DEVELOPMENTS

Harmonising Different Rights of Withdrawal: Can German Law Serve as an Example for EC Consumer Law?

By Prof. Dr. Peter Rott[*]

A. Introduction

Harmonisation of the different rights of withdrawal, enshrined in legislation on doorstep selling, distance selling, timesharing, and in the near future consumer credit, is amongst the top issues of the EC agenda on European private law.[1] Germany, following its tradition of a well-organised system of private law rules, has tried for some time to establish a harmonised system at the national level. At the same time, Germany appears to have created one of the most detailed set of rules on the right of withdrawal in Europe, in particular with a view to the consequences of the withdrawal from a contract, and it has tried to find the right balance between the interests of consumers and traders, a challenge that will also come up at EC level.

This article traces the process of harmonisation and points out the difficulties that have arisen. Some of them are of course related to the disharmonious requirements from the various EC Directives that had to be implemented. However, it will be demonstrated that this is not true for all of the difficulties.
This article briefly outlines the historical development of the right of withdrawal in Germany and the implications of this development (**B.**) and then analyses its basic concepts, in particular in comparison with other rights the exercise of which has similar effects (**C.**). Special attention is given to the legal consequences of the exercise of the right of withdrawal and their compatibility with the relevant EC Directives (**D.**). Finally, this article discusses the right of withdrawal with a view to linked contracts (**E.**).

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[1] *See only* the EC Commission's Communication A More Coherent European Contract Law – An Action Plan, COM(2003) 68 final, at 8.

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B. The harmonisation process in Germany

I. The historical development[2]

A so-called right to withdrawal has always existed in § 130 BGB but this was in an entirely different context. It was merely concerned with the withdrawal of a declaration of will that had not been received by the addressee yet. Exercising the right of withdrawal, the sender of the declaration of will is able to avoid its becoming valid, thus, for example, preventing to make a binding offer to contract. This has, of course, nothing to do with the right of withdrawal that is subject to this article. Nevertheless, the mere fact that German contract law uses the same term for entirely different legal concepts may be seen as a disturbance caused by EC law.[3]

The EC consumer law type of a right of withdrawal was first introduced in 1969, 1970 and 1974 for the investment on the capital market[4] and for instalment sales under the *Abzahlungsgesetz*. (Instalment Act).[5] In the following years, new rights of withdrawal developed in the form of specific legislation, which was introduced in order to implement EC consumer law, namely in § 1 of the *Haustürwiderrufsgesetz*, *HausTWG* (Doorstep Selling Act) and in § 5 of the *Teilzeit-Wohnrechtegesetz, TzWrG* (Timesharing Act). However, the right of withdrawal was extended to some few other types of contract where EC law provided for no such requirement, in particular for distance learning contracts in § 4 of the *Fernunterrichtsgesetz, FernUSG* (Distance Learning Act), for insurance contracts in § 8 of the *Versicherungsvertragsgesetz, VVG* (Insurance Contract Act) and for consumer credit contracts in § 7 of the *Verbraucherkreditgesetz, VerbrKrG* (Consumer Credit Act).[6]

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[2] *See also* Caroline Meller-Hannich, *Vertragslösungsrechte des Verbrauchers aus dem BGB – Geschichte und Gegenwart*, JURISTISCHE AUSBILDUNG (JURA) 369, 371-373 (2003).

[3] *See* Joachim Gernhuber, *Verbraucherschutz durch Rechte zum Widerruf von Willenserklärungen*, WERTPAPIER-MITTEILUNGEN (WM) 1797 (1998).

[4] The two relevant Acts, the Auslandsinvestment-Gesetz and the Gesetz über Kapitalanlagegesellschaften, were merged in 2003 into the Investment Act (Investmentgesetz, InvG). See Carsten Nickel, *Der Vertrieb von Investmentanteilen nach dem Investmentgesetz*, ZEITSCHRIFT FÜR BANKRECHT UND BANKWIRTSCHAFT (ZBB) 197 (2004).

[5] *See* Günter Reiner, *Der verbraucherschützende Widerruf im Recht der Willenserklärungen*, 203 ARCHIV FÜR CIVILISTISCHE PRAXIS (ACP) 1, 3 (2003).

[6] This Act replaced the Instalment Act.

In the year 2000, a "critical mass" of such specific legislation was reached, and the legislator decided that central notions and concepts of the various rights of withdrawal should be harmonised, and that this should occur through provisions to be included into the BGB. Thus, with the implementation of the Distance Selling Directive 97/7/EC, a first step was made. In particular, the new §§ 361a and 361b BGB largely harmonised the legal nature of the right of withdrawal, the normal period of withdrawal, some rules on the information to be supplied by the trader, and the consequences of the withdrawal.[7]

This process was intensified when Germany prepared for the implementation of the Consumer Sales Law Directive 1999/44/EC. In the context of implementing this Directive, the German law of obligations was modernised. The opportunity was also taken to integrate fields of private law that had developed outside the BGB, in order to make the BGB a comprehensive codification of private law again.[8] Amongst others, specific consumer legislation was transferred into the BGB, and the Unfair Contract Terms Act, the Doorstep Selling Act, the Distance Selling Act, the Time-sharing Act and the Consumer Credit Act were repealed. In the course of this process, the partly harmonised rules dealing with the right of withdrawal - §§ 361a and 361b BGB of 2000 – were replaced by the new provisions of §§ 355 to 357 BGB.[9] Further amendments were made following the *Heininger* judgment of the ECJ, in June 2002,[10] and in the course of the implementation of Directive

[7] For details see, for example, Peter Bülow, *Widerruf und Anwendung der Vorschriften über den Rücktritt*, WERTPAPIER-MITTEILUNGEN (WM) 2361 (2000); Andreas Fuchs, *Das Fernabsatzgesetz im neuen System des Verbraucherschutzrechts*, ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (ZIP) 1273 (2000); Sudabeh Kamanabrou, *Die Umsetzung der Fernabsatzrichtlinie*, WERTPAPIER-MITTEILUNGEN (WM) 1417 (2000); Jürgen Schmidt-Räntsch, *Zum Gesetz über Fernabsatzverträge und andere Fragen des Verbraucherrechts sowie zur Umstellung von Vorschriften auf Euro*, VERBRAUCHER UND RECHT (VuR) 427 (2000); Klaus Tonner, Das *neue Fernabsatzgesetz – oder: System statt ‚Flickenteppich'*, BETRIEBS-BERATER (BB) 1413 (2000); Peter Rott, *Widerruf und Rückabwicklung nach der Umsetzung der Fernabsatzrichtlinie und dem Entwurf eines Schuldrechtsmodernisierungsgesetzes*, VERBRAUCHER UND RECHT (VuR) 78 (2001).

[8] *See*, for example, Jürgen Schmidt-Räntsch, *Der Entwurf eines Schuldrechtsmodernisierungsgesetzes*, ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (ZIP) 1639, 1643 (2000).

[9] For the bigger picture, *see* for example Reinhard Zimmermann, THE NEW GERMAN LAW OF OBLIGATIONS (2005).

[10] For an overview, *see* Klaus Tonner, *Probleme des novellierten Widerrufsrechts: Nachbelehrung, verbundene Geschäfte, Übergangsvorschriften*, ZEITSCHRIFT FÜR BANK- UND KAPITALMARKTRECHT (BKR) 856 (2002).

2002/65/EC on the distance marketing of financial services.[11] The changes made will be dealt with in the following chapters.

II. Implications of the harmonisation approach

The approach of creating a largely harmonised regime for the various rights of withdrawal that stem from EC consumer law Directives has far-reaching implications on the relevant provisions and their interpretation. Obviously, a regime that implements the rights of withdrawal of the Doorstep Selling Directive 85/577/EEC, the Time-sharing Directive 94/47/EC, the Distance Selling Directive 97/7/EC and the Directive 2002/65/EC on the distance marketing of financial services has to satisfy the minimum requirements of all these Directives, or include exceptional rules that only apply to specific consumer contracts or situations. Furthermore, such a harmonised regime is bound to the limitations of Directive 2002/65/EC which is, apart from some options left to the Member States, a total harmonisation instrument that disallows more stringent consumer legislation.[12] Thus, the harmonised provisions have to be drafted and interpreted in such a way that all these requirements are met, which is not an easy task as will be demonstrated repeatedly throughout this article.

