

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

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

Jan M. Smits*

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Abstract

Both in Europe and the United States, withdrawal rights are increasingly part of mandatory legislation to protect consumers. Withdrawal rights allow the consumer to terminate the contract within a set ‘cooling-off period.’ This paper offers a threefold analysis of these rights. First, it makes a comparison between statutory withdrawal rights in Europe and in the United States. Second, it presents the results of a modest survey of the voluntary use of withdrawal rights in general conditions of retailers. Third, it evaluates the usefulness of mandatory

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withdrawal rights. The paper shows what can be the effect of introducing such mandatory rights on the behaviour of both retailers and consumers. The main reason why a retailer voluntarily grants withdrawal rights to a consumer is that it creates trust and thus enhances the willingness of the buyer to purchase products. This trust-building process can be undermined if the legislator imposes statutory withdrawal rights, leading to crowding-out effects. Finally, the consequences of this finding for the optimal design of withdrawal rights are discussed.

I. INTRODUCTION

In contract law, frequent use is made of so-called rights of withdrawal. These rights allow a party to a contract (usually a consumer) to terminate the contract within a certain period of time after its conclusion (the 'cooling-off period'). In the last decade, these withdrawal rights have mushroomed. Not only do many European directives contain such rights, but the withdrawal rights also figure more and more prominently in contract law of national origin. Outside of Europe, this proliferation of cooling-off periods can also be witnessed in the United States and in other parts of the world.

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

II. WITHDRAWAL RIGHTS IN EUROPE AND IN THE UNITED STATES

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

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

1. See, e.g., Peter Rott, *Information obligations and withdrawal rights*, in *EUROPEAN UNION PRIVATE LAW* 187 (Christian Twigg-Flesner ed., Cambridge 2010); see also Marco Loos, *Rights of withdrawal*, in *MODERNISING AND HARMONISING CONSUMER CONTRACT LAW* (Geraint Howells & Reiner Schulze eds., 2009).

2. Council Directive 94/47, art. 5 (now repealed) (contained a period of 10 calendar days).

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

4. Directive on Consumer Rights, COM (2008) 614 final.

Frame of Reference of European Private Law,⁵ that devotes a whole chapter to the right of withdrawal.

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

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

5. Principles, Definitions and Model Rules of European Private Law (Christian Von Bar, Eric Clive & Hans Schulte-Nölke eds., München 2009); Bürgerliches Gesetzbuch [BGB][Civil Code] § 355, ¶ 1, (Ger.) (gives a similar period of “two weeks”).

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

7. BW, art. 7:2 (Dutch Civil Code) (2003), <http://www.dutchcivillaw.com/legislation/dcctitle7711.htm>.

8. Fernunterrichtsschutzgesetz [FernUSG] [Distance learning Protection Act], Aug. 24, 1976 Widerrufrecht, § 4 (This right was preceded by the Auslandsinvestmentgesetz of 1969, creating a withdrawal right in contracts for certain foreign investments.).

entered into by victims of traffic accidents and from contracts with marriage agencies.⁹

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

The FTC rule¹⁰ dates back to 1972 and allows the buyer to cancel a purchase of \$25 or more within three business days if the sale takes place at the buyer's home or at a location that is not the seller's permanent place of business (such as a hotel, convention centre or restaurant). The salesperson must inform the consumer about the cancellation right at the time of sale and give him two copies of a cancellation form.¹¹ This federal rule can best be compared with the European withdrawal right in case of door-to-door contracts. It does not apply to distance contracts: contracts concluded by mail or telephone (or online) are explicitly excluded. The rule is also not applicable to transactions such as sales of real estate and new cars, and sales of arts or crafts at fairs. After the cancellation, the seller has ten days to refund the money.¹²

Under the well known Truth in Lending Act of 1968,¹³ the consumer also has three business days to rescind the contract in a consumer credit transaction involving a security interest in the consumer's principal dwelling (unless the loan is not intended primarily for personal family purposes or the loan is a purchase-money loan (i.e. for the purchase of a home)). As in European consumer law, this period is extended in case the lender does not adequately inform the consumer of the right to rescind.¹⁴

In addition to these two federal rules, many individual American states have their own "cancellation laws." A brief survey of the law of New York¹⁵ reveals that consumers have withdrawal rights under state law if they (to name a few examples) buy automobiles; conclude a contract with a professional seller over the telephone; lease or buy

9. Cf. FRANÇOIS TERRE, PHILIPPE SIMLER & YVES LEQUETTE, *DROIT CIVIL: LES OBLIGATIONS* 266 ff. (8th ed. 2002).

10. Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations, 16 C.F.R. § 429.1 (2011).

