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PROTECTION IN THE CONTEXT OF DIRECT
SELLING”

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I. INTRODUCTION

Direct selling is a method of selling. It is one of the oldest distribution channels in history, beginning appearing alongside the development of civilization.¹ As hunter-gatherers settle down to farm and build towns, the first direct sellers begin to sell their wares across Europe, Africa and Asia.² This kind of selling prevails for a long time in history.³ With the development of companies and enterprises, direct selling is gradually quit the historical stage. The modern way of direct selling is merged firstly in the USA.⁴ In 1855, Rev. James Robinson Graves developed a business model that sellers going door to door to sell products.⁵ It sells products directly to consumers away from a fixed retail location. Sellers direct personal presentation, demonstration, and sale of products and services to consumers, usually in their homes or at their jobs.⁶ The World Federation of Direct Selling Associations defines modern direct selling as a dynamic, vibrant, rapidly expanding channel of distribution for the marketing of products and services directly to consumers.⁷ This burgeoning economic model brings vigor to the economic market meantime consumers can benefit from it. Consumers can benefit from direct selling because of the convenience and service it provides, including personal demonstration and explanation of products, home delivery, and generous satisfaction guarantees. The cost for an individual to start an independent direct selling business is typically very low with little or no required inventory or other cash commitments to begin.⁸ Direct selling accounted for more than US\$182 billion in retail sales globally in 2014.⁹ Besides the bright side, direct selling also causes problems, such as pyramid sales,

¹ J.M. Emmert, 'The Big History of Direct Selling' (2014) Direct Selling News <http://directsellingnews.com/index.php/view/the_big_history_of_direct_selling#.VkRx_WQrJ00> accessed 3 July 2015

² Ibid.

³ Ibid

⁴ Ibid

⁵ Ibid.

⁶ Xardel Dominique, 'The Direct Selling Revolution: Understanding the Growth of the Amway Corporation' 1996 30(1) The Journal of Consumer Affairs 283

⁷ World Federation of Direct Selling Associations, 'What is Direct Selling?' (WFDSA, 3 July 2015) <http://www.wfdsa.org/about_dir_sell/?fa=whatids> accessed 3 July 2015

⁸ Ibid.

⁹ Ibid.

aggressive commercial practices and so on. Among all issues related or caused by direct selling, this thesis only focuses on the general rules of consumer information and the right of withdrawal in the context of direct selling.

Consumer protection is not a burgeoning concept. It has been known by the public for a long time. It focuses on protection of consumers engaging in commercial activities. The content of consumer protection keeps enlarging as long as the development of the market economy.¹⁰ Besides laws directly concern about consumer protection, other laws sometimes may objectively protect consumers' rights even though the direct aim of those laws are not to protect consumers such as the antitrust laws. The aim of the antitrust law is to maintain competition among traders, however, it objectively serves as consumer protection since consumers can benefit from traders' competition, getting products with higher quality and lower price. Therefore, when talking about consumer protection in a specific area, many laws will have direct or indirect connection. However, concerning about the ultimate purpose and space limit, only rules that directly respond to asymmetry of information will be given a detailed discussion in this thesis. Asymmetry of information is an issue that widely exists in all kinds of transactions. With the professionalization of traders, the development of technology and the diversity of products, consumers become more and more difficult to know the full information of a product. Asymmetry of information is more serious in direct selling since another element that goes against consumers involved-surprise. Consumers of direct selling usually surprised by direct sellers. Reports show that consumers under direct selling are likely to make inappropriate choices, pay too high prices or they buy products that are not suitable for the intended purpose¹¹. Subsequently, they find they are inadvertently locked in a contract with no option to cancel. The surprised visit gives consumers no time to know the products objectively by themselves or from a third party. All information is comes from direct sellers. And direct sellers, in order to sell the products successfully, are tending to tell consumers only the bright sight of the products. The partial information is the main reasons to

¹⁰ Mark E. Budnitz, 'The Development of Consumer Protection Law, The Institutionalization of Consumerism, and Future Prospects and Perils' (2010) 26(4) Georgia State University Law Review 1147

¹¹ Ibid. 1

misdirect consumers' choices. After concluding the contract, consumers getting objective information, they may regret and want to cancel the contract. This happens in both the EU and China. And both the EU and China give a special remedy to consumers of direct selling - the right of withdrawal. The right of withdrawal now is not only applicable to consumers of direct selling even though it firstly designed for door-to-door sales. The right of withdrawal is the most effective way to free consumers from an irrational contract. Concerning about the peculiarity of right of withdrawal, it will also be illustrated in this thesis.

In this master thesis, the author chooses the European Union (EU) and China to compare. The author comes from Mainland China and hopes this thesis will be helpful for the modification of Chinese laws on consumer protection in the context of direct selling, which is in the ongoing. The reason to choose the EU to compare is that the EU has more advanced rules on consumer protection in this context and China has often referred to the EU on consumer protection before.¹² Comparing to EU laws, the rules of Chinese consumer protection in the context of direct selling are quite general. This thesis tries to use comparative study to discover the reasons behind the similarities and differences between the EU and China. And hope these discoveries will be helpful for the modification of Chinese laws. In the thesis, I only present general rules of EU laws since the EU rules are quite particular and many of those rules are concerning about products that is not allowed to be sold through direct selling in China. Since this thesis is not focus on whether China should expand its permission scope of products that can be sold through direct selling, those rules are meaningless. Unlike the EU, all rules of China that affecting the consumer information and the right of withdrawal in the context of direct selling will be illustrated. For the EU part, the Directive on Consumer Rights¹³ will be underlined. This is because according to Decree No. 72 of 2005 of State Administration for Industry and Commerce of People's Republic of China only five categories of

¹² Hu Tianye, ' Referring to Directive 2011/83/EU' (Chinalawedu, 17 May 2013) <<http://www.chinalawedu.com/new/201305/fangqianru2013051714380650526625.shtml>> accessed 13 August 2015

¹³ Directive 2011/83/EU, [2011] OJ L 304/74

products can be sold thorough direct selling. They are cosmetics, health food, cleaning supplies, health care equipment and small kitchen utensils and appliance. All these five categories of products are under the control of the Directive on Consumer Rights¹⁴, which gives general rules of consumer information and right of withdrawal. However, not all rules in the Directive will be involved. To correspond to the purpose of the thesis, only rules of consumer information in Article 6 and Article 7 and rules of right of withdrawal will be concerned. For the Chinese part, attention is paid to the Consumer Protection Law¹⁵ and the Administration of Direct Selling Regulations¹⁶. Because that all rules of consumer information and the right of withdrawal are included in these two legal documents. The thesis will be developed in 6 chapters.

Chapter one is an introduction part. Chapter two studies on consumer information under the EU law. After a brief introduction to the socio-economic background of the establishment of consumer information in the EU, the current provisions related to direct selling will be specified. In 2011, the EU enacted the Directive on Consumer Rights, which applies to consumer protection in the context of direct selling. This Directive has clear regulations on consumer information. All the articles concerning consumer information under this Directive will be discussed in detail. Chapter three proceeds to the analysis of consumer information of China. After a brief introduction to the socio-economic issues behind the establishment of consumer information in China, the current provisions will be specified. In this chapter two laws will be illustrated: the Consumer Protection Law and the Administration of Direct Selling Regulations. The Consumer Protection Law has general rules on consumer information for all consumers. The Administration of Direct Selling Regulations is an administrative regulation, which specifies on direct selling. It has special rules on consumer information for consumers in the context of direct selling. All the articles in these two laws concerning consumer information will be elaborated. Chapter four focuses on the right of withdrawal in the EU. After a brief introduction to the

¹⁴ Ibid.

¹⁵ 2013 Consumer Protection Law of PRC

¹⁶ 2005 the Administration of Direct Selling Regulations

socio-economic issues behind the establishment of the right of withdrawal in EU, the current provisions will be specified. In 2011, the EU enacted the Directive on Consumer Rights, in which has clear regulations on the right of withdrawal. In chapter three, all the articles concerning the right of withdrawal under that Directive will be discussed in detail. Chapter five proceeds to the analysis of the right of withdrawal in China. After a brief introduction to the socio-economic issues behind the establishment of right of withdrawal, the existing provisions will be specified. The provisions exist in the Consumer Protection Law and the Administration of Direct Selling Regulations. All those articles will be elaborated. Chapter six deals with the comparative study on consumer information and the right of withdrawal. The author firstly points out the similarities and discrepancies of consumer information and the right of withdrawal between the EU and China. Chapter five is divided into 3 parts. Then the author analyze the reasons back those differences. At the end of chapter six, the author gives a few suggestions to improve Chinese laws on consumer protection and right of withdrawal.

Before going to the text some basic concepts need to be clarified. They are the concepts of '*consumer*', '*trader*' and '*off-premises contract*'. There is no consistent and unified definition of '*consumer*' in EU law. The vast majority of the definitions of EU law share a common core that a consumer must be a natural person who acts outside his commercial activities. Article 2(1) of the Directive on Consumer Rights defines consumer consistent with the common approach. It states: '*consumer means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession*'. According to ECJ's cases other limitations exist when interpreting '*consumer*'. First, the consumer can only be a natural person. This approach first appears in the *Bertrand case*^{17, 18}. It provided that consumers that are protected could only be a private final consumer. This implies that only natural person can be consumer. This approach has been confirmed in the *Cape*

¹⁷ Case C-150/77 *Bertrand v Paul Ott KG* [1978] ECR I-01431

¹⁸ Julia Hörnle, *Cross-border Internet Dispute Resolution* (Cambridge University Press 2009) 33

*Snc and Idealservice Srl case*¹⁹ and *Idealservice MN RE Sas and OMAI Srl case*²⁰. These two cases insist that consumer ‘*must be interpreted solely to natural persons*’.²¹ Therefore, a legal person cannot be treated as consumer. Second, consumers of dual purposes contracts may be treated as consumers in EU law. In the *Gruber case*, the judge gives an exception for dual purposes contracts. The exception is that ‘*in case the link between the contract and the trade or profession of the person concerned is so slight as to be marginal and, therefore, plays only a negligible role in the context of the supply in respect of which the contract was concluded, considered in its entirety, the person can be considered as a consumer*’. In the context of direct selling, this case gives direct sellers of multi-level marketing a room to be treated as consumers. In practice, sometimes, direct sellers buy the same products they sell for personal use and may sell some of the products they bought for personal use to an emergency customer. In this situation the contract objectively has dual purposes. According to the *Gruber case*²², if the direct seller can prove that the contract has only negligible link to his commercial activity he can be treated as consumer. However, the *Gruber v Bay Wa AG case* sets a strict criteria for dual purposes contracts. ‘*It is only when a consumer, by his own conduct with respect to the trader, gave the latter the impression that he was acting for professional purposes, that the awareness or lack thereof has significant consequences.*’²³ If the consumer gives a trader an impression that he is acting for professional purposes even if the contract does not serve a non-negligible professional purpose the consumer cannot be treated as a consumer. The ECJ also gives examples of situations that a consumer will be treated as performing commercial activities in the *Gruber v Bay Wa AG case*. They are individual orders, without giving further information that could be used for a business, the use of business stationery, the deliverance to a business address or mentioning the possibility of recovering value added tax.²⁴ The strict criteria of the *Gruber v Bay Wa AG case*

¹⁹ Case C-541/99 *Cape Snc and Idealservice Srl* [2001] ECR I-9049 835

²⁰ Case C-542/99 *Idealservice MN RE Sas and OMAI Srl* [2001] ECR I-9049 835

²¹ Ibid. Para 17

²² Case C-464/01 *Gruber v Bay Wa AG* [2005] ECR I-00439

²³ Ibid. Para 51

²⁴ Ibid. Para 52

makes direct sellers nearly impossible to be treated as a consumer. Unlike the EU, the definition of ‘consumer’ in China is defined from consumers’ behaviors. Article 2 of the Consumer Protection Law of PRC states: *‘the rights and interests of consumers when purchasing or using commodities or receiving services as consumer needs for daily use shall be protected by this Law.’* This article indicates consumers are those who consume for satisfying the daily use of life. Daily use means that consumers’ consumption is not for commercial activities. This is the same as the EU. There is no explicit stipulation that only natural person can be treated as consumers even though most scholars and judges are of the opinion that the consumer should be natural person only. The definition of ‘trader’ is stipulated in Article 2(2) of the Directive. The definition is the same as the Doorstep Selling²⁵, which is the predecessor of the Directive on Consumer Rights concerning about consumer protection in the context of direct selling. There is no big argument on this definition but it does not mean these two definitions are perfect. According to the statistics of Direct Selling Europe, 83% of the direct sellers in Europe are work part-time and 25% of new direct sellers are not previously in any form of employment.²⁶ To those direct sellers, whether they can be treated as traders are determined by the interpretation of Article 2(2). Chinese definition of ‘trader’ is in Article 3 of the Consumer Protection Law of PRC, it states: *‘this law shall be observed by business operators in the provision of commodities produced or sold and in the provision of consumer services’*. This article means that traders are those who professionally do commercial activities. Also there is no explicit explanation whether the trader can only be a natural person. Most scholars and judges are of the opinion that the trader can be either a natural person or a legal person, which is the same as the EU.