C. The basic concepts

I. The legitimacy of the right of withdrawal

Of course, Germany had no choice but to introduce the right of withdrawal where EC consumer law required the Member States to do so. Nevertheless, the substantive legitimacy of such a right was doubted by some authors.[13] It is fairly obvious and shall therefore only be touched upon briefly that the various rights of withdrawal enshrined in EC and national legislation serve a variety of purposes and may be of different use in this respect. They have, however, in common that they react to circumstances in which there is a danger that the consumer is not able to

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[11] For an overview, *see* Peter Rott, *Die Umsetzung der Richtlinie über den Fernabsatz von Finanzdienstleistungen im deutschen Recht*, BETRIEBS-BERATER (BB) 53 (2005). The rules on insurance contracts of Directive 2002/65/EC were implemented separately by amending the Insurance Conrtracts Act, *see* Christian Schneider, *Umsetzung der Fernabsatzrichtlinie 2002/65/EC im VVG*, VERSICHERUNGSRECHT (VERSR) 696 (2004); Rott, *ibid*., at 61-63.

[12] *See* recital (13) of Directive 2002/65/EC.

[13] For criticism *see*, for example, Gernhuber, *supra*, note 3, at 1797.

come to a substantially free decision.[14] For example, it seems to make sense to allow the consumer to withdraw from a contract which he or she concluded after having been surprised by a trader at the doorstep. This may even be a practical way of getting rid of a trader who insists on selling goods. The right of withdrawal is also useful where it was impossible for the consumer to see the goods in question before purchasing them, which is the situation of distance selling. In contrast, it has been doubted that the right of withdrawal is of practical use where contracts are highly complicated, which is the case of timesharing agreements or of consumer credit contracts – unless there is a hidden logic that even such complicated contracts are frequently concluded in a rush, or in a holiday mood, and that the consumer may understand their substance if he takes his time to digest the content of the contract.[15]

In practice, it seems that contracts concluded outside business premises are occasionally and distance selling contracts are fairly often withdrawn from,[16] whilst this is not the case with credit contracts. For the latter, other instruments might prove more useful, in particular such instruments that allow the consumer to adjust the contract, or to terminate the contract, when problems occur during the potentially long duration of the contract.

Moreover, one has to note that the right of withdrawal has substituted more stringent solutions, in particular total prohibitions, seemingly providing a more sophisticated solution that is more adequate for a reasonable consumer. For example, Germany has repealed the old prohibition to conclude credit contracts at the doorstep when it introduced the right of withdrawal in the Doorstep Selling Act. The events that have taken place since and that have led to the cases of *Heininger*, *Schulte* and *Crailsheimer Volksbank* have raised doubts that this was a prudent decision.[17]

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[14] *See* Reiner, *supra*, note 5, at 9-10.

[15] Some authors argue therefore in favour of a longer period of withdrawal for timesharing contracts in order to ensure that the consumer can make a free and informed decision back home. *See*, for example, Andrea Ehrhardt-Rauch, *Der Teilzeit-Wohnrechtevertrag*, VERBRAUCHER UND RECHT (VuR) 117, 119-120 (2002).

[16] In fact, I have myself made use of this possibility and ordered different types of children's bikes that were only available on the internet but not in local bicycle shops, finally withdrawing from all of the contracts after testing the bicycles.

[17] *See*, for example, Udo Reifner, *Anmerkung*, VERBRAUCHER UND RECHT (VuR) 263, 264 (2005).

II. The nature of the right to withdrawal

The right to withdrawal is a unilateral consumer right. The first decision to be made concerns its influence on the validity of a contract. When the right to withdrawal was first introduced in doorstep selling law, the *Bundesgerichtshof, BGH* (German Federal Court of Justice) held that contracts concluded at the doorstep were not fully valid until the right of withdrawal had expired. Until that moment, the validity of contracts would be pending ("*schwebend unwirksam*"),[18] a concept that is used in German law for contracts concluded by minors, or by agents that are not entitled to act. This concept of postponed validity had some legal consequences. In principle, a consumer who bought goods at the doorstep was only entitled to performance once the contract was fully valid, and so was the trader with a view to payment. This was perceived to be a problem, at least by some authors, who accordingly argued that the consumer should be allowed to refrain from his right to withdrawal in order to be able to claim immediate performance of the contract;[19] an opinion that was clearly ignoring EC law requirements.

Certainly, the concept of pending validity could not be reconciled with the Distance Selling Directive 97/7/EC.[20] It was therefore given up for all the different rights of withdrawal when this Directive was implemented and a first round of harmonisation took place.[21] Nowadays, contracts that are subject to a right to withdrawal are fully valid from the beginning but they can be invalidated by the consumer by exercising his right to withdrawal. Therefore, both parties can now claim performance immediately after the conclusion of the contract, unless they agree otherwise. No prohibition on the trader to perform the contract, or to claim payment, was introduced into German law, although consumer lawyers have occasionally called for such a provision,[22] following the model of French law. The only exception is made

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[18] *See* BGH, NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 57 (1996).

[19] *See* Andreas Fuchs, *Zur Disponibilität gesetzlicher Widerrufsrechte im Privatrecht*, 196 ARCHIV FÜR CIVILISTISCHE PRAXIS (AcP) 313, 352-359 (1996); Gerd Krämer, *Der Verzicht auf das verbraucherschützende Widerrufsrecht und die Rückbeziehung auf vertragliche Pflichten*, ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (ZIP) 93, 95-98 (1997). In practice, this had never caused any problem, see Klaus Tonner, *§ 355*, *in* VERTRIEBSRECHT margin note 20 (HANS-W. MICKLITZ, KLAUS TONNER eds, 2002).

[20] *See* Hans-W. Micklitz & Norbert Reich, *Umsetzung der EG-Fernabsatzrichtlinie*, BETRIEBS-BERATER (BB) 2093 (1999).

[21] *See* Katharina von Koppenfels, *Das Widerrufsrecht bei Verbraucherverträgen im BGB – eine Untersuchung des § 355 Abs 1 BGB-RegE*, WERTPAPIER-MITTEILUNGEN (WM) 1360 (2001).

[22] *See*, for example, Rott, *supra*, note 7, at 87.

in § 486 BGB on time-sharing contracts since Article 7 of Directive 94/47/EC requires such an exception to be made. This is one of the rules where the legislator refrained from totally harmonising the right to withdrawal.

A further, somewhat surprising consequence of the mentioned change of concept arose in civil procedural law, or more precisely in the law of execution, where it was of practical importance. Consider the situation again where the consumer was not informed of his right to withdrawal so that this right does not expire. Nevertheless, he has received the goods, and the trader takes him to court and obtains a payment order. After the judgment has ceased to be appealable, the consumer learns about his right of withdrawal and withdraws from the contract. Can he still prevent the execution of the judgment? Under § 767 par. 2 of the *Zivilprozessordnung; ZPO* (Civil Procedural Code), one can oppose the execution of a judgment on grounds that have come into being after the last hearing in court. With a view to the old concept of pending validity, the *Bundesgerichtshof* had argued--against the majority opinion of academics[23]--that no new grounds had come into being since the contract had never been fully valid.[24] This line of case-law, which is difficult to reconcile with relevant EC consumer law Directives,[25] cannot be upheld any longer after the shift towards the concept of a fully binding contract that can be avoided by exercising the right of withdrawal. Under this new concept, "new grounds" would be present, and execution of a judgment could be opposed under § 767 par. 2 ZPO.[26]

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[23] *See* Stefan Lorenz, *Schwebende Unwirksamkeit und Präklusion im Zwangsvollstreckungsrecht*, NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 2258, 2261 (1995); Peter Gottwald & Barbara Honold, *Ausübung des Widerrufs nach HTürGG § 1 Abs 1 nach Verurteilung zur Zahlung als neue Tatsache im Sinne des ZPO § 767 Abs 2*, JURISTENZEITUNG (JZ) 577 (1996); Burkard Boemke, *Das Widerrufsrecht im allgemeinen Verbraucherschutzrecht und seine Ausübung in der Zwangsvollstreckung*, 197 ARCHIV FÜR CIVILISTISCHE PRAXIS (AcP) 161, 178 (1997); Johannes Christian Wichard, *Verbraucherschützende Widerrufsrechte und Vollstreckungsgegenklage - BGH, NJW 1996, 57*, JURISTISCHE SCHULUNG (JuS) 112, 116 (1998).