11. *Id.*

12. *Id.*

13. Consumer Credit Protection Act, 15 U.S.C. §§ 1601 et. al.; *see also*, Right of Recission as to Certain Transactions, 15 U.S.C. § 1635 (for the cooling-off period).

14. *Id.*

15. *See* New York Consumer Protection Board website, "*Cooling-Off*" Law, http://www.consumer.state.ny.us/assisting/clhm/contracts.htm#cooling_off (last visited Feb. 6, 2011) (for a complete overview).

subdivided land; or contract with a credit-service business, a health club, an emergency-response service or a dating service. In many other states, similar rights exist. California for example¹⁶ not only allows cancellation of the contract in most of the cases in which New York allows it, but also extends the application of withdrawal rights to cases dealing with mobile telephone contracts, funeral contracts, electric service contracts, dental service contracts, many types of insurance contracts, service contracts for used cars, home appliances and new motor vehicles services, and contracts of credit repair and mortgage foreclosure consultants and with dance studios. Furthermore, contracts for services in the areas of discount buying, employment counselling, immigration and job listings are governed by cooling-off periods ranging from three to sixty days.

The above makes abundantly clear how widespread statutory withdrawal rights actually are. This makes it important to ask what the justification is for the use of such rights.¹⁷ Scrutiny of the motives behind the legislation in both Europe and the United States reveals that usually two different motives exist to allow the consumer some time for reconsideration. Both motives are based on the idea that the consumer needs to be protected.¹⁸ The first type of protection is against a lack of psychological strength and the second is against a lack of informational strength.¹⁹ A lack of psychological strength is present if the other party makes use of aggressive sales techniques (such as in doorstep sales), taking the consumer by surprise or intruding the privacy of her home: even if a consumer would have all the information he or she needs, the consumer could still be psychologically forced to enter into the contract.²⁰ A lack of informational strength on the other hand is a more frequent phenomenon. In certain types of contracts, it is impossible for the consumer to have an accurate picture of the product that is being sold or of the reliability of the other party (such as in distance contracts). In the view of many legislators, a withdrawal right can then be used to remedy such an information asymmetry: it allows the consumer to

16. See California Department of Consumer Affairs, *Consumer Transactions with Statutory Contract Cancellation Rights: Legal Guide K-6*, http://www.consumer.ca.gov/publications/legal_guides/k-6.shtml (last visited on July 15, 2010) (for an overview).

17. See, e.g., Pamaria Rekaiti & Roger Van den Bergh, *Cooling-Off Periods in Consumer Law*, 23 J. CONSUMER POL'Y 373 (2000); see also Horst Eidenmüller, *Die Rechtfertigung von Widerrufsrechten*, *Archiv für die civilistische Praxis* 210 (2010), pp. 67 ff.

18. See KATALIN JUDIT CSERES, *COMPETITION LAW AND CONSUMER PROTECTION* 151-92 (Alphen aan den Rijn, 2006) (discussing the various goals of consumer protection).

19. Cf. JAC. HIJMA, *WETTELIJKE BEDENKIJD* 20 (Deventer, 2004); and Günter Reiner, *Der verbraucherschützende Widerruf im Recht der Willenserklärungen*, 203 *ARCHIV FÜR DIE CIVILISTISCHE PRAXIS* 1, 9 ff. (2003).

20. *Id.*

acquire the information it needs by (e.g., in case of distance contracts) inspecting the product after delivery. Both motives fit in with the traditional goal of protecting the consumer against a party that is economically superior and better informed. This raises the question of the extent to which withdrawal rights are indeed effective in fulfilling this function. Before this question is discussed, however, we will first look at contract practice on the right to return goods.