Article 2(8) of the Directive gives a clear definition of ‘*off-premises contracts*’, which extends the scope of the old definition in the Doorstep Selling Directive. In the Doorstep Selling Directive, the EU only concerns about unsolicited visit by the trader

²⁵ Directive 85/577/EEC, [1985] OJ L 372

²⁶ Direct Selling Europe, ‘Direct Selling Key Data’ (DSE, 3 August 2015) <<http://www.directsellingeurope.eu/basic-page/policy-areas/direct-selling-key-data>> 3 August 2015

to the consumer's home or to that of another consumer or to the consumer's place of work and excursion organized by the trader as doorstep selling.²⁷ The new definition includes not only unsolicited visit but also solicited visit. The court in *Crailsheimer Volksbank eG v Klaus Conrads and Others case*²⁸ said the objective of the Doorstep Selling Directive was to protect the consumer from the element of surprise inherent in doorstep selling.²⁹ The unsolicited visit full of surprise therefore consumers of unsolicited visit need special protection. For the solicited visit, legislators consider there should be the same as traditional sales since the consumer initiates the invitation, the consumer should have compared to other traders. Based on these reasons, the Doorstep Selling Directive excluded solicited visit. However, the practice tells a diverse story. From the finding of UK Office of Fair Trading's (OFT) that there is no difference between unsolicited and solicited visits. Data from the OFT's Consumer Direct complaints database show that between February 2007 and October 2007 there were 6800 complaints relating to unsolicited off-premises transactions, and 32,000 complaints relating to solicited transactions.³⁰ The statistics shows that the surprise does not disappear event the visit is initiates by the consumer. The same changes also appear in other Member States.³¹ Another problem of distinguish solicited and unsolicited visit has been shown by the practice is that unsolicited visits of seller, in some situations, can be converted into solicited visit, which derogates consumer protection.³² Therefore, the new definition includes both unsolicited and solicited visit is more reasonable. The occasions of transactions have been enlarged not only limit to excursions or consumers' home. In the 1980s excursions organized by traders and door-to-door solicitation were the most common practices.³³ Nowadays, off-premises transactions happen in diverse occasions, such as conferences or

²⁷ Paul Harrison, Marta Massi, Kathryn Chalmers, 'Beyond Door-to-Door: The Implications of Invited In-Home Selling' (2014) 48(1) Journal of Consumer Affairs 195

²⁸ Case C-229/04 *Crailsheimer Volksbank eG v Klaus Conrads and Others case* [2005] ECR I-9295

²⁹ Ibid. Para43

³⁰ Summary of Response, Working Document of the Commission Responses to the Consultation on the Council Directive 85/577/EEC of 20 December 1985 to Protect the Consumer in Respect of Contracts Negotiated Away From Business Premises

³¹ Ibid.

³² Ibid.

³³ Ibid.

seminars, informational discussions with colleagues, and social networking.³⁴ With the change of mentality and life-style of the EU, the occasions of transactions need to be extended. '*Off-premises contract*' also include contracts that are concluded immediately after face-to-face negotiation. This also reflects the need of the reality. However, the word '*immediately*' needs further explanation to make the application effective and less controversial. Article 3 of the Administration of Direct Selling Regulations of PRC defines direct selling as: '*a form of distribution by which a direct selling enterprise recruits direct sellers to directly market products to end consumers outside the fixed business premises.*'

The definitions of these three concepts are almost the same in the EU and China. This indicated that the Directive on Consumer Rights, the Consumer Protection Law and the Administration of Direct Selling Regulations are legal documents that concerns about consumer protection in the context of direct selling. They are comparative.

II: RULES OF CONSUMER INFORMATION IN THE CONTEXT OF DIRECT SELLING IN THE EU

A. INTRODUCTION OF CONSUMER INFORMATION

In EU laws, consumer protection has progressively developed as a sub product of the execution of the internal market.³⁵ Initially the European Economic Community does not stipulate any article in the Treaty of Rome directly concern about consumer protection. Because the Community believes that the consumer would stand to benefit from a deregulated, integrated and more efficient common market, which is the ultimate aim of the Community. Therefore, Treaty of Rome only makes five incidental references to consumers in Article 39, 40, 85(3), 86 and 92(2). Among these five

³⁴ Ibid.

³⁵ Me Julia Senior, 'Strengthening Consumer Rights Online, A Settled Legislative Trend' (UIA, 28 March 2014) <file:///Users/youyang/Downloads/SENIOR%20%20Julia%20-%20Presentation.pdf> accessed 15 July 2015

articles there is no rule on consumer information. In the 1970s and 1980s the political atmosphere slowly became conducive to consumer-related measures. The recital of the Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy states: *'whereas the improvement of the quality of life is one of the tasks of the Community and as such implies protecting the health, safety and economic interests of the consumer.'* This indicates that the Community starts to consider issues of consumer protection. This Regulation provides for five basic rights, right to health and safety, right to economic interests, right to representation, right to redress and right to information and education.³⁶ With the change of view, the Community begins to legislate on consumer protection, such as the 1979 Directive on consumer protection as regards food price labeling³⁷, the 1984 Directive on misleading advertising³⁸ and the 1985 protection of consumers in the case of contracts negotiated away from business premises³⁹. And articles concerning about consumer information begin to appear in these directives.

With the adoption of the Single European Act and the emergence of the concept of Citizens' Europe, concerns about consumer protection are enshrined in the Treaty of Rome.⁴⁰ In the Maastricht Treaty a specific competence for consumer protection is formally introduced in Article 129a. After that more directives have been enacted, notably the Directive 97/7/EC⁴¹ and the Directive 1999/44/EC⁴². The Maastricht Treaty inserted the issue of consumer protection into Community policy but it was without doubt the Amsterdam Treaty that firmly established the concept of consumer protection.⁴³ The Nice Treaty came into force in 2003 maintained the importance of

³⁶ Kluwer Law International, 'Forty Years of EU Consumer Protection: Where Does It Stand Now?' (2015)

42(3) Legal Issues of Economic Integration 195

³⁷ Directive (79/112/EEC), [1979] OJ L 33/1

³⁸ Directive (84/450/EEC), [1984] OJ L 250

³⁹ Directive (85/577/EEC), [1985] OJ L 372

⁴⁰ Diahanna Lynch, David Voge, 'The Regulation of GMOs in Europe and the United States: A Case-Study of Contemporary European Regulatory Politics' (Council on Foreign Relations Press 2001) 7

⁴¹ Directive 97/7/EC, [1997] OJ L 144/19

⁴² Directive 1999/44/EC, [1999] OJ L 171/12

⁴³ Klaus-Dieter Borchardt, 'The ABC of European Union law' <http://europa.eu/documentation/legislation/pdf/oa8107147_en.pdf> accessed 17 July 2015

consumer protection with the appropriate legal framework.⁴⁴ The Lisbon Treaty did not add any notable changes to the consumer policy.⁴⁵ During this time, consumer information has always been a method that used by the EU to protect consumers.

Nowadays the EU policies of consumer protection guarantee a high level of consumer safety in many areas.⁴⁶ Stringent safety standards apply to toys, electrical appliances, cosmetics, pharmaceuticals, food, lighters, personal protective equipment, machinery and recreational boats.⁴⁷ The EU also safeguards consumer's wider interests in areas such as fair business practices, misleading advertisements & those that denigrate rival brands (comparative advertising), price indicators & labeling, unfair contract terms, distance & doorstep selling, timeshares & package holidays and the rights of recreational or business travellers.⁴⁸ The modern EU consumer policy is:

safeguard consumer rights through legislation, including helping consumers resolve disputes with traders fast and efficiently (e.g. through alternative dispute resolution and European Consumer Centers);

ensure consumers rights keep pace with economic and social change-especially in the digital area, energy, and financial services;

guarantee the safety of any product consumers buy within the single market;

help consumers make choices based on clear, accurate and consistent information (e.g. when shopping online)⁴⁹

Consumer information is a remedy to information default of economic market. It is one of also the most persuasive rationales for consumer protection. Consumer protection is kind of states' intervention of free economy, which is considered unnecessary in the earlier time. Economics of earlier time believe that perfect

⁴⁴ Luisa Antonioli, 'Consumer Law as an Instance of the Law of the Diversity' (2012) 30 Vermont Law Review 855

⁴⁵ Ward Schoenmaekers, 'the Notion 'Consumer' in European Private Law' <<http://lib.ugent.be/en/catalog/rug01:002163256>> accessed 16 September 2015

⁴⁶ RUXANDRA MĂLINA PETRESCU-MAG1, DACINIA CRINA PETRESCU2, RAÚL HUMBERTO SEVILLANO BLAS, 'Trends of Community Expenditure on Common Agriculture Policy, Including the Agrienvironmental Measure' (2009) 1 Studia Universitatis Babes-Bolyai, Negotia 59

⁴⁷ Mira Malczyńska-Biały, 'the European Union and the Need to Protect Consumers' (2012) 9 Studies in Politics and Society 262

⁴⁸ Ibid.

