unclear with regard to the effect of a timely dispatch. They allow different interpretation in the case of a letter which was dispatched in time, but got lost and therefore never reached the addressee. If the rule only regulates the calculation of the period, and leaves the consumer to bear the risk of a successful transmission of the declaration, the contract is not withdrawn, if the letter gets lost. The rule that the declaration is deemed to be received could also be construed as being legal fiction. This could be clarified either way.

5. Rights and obligations during the period for withdrawal

Apart from Directive 94/47, which contains a prohibition of advance payments, the acquis does not regulate the rights and obligations of the parties to the contract for which the period for withdrawal is pending. Per argumentum e contrario, one could therefore conclude that in all other cases the Directives allow the business to claim payments during the period. This interpretation is supported by the rules on unravelling the contract (cf. No. 12 of the above table), which regulate the reimbursement of sums paid by the consumer. It goes without saying that the consumer must also be entitled to claim performance during the pending period. The only question to decide for all withdrawal rights could be, whether the member states should be allowed to regulate more restrictive consumer protection rules like a general prohibition to claim payment before the period has expired.

With regard to advance payments under timeshare contracts, it could be clarified whether prohibition is applicable only until the end of the regular (10 calendar days) period or also, in case of breach of information obligations, to the 3 months plus 10 calendar day period.

6. Obligation to inform about right of withdrawal

The EC legislator should focus attention on this issue, especially due to the fact that this information obligation has enormous importance both for the position of the consumer on the one hand, and the business, which may suffer harsh consequences as a result of a breach of this obligation, on the other. This is also true, because differences of the member states' laws in this field may constitute very effective barriers to trade. The following issues might be considered in this context:

a. Formal requirements

It should be clarified that the information should be in writing (meaning practically on paper) or on a durable medium; the latter only in cases where electronic communication has been established between business and consumer.

b. Language

The language requirement in Directive 94/47 is unique and especially designed for such contracts. As to the other directives, the requirement of information in clear and intelligible language might in some cases amount to an obligation to use a certain (official) language. A general regulation of this issue is hardly imaginable, as the variety of cases and situations is too broad. Therefore, this issue might be left for the courts to decide.

c. Content of the information

The common core of the Directives is the requirement to inform the consumer about the existence of a withdrawal right and the name and address of the person against whom that right may be exercised. It could also be argued that the length of the period must be indicated. Many member states have stated further requirements with regard to the content of the information about the withdrawal right. This difference may constitute a barrier to trade because it might force businesses to draft special information notices for specific member states. Therefore, the acquis should seek to regulate this area in a way which allows for cross-border use of information. Such a regulation could, for example, provide a form which the

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business can use in order to inform the consumer about his right of withdrawal. EC law could, furthermore, stipulate that a business fulfils its obligation to inform the consumer about the withdrawal right by using this form, notwithstanding any other deviating national law. It is a policy question whether such a full harmonisation measure would displace the national law applicable in all cases or only in cross border situations.

The content of the information to be provided with the help of such a form should at least encompass

- the existence of a withdrawal right;
- the length of the period; and
- the name and the address of the person against whom that right may be exercised.

Further sought-after information to be included in the form could be the beginning of the period. This issue is connected with the general question of when the period begins. If the *acquis* contains rules along the lines of the suggestion made under No. 2, it should also be possible to find suitable wording which explains at least the basic rules governing the beginning of the withdrawal period.

An additional element could be to provide the consumer with a form which could be used by him in order to exercise the withdrawal.

7. Point in time when information about the right of withdrawal has to be given

When the *acquis* offers a form as described under No. 6, the point in time when the consumer has to be provided with such a form (in writing or - if appropriate – on a durable medium) would be, at the latest, at the conclusion of the contract. The actual obligations to inform the consumer about the existence of a right of withdrawal at an earlier point in time could be maintained.

8. Sanctions in case of breach of the information obligation

The *acquis* is rather incoherent, because it comprises two different approaches. On the one hand, the ECJ decision *Heininger* has clarified that in doorstep selling cases the period does

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not begin before the consumer has been informed about his right of withdrawal. This may lead to an eternal withdrawal right. Directive 2002/65, which is a full harmonisation measure, seems to follow the same pattern. On the other hand, Directive 94/47 and Directive 97/7 only stipulate a “3 months plus” rule, i.e. a prolongation of the withdrawal period up to a maximum of 3 months. This issue should be solved by choosing either one or the other whereby it may seem more plausible to bring the sanction in line with the ECJ case-law. It is a political question whether the eternal period in such cases is really an appropriate sanction, also bearing in mind that the period might in practice be cut off by national rules on prescription or procedural law. With regard to the laws of the member states, a maximum withdrawal period of one year could be considered as being more reasonable than the eternal period created by the ECJ in the *Heiniger* ruling.

9. Exercise of right of withdrawal, in particular formal requirements

The Directives do not regulate a formal requirement for the withdrawal. However, some member states do. This difference may constitute a barrier to trade, because it might force the business to include any formal requirement for the exercise of the withdrawal right into the information of the consumer about his right (cf. e.g. Art. 5(1) 1st indent of Directive 97/7). Therefore, EC law could clarify that the consumer need not fulfil any formal requirement when withdrawing from a contract.

10. Effect of withdrawal for contractual obligations

The Directives contain only rather incomplete provisions on the effects of withdrawal. As the ECJ cases *Crailsheimer Volksbank* and *Schulte* have illustrated, a basic provision along the lines of Art. 5(2) of Directive 85/577 or Art. 35(1) of Directive 2002/83 might be useful for the national legislators to assess the general effect of withdrawal.

11. Effect of withdrawal with regard to credit agreements

Apart from Directive 85/577 (and Directive 2002/83 where it is not appropriate) all the other Directives which contain a withdrawal right, comprise a rather similar provision on credit

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agreements. Therefore, such a rule could be seen as a general principle and thus be extended to doorstep contracts as well.

12. Rules for the unravelling of contract after withdrawal

While Directive 85/577 expressly leaves the rules on the unravelling of a withdrawn contract to the member states, Directive 94/47 does not comprise a general provision, but regulates some details on the costs of legal formalities. By contrast, Directive 97/7 already contains some basic general rules on reimbursements. The ECJ cases *Crailsheimer Volksbank* and *Schulte* have clarified some further issues. In the course of a review of the *acquis* these lines could be completed to a set of basic rules for the unravelling of withdrawn contracts. Such rules would state the general obligation of both parties to return goods and money received and could clarify which defrayals and costs the consumer would have to bear. It would also have to be considered to what extent such a set of rules, which might interfere with national rules on unjustified enrichment, should be enacted in a way of full harmonisation in order to achieve further progress in market integration.

13. Relation of withdrawal to other remedies

Following the model of Art. 5(1) of Directive 94/47, a general rule could be stated, that a right of withdrawal does not prejudice other remedies available to the consumer, such as the invalidity of the contract or the right to terminate a contract because of its breach. This may lead to the somewhat surprising result that a consumer could be entitled to withdraw from an invalid contract. Such a remedy can make sense in those cases where the rules applicable for unravelling of the invalid contract would be less favourable than the rules for the unravelling of a withdrawn contract.

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