III. NON-STATUTORY RIGHTS OF WITHDRAWAL: CONTRACT PRACTICE ON THE RIGHT TO RETURN GOODS

Apart from the statutory rights discussed in the previous section, there is a widespread practice that customers can return goods. Many retail shops throughout the world have adopted the policy that customers can do so at will and receive back the contract price or at least a credit note with which they can buy a different product in the same shop. This return policy is often laid down in the general conditions of the retailer. These contractual rights are even so common that the general public in some countries seems to think that there is a “general right to return goods.”²¹ However, surprisingly little empirical material exists to test how widespread these return policies really are. Therefore, part of this paper is a very modest survey of these return policies as can be discerned from the general conditions employed by shops. Although the data are not representative for the entire retail practice, they do give a fair impression of existing return policies.²²

My survey is based on the general conditions of thirty-two shops that consumers visit regularly: supermarkets, department stores, pharmacies and sellers of clothing, furniture, electric appliances, toys and books. The survey is primarily based on the general conditions that these companies use in the Netherlands, but these conditions are compared with those of shops in some other countries (notably Belgium, Germany, the United Kingdom and the United States). I am aware of the fact that in order to be representative for the whole of Europe and the United States, this survey needs to be extended, but my only purpose here is to have a fair impression of international retail practices. I distinguish between general conditions for online sales and for “normal” sales.²³

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

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

23. The materials on which the findings are based are available from the author.

For online sales, most Dutch companies make use of the model general conditions that were drafted through the cooperative efforts of the professional organisation of retailers in the Netherlands and the most important Dutch consumer association.²⁴ These conditions are highly influenced by European directive 97/7 on distance contracts. Although the directive prescribes a minimum cooling-off period of seven working days, the model conditions allow consumers to withdraw from the contract within fourteen days. The majority of Dutch shops have adopted this model, although about half of the shops I looked at have extended this period even further to thirty days. This practice does not seem to differ from other European countries, but it seems less lenient than the policy of at least some retail shops in the United States: there, it is no exception that the return period is 180 days (despite the fact that, in most States, no statutory withdrawal rights exist for online contracts).

The survey also confirms the perception that withdrawal rights exist on a large scale in case of regular sales in shops. Only one shop in the sample of thirty-two did *not* allow the consumer to return the goods and either receive reimbursement of the contract price or a credit note.²⁵ But differences do exist as to the length of the cooling-off period: most shops allow fourteen days, followed by a significant number of shops that allow their customers to return goods within thirty days or (in the case of an internationally active seller of furniture) even ninety days. Four shops use a period of eight days, and one big Dutch supermarket even allows a right to return goods without specifying any time limit. Again, this practice does not seem to differ too much from practices in Belgium and Germany, whereas in the United States the period appears to be longer for contracts with large retailers (in which case periods of ninety or even 180 days are not exceptional).

The abundant granting of withdrawal rights to consumers in general conditions, even if there is no statutory need to do so (either because there is no statutory right at all or because such a right is for a shorter time period), raises the interesting question of how the introduction of mandatory law in this field influences the voluntary behaviour of business in allowing consumers to return goods. This is part of the more general question of just how effective mandatory withdrawal rights

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

25. In this case, the shop gave as a reason why no such right exists—that it concerns an "outlet" (note that other outlet stores were part of the survey, but still allowed products to be returned).

actually are. The next section will consider the usefulness of withdrawal rights against the purposes these rights intend to fulfil.