⁴⁹ K.J. Cseres, A. Schrauwen, 'Empowering Consumer-citizens Changing rights or merely discourse?' (Universiteit van Amsterdam, September 2012) <<http://acelg.uva.nl/Publications>> accessed 1 August 2015

competition in the free market could secure the best for the consumers.⁵⁰ They insist the free market was a self-organizing system.⁵¹ Producers have to sell their goods to consumers in order to survive.⁵² Producers will only be able to sell to consumers what consumers want to buy.⁵³ Consumers' preference will dictate what is made available.⁵⁴ Producers compete. Consumers choose. The invisible hand of producers behaving in response to consumers' preference organizes the market. In this kind of market, consumers will be supplied according to their preference and there will be neither unsafe products nor even poor products.⁵⁵ Therefore, states' intervention is unnecessary. Unfortunately this is just a pleasant dream only applicable for early economic market. With the prosperity of commodity economy economics found out that the perfect competition is a mirage. There is a crucial element, which has been omitted. That is the transposition of information between producers and consumers. The information cannot be adequately deliver from the demand-side to the supply-side or adversely. And this will dramatically jeopardize the perfect competition market theory.⁵⁶ More skepticism exist as to whether the market system really is in the consumer interest, a defensible notion of demand can realistically individually exist in a modern economy and so on.⁵⁷

With the emergence and development of capitalism in the 12th and 13th century, the diversity of consumer goods increases.⁵⁸ Before the 19th century, the prosperity of the free market is much lower than nowadays. In that era, the status of traders and consumers are almost equal. States believe in perfect competition theory even though a few interventions have existed. Those interventions are rather designed to manage the behavior of traders in order to maintain the market order than to protect consumers. For instance the Trade Descriptions Act 1968 of UK, the avowed intent of

⁵⁰ Geraint Howells and Stephen Weatherill, *Consumer Protection Law* (2 edn, ASHGATE 2005) 1

⁵¹ Ibid.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Cf. J. Hanson and D. Kysar, *Taking Behavioralism Seriously* (Harvard LR 1420 1999) 112

⁵⁷ C. Sunstein, *Behavioral Law and Economics* (Cambridge university Press, 2000)

⁵⁸ Chen Qingchuang, Zhan Tianxiang, Ji Xiangxiang, *the Brief History of the World* (4th Zhe Jiang University Press 2014) 15

which is to protect honest traders against unscrupulous competitors who sought to create a trading advantage by wrongly describing the product they sell.⁵⁹ This Act objectively plays a role of protecting consumers from misleading practices. In that age, laws are inclined to protect traders. In United Kingdom, consumers have to verify that the quality of goods they had purchased and only in case of gross negligence the seller could have been held liable.⁶⁰

The statute of consumer changes in the late 19th century. In 19th century, profound changes take place in human socio-economic life.⁶¹ Due to the change of production organization, the producers are no longer handicraftsmen or owners of individual workshops.⁶² More and more modern enterprises with powerful economic strength occurred. Along with the development of science and technology, the process of production become more and more complex and the technical content of products become higher and higher.⁶³ Consumers become more and more difficult to get full information of a product. Due to the revolution of circulation, the links of circulation increased. The relationship among the producer, the trader and the consumer become more and more intricate. All these changes aggravate the asymmetry of information between the trader and the consumer. Consumers turn into a weak group in market transactions. Corresponding to the changes of social needs, consumer protection laws appear.

Economics of 19th and 20th century find out that asymmetry of information between the trader and the consumer is a key issue.⁶⁴ The failure of information is likely to lead to significant damages to consumers. In a situation where information between

⁵⁹ David Oughton and John Lowry, *Consumer Law* (2 edn, Blackstone Press Limited 2000) 12

⁶⁰ Antonella Corradi, 'International law and Consumer Protection: The history of consumer protection' (Hauser Globa Law School Program, 2015) <http://www.nyulawglobal.org/globalex/International_Law_Consumer_Protection.htm> accessed 20 July 2015

⁶¹ Lynda Mugglestone, 'Nineteenth-century English—an overview' (OED, 2013) <<http://public.oed.com/aspects-of-english/english-in-time/nineteenth-century-english-an-overview/>> accessed 5 August 2015

⁶² Michael T. Hannan, 'History of the Organization of Work' (Encyclopaedia Britannica, 2015) <<http://global.britannica.com/topic/history-of-work-organization-648000>> accessed 7 August 2015

⁶³ Ibid. 60

⁶⁴ Joseph E. Stiglitz, 'The Contributions of the Economics of Information to Twentieth Century Economics' (2000) 115(4), *Quarterly of Journal of Economics*, 1441

the trader and the consumer is asymmetric, the trader would use partial or false information to induce or deceive consumers. The trader can hide some information, advertise false information, or use improper bidding to sell inferior goods to the consumer. And those behaviors are really adopted by some traders in practice. Left those deceptions developed freely will cause huge damage to consumers and the whole market. George A. Akerlof's 'lemon' market theory demonstrates the hazard of asymmetry of information.⁶⁵ George A. Akerlof surveys a second-hand automobiles market. He finds that consumers cannot truly get full information of a second-hand automobile. They can only judge from the information that provided by traders and their own experience. In this situation, traders of bad cars will hide information and sell the cars at a lower price. Consumers are likely to choose those bad cars. This leads those traders whose automobiles have a better quality and a higher price cannot survive in the market and they will gradually leave the market. After that the average quality of second-hand automobiles goes down together with the average price. Then again traders with bad cars use lower price to induce consumers and drive out traders with good cars. At the end of the report, George A. Akerlof claims that continuing leaving of traders with good cars may eventually destroy the second-hand automobiles market. Geoffrey Heal challenges Akerlof's theory.⁶⁶ He claims that only shortsighted traders will use asymmetry of information to deceive consumers.⁶⁷ Traders who prefer multiple-transactions rather than a single sale will tell consumers true information.⁶⁸ In response, Akerlof says that he agreed with the essence of Heal's claim but he insists that the types of counteracting institutions will affect any continuity in the relationship of traders.⁶⁹ Besides Geoffrey Heal, Jae-cheol Kim, Igal Hendel and Alessandro Lizzeri also challenge Akerlof's theory to some extent. Jae-cheol incorporates the potential changeability of the agent's status into the model.⁷⁰ Igal Hendel and Alessandro Lizzeri concern about the dynamic interaction

⁶⁵ George A. Akerlof, 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism' (1970) 84(3) The Quarterly Journal of Economics 488

⁶⁶ Geoffrey Heal, 'Do Bad Products Drive Out Good?' (1976) 90 Q. J. ECON. 499

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ George A. Akerlof, 'Reply to Professor Heal' (1976) 90 Q. J. ECON. 503

⁷⁰ Jae-Cheol Kim, 'The Market for "Lemons" Reconsidered: A Model of the Used Car Market with Asymmetric

between the new and used goods market.⁷¹ Although these studies reach different conclusions, they all highlight the importance of asymmetry of information. Besides the damage that George A. Akerlof finds, Iain Ramsay also finds some other damages of asymmetry of information. He claims that imperfect consumer information also may result in the following potential market failures, misallocation of consumer resources, informational market power, artificial product differentiation and informational inefficiencies-providing misleading signals to consumers.⁷²

In a consumer market, asymmetry of information between the trader and the consumer is inevitable. Productions are designed and produced by the trader. Traders know every detail of the production. Consumers can only acquire the information on the productions by three means: the experience of the past, the interventions by the government or other organizations or directly from the notice of the trader. For the daily supplies or services, consumers can get some information from their past experience, such as the quality of clothes. However, past experience is not applicable to high technologic productions or unfamiliar goods, such as computers and cars. For those kinds of productions, consumers can only get information from traders or the government or other organizations. It is unpractical to ask the government or other organizations to promulgate details of every production that is now selling in the market. The most effective way is to let traders to expose the information of their productions. However, how much information a consumer can get from a trader depends on the integrity of the trader. For maintaining their own interests, traders are unlikely to give comprehensive and impartial information. Therefore, states' intervention is necessary. States enforce traders to expose some information is a remedy to asymmetry of information.

B. RULES OF CONSUMER INFORMATION

Since this thesis just wants to discuss the general rules of consumer information in the context of direct selling, only the Directive on Consumer Rights and Unfair

Information' (1985) 75 AM. ECON. REV. 836

⁷¹ Igal Hendel, Alessandro Lizzcristi, 'Adverse Selection in Durable Goods Market' (1999) 89 AM. ECON. REV. 1097

⁷² Iain Ramsay, *Consumer Law and Policy* (2 edn, Oxford and Portland, Oregon 2007) 64 Citing: IDC Ramsay, 'Rationales for Intervention in Consumer Marketplace (1984)' 25-35

Commercial Practices Directive will be probed into details.

General rules of consumer information are set out in Article 6 and Article 7 of the Directive on Consumer Rights. Details of these articles will be discussed in detail followed.

1. SUBSTANTIVE REQUIREMENTS

Article 6(1) of the Directive on Consumer Rights indicates that the main characteristics, the identity of the trader, the price of the goods, the arrangement for payment, the existence of right of withdrawal, guarantees and after-sales services, duration and termination of the contract of the contract guarantees and after-sales services, deposits and financial guarantees and out-of-court redress mechanisms deposits and financial guarantees all needs to be provided to consumer in advance.

1.1 RULES OF MAIN CHARACTERISTICS

Article 6(1)(a) of the Directive requires traders to provide main characteristics to consumers. The content of main characteristics is not explained in the Directive. Luckily, Article 6(1)(b) of the Unfair Commercial Practice Directive⁷³ also requires trader to provide main characteristics to consumer. And the definition of ‘trader’ and ‘consumer’ in that Directive is the same as the definition in the Directive on Consumer Rights. Therefore, concerning about the consistency of laws, the content of main characteristics should be the same as those explicated in Article 6(1)(b) of Unfair Commercial Practices Directive. Article 6(1)(b) of the Directive states: *‘the main characteristics of the product, such as its availability, benefits, risks, execution, composition, accessories, after sale customer assistance and complaint handling, method and date of manufacture or provision, delivery, fitness for purpose, usage, quantity, specification, geographical or commercial origin or the results to be expected from its use, or the results and material features of tests or checks carried*

⁷³ Directive 2005/29/EC, [2005] OJ L 149/22

out on the product'. The 2009 Guidance on the Implementation/Applicable of Directive 2005/29/EC on Unfair Commercial Practice⁷⁴ explains that the purpose of main characteristics is 'to ensure that consumers are not misled when they make a purchasing decision'. 'The content of main characteristics of a product may vary depending on the product concerned, 'complex products may require the provision of more information than simple ones' and 'certain restrictive conditions which limit the offer should also in principle be considered as part of the main characteristics of the product'. The content of main characteristics of a product may vary depending on the 'medium' used by the trader.'⁷⁵ According to the guidance, the content of main characteristics should be decided case-by-case based on the character of the product and the medium used by the trader. In the context of direct selling, transactions are traded face-to-face, the medium used by the trader is less important in direct selling. Attentions should be paid on the character of the product. In the *Trento Sviluppo srl, Centrale Adriatica Soc. coop. arl v Autorità Garante della Concorrenza e del Mercato*⁷⁶ case, the judge states that if a practice inter alia likely to cause the consumer to take a transactional decision that he would not have taken in the absence of such a practice the practice will be considered misleading. Therefore, it can be deduced that if the absence of a characteristic will lead the consumer to do an oppose choice the characteristic should be deemed as main characteristic. Using the same approach in the Directive on Consumer Rights is reasonable. Since this is no different explanation of the content of the main characteristics in the Directive. Also, let the judge to decide the content of main characteristics case-by-case is more effective to realize consumer protection. Therefore, I deem the content of main characteristics in the Directive on Consumer Rights should be decided case-by-case just as the approach as the Unfair Commercial Practice Directive.

⁷⁴ 2009 Guidance on the Implementation/Applicable of Directive 2005/29/EC on Unfair Commercial Practice

⁷⁵ Ibid

⁷⁶ Case C-281/12 *Trento Sviluppo srl, Centrale Adriatica Soc. coop. arl v Autorità Garante della Concorrenza e del Mercat* [2013] para 33

1.2 RULES OF TRADERS' IDENTITY

Traders need to provide details of their identity to consumers. The detail of the identity is not the same based whether the trader is establishment or not.