[24] BGH, NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 57 (1996).

[25] *See* Bettina Heiderhoff, *Einflüsse des europäischen Privatrechts zum Schutz des Verbrauchers auf das deutsche Zivilprozessrecht*, ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT (ZEuP) 276, 285-287 (2001).

[26] *See* Karsten Schmidt, *Verbraucherschützende Widerrufsrechte als Grundlage der Vollstreckungsgegenklage nach neuem Recht - Zur Bedeutung des neuen § 361a BGB für den prozessualen Rechtsschutz des Schuldners*, JURISTISCHE SCHULUNG (JuS) 1096 (2000).

III. Formal requirements

The first EC Directives have not included formal requirements for exercising the right to withdrawal and have left it for the Member States to decide.[27] Under the specific German consumer protection acts, the consumer had to notify the trader in writing. With the implementation of the Distance Selling Directive 97/7/EC and the first harmonisation wave, the legislator allowed the consumer to exercise his right to withdrawal in the so-called textual form ("*Textform*") of § 126a BGB, which includes the use of electronic mail, or by simply returning the goods delivered to him.

IV. The regular period of withdrawal

The relevant EC Directives all provided for different periods for the right of withdrawal, and so did the various German consumer protection acts. This, however, was regarded as highly unsatisfactory by German academics, and the legislator decided in 2000 to harmonise the different periods. As Directive 2002/65/EC on the distance marketing of financial services war already forthcoming at the time, the common denominator was two weeks, to which all the other shorter periods were extended. This is still the rule enshrined in § 355 par. 2 s. 2 BGB.

V. Information on the right of withdrawal

As the ECJ clarified in the *Heininger* case, the right of withdrawal can only be exercised if the consumer is aware of it. Therefore, all the relevant EC Directives and purely national legislation in this field require the trader to inform the consumer of this right. However, the legal consequences of the trader's breach of his obligation to inform the consumer of his right to withdrawal varied from one area of law to the other. Originally, Germany had implemented these different rules in the specific consumer protection acts. Thus, for distance selling contracts and for time-sharing agreements, an extension by three months applied, whereas the period in question was one year for consumer contracts. In doorstep selling law, the right of withdrawal expired one month after both parties had completed their performance. Due to much criticism of this inconsistency, the German legislator also harmonised the extended periods of withdrawal, even though the EC Directives did not make this necessary.

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[27] *See*, in particular, ECJ, judgment of 22 April 1999, Case C-423/97 *Travel Vac SL v. Manuel José Antelm Sanchis*, [1999] ECR I-2195.

The new extended period introduced with the Act on the Modernisation of the Law of Obligations was six months; a compromise that was criticised by some for its missing material logic.[28] However, it was already obvious at the time that this new legislation would not last since A.G. Léger had already delivered his opinion in the *Heininger* case,[29] and even the ECJ made its judgment before the new German law came into effect. Therefore, the rules were changed again in June 2002, increasing the extended period for all consumer contracts to the new minimum set by the Doorstep Selling Directive as interpreted by the ECJ. Since then, the rule has been that if the consumer has not been adequately informed of his right to withdrawal, the latter does not expire at all, § 355 par. 3 s. 3 BGB.[30] If other information than the notice on the right to withdrawal is missing, for example specific information required by distance selling law, the right of withdrawal usually expires after six months, § 355 par. 3 s. 1 BGB.[31] An exception is again made for the distance marketing of financial services where Art. Directive 2002/65/EC prevents the expiry of the period of withdrawal if *any* information required is missing.[32]

It was then of course necessary to allow the trader to make good for his failure. In this case, the period of withdrawal is one month, beginning on the day on which the consumer is supplied with the relevant information, § 355 par. 2 s. 2 BGB.[33]

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[28] *See*, for example, Peter Mankowski, *Zur Neuregelung der Widerrufsfrist bei Fehlen einer Belehrung im Verbraucherschutzrecht*, JURISTENZEITUNG (JZ) 745, 748-751 (2001).

[29] *See* Peter Rott, *Widerrufsrechte ernst genommen – eine Botschaft zur rechten Zeit*, VERBRAUCHER UND RECHT (VuR) 389 (2001).

[30] For critical comments, see Mathias Habersack & Christian Mayer, *Der Widerruf von Haustürgeschäften nach der 'Heininger'-Entscheidung des EuGH*, WERTPAPIER-MITTEILUNGEN (WM) 253, 258-259 (2002), who have regarded this as excessive protection of consumers.

[31] For critical comments on the confusion caused, see Sven Timmerbeil, *Der neue § 355 III BGB – ein Schnellschuss des Gesetzgebers?*, NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 569 (2003).

[32] *See* Rott, *supra*, note 11, at 60.

[33] Some authors argue that this extended period of one month is in breach of Directive 2002/65/EC, which does not provide for such an extension and disallows more stringent national consumer protection measures than those provided for by the Directive. *See* Tilman Finke, DER FERNABSATZ VON FINANZDIENSTLEISTUNGEN AN VERBRAUCHER 186 (2004); Frank Domke, *Fernabsatz von Finanzdienstleistungen: Die Länge der Widerrufsfrist bei nach Vertragsabschluss erfolgter Widerrufsbelehrung*, BETRIEBS-BERATER (BB) 61 (2006).

Until June 2002, the law also required the consumer to sign the information to make sure that he has really seen it and understood its importance. This requirement was abolished when the *Heininger* judgment was implemented.[34]

VI. Details

Details on the supply of information to the consumer are regulated in § 355 par. 2 BGB. The period of withdrawal only begins once the consumer is supplied the relevant information in a clear manner that explains his rights plainly. The term "rights" means that the information supplied must not only include the existence of the right of withdrawal but also the numerous and complex consequences of the withdrawal.[35] This latter requirement is of course a source of mistakes, in particular, where authoritative interpretation by the courts on the consequences of the withdrawal is not yet available.[36] If a trader gives notice of a right of withdrawal that actually is not provided for by the law, the question arises whether this can be seen as a contractual offer to the consumer. BGH case-law is not available yet but the OLG Munich has denied such an offer, arguing that information on a non-existing right of withdrawal was legally irrelevant.[37]

The notice must be given in textual form,[38] and it must include the name and address of the person who shall be notified of the withdrawal. Finally, the notice must

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[34] For critical comments, *see* Markus Artz, *Die Neuregelung des Widerrufsrechts bei Verbraucherverträgen*, ZEITSCHRIFT FÜR BANK- UND KAPITALMARKTRECHT (BKR) 603, 607 (2002); Nikolaj Fischer, *Die Reform der Schuldrechtsreform*, VERBRAUCHER UND RECHT (VuR) 309, 312 (2002); Peter Rott, *§ 355*, *in* DAS NEUE SCHULDRECHT margin note 19 (WOLFHARD KOHTE, HANS-W. MICKLITZ, PETER ROTT, KLAUS TONNER, ARMIN WILLINGMANN eds. 2003).

[35] *See infra*, at D.

[36] A typical case is BGH, ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (ZIP) 1157 (2004), where the BGH surprisingly held that in the case of a purchase of approval the period of withdrawal only begins to run after the time agreed for the approval. Since the notice on the right of withdrawal given by the trader did not reflect this, the extended (respectively: unlimited) period of § 355 par. 3 s. 3 BGB applied.

[37] OLG Munich, WERTPAPIER-MITTEILUNGEN (WM) 1324 (2003).

[38] Availability on internet does not meet this requirement, see BUNDESTAGS-DRUCKSACHE (BT-DRS.) 14/7052, 195; LG Kleve, NEUE JURISTISCHE WOCHENSCHRIFT – RECHTSPRECHUNGSREPORT (NJW-RR) 196 (2003); Peter Mankowski, *Website als dauerhafter Datenträger*, COMPUTER UND RECHT (CR) 404 (2001); Niko Härting, *Der dauerhafte Datenträger*, KOMMUNIKATION UND RECHT (K&R) 310 (2001).

point out the day on which the period begins to run and the correct procedure for notifying the trader of withdrawal.[39]

The German courts have been very strict in enforcing clear information, with a view to the design of the information as much as with a view to its content.[40] One example for the required design is a decision by the BGH of 1996. The BGH held that it was necessary to design the information in such a way that the consumer cannot ignore it. This implies that the information is particularly highlighted and distinguished from the rest of the text. In this case, the information on the right of withdrawal was separated from the rest of the text by a line. However, other parts of the text were also separated in the same way. No bold or coloured print was used; in the contrary, the information was in smaller print then the rest of the text. This was regarded to be insufficient.[41] The OLG Frankfurt has even gone so far as to require an internet trader to ensure that an order can only be placed after the consumer has seen the information to be provided under § 355 par. 2 BGB.[42] This decision, however, was generally criticised[43] and should be regarded as exceptional.