IV. THE EFFECTIVENESS OF STATUTORY WITHDRAWAL RIGHTS: ON CROWDING OUT EFFECTS

It was seen above that withdrawal rights have the function of remedying a lack of psychological or informational strength on the part of the consumer. It is not difficult to see that this function will not always be satisfied in all of the applications mentioned in section II. It is intuitive that the length and further design of the cooling-off period decide whether the granting of the withdrawal right will be successful.²⁶ Thus, it is well established that a mandatory information duty on the part of the professional party combined with a withdrawal period may simply be too much: this cannot only drive suppliers of goods out of the market; the extra effect of a withdrawal right *next* to extensive duties to give information does not add much to help the consumer make up her mind because of the risk of an information overload. In case of financial services (like insurance products or credit agreements), a cooling-off period will not help because the possible consequences of such products will often only become clear after a long time. In other cases (such as the three days' cooling-off period for the purchase of a house in Dutch law), it is often difficult to see how, within such a brief period, any extra information could be gathered that was not already available before the purchase. And even regarding distance contracts, concerns have been expressed about how effective withdrawal rights actually are. It may be true that they allow the consumer to inspect the product and decide whether he really wants to purchase it. But this motive does in itself not justify making the right mandatory. Gerhard Wagner rightly says that there is no potential flaw in the rational self-determination of the consumer and that therefore a waiver of the right to withdraw should be possible: "a consumer may rationally decide to waive the right of withdrawal in exchange for a better price."²⁷ This leaves door-to-door contracts as the main field in which withdrawal periods are legitimate because such periods can remedy a lack of self-determination of the consumer. However, here too we should acknowledge that the effectiveness of these rights depends on the presumptions that consumers are rational beings, are driven by self-interest and are willing to act upon

26. Cf. e.g. HANS-W. MICKLITZ, NORBERT REICH & PETER ROTT, UNDERSTANDING EU CONSUMER LAW 198 (2009); cf. also Rekaiti & Van den Bergh, *supra* note 17, at 380.

27. Gerhard Wagner, *Mandatory Contract Law: Functions and Principles in Light of the Proposal for a Directive on Consumer Rights*, 3 ERASMUS L. REV. 47, 59 (2010).

it to trigger their rights.²⁸ All of these are presumptions that have been criticised in various behavioural studies. In effect, this type of protection is not primarily used by those who need it the most (because they are not in a position to exercise their rights), but mostly by consumers who do not need the protection anyway.

Although it is questionable whether legislators are always aware of these problems, a more fundamental question is whether the granting of (mandatory) withdrawal rights is a good thing at all. We saw in section 3 that many retailers grant withdrawal rights voluntarily, even in cases where no legal obligation exists to do so. These contractual rights cannot be motivated by the reasons underlying the existence of statutory rights: if consumers buy a product in a shop, they are not considered to be taken by surprise or to lack information about the product. It is therefore likely that there is another reason why retailers grant these rights: they do so to create trust with their customers. Next to giving warranties and engaging in advertising or labelling schemes, allowing a customer to return the product can help to create trust in a particular seller²⁹ and to increase the number of transactions. Consumers are more willing to buy products that they can return.³⁰

The contractual practice of granting withdrawal rights in the absence of a legal duty to do so therefore casts doubt on the motivation of retailers to allow consumers to withdraw from contracts. Accordingly the usefulness of mandatory legislation in this area must be questioned. Apparently, the imposition of mandatory withdrawal rights is based on the assumption that behaviour of parties is driven by self-interest and that the granting of a withdrawal right is not in line with such self-interest. But the correctness of this view is doubtful: if creating trust and attracting customers are indeed the motivating factors for a party to grant a withdrawal right, then this trust-building process would be undermined if legislators were to impose statutory withdrawal rights. It will be shown in the following section of this paper that this “crowding out” effect is indeed likely to occur.

The starting point is the importance of social norms, which control behaviour in spite of legislation.³¹ It is widely accepted that these social

28. On the rationality of the average consumer, *see* Case C-210/96, Gut Springenheide and Tusky, 1998 E.C.J. cited in many other cases. On this presumption *see* further e.g. Jacob Jacoby, *Is it rational to assume consumer rationality? Some Consumer Perspectives on Rational Choice Theory*, 6 ROGER WILLIAMS U. L. REV. 81 (2000).

29. *See* Rekaiti & Van den Bergh, *supra* note 17, at 380. The authors also point out that through withdrawal rights retailers get a better picture of how satisfied customers are with their products.