Article 6(1)(c) deals with details of the traders' establishment. The concept of establishment has not been defined in this Directive. Therefore, in order to understand the meaning of '*establishment*', referring to other legal documents may be helpful since this a concept that exists in the Treaty on Functioning of the European Union and should have the same meaning in every secondary law. In Article 4 of the Service Directive⁷⁷, '*establishment*' is defined as '*the actual pursuit of an economic activity, as referred to in Article 43 of the Treaty, by the provider for an indefinite period and through a stable infrastructure from where the business of providing services is actually carried out*'. This implies that establishment is a fixed store that provides the actual service. The ECJ's understanding of '*establishment*' is not quite the same as that of the Service Directive. In *Gebhard case*⁷⁸ ECJ defines '*establishment*' as follows, '*The concept of establishment within the meaning of the Treaty is a very broad one, allowing a Union national to participate, on a stable and continuous basis, in the economic and social interpretation within the Union in the sphere of activities as self-employed person*'. The ECJ does not require a stable infrastructure. However, Article 6(1)(c) of the Directive on Consumer Rights requires a geographical address of the trader, which implies the trader must have a stable infrastructure. Geographical addresses, telephone number, fax number and e-mail addresses are mandatory requirements. Other requirements may be needed if the trader is deals the behalf of a principal, he should provide the geographical address and the identity of the principal. The concept of '*place of business*' also has not been defined in the Directive. But it has been explained in the *Planzer case*⁷⁹ states, '*Determination of a company's place of business requires a series of actors to be taken into consideration, foremost*

⁷⁷ Directive 2006/123/EC, [2006] OJ L 376/40

⁷⁸ Case C-55/94 *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1996] ECR I-4165 para 33

⁷⁹ Case C-73/06 *Planzer Luxembourg Sàrl v Bundeszentralamt für Steuern* [2006] ECR I-5677 para 61

amongst which is its registered office, the place of its central administration, the place where its directors meet and the place, usually identical, where the general policy of that company is determined. Other factors, such as the place of residence of the main directors, the place where general meetings are held, the place where administrative and accounting documents are kept, and the place where the company's financial, and particularly banking, transactions mainly take place, may also need to be taken into account'. According to the case the 'place of business' should mean the place where the essential decision and central administrative management are made. According to Article 6(1)(d) the Directive on Consumer Rights, if the traders' place of business is not the same as the establishment, the trader needs to provide his geographical address of the place of business to the consumer. Other requirements may be needed if the trader is working on the behalf of a principal, he should provide the geographical address and identity of the principal.

1.3 RULES OF PRICE OF PRODUCTS

Price of goods or services and all kind of relative and potential charges in the transaction must be given to consumers. If the total of the goods or services is fixed, the trader needs to provide the consumer the exact price including tax price of the goods or services to the consumer. If the total of the goods or services is not fixed, the trader needs to provide the consumer the exact measure of how the trader will charge such as unit price. Also, relative charges need to be provided in advance too. Two kinds of contracts need special attention. Contracts of undetermined duration and contracts containing a subscription. In those two kinds of contracts, if the product is charged at a fixed rate, information about the total cost per billing period and about the total monthly costs should be provided. Otherwise, if the total cost of the product cannot be calculated in advance, the trader should inform the consumer of the way, in which these variable costs are calculated. The Doorstep Selling Directive only concerns about fixed price. The addition of not fixed price is to correspond to the development of economic market.

Note that, under Article 6(6), the consumer does not have to bear any additional charges or costs of which the trader does not provide in advance.

1.4 RULES OF OTHER REQUIREMENTS OF CONSUMER INFORMATION

Article 6(1)(g) of the Directive on Consumer Rights arranges requirements for executing the contract-payment and delivery. The payment, delivery, performance and the time of performance need to be provided in advance. And, where applicable, the trader's complaint handling policies also need to be provided. The similar requirements also exist in Article 7(4)(d) of the Directive on Unfair Commercial Practices. In Article 7(4)(d), the trader needs to provide arrangements for payment, delivery, performance and the complaint handling policy if the requirement is depart from the professional diligence. The Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices states, *'the arrangements for payment, delivery, performance and the complaint handling policy of most established products, services and traders (Article 7(4)(d)) would normally be expected to conform to the requirements of professional diligence, and so would not normally have to be stated explicitly. Such information must be displayed only where the terms of payment, delivery, performance and handling of complaints are to the consumer's disadvantage when compared to the good diligent market practice'*. Therefore, according to the Directive on Unfair Commercial Practices, arrangements for payment, delivery, performance and the complaint handling policy only need to be provided under the situation where the trader's policies are inconsistent with the market customary practice and disadvantage to the consumer. However, this preliminary does not appear in Article 6(1)(g) of the Directive since the Directive pursues a high level of unifying consumer protection rules. The trader needs to provide information of arrangements for payment, delivery, performance and the complaint handling policy no matter his policies are consistent or inconsistent with customary practices. This unconditional requirement makes the consumer easier to get necessary information without understanding customary habit of the market, which usually cannot be known by the consumer. This requirement reduces transaction cost for the consumer. It is an improvement on a high level of consumer protection.

Article 6(1)(l) and (m) of the Directive require guarantees and after-sales services. Under the obligation to remind the consumer of the legal guarantee, the seller should specify that, under EU law, he is liable for any lack of conformity that becomes apparent within a minimum of two years from delivery of the goods and that national laws may give the consumer additional rights.⁸⁰ Differing from the legal guarantees of conformity for goods the guarantee for after-sales services is alternative. Traders have the autonomy to decide.⁸¹ After-sales services is not a legal obligation of the trader, it is a contractual obligation.

Article 6(1)(p) of the Directive deals with two special contracts - contracts of indeterminate duration or contracts that extend automatically. For those two kinds of contracts, the minimum duration of the consumer's obligations needs to be provided in advance. The minimum duration of the consumer's obligations means the duration that consumers are not allowed to terminate the contract. Since the Directive does not pay more attention on unifying contract laws of Member States, each Member's domestic contract law regulates details of those two kinds of contract.

Article 6(1)(q) of the Directive deals with transactions paid credit cards. The trader needs to inform the consumer in advance if he will block or debit from the consumer's account. As explained in recital 33, *'The trader should be obligated to inform the consumer in advance of any arrangement resulting in the consumer paying a deposit to the trader, including an arrangement whereby an amount is blocked on the consumer's credit or debit card'*. Transactions paid by credit cards involved another party into the transaction-a bank. The payment happens among the consumer, the trader and the bank. The bank substitutes the consumer to pay the trader first. Only after the payment, the consumer can acquire information about the payment happens between the trader and the bank. Different traders have different policies on deposits and financial guarantees, without traders' information, the consumer cannot know what will happen. Therefore, the Directive stipulates that the trader needs to provide information of deposits and financial guarantees to the consumer. This

⁸⁰ 2009 Guidance on the Implementation/Applicable of Directive 2011/83/EC on Directive on Consumer Rights

⁸¹ Ibid.

requirement satisfies the aim of achieving a high level of consumer protection since credit cards have been widely used nowadays.

Article 6(1)(t) of the Directive gives consumers an alternative dispute resolution scheme. This subparagraph has a close connection with Directive on Consumer ADR⁸². Article 13 of the Directive states, *'1. Member States shall ensure that trader established on their territories inform consumers about the ADR entity or ADR entities by which those traders are covered, when those traders commit to or are obligated to use those entities to resolve disputes with consumers. That information shall include the website address of the relevant ADR entities. 2. The information referred to in paragraph 1 shall be provided in a clear, comprehensible and easily accessible way on the traders' website, where one exists, and, if applicable, in the general terms and conditions of sales or service contracts between the trader and a consumer. 3. Member States shall ensure that, in cases where a dispute between a consumer and a trader established in their territory could not be settled further to a complaint submitted directly by the consumer to the trader, the trader provides the consumer with the information referred to in paragraph 1, specifying whether he will make use of the relevant ADR entities to settle the dispute. That information shall be provided on paper or on another durable medium.'* This article requires the trader to provide to the consumer an alternative dispute resolution scheme to settle disputes other than courts. The arrangement of ADR of each Member State is different. Some Member States set ADR based on administrative regions, such as the Czech Republic. Some Member States set ADR based on expertise, such as Austria. In the context of direct selling, some Member States have a specific ADR-mechanism to settle disputes, such as the UK.⁸³ Member States' domestic laws control the substantive and procedural laws of ADR.

There are two associations on consumer protection in the context of direct selling in Europe at the EU level: The Direct Selling Association (DSA), which is a member of

⁸² Directive 2013/11/EU, [2013] OJ L 165/63

⁸³ http://ec.europa.eu/consumers/solving_consumer_disputes/non-judicial_redress/adr_in_your_country/index_en.htm < accessed 16 August 2015

World Federation of Direct Selling Associations (WFDSA), and the Direct Selling Europe (DSE). Each of them has a Code of Ethics. Each Code of Ethics has articles about resolving disputes between consumers and traders. The procedures of DSA are:

- try to resolve the matter directly with the company;
- if not satisfied, contact the DSA Code Administrator in the country where the alleged violation occurred;
- if not satisfied, contact the WFDSA.

According to the Code of Ethics of DSE, *'Complaints between consumers and direct selling companies and/or its direct sellers are to be dealt with by the Alternative Dispute Resolution entity to be chosen by the two parties. If within a reasonable time no solution can be found to the satisfaction of both parties, the consumer may report a breach of this Code to the Managing Director of DSE'*. Members of two associations need to inform consumers the existence of the code of ethics in advance. These two Codes of Ethics only applicable to the members of two associations not all the direct selling companies. Therefore, if the customer wants to use either Code of Ethics to safeguard his right he must make sure the company is a member of those two associations. The membership of two associations can be found on the official websites. Some Member States of EU also have their national direct selling associations. And the rules of each national direct selling association can be found on their websites.

All the consumer information mentioned above is compulsory and has to be provided to consumers by traders. However, if there is an express agreement between the trader and the consumer, the content of consumer information can be altered. The legal consequence of failure of providing information that has been illustrated above has been expressed in Article 6(1). It states: *'before the consumer is bound by a distance or off-premises contract [...] the trader shall provide the consumer with the following information [...]' implies the entire information stipulated Article 6(a)-(t) are compulsory precondition for a contract to be concluded. All those information need to be provided in advance.'* This paragraph tells that if consumer information has not been given to consumers in advance, consumers are not bound by the contract. In the

Doorstep Selling Directive, there is no unified legal consequence for lack of consumer information. Member States enact different rules on the consequence of lack of consumer information, which cause fragmented framework. The Directive aims to full harmonization of rules on consumer protection in the context of direct selling, hence, unified legal consequence of lack of consumer information is necessary. The Directive stipulates unified legal consequence is an improvement of the EU. Noteworthy, this paragraph only concerns about the effect of the contract. The contract is not bound is caused by either termination of contract or void before the fact is decided by Member States' domestic contract law.

Not only all information above needs to be provided but also needs to be provided clearly. Article 6(1) expresses that all information needs to be provided '*in a clear and comprehensive manner*'. Recital 34 specifics the meaning of '*clear and comprehensive manner*' as, '*[...] the reader should take into account the special needs of consumers who are particular vulnerable because of their mental, physical or psychological infirmity, age or credulity in a way which the trader could reasonably be expected to foresee. However, taking into account such specific needs should not lead to different levels of consumer protection.*' This paragraph expresses that there is no unified objective standard for '*a clear and comprehensive manner*', it should be decided case by case. The paragraph focuses more on substantive fairness not formal fairness. Therefore, a trader cannot relief even though he has reached a standard that normally an adult can get the meaning of his words. Traders need to give further explanation to people with special needs. However, this does not mean a different level of protection, the amount of information needs to be provided is the same. Traders need provide more clear explanation to those weaker consumers on the same amount of information cause the weaker consumer may have problems on understanding. Traders do not need to provide more information that has not been listed in the Directive. The information provided also needs to be truthful and comprehensive, otherwise, the trader breaches his duty under Article 6 of Unfair Commercial Practices Directive.