Concerning the material clarity, or transparency, of the notice, one may point to a decision by the BGH of 2002. In this case, the trader had given the following notice: "The period of withdrawal begins to run once the contractual document is handed over but not before the consumer has made his contractual declaration."[44] The BGH argued that this type of notice implied that the period of withdrawal might run after the contractual document is handed over, which is not possible. He also stressed that the consumer may not be familiar with the legal term of making a contractual declaration.[45] Furthermore, the BGH held that the notice may not be

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[39] For details, *see* Rüdiger Martis & Alexander Meinhof, *Voraussetzungen des Widerrufs nach § 355 BGB*, MONATSSCHRIFT FÜR DEUTSCHES RECHT (MDR) 4, 7-8 (2004).

[40] For an overview, *see* Martis & Meinhof, *supra*, note 39, at 8-9.

[41] *See* BGH, NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 1964 (1996).

[42] OLG Frankfurt a.M., MULTIMEDIA UND RECHT (MMR) 529 (2001).

[43] *See only* Fuchs, *supra*, note 7, at 1277; Kamanabrou, *supra*, note 7, at 1422; Peter Mankowski, *Fernabsatzrecht: Information über das Widerrufsrecht und Widerrufsbelehrung bei Internetauftritten*, COMPUTER UND RECHT (CR) 767, 771-772 (2001).

[44] Translation by the author.

[45] BGH, ZEITSCHRIFT FÜR BANK- UND KAPITALMARKTRECHT (BKR) 872, 873-874 (2002).

given prior to the conclusion of the contract, since the consumer may forget about it until the contract is actually concluded.[46]

Given the strict requirements governing clarity of information, mistakes are easily made, and they have drastic consequences, as explained above. Therefore, the legislator thought about a mechanism that would reduce the trader's risk, and he introduced an optional model form, as an annex to the *Verordnung über Informations- und Nachweispflichten nach bürgerlichem Recht, BGB-InfoV* (Information Duties Regulation), the use of which satisfies the requirements of § 355 par. 2 BGB, according to § 14 BGB-InfoV. It must however be said that the model form has attracted heavy criticism. It is extremely complicated because it caters, with various options in the text and with currently ten sometimes lengthy footnotes, for all the various rights of withdrawal with their remaining differences. It also contains a few flaws that have still not been remedied.[47] Moreover, the wording is overly technical and fails to adequately explain to the consumer the costs he may incur or how they can be avoided;[48] which will become clearer after a look at the consequences of withdrawal as detailed below. Some authors even went so far to consider the model form void, arguing that it violated the superior law of the BGB.[49] Thus, it is still undecided to what extent the model form really is a useful instrument for traders.[50]

D. Consequences of the withdrawal

I. Introduction

As one would presume, the greatest problems have arisen regarding the consequences of withdrawal in such cases where the contract has already been per-

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[46] *Id.*, 874.

[47] For details, *see* Andreas Masuch, *Neufassung des Musters für Widerrufsbelehrungen*, BETRIEBS-BERATER (BB) 344 (2005).

[48] For more details, *see* Rott, *supra*, note 34, § 355 margin note 16; Claudius Marx & Swen Oliver Bäuml, *Die Information des Verbrauchers zum Widerrufsrecht im Fernabsatz – „klar und verständlich?"*, WETTBEWERB IN RECHT UND PRAXIS (WRP) 162, 166 (2004). See also Hans Christoph Grigoleit, *Besondere Vertriebsformen im BGB*, NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 1151, 1156 (2002); Frank Bodendiek, *Verbraucherschutz – Die neue Musterwiderrufsbelehrung*, MONATSSCHRIFT FÜR DEUTSCHES RECHT (MDR) 1, 3 (2003).

[49] *See* Andreas Masuch, *Musterhafte Widerrufsbelehrung des Bundesjustizministeriums?*, NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 2931, 2932 (2002).

[50] *See*, for example, Marx & Bäuml, *supra*, note 48, at 164.

formed, either in full or in part. This is even worse where the trader had failed to inform the consumer about his right to withdrawal and where the consumer has withdrawn from the contract after years. These potential consequences led to serious debate during the legislative process, not only for reasons of legal policy but also with a view to the compatibility of German law with relevant EC Directives, in particular with Article 6 (2) of the Distance Selling Directive 97/7/EC. According to this provision, the only charge that may be made to the consumer because of the exercise of his right of withdrawal is the direct cost of returning the goods.

Importantly, the right of withdrawal is itself not affected by the performance of the contract. Thus, the consumer can still withdraw from the contract once he has received the goods or service. The only exception is distance selling law where the relevant EC Directives have resulted in deviating rules.[51] These exceptions were codified, with slightly differing details stemming from the different wording of the Distance Selling Directives, in § 312d par. 3 BGB.

Through the change of concept as explained above, the right of withdrawal has been placed in closer proximity to the right of rescission ("*Rücktrittsrecht*")[52] that had always formed part of the German law of obligations. Both do not render the contract invalid but transform it into a relationship that aims primarily at the return of the goods, services or payment received.[53] Therefore, the right of withdrawal was also placed in close proximity to the right of rescission in the Code Civil. Both share one chapter on "rescission; right of withdrawal and right of return in consumer contracts". Technically, § 357 par. 1 s. 1 BGB (on the right of withdrawal) therefore refers to the law on rescission. Contractual penalties, damages or fees related to the exercise of the right of withdrawal are invalid. This is clear from § 357 par. 4 BGB that excludes other claims than those established in § 357 with §§ 346 ff. BGB that are outlined infra.[54]

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[51] *See infra*, **D.** *VIII.*

[52] *See*, for example, von Koppenfels, *supra* note 21, at 1368 f.; BGH, ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (ZIP) 1157, 1158 (2004). A minority of authors favour the doctrinal proximity with the right to avoidance in cases of mistake, fraud or duress of §§ 119 , 123 BGB; *see* Reiner, *supra* note 5, at 27-29.

[53] *See* Reinhard Gaier, *Das Rücktritts(folgen)recht nach dem Schuldrechtsmodernisierungsgesetz*, WERTPAPIER-MITTEILUNGEN (WM) 1, 3-4 (2002).

[54] This does not exclude the right to avoid the contract for other reasons, such as mistake, fraud, duress or non-conformity of goods or services with the contract. *See also* Reiner, *supra*, note 5, at 38-39.

II. Return of payment

Obviously, the trader has to return any payment made by the consumer, § 357 par. 1 s. 1 with § 346 par. 1 BGB. The trader may also be liable to pay interest on payment made by the consumer. The implementation of Article 7 (3) of the Distance Selling Directive 97/7/EC has brought some confusion into German law in this respect. The rules are now as follows: The consumer can claim interest if the trader is delayed with his performance, for example, after a reminder by the consumer. If the consumer does not remind the trader to return the payment, the trader will be liable for interest automatically after 30 days have expired. This period begins once the trader has received the consumer's withdrawal from the contract.[55]

Apart from this, the consumer may claim interest if the trader has worked with the payment made and has made profit out of it, § 346 par. 1 BGB. Finally, the trader may be liable for interest if he has not made profit but should have done so had he exercised the care he usually exercises in his own affairs (*diligentia quam in suis*), § 347 par. 1 s. 2 BGB. Thus, there is no automatic liability for interest that existed for the right of rescission prior to the 2002 reform.[56]

Special problems arise where the consumer has bought shares of a company at the doorstep, or by distance selling. Under the normal rules, the consumer could claim the amount paid for the shares. However, the BGH has ruled otherwise. This has to do with the difficulties that arise if the company has already been operational. In such cases, the courts have held for a long time that the protection of the creditors of the company prevails over the protection of shareholders even if their membership is flawed. Thus, they have replaced rights that have effect *ex tunc*, such as the right to avoidance in case of fraud of § 123 BGB, by the right to terminate the contract *ex nunc*. Consequently, the shareholder does not receive what he paid but what his share is worth at the time he terminates the contract, which may be significantly less. This type of case-law was then extended to the right of withdrawal.[57]

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[55] Flaws of the first implementation have been remedied when Directive 2002/65/EC was implemented, *see* Rott, *supra*, note 11, at 61.