30. Wagner, *supra* note 27, at 59.

31. *See generally* ERIC A. POSNER, LAW AND SOCIAL NORMS (Harvard 2000).

norms are influenced by considerations of reciprocity (or even of fairness in general).³² Behavioural studies clearly show that behaviour of people and of organisations is therefore not necessarily motivated by self-interest. This altruistic behaviour can be influenced in a negative way by regulation: the intrinsic, “other-regarding” motivation of people is then replaced by extrinsic motivation, leading to opportunistic behaviour. This is a well known phenomenon of which many examples exist. Titmuss showed in a famous study that the voluntary system of blood donation in the United Kingdom led to a larger supply of high quality blood than the remunerated system in the United States: paying for blood did not lead to an efficient increase in the number of donors.³³ Another example concerned an experiment conducted in day-care centres in Israel: the introduction of a fine for parents that were late in picking up their children led to a doubling of the number of latecomers.³⁴ This “motivational crowding out”³⁵ can be easily explained: in the absence of a “formal” reward or sanction, a person can show its intrinsic motivation to help others or to “do the right thing.” As soon as a monetary reward or a fine is introduced, others will perceive the beneficial behaviour as *not* being motivated by altruism, leading to a decrease in the willingness to act in this way. In the day-care experiment, parents simply perceived the fine as the price to be paid for coming late and therefore as much less of a disincentive for coming late than the feeling of acting in the wrong way.

These two examples show that the introduction of an explicit policy or incentive can undermine moral and altruistic behaviour. In other words, pre-existing values to act in a socially beneficial way can be compromised.³⁶ Creating mandatory withdrawal rights can have the same effect. A survey by Borges and Irlenbusch³⁷ investigated whether

32. Cf. e.g. Vittorio Pelligra, *Trust, Reciprocity and Institutional Design: Lessons From Behavioural Economics*, 37-2006 AICCON WORKING PAPERS, available at http://ideas.repec.org/p/ris/aiccon/2006_037.html. Vittorio Pelligra, *Trust, Reciprocity and Institutional Design*, AICCON Working Papers 37-2006, available at http://ideas.repec.org/p/ris/aiccon/2006_037.html (last modified Jan. 31, 2011).

33. RICHARD TITMUSS, *THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* (Random House 1971).

34. Uri Gneezy & Aldo Rustichini, *A Fine is a Price*, 29 J. LEGAL STUD. 1 (2000).

35. See BRUNO S. FREY, *NOT JUST FOR THE MONEY: AN ECONOMIC THEORY OF PERSONAL MOTIVATION* (Edward Elgar 1997).

36. See Kenneth J. Arrow, *Gifts and Exchanges*, 1 PHIL. & PUB AFFAIRS 343 (1972), and Samuel Bowles & Sandra Polania Reyes, *Economic Incentives and Social Preferences: A Preference-based Lucas Critique of Public Policy*, 2734 CESifo Working Paper 3, 3 (2009), available at http://ideas.repec.org/p/ces/ceswps/_2734.html, which points out that there may even be a neurological basis for the counterproductive effects of explicit incentives.

37. Georg Borges & Bernd Irlenbusch, *Fairness Crowded Out by Law: An Experimental Study on Withdrawal Rights*, 163 J. INST. & THEORETICAL ECON. 84 (2007).

the provision of rights to protect one party reduces considerations of fairness in the other party. They explain that between 1998 (one year after the directive on distance selling was published) and 2004, the return quota in Germany increased from 24% to 35%. They convincingly relate this increase in the use of withdrawal rights to the crowding out of reciprocity.³⁸

one should expect that there is a considerable difference in withdrawal behaviour depending on whether they are voluntarily granted by sellers or whether they are imposed by law. If the seller voluntarily offers a withdrawal right to the buyers this might be perceived by them as a generous act and they might feel inclined to reciprocate by not exploiting the seller too much. On the other hand a withdrawal right imposed by law would provide the buyers with an entitlement to exert this right. Additionally, it would deprive the seller of showing “friendly” intentions and thereby buyers might not see the need to be considerate of the seller.

Their survey substantiates that this is indeed the case: “return behaviour” is influenced by how buyers perceive a seller’s behaviour (as voluntary or as a consequence of applying mandatory rules). This effect is likely to become more important if it is true what some say about the consumer of the future, who would be even less self-interested: she will still want what is best for herself, but not at the cost of others.³⁹

Further evidence for this phenomenon can be found in the general conditions of retailers discussed in section III. Even in areas where mandatory withdrawal rights exist, retailers usually allow their customers to withdraw from the contract for a longer period than necessary. The most plausible reason why they do so is to attract customers, and the only way to do this is to *go further* than the statutory rule prescribes.