2. FORMAL REQUIREMENTS

The general rule of formal requirements is that all the information and the copy of the signed contractor confirmation of the contract need to give to consumers on paper or another durable medium.⁸⁴

Article 7(4) is an exception to the general rule. If the contract satisfies the following four requirements at the same time, the formal restrictions can be less strict. Firstly, consumers solicit the visit. Secondly, the purpose of the contract is for repairing or maintaining. Thirdly, the contract is fulfilled immediately. Fourthly, the payment does not exceed EUR 200. In the situation, the contract satisfies all four elements simultaneously, the trader can provide only (a), (b), (c), (h) and (k) of Article 6(1) and the price of products or services to the consumer. (b), (c) of Article 6(1) and the price need to be on paper or another durable medium. But (a), (h) and (k) of Article 6(1) can be provided in various ways not only on paper or another durable medium, if the consumer expressly agrees. The exception is restricted by a series of preconditions. This exception is not mandatory. Member States have the autonomy to decide to apply or not. Member States can choose to just apply the general requirement.

Except the requirements of these two rules no more formal requirements is allowed. All formal requirements have been exhaustively listed in Article 7. Member States cannot stipulate more requirements on the form of information.

Unlike substantive requirements, the legal consequence of infringement of formal requirements is not clearly expressed in the Directive. Therefore, it should be depended on domestic law of Member States.

⁸⁴ Directive 2011/83/EU art. 7(1)

III: RULES OF CONSUMER INFORMATION IN THE CONTEXT OF DIRECT SELLING IN CHINA

A. INTRODUCTION OF CONSUMER INFORMATION

The first Consumer Protection of PRC is enacted in 1993⁸⁵. The aim of the 1993 Consumer Protection law is ‘*to protect the legal rights and interests of consumers, to maintain social and economic order and to promote the healthy development of the socialist market economy*’⁸⁶. After that the PRC enacts some other laws on consumer protection such as Product Quality Law of PRC⁸⁷, Advertisements Law of PRC⁸⁸ and so on. The new Consumer Protection Law is enacted in 2014 replaced the 1993 Consumer Protection Law. Both Consumer Protection Laws have provisions on consumer information. Reasons of developing consumer information in two Consumer Protection Laws are the same as the EU, notably to rebalance the asymmetry of information between the trader and the consumer.

The thesis deals with consumer protection in the context of direct selling; therefore, only two laws of the PRC will be illustrated. They are the new Consumer Protection Law and the Administration of Direct Selling Regulations that enacted in 2005.

B. RULES OF CONSUMER INFORMATION

1. SUBSTANTIVE REQUIREMENTS

1.1 RULES OF MAIN CHARACTERISTICS

Article 8, 13 and 20 of the Consumer Protection Law deal require the trader to provide main characteristics of the product to consumers. Article 8 and 13 give the consumers rights to be informed. Article 20 deals with the traders’ obligations to inform. These articles do not mention the words ‘main characteristics’. But in practice

⁸⁵ 1993 Consumer Protection Law of PRC

⁸⁶ Ibid

⁸⁷ Product Quality Law of PRC

⁸⁸ Advertisements Law of PRC

they are concerning about the main characteristics of the product. Legislator uses a non-exhaustive enumeration to describe what should be informed and use the words '*and so on*' at end. '*And so on*' is widely used in Chinese legislation. The common understanding of '*and so on*' in civil law is that the list is not exhaustive. With the development of society the content will be extended. In particular if the listed content may not enough, the judge will usually ask the superior court to interpret the law.

1.2 RULES OF IDENTITY

Article 21 of the Consumer Protection Law requires the trader to provide his identity to the consumer. The identity contains the trader's name and trademark. This article is aim to protect the consumer from wrongfully identify the trader and also help the consumer to ascertain who should assume corresponded liabilities to the consumer. If products consumers bought causes a negative effect on them, consumers can sue the trader. Without a specific defendant the litigation cannot be prosecuted. However, the definition of '*true name*' is not clear. Mostly it is understood as the registered name of the undertaking that sells the product to the consumer.

1.3 RULES OF PRICE

Article 20 and 23 of Consumer Protection Law deal with the price of the commodities. The trader needs to provide the clear price to the consumer in advance. More details of price are stipulated in the Price Law of PRC⁸⁹. There is no specific requirement on price in the context of direct selling.

1.4 RULES OF OTHER REQUIREMENTS OF CONSUMER INFORMATION

Article 18 of the Consumer Protection Law deals with security of the commodities. The trader needs to warn the consumer the risk dangerousness of the commodities and indicate correct method for use.

⁸⁹ the Price Law of PRC

2. FORMAL REQUIREMENTS

There is no formal requirement for consumer information in China.

There is no legal consequence of failure of providing consumer information. The legal consequences of infringement of consumer information of Consumer Protection Law are based on either personal injury or pecuniary loss. Therefore, lacking personal injury or pecuniary loss means that there is no legal consequence. The legal consequences of the infringement of information of price are referring to the Price Law of the PRC according to Article 48 of the Administration of Direct Selling Regulations. According to the Price Law, the trader does not sell as the price marked outside will face a confiscation of the amount of illegal gains and additional a fine up to 5000RMB. This is no compensation to the consumer. From the legal consequence aspect, China's rules are behind the EU's rules. Without adequate legal consequences the efficacy of the rules cannot be achieve. This is one of the reasons that why the actual effect of China's rules is unsatisfactory. Since there is no formal requirement, there is no legal consequence of infringement of formal requirements.

IV: RULES OF THE RIGHT OF WITHDRAWAL IN THE CONTEXT OF DIRECT SELLING IN THE EU

A. INTRODUCTION OF THE RIGHT OF WITHDRAWAL

Right of cancellation, another expression of right of withdrawal, firstly appears in EU laws is in the Doorstep Selling Directive in 1985. Article 4 of the Doorstep Selling Directive states, '*... traders shall be required to give consumers written notice of their cancellation within the period laid down in Article 5...*' The Directive aimed to protect consumers in respect of contracts negotiated away from business premises. The recital of the Directive states, '*Whereas the special feature of contracts concluded away from the business premises of the trader is that as a rule it is the trader who initiates the contract negotiations, for which the consumer is unprepared or which he does not expect; Whereas the consumer is often unable to compare the quality and*

price of the offer with other offers; Whereas this surprise element generally exists not only in contracts made at the doorstep but also in other forms of contract concluded by the trader away from his business premises; Whereas the consumer should be given a right of cancellation over period of at least seven days in order to enable him to assess the obligations arising under the contract.' The recital clearly reveals the relationship among special feature of contracts, unprepared consumers and right of cancellation. A new kind of contract is emerging in that period. It is the contracts that concluded away from business premises. Those contracts have some special features. The specialties are that consumers are unprepared, because they could not know the visit of the sellers. And the asymmetry of information is more serious in this kind of selling since consumers all information of products is given by the direct seller, consumers even cannot compare the quality and price of the offer with other offers when they concluded the contract. To solve the issue, the EU gives consumers a right to withdrawal. The right of withdrawal is special remedy for asymmetry of information in the context of direct selling. It is a unilateral consumer right, which will influence the validity of the contract. It gives consumers a chance to rethink their decisions after the conclusion of the contract. The right of withdrawal is a regime for protecting the weak in the diverse economic market.⁹⁰ As the development of economic market, consumers become more and more rely on the traders. Traders have stronger impact on consumers as Joel Bakan said, companies dominated our lives; they decide what we eat, what we wear and where we work. We are surrounded by the symbol, culture and ideology of companies. We can never escape from them.⁹¹ Comparing to traders, consumers are in a weaker status. In the context of direct selling this weaker position is more apparent. The surprise element aggravates the potential risk of consumers. Therefore, to achieve substantive fair, giving consumers a special remedy satisfies the actual demands. John Rawls explains the rational of difference principal in his outstanding work *A Theory of Justice* the rational. Giving

⁹⁰ Zhang Xueze, 'Exercising the right of withdrawal' (2011) 1 East China university of political science and Law 51

⁹¹ Joel Bakan, translated Zhu Jinye, *Enterprises: Pathological Pursuit of Profit and Rights* (1th edn. Shanghai Renmin Press 2008) 34

worst-off special opportunities can achieve real justice as fairness.⁹² Therefore, to solve the contradiction between consumers and traders the right of withdrawal has been adopted.

After that the right of withdrawal has been applied to other areas other than door-to-door selling. In the year 2002, a ‘critical mass’ of such specific legislation was reached, and the legislator of the EU decided that central notions and concepts of the various rights of withdrawal should be harmonized.⁹³ This has been realized to some extent in the Directive on Consumer Rights.⁹⁴ In 2011, the European Parliament and the Council enacted Directive 2011/83/EU of the parliament and of the council of 25 October 2011. The Directive on Consumer Rights lays down standard rules for the common aspects of distance and off-premises contracts including the rules of right of withdrawal.

B. RULES OF CONSUMER INFORMATION OF THE RIGHT OF WITHDRAWAL

When the right of withdrawal exists, traders need to inform consumers in advance, before the conclusion of contract, along with other information that mentioned in part one. Under Article 6(4), the trader may use the model instructions on withdrawal set out in Annex I (A) of the Directive on Consumer Rights to provide information. If the information is filled in correctly and given to the consumer, the requirement is satisfied. The model instructions on withdrawal are not mandatory. The trader can adjust them according to his needs. A model withdrawal form set out in Annex I (B) is also needed, even if the trader also gives the consumer the option of filling in and sending a form on its website about the right of withdrawal, in line with Article 11(3). In some circumstances, the right of withdrawal is unconditionally not provided or conditionally not provided. In those circumstance special information is needed to fulfill the obligation of informing.

⁹² Rawls John, translated by He Huaihong, He Baogang, Liao Shenbai, *A Theory of Justice* (1th edn, China Social Sciences Press 1988) 136

⁹³ Peter Rott, ‘Harmonizing different Rights of Withdrawal: Can German Law Serve as an Example for EC Consumer Law?’ (2014) 7(12) *German Law Journal* 1109

⁹⁴ *Ibid*

For unconditional exceptions, the trader needs to explicitly tell the consumer that he cannot withdraw from the contract. For example, for products such as milk and meat, covered by the exception in Article 16(d), only the information required by Article 6(1)(k) is relevant, i.e. the trader should inform the consumer that there is no the right of withdrawal from the contract because these products are likely to deteriorate or expire rapidly.⁹⁵ All situations that consumers cannot withdraw from the contract have been listed in Article 16 of the Directive on Consumer Rights.

For conditional exception, the trader needs to inform the consumer clearly under which circumstance consumer loses his right of withdrawal. For example, for canned food, which is sealed within the meaning of Article 16(e), the trader should inform the consumer on the conditions, time limits, etc. for withdrawal as required under Article 6(1)(h). The trader should also inform the consumer that, for health protection and hygiene reasons, the consumer loses the right of withdrawal if the can has been opened.⁹⁶

C. RULES OF TIME LIMIT OF THE RIGHT OF WITHDRAWAL

The general period of time limit of the right of withdrawal is 14 days. The 14 days should be understood as 14 calendar days. Recital 41 specifies that, *'[...] all periods contained in this Directive should be understood to be expressed in calendar days.'* Recital 41 also mentions that Council Regulation No. 1182/71⁹⁷ applies to the Directive. According to Article 3(3) of that regulation: *'The periods concerned shall include public holidays, Sundays and Saturdays, save where these are expressly excepted or where the periods are expressed in working days'*. Therefore public holidays, Sundays and Saturdays are included in the 14 days. However, if the withdrawal period ends on one of these days, it should be extended to the next working day because Article 3(4) of the Regulation states that: *'Where the last day of a period expressed otherwise than in hours in a public holiday, Sunday or Saturday,*

⁹⁵ Ibid. 74

⁹⁶ Ibid. 74

⁹⁷ Council Regulation No. 1182/71, [1971] OJ L 124

*the period shall end with the expiry of the last hour of the following working day’.*⁹⁸

The days designed as public holidays are decided by each Member State and listed on the website of the EU. Although the period of the right of withdrawal is extended, it does not mean that traders have obligations to inform the consumer that an extension is possible.⁹⁹

But if the trader does not provide the conditions, time limit, procedures for exercising the right of withdrawal and withdrawal form, the time limit will be extended. The extended period is 12 months, from the end of the initial withdrawal period. If the trader supplies all required information in the extended 12 months, the extended period shall expire 14 days after the day upon which the consumer receives that information.