[56] *See* Gaier, *supra*, note 53, at 5-6 (2002).

[57] *See* BGH, DER BETRIEB (DB) 1775 (2001); against earlier judgments such as BGH, BETRIEBS-BERATER (BB) 596 (1997); OLG Stuttgart, ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (ZIP) 322, 326 (2001); LG Bonn, MONATSSCHRIFT FÜR DEUTSCHES RECHT (MDR) 337 (1998). Most authors have approved, *see* Christoph Louven, *Widerruf des Beitritts zu einer Publikums-BGB-Gesellschaft,* BETRIEBS-BERATER (BB) 1807 (2001); Hervé Edelmann, *Die Haftung der Banken bei der Finanzierung von Fondsbeteiligungen im Bereich des HWiG,* DER BETRIEB (DB) 2434, 2436 (2001); Carsten Schäfer, *Anmerkung*, JURISTENZEITUNG (JZ) 249 (2002); Harm Peter Westermann, *Gesellschaftsbeitritt als Verbraucherkreditgeschäft?*, ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT

Considering that, under the *Heininger* judgment, the consumer may have the right to withdraw from the contract even after years, and that many consumers bought shares in companies that were set up to build and manage property that has lost its value partly or completely, this view of the BGH can hardly be reconciled with the relevant EC Directives.[58]

III. Return of goods by the consumer

Equally obvious, the consumer has to return what he has received. If goods can be sent by parcel, the consumer has to send it to the trader, § 357 par. 2 s. 1 BGB. Otherwise, the trader has to collect the goods from the consumer. The trader always bears the risk that goods are destroyed or damaged during the transport.[59]

IV. Costs for returning the goods

In contrast, the rules on the costs of returning goods are fairly complicated. It must be remembered that Article 6 (2) of Directive 97/7/EC allows the Member States to make the consumer pay for the return of goods. Initially, Germany had opted for a differentiated solution: The contracting parties could agree upon the consumer paying for the return of goods, unless the value of the goods ordered exceeded 40 Euros. Absent such an agreement, the trader had to reimburse the consumer for these costs.[60] The rule was somewhat unfortunate since it referred not to the value of the goods returned but to the value of the goods ordered. Thus, a consumer could, for example, order five books of ten Euros each and return four of them, thereby exceeding the limit of 40 Euros.[61] The book traders were particularly un-

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(ZIP) 240, 244-245 (2002); Markus Lenenbach, *Verbraucherschutzrechtliche Rückabwicklung eines kreditfinanzierten, fehlerhaften Beitritts zu einer Publikumspersonengesellschaft*, WERTPAPIER-MITTEILUNGEN (WM) 501, 503 (2004).

[58] *See also* Peter Hahn & Petra Brockmann, Die Anwendung der Grundsätze der fehlerhaften Gesellschaft auf Beteiligungen an Personengesellschaften, VERBRAUCHER UND RECHT (VuR) 164, 168-169 (2002).

[59] *See also* LG Düsseldorf, VERBRAUCHER UND RECHT (VuR) 452, 454 (2002).

[60] The law does not provide for a right to retain goods until the trader has made the amount available that is needed for sending the goods back, see Herbert Roth, *Das Fernabsatzgesetz*, JURISTENZEITUNG (JZ) 1013, 1018 (2000); Christian Berger, *Die Neuregelung des verbraucherrechtlichen Widerrufsrechts in § 361a BGB*, JURISTISCHE AUSBILDUNG (JURA) 289, 293 (2001).

[61] *See* Kamanabrou, *supra*, note 7, at 1420; Reinhard Gaertner & Sibylle Gierschmann, *Das neue Fernabsatzgesetz*, DER BETRIEB (DB) 1601, 1604 (2000); Rott, *Widerruf und Rückabwicklung*, *in*

happy with this rule and pressured the legislator to change it. They succeeded when the law was amended in order to implement Directive 2002/65/EC on the distance marketing of financial services in 2004.[62] The new rule is as follows: In distance selling cases, the parties may agree that the consumer has to pay the costs of returning the goods if the price of the returned good does not exceed 40 Euros. In the case of more expensive goods, the consumer can only be burdened with the returning costs if he has not yet paid the total or part of the price. This "agreement" will usually form part of the trader's standard terms. In other cases, in particular in doorstep selling, the consumer never has to bear the costs for returning the goods. These provisions also apply, in principle, if the trader has reserved the right to send equivalent goods and has done so. However, in this case, the consumer does not have to pay the costs of the return of the goods, § 357 par. 2 s. 3 BGB.

If the trader sends equivalent goods without having reserved the right to do so, the consumer is not obliged to send them back but he must return them if the trader collects them. If the trader sends unsolicited goods, the consumer may keep them anyway, under § 241a par. 3 BGB.[63] Finally, if the trader erroneously sends unsolicited goods, the consumer may not keep them but does not have to send them back. Instead, the trader has to collect them.

The liberalisation of the postal services market has caused several problems. The Deutsche Post AG, which is the former monopolist in postal services, only accepts parcels of up to 20 kg. Authors have rejected the consumer's obligation to use one of the other companies such as UPS or Hermes that have no shops or agencies. In practice, however, traders frequently "ask", or require, the consumer to use their usual delivery service, which is cheaper than the Deutsche Post AG. This has the advantage that the consumer does not have to pay for delivery and then collect the expenses from the trader. However, the consumer may have to wait at home until the delivery service shows up. It is therefore widely accepted that the consumer may follow the trader's instructions but is not bound by them. Lower instance

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VERBRAUCHERSCHUTZ UND SCHULDRECHTSMODERNISIERUNG 249, 264 (HANS-W. MICKLITZ, THOMAS PFEIFFER, KLAUS TONNER, ARMIN WILLINGMANN eds. 2001), against Niko Härting & Martin Schirmbacher, *Fernabsatzgesetz – Ein Überblick über den Anwendungsbereich, die Systematik und die wichtigsten Regelungen*, MONATSSCHRIFT FÜR DEUTSCHES RECHT (MDR) 917, 921-922 (2000), and Berger, *supra* note 60, at 293.

[62] *See* Rott, *supra*, note 11, at 60-61. For critical comments see Gisela Rühl, *Die Kosten der Rücksendung bei Fernabsatzverträgen: Verbraucherschutz versus Vertragsfreiheit?*, EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (EUZW) 199 (2005), who pleads for more competition through freedom of contract.

[63] This provision was introduced in order to deter traders from sending unsolicited goods.

courts have held contract terms in which the consumer is required to use the original packaging and a specific label invalid.[64] If the consumer decides to send goods with a different carrier, he cannot be held liable for the difference in expenses incurred by the trader.[65] The question of whether or not the trader is allowed to charge the consumer with the costs for sending the goods to the consumer is not explicitly mentioned in § 357 BGB. The OLG Nuremberg concluded that this was possible.[66]

V. Compensation for the use of the goods

Under, § 357 par. 1 s. 1 with § 346 par. 1 BGB, the consumer must compensate the trader for the use he made of the goods before returning them ("*Nutzungen*"). This is one of the most controversial issues of the right of withdrawal. Exceptions apply to timesharing contracts, § 485 par. 5 BGB, and to distance learning contracts, § 4 par. 3 FernUSG.

The term "*Nutzungen*" is defined in § 100 BGB, and it means the benefits of the use of a good. Thus, the consumer is not liable for the mere possession of the goods in question. However, the consumer has to compensate the trader, for example, for having used a car, or clothes. In contrast, "*Nutzungen*" does not cover damage to the goods, which is dealt with under a different provision.[67]

Compensation for the use of goods is difficult to calculate. Most authors agree that the provision does not turn the sales contract into a kind of lease, and that compensation cannot be calculated in line with the normal price for renting a good for the time in question.[68] Rather, the trader should be compensated for losses from not having had the goods available. In practice, the obligation to compensate the trader

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[64] *See* OLG Hamm, NEUE JURISTISCHE WOCHENSCHRIFT – RECHTSPRECHUNGSREPORT (NJW-RR) 1582 (2005); LG Frankfurt, WETTBEWERB IN RECHT UND PRAXIS (WRP) 920 (2005); LG Düsseldorf, VERBRAUCHER UND RECHT (VuR) 452, 454 (2002).