The remaining question is what this all means for the design of withdrawal rights. The above does not mean that mandatory withdrawal right should be abolished all together, but it should make us think about the ideal “governance system” of these rights. Such a system should not only try to tackle the problems identified in the beginning of section 4. It should also take into account the importance of reciprocal behaviour and of creating trust between seller and consumer. The ideal governance system of withdrawal rights should also offer a solution for the crowding out of reciprocity by mandatory rules, while trying to avoid conflicts between intrinsic and extrinsic motivations of parties. It should also specify when withdrawal rights should be mandatory or optional and at

38. *Id.* at 94.

39. *See e.g.* ALAN FAIRNINGTON, *THE AGE OF SELFISH ALTRUISM: WHY NEW VALUES ARE KILLING CONSUMERISM* (Wiley 2010).

which level of regulation (at the level of countries/states or at the European/federal level) they should be granted. Although it seems nigh impossible to design a system that would meet all these requirements, the next section does attempt to provide the contours of such a system.

V. TOWARDS AN OPTIMAL DESIGN FOR WITHDRAWAL RIGHTS: ON CHOICE ARCHITECTURE

It was seen above that withdrawal rights are particularly well founded where a party cannot exercise its autonomy as a result of pressure put on that party. The clear example of this is doorstep selling, where the traditional instruments of mistake, undue influence and the general unconscionability or good faith doctrine are not optimal. It is then better to standardise the likelihood that the consumer felt pressured by allowing her to withdraw from the contract. This is different in the case of distance contracts, where there is no need to give a mandatory rule allowing the consumer to rethink its decision to enter into the contract.⁴⁰ Here, the traditional instruments of private law can do the trick much better. An extra argument in favour of this view is that a mandatory withdrawal right may lead to a crowding out effect: individual retailers will no longer be able to show their willingness towards consumers to give them an extra right, thus seducing them to purchase their products.

These findings still leave open the question of what geographical scope should be implemented for withdrawal rights for doorstep selling. Both in the European and United States contexts, the choice is between regulation at the European federal or Member State level for Europe and at the federal or state level for the United States. Although we lack hard and firm criteria to decide which level is best,⁴¹ it seems the right approach of both the United States FTC rule and the European Directive on doorstep selling is to choose the European/United States federal level. This choice is motivated by the great importance of protecting consumers on the federal or European market in case of the invasion of privacy that comes with doorstep selling. In line with Ayres and Braithwaite's model of "dynamic regulatory institutions,"⁴² it makes sense to safeguard intrinsic motivation at a lower level by creating only informal sanctions (and thus enhance dialogue and trust) while allowing formal sanctions for major violations.

40. Wagner, *supra* note 27, at 58.

41. Cf. however Karl Kreuzer, *Vom Internationalen zum Transnationalen Privatrecht: Versuch einer rechtspolitischen Theorie zur Regelung transnationaler privatrechtlicher Sachverhalte*, FESTGABE ZIVILRECHTSLEHRER 1934/35 289 (1999).

42. IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION* (Oxford 1992).

But this is not all. In addition to the optimal *legal* design of withdrawal rights, it is useful to think about how to give parties incentives to make the right choice in the first place (instead of remedying the wrong decision afterwards). This is what so-called choice architecture deals with: the way in which choices are presented influences the way in which decisions are made. Can we think of tools that nudge people to make a better choice when they purchase a product in their own home?⁴³ It was argued above that in doorstep selling the main problem lies in the consumer's being pressured to enter into the contract, just to get rid of the salesperson invading her privacy. One possible solution to this problem would be to design the contracting process in such a way that door-to-door sellers are obliged to sell their products in two stages. In the first stage, they would be allowed to visit potential customers and show the products they want to sell. A contract entered into in this stage of the contracting process would not be valid. Only in a second stage (after the seller left the house) could a valid contract be concluded, by making a telephone call, sending in a form or ordering the product on a website. This would of course require that the customer know about these protective rules, but this is a matter of informing her. In distance contracts, we can think of similar mechanisms to overcome the problem of consumers lacking information about the product.⁴⁴ Legislators thus performing the role of choice architects can help in finding the optimal design for withdrawal rights.

43. RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH AND HAPPINESS* (Yale 2008).

44. See also Eidenmüller, *supra* note 17, at 97.