D. RULES OF CALCULATING STARTING POINT OF THE WITHDRAWAL PERIOD

Sales contract and service contract have different starting point.¹⁰⁰ If the trader sells goods to the consumer, the starting point is when consumers directly or indirectly physical possession of the goods. If the trader sells multiple goods to the consumer and the goods cannot be delivered at once, the starting point is when the consumer directly or indirectly obtains physical possession of the last goods. If the trader sells goods to the consumers and the good consists of multiple lots and pieces, the starting point is when the consumer directly or indirectly obtains physical possession of the last piece of the good. If trader sells goods to consumer and there is a fixed period for delivery, the time begins when the consumer directly or indirectly obtains physical possession of the first goods. The right of withdrawal begins at the conclusion of the selling contract. If the trader provides service to the consumer, the starting point is the day of the conclusion of the contract. In summary, the Directive on Consumer Rights provides two ways to calculate the starting point of 14 days:

⁹⁸ Ibid. 74

⁹⁹ Ibid.

¹⁰⁰ Ibid.

- the day of the conclusion of the contract - for service contracts, contracts for the supply of public utilities;
- the day of taking physical possession of goods (delivery) – for sales contracts but subject to several special rules for: (1) multiple goods ordered in one order and delivered separately; (2) goods consisting of multiple lots or pieces and delivered separately; and (3) contracts for regular delivery of goods during defined period of time.¹⁰¹ For goods that are delivered, the starting point begins at the day after the goods reach the consumer or another person indicated by the consumer, other than a carrier. For multiple deliveries the starting point begins at the day after delivery of the last of the goods ordered in a single order but delivered separately. This rule is justified by the consumers' legitimate interest in receiving all parts of a single order before deciding whether to withdrawal from the contract.¹⁰²

E. RULES OF EXERCISING THE RIGHT OF WITHDRAWAL

1. RULES OF CONSUMERS' OBLIGATIONS

If a consumer wants to exercise his right of withdrawal, he needs to return of the goods to the trader and to compensate the trader.

Firstly, the consumer needs to return the goods to the trader. This requires the consumer to return the goods to the trader by sending them back within 14 days from the day after the consumer notified the trader. The consumer should assume the direct cost of returning the goods unless the trader has failed to inform the consumer of this requirement under Article 6(1)(i) or has agreed to bear the cost. If the trader decides to collect the goods himself, it will bind the consumer only when the trader has also offer to bear the cost. If the trader does not bear the cost and the consumer finds a more cost-efficient and still reliable method to return the goods, the consumer should not be bound by trader's offer.

In the context of direct selling an exception exists. If the goods have been delivered to

¹⁰¹ Ibid.

¹⁰² Ibid.

the consumer's home at the time of the conclusion of the contract, the trader has to collect at his own expense those goods, which 'cannot normally be return by post'.¹⁰³ Those goods need advance information about the cost of returning goods. It will be treated as within the period of withdrawal, if the consumer sends back the goods before the period of 14 days expired. Even though the trader may receive the goods after the period of withdrawal.

Secondly, the consumer needs to compensate the trader if they mishandle goods. The consumer can withdraw from the contract regardless of how the goods have been handled during the withdrawal period, as explained in recital 47, '*Some consumers exercise their the right of withdrawal after having used the goods to an extent more than necessary to establish the nature, characteristics and the functioning of the goods. In this case the consumer should not loss the right to withdraw but should be liable for any diminished value of the goods [...]'*. Accordance with Article 14(2) of the Directive the consumers are liable '*for any diminished value of the goods resulting from the handling of the goods other than what is necessary to establish the nature, characteristics, and functioning of the goods'*. Recital 47 further explains the obligation, '*[...] In order to establish the nature, characteristics, and functioning of the goods, the consumer shall only handle and inspect them in the same manner as he would be allowed to do in a shop. For example, the consumer should handle and inspect the goods with due care during the withdrawal period'*. Whether the consumers' test of the goods goes beyond what is necessary to establish their characteristics and functioning will have to be assessed on a case-by-case basis. In principle, the consumer should be able to open the packaging to access the goods if similar goods are normally displayed in shops in an unpacked condition.¹⁰⁴ Hence damage caused to the packaging by merely opening it is not cause for compensation.¹⁰⁵ However, any protective films applied to the item should only be removed where strictly necessary to test it.¹⁰⁶ An exception of consumers' liabilities

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

for mishandling of the goods exists in accordance with Article 14(2), which states, *'the consumer is any event not liable for diminished value of the goods where the trader has failed to provide notice of the right of withdrawal in accordance with point (h) of Article 6(1)'*. The diminished value of the goods can consist of the cleaning and repair cost and loss of income for the trader when disposing of returned good as second-hand good. The Directive does not regulate the enforcement of the consumers' liabilities. Whether the liability should be enforced by legal proceedings or whether the trader can unilaterally charge the consumer for the damage or reduce the amount of any refund has not been expressly explained. According to Article 3(5), which states, *'The Directive shall not affect national general contract law such as the rules on the validity, formation or effect of a contract, in so far as general contract law aspects are not regulated in this Directive'*. This issue is subject to the domestic law of the Member States.

2. RULES OF TRADERS' OBLIGATIONS

After the consumer exercises his right of withdrawal, the trader needs to reimburse the payment to the consumer. Article 13 of the Directive on Consumer Rights requires the trader to carry out the reimbursement without undue delay and by no later than 14 days from the day the consumer informs the trader of the decision to withdraw from the contract. However, in a sales contract, the trader could withhold the reimbursement beyond 14 days only in the situation that he has not received the goods or evidence supplied by the consumer that the goods have been sent to him. After he has received either the goods or the evidence, he should reimburse the consumer without undue delay. The content of 'undue delay' must be assessed on a case-by-case basis. Normally, it means a few working days. There is no definition of 'evidence of having sent back the goods' in the Directive.¹⁰⁷ In principle, it should be understood as a written statement from an established transport or postal service provider specifying the sender and the recipient.¹⁰⁸ In principle, the evidence should not

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

necessarily have to involve third party guarantees that the goods in question have been inspected and verified.¹⁰⁹ Such extra services are likely to be expensive and so could discourage the consumer from exercising the right of withdrawal, which is specifically precluded by the Directive mentioned in recital 47, *'[...] The obligations of the consumer in the event of withdrawal should be not discourage the consumer from exercising his right of withdrawal'*.¹¹⁰ Article 13(1) also requires the trader to use the same means of payment for the refund as the consumer used for the initial transaction. However, the trader should not have to cover the handling charge of the initial transaction. For example, bank fees and loss arising from the currency exchange should not be refunded. A different method is allowed provided that the trader and the consumer have expressly made an agreement.

A consumer may want to partly withdraw from a contract that supplies multiple or defective goods. Although the Directive does not expressly provide for such a right, it also does not prevent the trader and the consumer from agreeing on a partial withdrawal from the contract by returning only an individual good or several goods sold under a single order.¹¹¹

F. RULES OF PROCEDURAL REQUIREMENTS

If the consumer wants to exercise his right of withdrawal, he has to do it according to the specific procedure. He must notice the trader within the time limit. The consumer can use the model withdrawal form or making any other unequivocal statement. For understanding the content of unequivocal statement, recital 44 is helpful. It states, *'[...] however, the consumer should remain free to withdrawal in his own words, provided that his statement setting out his decision to withdrawal from the contract to the trader is unequivocal. A letter, a telephone call or returning the goods with a clear statement could meet his requirement, but the burden of proof of having withdrawal within the time limit fixed in the Directive should be on the consumer. For this reason,*

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Ibid.

it is in the interest of the consumer to make use of a durable medium when communicating his withdrawal to the trader'. Therefore, simply retuning the goods without any explicit statement or refusing delivery would not as such count as valid expressions of withdrawal. A clear statement does not necessarily mean that the consumer needs to refer to the right of withdrawal in legal terms. For example, also a statement of 'terminating' or 'retracting' from the contract or using similar words should be considered as sufficiently 'unequivocal' as long as the consumer and the contract in question are identifiable.¹¹² The consumer bears the burden of proof

G. RULES OF EXCEPTIONS OF THE RIGHT OF WITHDRAWAL

Concerning about the actual demands, in some transactions that the right of withdrawal is not legally given to consumers. The reason to introduce the right of withdrawal to consumers has been explained in paragraph 38 of *Heininger case*¹¹³ and paragraph 43 of *the Crailsheimer Volksbank eG case*,¹¹⁴ it is to protect consumers' against the risks arising from the conclusion of contracts under surprise. Conditions for use the right of withdrawal has been explained in paragraph 42 of *the Travel Vac SL case*¹¹⁵, '*the consumer is unprepared for the contract negotiations, and that he is often unable to compare the quality and price of the offer with other offers*'. Unprepared for negotiations and unable to compare are two conditions for using right of withdrawal. In paragraph 43 of the same case, the judge says that only one condition is enough to refer to right of withdrawal. Therefore, if none of these two conditions is achieved, the right of withdrawal should be canceled. Concerning about the nature of exceptions, it is hard to say that consumers of those transactions are surprised by the trader and make decisions under that surprise. Therefore, the premises of the right of withdrawal have disappeared. The premises of those transactions become the same as the ordinary on-premises transactions. The right of

¹¹² Ibid.

¹¹³ Case C-481/99 *Georg Heininger and Helga Heininger and Bayerische Hypo- und Vereinsbank AG* [2001] ECR I-09945 para 38

¹¹⁴ Case C-229/04 *Crailsheimer Volksbank eG v Klaus Conrads, Frank Schulzke and Petra Schulzke-Lösche, Joachim Nitschke* [2005] ECR I-9215 para 43

¹¹⁵ Case C-423/97 *Travel Vac SL v Manuel José Antelm Sanchis* [1999] ECR I-02195 para 42

withdrawal is not given to consumers of ordinary on-premises transactions. Also concerning about that traders performed the contract with good faith should be protected, therefore, those exceptions are fair as justice.

1. FULL PERFORMED SERVICE CONTRACT

Consumers cannot withdrawal from a service contract that has been fully performed if the contract satisfies 3 conditions at the same time. First, the contract has been fully performed. Second, the performance begins with the consumer's prior express consent. Third, the trader has notified the consumer that he will lose his the right of withdrawal once the contract has been fully performed. With the notification and consent from the consumer, it is impossible to say the trader surprises the consumer or he does not know the information provided by the trader well enough. Therefore, the premise of the right of withdrawal has disappeared. Meantime, the contract has been fully performed, if allowing the consumer to withdrawal from the contract at this time it is unfair to the trader who has performed his obligation in good faith.