[65] *See* LG Düsseldorf, *supra*, note 64, at 454.

[66] OLG Nürnberg, NEUE JURISTISCHE WOCHENSCHRIFT – RECHTSPRECHUNGSREPORT (NJW-RR) 1581 (2005).

[67] *See*, *infra*, at **D.** *VI.* and *VII.*

[68] *See*, for example, Anja Gorris & Jens M. Schmittmann, *Umsatzsteuerliche Auswirkungen des Fernabsatzgesetzes*, BETRIEBS-BERATER (BB) 2345, 2346-2347 (2001).

for the use made of goods appears not to have caused problems yet. The reason is probably that internet car sales have not yet become common.

Authors have strongly opposed the obligation to compensate the trader for the use of the goods, and they have pointed at Article 6 (2) of Directive 97/7/EC. They have argued that this provision disallows Member States to impose any other costs than transportation costs on the consumer.[69] On the other hand, one could argue that the Distance Selling Directive tries to put the consumer in a position similar to a consumer who goes into a shop.[70] In contrast, the consumer in a shop is not necessarily allowed to use goods free of charge either. Thus, Article 6 (2) does not seem to prohibit the obligation to compensate the trader for the use of goods, as established by German law.[71] However, the amount of compensation must not be calculated so as to factually prevents the consumer from exercising his right of withdrawal. In addition to this, the consumer is protected by the trader's duty to inform the consumer on his right of withdrawal and on the consequences of his exercising this right. This includes the duty to inform the consumer of the potential amount of compensation he might have to pay for the use of the goods.

VI. Compensation for loss of or damage to the good

Moreover, the consumer is liable for the loss of or damage to goods during the time he has the goods in possession. German law has established strict liability in this case. In its proposal for the reform Act, the government argued that the consumer had increased duties, due to the undecided situation until the end of the period of withdrawal. This argument, however, does not hold: If the consumer does not act negligently, he has not breached any duty.[72] Arguably, the rule is not in line with

[69] *See*, for example, Hans-W. Micklitz, *Die Fernabsatzrichtlinie 97/7/EG*, ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT (ZEuP) 875, 887 (1999); Micklitz & Reich, *supra*, note 20, at 2095; Helmut Heinrichs, *Das Widerrufsrecht nach der Richtlinie 97/7/EG über den Verbraucherschutz bei Vertragsabschlüssen im Fernabsatz*, *in* FESTSCHRIFT FÜR DIETER MEDICUS 177, 194 (VOLKER BEUTHIEN ET AL. eds 1999); Tonner, *supra*, note 7, at 1416; against Christine Gößmann, *Electronic Commerce*, MULTIMEDIA UND RECHT (MMR) 88, 91 (1998); Grigoleit, *supra*, note 48, at 1154-1155.

[70] This is also the view of the German legislator, see annex 2 to the BGB-InfoV.

[71] For more details, see Rott, *supra*, note 61, at 265-269.

[72] *See also* Jürgen Kohler, *Rücktrittsrechtliche Schadensersatzhaftung*, JURISTENZEITUNG (JZ) 1127, 1135 (2002).

the Distance Selling Directive either.[73] The risk of the loss of or damage to the goods is inherently linked with distance selling and cannot therefore be avoided. Thus, the consumer in distance selling is in a worse position than the customer in a shop. The latter would certainly not be liable if he happened to be present while, say, the shop burns down for an unconnected reason.

A different rule applies if the consumer was not informed about his right to withdrawal. In such a case, he is only liable for the breach of the *diligentia quam in suis*, § 357 par. 3 s. 3 with § 346 s. 1 no. 3 BGB. Still, there may be situations where even this rule is in breach of EC law. What if the consumer has made the wrong decision and has bought a product that he does not like? Not knowing of his right of withdrawal, he may simply dispose of it, intentionally. This would not have happened had he been duly informed by the trader. Taking the *Heininger* judgment into consideration, it seems fair to say that the trader should not be protected in such a case. Therefore, the consumer should not be liable.[74]

According to § 357 par. 1 s. 1 with § 346 par. 2 s. 2 BGB, the amount of compensation shall be based on the payment that was agreed upon. This rule allows for some flexibility, and it has to do so. For example, one particular danger of doorstep selling lies in overpricing goods or services. In such a case, the consumer should merely have to compensate the trader for the objective value of the goods. On the other hand, the consumer should benefit from a discount that was agreed upon. In such a case, the agreement should indeed be relevant for calculating the compensation.[75]

VII. Compensation for the loss of value caused by the use of the good

The use of goods bought at the doorstep or by distance selling may not only be a benefit for the consumer. It also turns new goods into second-hand goods, which in itself seriously impacts on the value of the goods. For example, on the German

[73] For fundamental opposition against any costs imposed on the consumer, see the authors named *supra*, note 69.

[74] For more details, *see* Rott, *supra*, note 7, at 82.

[75] For more details, *see* Rott, *supra*, note 61, at 287. *See also* Grigoleit, *supra*, note 48, at 1154, and the critical comments by Gaier, *supra*, note 53, at 9.

market, cars lose approximately 10 to 15 % of their value simply by being registered for the first time.[76]

German law prior to the 2002 reform did not recognise any right to compensation resulting from this kind of loss of value.[77] During the reform the car manufacturers, together with book traders, successfully pressured the government to change this. The new rule, enshrined in § 357 par. 3 BGB, is as follows: The consumer has to pay compensation for the loss in value that arises from starting to make use of the goods if he was informed, at the time of the conclusion of the contract and in textual form, about this obligation, and if he was informed as to a way to avoid this obligation.[78] In contrast, no such obligation arises if the consumer merely unpacks and tests the goods. The details of this provision are rather unclear. Case-law is not available yet. In particular, it seems difficult to distinguish between the use of goods and the testing of goods. For example, the consumer is free to flick through a book and see whether or not pages are missing. In contrast, he will be liable for compensation once he starts reading the book. The burden of proof lies with the consumer. However, it will be difficult for a trader to counter the consumer, if the consumer merely claims to have tested the book. The only clear-cut case is, according to the explanations by the German government, the registration of a car. Although it seems difficult to regard the registration as such as "making use of a car", the legislative intention is to make the consumer pay for this act.

Apart from political resistance against this provision, its compliance with Article 6 (2) of the Distance Selling Directive 97/7/EC has also been doubted by many.[79] Indeed, it seems highly unlikely that a consumer withdraws from the purchase of a car if he has to pay thousands of Euros in compensation, only for to have no car in the end.[80] Thus, the use of the car in practice amounts to a waiver to exercise one's

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[76] *See* Schmidt-Räntsch, *supra*, note 7, at 433. This has to do with the former Rebates Act. Under the Rebates Act, it was prohibited to give discounts of more than 3 % on new products. Car traders, however, circumvented the law by registering cars for one day and then selling them as second-hand cars. In that way, they could give discounts of 10-15% without breaking the law.

[77] *See* the former § 361a par. 2 s. 6, second part BGB.

[78] For more details see Rott, *supra*, note 61, at 281-285.

[79] *See*, for example, Micklitz, *supra*, note 69, at 887; Micklitz & Reich, *supra*, note 20, at 2095; Tonner, *supra*, note 7, at 1416; Gert Brüggemeier & Norbert Reich, *Europäisierung des BGB durch große Schuldrechtsreform?*, BETRIEBS-BERATER (BB) 213, 215 (2001); Jens-Uwe Franck, *Zur Widerrufsbelehrung im Fernabsatz*, JURISTISCHE RUNDSCHAU (JR) 45, 46-47 (2004).

[80] Even the German Ministry of Justice has conceded this.

right to withdrawal;[81] which is not possible under Article 12 (1) of the Directive. As mentioned above, no cases appear to have reached the German courts yet. The problem shall, however, be illustrated by an Austrian case that was taken as high as to the *Oberster Gerichtshof, OGH* (Austrian Supreme Court).[82] A consumer had bought a flat screen at the price of 2,179.46 Euros. He used it for 43 ½ hours and then withdrew from the contract in due time. The trader only returned 1,499.96 Euros, arguing that he could only sell the screen at that price following the return. In other words, he charged the consumer 679.49 Euros for using the screen and thus rendering it second-hand. The OGH upheld the claim in principle[83] but reduced it, in line with the appeal court, to 349.49 Euros. Unfortunately, the OGH has not referred the case to the ECJ, arguing under the *acte clair* doctrine that his own interpretation of the Distance Selling Directive was beyond doubt.