2. SPECIFIED OR PERSONALIZED GOODS

Specified or personalized goods cannot be withdrawal. Specification or personalization should be understood as that the goods are unique and produced according to the individual wishes and requirements stated by the consumer and agreed with the trader. Since this rule is an exception from the general application of right of withdrawal, it should be interpreted narrowly.¹¹⁶ Therefore, where the consumer simply make up the goods by picking from the standard options provided by the trader, such as color or additional equipment in a car, or makes up a set furniture on the basis of standard elements, it should not be possible to speak of either specification or personalization.¹¹⁷ In this kind of contract, traders design and produce the products exactly under the requirement of the consumer. It is impossible

¹¹⁶ Ibid. 74

¹¹⁷ Ibid.

to say that a consumer is surprised by the trader and makes an irrational decision under the surprise. And the product itself may not be easily sold to another. Therefore, allowing the consumer to withdrawal will jeopardize traders' legal interest.

3. GOODS OR SERVICES SUPPLIED DURING URGENT REPAIRS OR MAINTENANCE

Goods or services supplied during urgent repairs or maintenance cannot be returned. In the situation that the consumer makes an offer for urgent repairs or maintenance, goods or services provided for that urgent repairs or maintenance couldn't be returned. However, if the trader provides some additional goods or services other than necessarily used in carrying out the repairs or maintenance, those goods or services can be returned. Also, in this kind of transaction, consumers are impossible to be surprised and make irrational decision under the surprise element. And the trader with good faith should be protected. Therefore, it is fair as justice to cancel the right of withdrawal in this kind of transaction.

4. GOODS WITH SPECIAL NATURE

Besides the exceptions mentioned above, there are other exceptions exist-goods with special nature. The author considers that the rationale for the goods with special is a little different from the exceptions mentioned above. For these exceptions, the nature of the product is most important reason to cancel the right of withdrawal. The nature of these goods decided that return of goods would cause seriously damages to the trader. Consumer protection is not the only aim of the Directive, promoting internal market and balancing consumer protection and competitiveness of enterprises are also the aims of the Directive¹¹⁸. Allowing consumers to return those goods with special nature freely will cause extra obligations to traders, which is unfair to a legal trader and will block the development of internal market. If the trader has illegal practices, other laws will punish him. Consumers still will be protected. Therefore, giving those

¹¹⁸ Directive 2011/83/EU recital 4

traders more obligations do more harm than good.

Goods that are liable to deteriorate or expire rapidly cannot be returned, such as food and drinks with short expiry time limits. Goods that are sealed for genuine health protection or hygiene reasons cannot be returned if they have been unsealed, such as unsealed lipsticks. Goods that are inseparably mixed with another cannot be returned such fuel.

The alcoholic beverages cannot be returned are those, which have to be delivered after 30 days of conclusion of contract and the value is fluctuated. Other alcoholic beverages are not fall in this exception.

Digital content supplied on a tangible medium. If the external packing of the tangible medium has been opened, the goods cannot be returned.

For this exception to apply, the contract should stipulate ‘*a specific date or period of performance*’. For understanding this provision, recital 49 is helpful. It states as follows, ‘*[...] The granting of a the right of withdrawal to the consumer could also be inappropriate in the case of certain services where the conclusion of the contract implies the setting aside of capacity which, if a the right of withdrawal were exercised, the trader may find difficult to fill. This would for example be the case where reservations are made at hotels or concerning holydays cottages or cultural or sporting events*’.

Digital content not supplied on a tangible medium cannot be returned. Normally the performance of contract of supplying of digital content, which is not supplied on a tangible medium should after the expiry of withdrawal period. However, with the prior express consent and confirmation of losing the right of withdrawal the contract can be performed earlier. Therefore, the consumer loses his right of withdrawal.

H. EFFECT OF WITHDRAWAL

A consumer who exercises his the right of withdrawal unilaterally terminates the contract. The consumer terminates the parties’ obligations to perform the contract, in particular the consumer’s obligation to pay or to conclude the contract if the consumer

has made the offer. However, under Article 3(2) states, ‘ *If any provision of this Directive conflicts with a provision of another Union act governing specific sectors, the provision of that other Union act shall prevail and shall apply to those specific sectors*’.

This effect extends to ancillary contract. If the consumer exercises the right of withdrawal on the main contract, the ancillary contract automatically terminated. The rules of reimbursement of the ancillary contract are the same as the main contract stipulated in Article 13 (2) and 14.

V: RULES OF THE RIGHT OF WITHDRAWAL IN THE CONTEXT OF DIRECT SELLING IN CHINA

A. INTRODUCTION OF THE RIGHT OF WITHDRAWAL

One of the light spots of the new Consumer Protection law enacted in 2014 is the legislation of the right of withdrawal, which does not exist before, although some scholars criticize that requirements of exercise of the right of withdrawal are too rough and too harsh. Professor Liu Junhai claims that the application scope of exercising the right of withdrawal should be clear that transactions with big deals should be ruled out.¹¹⁹ Judge Bian Meinan agrees with Professor Liu’s opinion, he says that details of exercising the right of withdrawal should be given according to the actual demands of the society.¹²⁰ Article 25 of the Consumer Protection Law allows consumers to return products without reason. However, this is not the first time the right of withdrawal is stipulated in a national legal document. Before 2014, an administrative regulation enacted in 2005, with regard to direct selling, has given consumers a right to withdraw. And there are series of requirements on exercising the right of withdrawal. On a press conference, the State Council Legislative Affairs Office and the head of the Ministry of Commerce presented the reason why special

¹¹⁹ Liu Junhai, ‘Right of Withdrawal Makes Direct Selling More Rational’ (CQN, 11 February 2015) <<http://www.cqn.com.cn/news/zgzlwlx/1005829.html>> accessed 19 August 2015

¹²⁰ Bian Meinan, ‘Briefly Discuss Right of Withdrawal’ (Liaoning Shenyang Municipal Intermediate People’s Court, 10 October 2014) <<http://syzy.chinacourt.org/public/detail.php?id=6433>> accessed 19 August 2015

treatment is given to consumers of direct selling. According to that response, direct selling is one kind of modern transactions, which can reduce the cost of an enterprise effectively. Direct selling is positive to stimulate commodity circulation. However, asymmetry of information is a big problem in direct selling in China. In addition, China's direct selling market is immature, regulations are backward and consumers are strange to this kind of transaction. Therefore, there is a high risk that criminals will use this situation to injure the benefit of consumers. And this has been proved by the history. The history of direct selling in China is a history with lots of civil and criminal disputes. For this reason, the Administration of Direct Selling Regulations stipulates strict rules to restrict direct selling enterprises' behaviors.¹²¹ Under the chaos of the direct selling market, the right of withdrawal is given to consumers. Consumers of direct selling in China are the same as the EU that usually surprised by the trader and make irrational decisions under the surprise. The main objective of the right of withdrawal is to give unprepared consumers a second chance to reconsider their decisions in an off-premises transaction. To illustrate details of the right of withdrawal in the context of direct selling in China, both the new Consumer Protection Law and the Administration of Direct Selling Regulations will be explained.

B. RULES OF CONSUMER INFORMATION OF THE RIGHT OF WITHDRAWAL

The trader shall inform the consumer the existence of the right of withdrawal in advance. However, there is no article in the Regulations concerning about legal consequences of failure to do so. There is no article require to provide information of the existence of the right of withdrawal in the Consumer Protection Law.

¹²¹ Chinanews, 'Strictly Hit Illegal Pyramid Selling' (EPA. 30 May 2013) <<http://www.chinanews.com/gn/2013/05-30/4875726.shtml>>accessed 28 May 2015

C. RULES OF TIME LIMIT OF THE RIGHT OF WITHDRAWAL

Article 25 of the Consumer Protection Law states, *'The operator uses Internet, TV, telephones, mail order and so on to sell commodities, the consumer can return the commodities within 7 days after receive the commodities, without any reason [...]'*.

Article 25 of the Administration of Direct Selling Regulations states, *'[...] Consumers may within 30 days of the purchase of the direct selling product [...]'*. These two articles deal with time limit of right of withdrawal. They give two different time limits for right of withdrawal. Judging by appearance they are contradictory. Therefore, which one is applicable needs further analysis.

The Consumer Protection Law, enacted by Standing Committee of the National People's Congress, has a higher hierarchy than the Administration of Direct Selling Regulations, enacted by State Council. The Administration of Direct Selling Regulations is a special administrative regulation, which specifically deals with direct selling. However, this is no article of the Legislation Law of PRC¹²² concerns about the relationship between higher general rules and lower special rules. Unfortunately, no case has been found to demonstrate this issue. Therefore, the relationship between the Consumer Law and the Administration of Direct Selling Regulations needs to be discussed to determine which time limit should apply to the right of withdrawal in the context of direct selling. Firstly, the author needs to determine whether the Consumer Protection Law is applicable. If it is applicable, then the author goes further concerning about the relationship between the Consumer Protection Law and the Administration of Direct Selling Regulations and which one should apply. If the Consumer Protection Law is not applicable, then the author checks whether the Administration of Direct Selling Regulations should apply.

The author's personal opinion is that Article 25 does not apply to direct selling. In order to determine whether the Consumer Protection Law is applicable, one issue needs to be clarified. It is whether the subject of Article 25 of the law deals with consumers of direct selling. Article 25 reads, *'The operator uses Internet, TV,*

¹²² Legislation Law of PRC

telephones, mail order and so on to sell commodities the consumer can return the commodities within 7 days after receive the commodities [...]'. There is no clear indication on direct selling in the text. Therefore, the interpretation of the words '*and so on*' is necessary. Unfortunately, there is no official interpretation of the words. In the meantime, judicial decision is also not helpful. The author also finds that scholars have different perspectives on interpreting the words '*and so on*'. Some scholars sustain that direct selling is included in the words '*and so on*' since Article 25 should be applicable to all the non-traditional sales approach, such as Yang Lixin¹²³ a celebrated civil law scholar. His perspective is that the right of withdrawal should apply to all kinds of sales in principle, traditional sales and non-traditional sales, unless the application will cause exorbitant social cost. However, considering that China has just begun to implement the right of withdrawal and the overall quality of the consumer the right of withdrawal should be applicable only to the areas that are badly in need of adjustment and this is the reason why the right of withdrawal is not given to all consumers. Therefore interpreting from the legislative intent, Article 25 should apply to non-traditional sales including off-premises sales and distance sales.¹²⁴ In his opinion, Article 25 should apply to consumers in the context of direct selling. Disagreements exist, such as Pan Dong a scholar from Shanxi University. He argues that the right of withdrawal should not apply to all kinds of sales. It should just apply to the areas that information between the trader and the consumer is not equal, especially the areas using non-traditional sales approach. Article 25 only applies to distance sales.¹²⁵ The author personally tends to the second conclusion, but disagrees with the reason, that Article 25 only applies to distance sales. The content of the words '*and so on*' must share the common feature of the enumeration *Internet, TV, telephones and mail order*. Those four listed transactions are all negotiated through communication tools without face-to-face communication. Traders use communication tools to advertise their products. Consumers use communication tools

¹²³ Yang Lixin, Professor of Renmin University, Vice-chairman of China Civil Law Society

¹²⁴ Yang Lixin, 'Right of Withdrawal of Consumers of Non-traditional Sales' (2014) 2 Faxue 30

¹²⁵ Pan Dong, 'Zou Yi Xin Xiao Fa Zhong Fan Hui Quan De Xiang Guan Fa Lv Wen Ti' (2014) 8 FZYSHCN 149

to buy products. After ordering, the trader will send the goods to the consumer. The whole process of transaction finished without face-to-face communication. This common feature of the listed four transactions is the feature of distance selling not direct selling. Distance Selling is a channel-agnostic form of advertising which allows businesses and nonprofit organizations to communicate straight with the customer, with advertising techniques that can include cell phone text messaging, email, targeted television commercials and so on. It is a different approach from direct selling. The whole process can be fulfilled without meeting. Unlike distance selling, direct selling markets and sells products, directly to consumers away from a fixed retail location. Sales are typically made through party plan, one to one demonstrations, and other personal contact arrangement.¹²⁶ It needs face-to-face communication. Hence the content of the words '*and so on*' should not include direct selling. Professor Yang Linxin's understanding of Article 25 actually expands the application of Article 25. Without cases, it is hard to determine whether it is necessary to expand the application of Article 25. Therefore, a literal interpretation is more proper. Article 25 should apply only to distance selling, and should not include direct selling.