One may accept the German solution as a compromise between the interests of the trader and the consumer. At least, the consumer must be warned[84] and therefore has a choice. Then, however, the quality of the warning is essential. It must be made clear to the consumer how much he may have to pay if he withdraws from the contract after having used the goods. Current practice does not satisfy these requirements. Traders routinely use the sentence taken from the model form laid down in the annex to the BGB-InfoVO, which merely states: "If you cannot return the received goods at all, or merely in a deteriorated state, you will have to pay compensation. This does not apply if the deterioration exclusively results from testing the goods, as it would have been possible in a shop."[85] Thus, it seems quite likely that a relevant German case will be referred to the ECJ once it reaches the German courts.

VIII. Compensation for services rendered before the withdrawal

A final issue is services that the trader renders to the consumer before the latter withdraws from the contract. Only Directive 97/7/EC caters to this situation; it states that the consumer may not exercise his right to withdrawal in respect of con-

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[81] *See also* Brüggemeier & Reich, *supra*, note 79, at 219.

[82] OGH, VERBRAUCHER UND RECHT (VuR) 242 (2006), with a case-note by Peter Rott, *Ein teurer Widerruf! – Besprechung von OGH, 27.9.2005, Az. 1 Ob 110/05s*, VERBRAUCHER UND RECHT (VuR) 218 (2006).

[83] § 5j of the Austrian Consumer Protection Act (*Konsumentenschutzgesetz*, KSchG) provides for a rule that is similar to § 357 par. 3 BGB.

[84] Which is not the case under Austrian law.

[85] Translation by the author.

tracts for the provision of services if performance has begun, with the consumer's agreement, before the end of the period of withdrawal.[86] In other situations, for example in doorstep selling law, the right to withdrawal remains despite services rendered. Under § 357 par. 1 s. 1 with § 346 par. 2 no. 1 BGB, the consumer has to compensate the trader for the value of the services rendered because these services can obviously not be returned in nature. As in the case of the destruction or deterioration of goods, the agreed price shall be the starting point for calculating the value of the services.

Again, compliance of this rule with EC law may be questioned. Under Article 5 (2) of the Doorstep Selling Directive, the giving of the notice shall have the effect of releasing the consumer from any obligations under the cancelled contract. Under German law, however, he shall pay at least for the objective value of the service rendered. Thus, he cannot change his mind within the period of withdrawal without consequences, even if the services may have been useless on reflection.[87] The protection of the trader does not necessitate this solution since the trader could simply wait for the period of withdrawal to expire before rendering his service to the consumer.[88]

E. The withdrawal from a linked contract

Linked contracts have been at the centre of discussion, both legal and political, in Germany in the context of the so-called "*Schrottimmobilien*" cases of *Schulte* and *Crailsheimer Volksbank*.[89] The issue is, however, broader and can be best explained by starting with "normal" linked contracts where the purchase of goods or services is financed by the trader or by a bank that cooperates with the trader. This tripartite relationship in which the consumer is confronted with two contracting partners has replaced a bilateral relationship in which the seller has given the purchaser a loan; and it has created problems ever since.[90] What happens to the sales contract if the

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[86] Art. 6 (2) lit. c) of Directive 2002/65/EC establishes a similar, although not identical rule for the distance marketing of financial services.

[87] *See* Rott, *supra*, note 61, at 287.

[88] *See also* Roth, *supra*, note 60, at 1017.

[89] *See* Peter Rott, *Linked contracts and doorstep selling: Case note on ECJ, judgments of 25 October 2005, cases C-350/03 - Schulte and C-229/04 - Crailsheimer Volksbank*, YEARBOOK OF CONSUMER LAW 403 (2007).

[90] On the history of credit financed sale in Germany, *see* Werner Dürbeck, DER EINWENDUNGSDURCHGRIFF NACH § 9 ABSATZ 3 VERBRAUCHERKREDITGESETZ 5-11 (1994).

connected credit is invalid or withdrawn or terminated by the consumer? And what happens to the consumer credit contract if the sales contract is invalid, or if the purchased good is defective? Under what circumstances is the connection between the two contracts close enough to evoke legal consequences?

I. Historical overview

The concept of linked contract was developed by the BGH under the good faith clause of § 242 BGB.[91] It was meant to protect the purchaser from the artificial splitting-up of one hire-purchase contract into two legally separate contracts: the purchase of goods or services and the credit contract. When the Consumer Credit Directive 87/102/EEC was implemented into German law, BGH case-law was codified in § 9 par. 3 of the former Consumer Credit Act.

In EC consumer law, provisions on linked credit contracts were introduced in the Timesharing Directive 94/47/EC and in the Distance Selling Directive 97/7/EC, and accordingly implemented in the German Timesharing Act and in the Distance Selling Act. During the first harmonisation round of 2000, the scattered rules remained untouched. In the course of the reform of the law of obligations, however, they were transferred into § 358 BGB and extended to cover doorstep selling contracts as well. The German Doorstep Selling Act had not provided for rules on linked contracts since Directive 85/577/EEC does not regulate this issue.

II. Linked contracts

Linked contracts are defined in § 358 par. 3 BGB. This provision distinguishes the financed purchase of movables or services from the financed purchase of real property or of related rights to real property. The definition of a linked contract was first enshrined in § 9 par. 1 s. 2 of the former Consumer Credit Act and was transposed into the BGB without substantial changes. Two requirements must be fulfilled. First, the credit must serve exclusively or partially to finance the other contract. Second, both contracts must form an economic unit. According to § 358 par. 3 s. 2 BGB, an economic unit shall be presumed where the supplier or service provider himself finances the credit for the consumer or, if it is financed by a third party, if the creditor uses the services of the supplier or service provider in connection with the preparation, or conclusion, of the credit agreement. This definition is signifi-

[91] *See*, for example, BGH, 37 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN (BGHZ) 94, 99-102 (1962).

cantly broader than the one provided by Article 11 (2) of the Consumer Credit Directive 87/102/EEC,[92] and German courts have interpreted it generously.

In contrast, the financed purchase of real property or of related rights had been excluded from the rules on linked contracts of § 9 of the former Consumer Credit Act. Merely in exceptional cases had the BGH established a link between the credit contract and the sales contract under the good faith clause of § 242 BGB.[93] This distinction was upheld when § 358 BGB was formulated in 2001.[94] This exemption for the financed purchase of real property also formed the background of the ECJ cases of *Schulte* and *Crailsheimer Volksbank* where German courts, in particular the *Landgericht Bochum* and the *Oberlandesgericht Bremen*, tried to persuade the ECJ that the two contracts had to be treated as linked contracts, and that the cancellation of the credit contract therefore led to the cancellation of the sales contract. With such a judgment, the consumer would be freed from repaying the credit, he could claim his part payment back, and he would merely have to hand over the (frequently overpriced) property in return. The ECJ declined to follow this approach arguing that such a rule was not implicit in Directive 85/577/EEC, which does not mention linked contracts at all.[95] Consequently, the BGH keeps treating the two contracts as separate.[96]

After the *Heininger* judgment of the ECJ, the law was changed and linked contracts on the purchase of property were included into § 358 par. 3 BGB. However, the legislator mainly codified former BGH case-law and established special rules for such contracts. The reason given is that consumers were usually aware of the fact that the seller of property and the creditor are different persons.[97] Therefore, the

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[92] For a comparison, *see* Peter Rott, *Maximum Harmonisation and Mutual Recognition versus Consumer Protection: The Example of Linked Credit Agreements in EC Consumer Credit Law*, THE EUROPEAN LEGAL FORUM (EuLF) I-61 (2006). In contrast, the definition of linked credit agreement as enshrined in Art. 3 lit. l) of the Amended Proposal for a new Consumer Credit Directive, COM(2005) 483 final, is remarkably similar, although not identical.

[93] *See* BGH, WERTPAPIER-MITTEILUNGEN (WM) 1287, 1288 (2002), with further references.

[94] For critical comments, *see* Johannes Köndgen, *Darlehen, Kredit und finanzierte Geschäfte nach neuem Schuldrecht - Fortschritt oder Rückschritt?*, WERTPAPIER-MITTEILUNGEN (WM) 1637, 1646 (2001).

[95] ECJ, judgment of 25 October 2005, Case C-350/03 *Elisabeth Schulte, Wolfgang Schulte v. Deutsche Bausparkasse Badenia AG*, [2005] ECR I-9215, at para. 76.

[96] BGH, BETRIEBS-BERATER (BB) 1588 (2006).

[97] *See* BGH, NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 41, 42 (1980); BGH, NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 3065, 3066 (2002).

scope of application was restricted to two types of cases. In the first case, the creditor himself procures the property, i.e. the creditor is also the seller, or the creditor acts on behalf of the seller, so that the consumer is only in contact with the creditor. In the second case, the creditor promotes the sale of the property in a way that exceeds his position as creditor. This may be the case where the creditor has his own interest in the sale of the property, or where the creditor is involved in the planning, the advertisement or the execution of the project,[98] or where the creditor disadvantages the consumer vis-à-vis the trader. In practice, such cases are rare, and certainly difficult to prove.[99]

III. The withdrawal from the linked consumer contract

§ 358 par. 1 BGB deals with the situation in which the consumer withdraws from a doorstep or distance contract, or from a timesharing contract, that was linked with a credit contract. It simply provides that the credit contract automatically shares the fate of the linked consumer contract, i.e. both are transformed into relationships that aim at the return of goods, services or payment received. Thus, it is impossible to withdraw from a purchase contract and to uphold the credit contract at the same time, which might be interesting, from the consumer's perspective, where the terms of the credit contract are extraordinarily favourable.[100] According to § 358 par. 5 BGB, the trader must inform the consumer about this consequence of the withdrawal from the contract.

IV. The withdrawal from the credit contract

The situation in which the consumer withdraws from the credit contract is covered by § 358 par. 2 BGB. Again, the linked contract shares the fate of the credit contract. Thus, a consumer can avoid a consumer contract that he could otherwise not with-

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[98] On this, see BGH, NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 41, 43 (1980), BGH, NEUE JURISTISCHE WOCHENSCHRIFT – RECHTSPRECHUNGSREPORT (NJW-RR) 879, 882 (1992); BGH, NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 3065, 3066 (2002).

[99] *See also* Robert Koch, *Zu den Auswirkungen des Urteils des BGH in Sachen Heininger./.Hypovereinsbank auf die Rückabwicklung von Realkreditverträgen und die Verwertung von Sicherheiten*, WERTPAPIER-MITTEILUNGEN (WM) 1593, 1598-1599 (2002).

[100] For example, 0 % credit is sometimes used to foster the sale of goods.

draw from by withdrawing from the linked credit contract. In contrast, the consumer cannot withdraw from the credit contract but uphold the linked contract. An exception is only made where as far as speculative transactions are concerned, in particular the purchase of securities or noble metals and currency transactions that are financed by credit, § 491 par. 3 BGB. In this case, the withdrawal from the credit contract does not affect the validity of the linked contract. This is meant to prevent speculation at the trader's expenses, an idea that can also be found in Article 6 (2) lit. a) of Directive 2002/65/EC on the distance marketing of financial services.

V. The correct defendant

The consumer who withdraws from one of the two linked contracts avoids both contracts. Therefore, in principle, he would have to sort out the return of goods, services and payment received with two contracting partners. § 358 par. 4 s. 3 BGB facilitates the situation for the consumer in those cases where the trader has already received the credit from the creditor, which is usually the case. From this moment on, the consumer is only concerned with the creditor. Thus, the creditor must return any payment made by the consumer but the creditor is also entitled to claim return of goods or services received, or compensation to which the consumer is liable.[101]

F. Some aspects of future harmonisation at EC level

The EC Commission has announced a Green Paper on the revision of the consumer law acquis to be published in autumn 2006.[102] Until now, no concrete plans have been laid open that could be commented on. Therefore, only some aspects of the harmonisation of the various rights of withdrawal shall be touched upon in this chapter.

The recent trend of EC consumer law is towards maximum harmonisation,[103] and in its Communication on distance selling law, the Commission suspects that minimum harmonisation of distance selling law has caused problems for the internal

[101] For more details, see Kamanabrou, *supra*, note 7, at 1425.

[102] *See* Commission, MEMO/06/339 of 21/9/2006, at 2.

[103] *See*, e.g., the first proposal for a new Consumer Credit Directive, COM(2002) 443 final, para. 1.2.

market.[104] Thus, it is easy to predict that a new harmonised right of withdrawal would follow the maximum harmonisation approach.

Germany has demonstrated that it is fairly easy to harmonise the more technical aspects of the various rights of withdrawal, such as the period of withdrawal, where EC law shows a tendency to fix a period of 14 calendar days,[105] or the notification of the withdrawal. Also, harmonised rules on linked contracts seem possible.[106] Whether or not all the technically feasible harmonisation is substantially justified is of course an entirely different question, and the wish for a longer period of withdrawal in timesharing law has already been mentioned above; and the rule that the period of withdrawal in distance selling contracts on the sale of goods only begins after the delivery of the good is of utmost importance although it deviates from the begin of the period of withdrawal in other Directives.

Furthermore, harmonisation at EC level that reduces national divergences significantly in order to foster the internal market would have to tackle the issue of the consequences of the withdrawal. Rules on the return of payment and goods, and also on expenses for the return of goods appear easy to draft,[107] and the Distance Selling Directive 97/7/EC can in parts serve as a blue print. This is, however, different with rules on compensation for the use of delivered goods, or for their deterioration or destruction during the period of withdrawal. Here, political controversies can be expected, just as Germany experienced them. Today, the positions of the Member States are far from each other: on one hand Germany and Austria with strong potential liability of the consumer, on the other hand France and Belgium with severe restrictions on traders. It is possible that the Member States will not be able to agree upon a detailed EC-wide solution, and that the harmonisation project will stop short at this point.

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[104] *See* Communication on the implementation of Directive 1997/7/EC of the Council and the European Parliament of 20 May 1997 on the Protection of Consumers in respect of Distance Contracts, COM(2006) 514 final, at 14.

[105] *See* Art. 6 (1) of Directive 2002/65/EC and Art. 13 (1) of the Amended Proposal for a new Consumer Credit Directive, COM(2005) 483 final.

[106] *See also* the Art. 14 (1) of the Amended Proposal for a new Consumer Credit Directive, COM(2005) 483 final.

[107] Although the Commission has found major differences among the current laws of the Member States, *see* the Communication, COM(2006) 514 final, at 12.

The same problem can be expected with a view to national rules that are more stringent in such a way that they prohibit certain contracts in certain branches of business completely for which EC consumer law provides for a right to withdrawal. Would the expected maximum harmonisation approach prohibit such national rules? The recent cases of *Burmanjer*[108] and of *A-Punkt Schmuckhandel*[109] demonstrate that such national rules have come under pressure already.

In contrast, doctrinal issues, in particular the question whether a contract comes into being at the time of agreement or only after the period of withdrawal has expired, will probably not be touched upon. Such questions, however, seem to have little practical impact and are therefore irrelevant from an internal market perspective.

G. Conclusion

Germany has gone a long way in creating a largely harmonised, complex and complicated system of rules concerning the right of withdrawal. This system can be criticised from various angles. First of all, the wish to create harmonised rules may sometimes have prevailed over the substantial differences between the various circumstances in which a right to withdrawal is conferred on the consumer. Secondly, it has proven to be difficult to comply with all the disharmonious rules of EC law while creating such a harmonised system. And finally, it may be doubted that the right of withdrawal as such provides a high level of consumer protection in all the circumstances to which is applies. Two of the three issues are most likely to lead to controversies at EC level as well: How far should harmonisation go? Moreover, should the right of withdrawal be the sole instrument of consumer protection? The EC, and certainly the Member States, should take steps to avoid reducing the current level of consumer protection in the course of a seemingly technical process of harmonisation.

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[108] Judgment of 26/5/2006, Case C-20/03 *Marcel Burmanjer and others*, [2005] ECR I-4133.

[109] Judgment of 23/2/2006, Case C-441/04 *A-Punkt Schmuckhandels GesmbH v. Claudia Schmidt*, [2006] ECR I-2093.