Since Article 25 does not apply to consumers in the content of direct selling, the author needs examine whether the Administration of Direct Selling Regulations should apply. One issue, which needs to be answered, first is whether the rules of the right of withdrawal in the Administration of Direct Selling Regulations are legal. Whether the State Council has the power to give consumers of direct selling a right that has not been given in a higher law? My answer is yes. According to Article 89¹²⁷ of the Constitution Law of PRC and Article 8 and Article 65 of the Legislation Law, the State Council has the power to legislate, in the line with constitution and laws, in order to implement its public administration. The interpretation of the Legislation Law gives an elaborate explanation of the power of the State Council. Along with the reform of the economic system and the opening to the outside world, the social

¹²⁶ Direct Selling Europe, 'Direct Selling' (DSE, 2015) <
<http://www.directsellingeurope.eu/basic-page/direct-selling>> accessed 14 June 2015

¹²⁷ Constitution of the PRC

interest is becoming more and more diverse, the social relations are becoming more and more complex, and so many new social relations are in urgent need to be adjusted. But the National People's Congress and its Standing Committee as the highest legislative body of the state have strict rules for legislation, which needs a long period. The State Council is the Central People's government, is the supreme organ of state power, responsible for the implementation of laws and regulations, unified leadership of the country's administrative work. The State Council needs to formulate administrative regulations, not only to meet the needs of administrative management, but also for the national people's Congress and its Standing Committee to develop the law. At present China's legal system is not complete, some social relations have not been regulated by law. Allowing the State Council to create some social behavior standards in time help to control the increasingly complex social management needs. The National People's Congress and its Standing Committee have authorized the State Council triple in 1980's. The third authorization happened in April 10th 1985. At the third session of the six National People's Congress, the National People's Congress authorized the State Council to legislate on issues of Economic reform and opening to the outside world. The regulations shall not violate the Constitution of PRC and the basic principles of laws enacted by The National People's Congress and its Standing Committee. This is a wide range of authority. In accordance with the authority, the State Council has the power to legislate on issues of Economic reform and opening to the outside world. The State Council can either enact administrative regulations on issues that have not been regulated in laws or modify or supplement the existing laws. However, neither the regulations nor modifications or supplements can contradict the basic principles of laws enacted by The National People's Congress and its Standing Committee. Due to the wide range of authority, to ensure the proper use of the power, the National People's Congress stipulates that the State Council needs to file on record for reference. Through the practice test, if the conditions are ripe to legislate the State Council needs to report to the National People's Congress or and its Standing Committee. For the time limit of authorization, some experts advice to give the authorization a limited period, such as 3 years or 5 years. The expiration of the period,

authorization shall terminate. The State recognizes that this opinion is quite reasonable. But taking into account the current situation in China to give authorization a clear period is difficult. Therefore, the Legislation Law does not make clear provisions for the duration of authorization. But without explicitly specify period of authorization does not mean that there is no time limit. In accordance with the provisions of the legislative law, after the enactment of the law by the National People's Congress and its Standing Committee, the authorization terminated. So with the continuous development of the law, in fact, gradually withdraw the authorization¹²⁸.

According to the Interpretation of the Legislative Law¹²⁹, as long as there is no law concerning about the consumers' the right of withdrawal in the context of direct selling and the rule of the right of withdrawal in the Administration of Direct Selling Regulations is not contradict to the basic principles of the Consumer Protection Law, the rule of the right of withdrawal in the Administration of Direct Selling is legal and should be obeyed. First, there is no law deal with consumers' the right of withdrawal in the context of direct selling. Direct selling as a non-traditional sales approach experienced an ups and downs fate in China. In 2001, China participated in the World Trade Organization and promised to open up market for off-premises sales. To realize the promise, China enacted the Administration of Direct Selling Regulations in 2005 as the first law concerning about direct selling. Ten years has passed, still no higher law concerning about this issue. Second, the rule of the right of withdrawal in the Administration of Direct Selling is not contradicts to the basic principles of the Consumer Protection Law. The definition of '*contradict*' has been explained in the Interpretation of the Legislative Law. The following situations should fall in the scope of 'contradict': (a) the upper law has clear provisions, the lower law contrary to the provisions of the superior; (b) although no provisions of lower law directly contrary to the superior, but intend to offset the effect of the superior; (c) upper law does not make a clear regulation, the lower law contrary to the purpose and spirit of the upper

¹²⁸ Interpretation of the Legislation Law of People's republic of China

¹²⁹ Ibid.

law; and (d) unauthorized legislation; (e) a lower law commits punishment beyond the type and extent of the upper law punishment. In line with any of the above 5, can be considered to be inconsistent with the upper law. Concerning the situation here, only (c) is relevant¹³⁰. The basic principles of the Consumer Protection Law is stipulated in Article 1, it states, *'This Article is formulated in order to protect the legal rights and interests of consumers, to maintain social and economic order and to promote the healthy development of the socialistic market economy'* and Article 4 of the Law: *'Transactions between business operators and consumers shall be conducted according to the principles of voluntary participation, equality, fairness, honesty and trustworthiness'*. The Administration of Direct Selling Regulations just gives consumers in the context of direct selling a right of withdrawal, which is clearly quite in line with the principle of the Consumer Protection Law to protect the consumer. Therefore, the right of withdrawal in the Administration of Direct Selling Regulations is legal and should be obeyed.

To sum up in conclusion, the time limit of the right of withdrawal in the context of direct selling is 30 days.

D. RULES OF CALCULATING STARTING POINT OF THE WITHDRAWAL PERIOD

The day from which a time period begins shall not be counted as within the time period. If the expiration date of a time period falls on a holiday, then the day immediately following the holiday shall be regarded as the expiration date.¹³¹

E. RULES OF EXERCISING THE RIGHT OF WITHDRAWAL

1. RULES OF CONSUMERS' OBLIGATIONS

If a consumer wants to exercise his right of withdrawal he needs to return the goods to the trader. Under Chinese law, only unsealed products with invoice or sales voucher

¹³⁰ Ibid.

¹³¹ Civil Procedure Law of PRC

issued by the direct selling enterprise can be returned. This means two conditions must both be satisfied when a consumer wants to exercise his right of withdrawal. He must unseal the product and has invoice or sales voucher. Article 22 of the Regulation stipulates that ‘... *after closing a deal, direct seller shall provide the consumer with an invoice and a sales voucher...*’ After closing a deal, consumers can get two receipt and consumers only need to provide one of them for return of goods. This requirement plays a role on protecting traders. Nonetheless, the requirement of products must be unsealed is controversial. There is no clear declaration on the meaning of unseal. Does it mean the product itself must be unsealed or even the outer packing should be unsealed? Some scholars criticize that if the outer packing needs to be unsealed it will makes consumers nearly impossible to exercise the right of withdrawal. Lawyer Zhou Mingqing claims that laws require the product need to be intact should not be understood as the packaging cannot be unsealed.¹³²

2. RULES OF TRADERS’ OBLIGATIONS

After the consumer exercises his right of withdrawal, the trader needs to reimburse the payments to the consumer. Chinese law requires the trader to carry out the reimbursement without undue delay and by no later than 7 days from the day the consumer informs the trader of the decision to withdrawal from the contract. The amount of reimbursement should be the amount showed on the invoice or sales voucher.

VI: CONCLUSION

A. COMPARISON OF CONSUMER INFORMATION AND RIGHT OF WITHDRAWAL IN THE EU AND CHINA

Akerlof’s lemon market theory indicates the defects of asymmetry of information. Direct selling is a kind of selling that has seriously asymmetric information issue. In

¹³² Chen Qing, ‘Right of Withdrawal in 2013 Consumer Protection Law’ (2015) 8 Renmin Luntan 134

order to remedy the consequences of asymmetry of information of the market, both the EU and China have stipulated rules of consumer information and right of withdrawal.

General rules of consumer information of EU laws are set out in the Directive on Consumer Rights. The EU has both substantive requirements and formal requirements. In the substantive requirements, the trader needs to provide main characteristics of the product, identity of the trader, price of the product and arrangements for executing the contract-payment and delivery, guarantees and after-sales services, duration and termination of contract, deposits and financial guarantees and out-of-court redress. Unlike the EU, the rules of consumer information of Chinese laws are simple. China only stipulates requirements on main characteristics of the product, identity of the trader and price of the product and the content of these rules are also quite simple. The similarities of the EU rules and Chinese rules are that they all focus on main characteristics of the product, identity of the trader and price of the product. That is because these three elements are the basic elements of a transaction and the asymmetry of information on these elements will seriously mislead consumers. Consumers have no idea on main characteristics of the goods, which is one of the main performances of asymmetry of information. Mandatory publication of main characteristics of the goods is the most direct way to resolve this asymmetry. Identity of the trader specifies the identity of the obligor. Laws protect the consumer through consumer information, without a specific obligor, the consumer cannot be protected effectively. Price is an inevitable element in every transaction after the appearance and circulation of currency. It is a critical element for a consumer to make a deal with a trader. Main characteristics, identity and price are the most fundamental elements of every modern transaction and easily been affected by asymmetry of information; therefore, both the EU and China choose the most effective way to regulate them: develop mandatory requirements on them. Although both the EU and China have developed requirements on main characteristics of the products, identity of the trader and price of the product, the contents of them are not the same. For main characteristics of the product, instead of defining main characteristics the EU decides

to determine the content case by case. Cases and guidance help to determine the content of main characteristics. Unlike the EU, China enumerates some contents of main characteristics and uses the words ‘*and so on*’ at the end of the enumeration. In practice, the characteristics that have been enumerated are similarly to the content of main characteristics. To some extent, the EU’s content of main characteristics is more feasible. For identity of the trader, the EU has different detailed requirements for the establishment and the place of business. China just descriptively stipulates that the trader needs to provide his identity without many details. For price, the EU concerns about both fixed price and floating price. China only concerns about fixed price. Besides the differences of the content, the legal consequence of lack of consumer information is also different. In the EU, lack of consumer information makes the consumer is not bound by the contract. In China, there is no provision on the legal consequence of lack of consumer information. Article 42 of the Contract Law of PRC¹³³ stipulates that the trader’s liabilities are only based on the particular damage of the consumer. Therefore, if the consumer has no damage the trader has no liability. Requirements of arrangements for executing the contract-payment and delivery, guarantees and after-sales services, duration and termination of contract, deposits and financial guarantees, out-of-court redress mechanism, forms of the information, exception and restriction are the requirements that only exist in the EU. They are conducive to draw the outline of details of a transaction, making the consumer more confidence. China does not have these requirements.

Rules of right of withdrawal exist in both jurisdictions. Requirements for consumer information of existence of right of withdrawal, rules of time limit, consumers’ obligations and traders’ obligations are exist in both the EU and China even though the specific content of them are not the same. For consumer information of existence of right of withdrawal, the EU stipulates that the trader not only needs to inform the consumer the existence of the right of withdrawal but also needs to point out the exceptions of exercising the right of withdrawal to the consumer. China only requires

¹³³ Contract Law of the People’s Republic of China

the trader to inform the existence of right of withdrawal because that there is no exception of exercising the right of withdrawal in China. For rules of time limit, the EU has two rules, general period of time limit is 14 days, and in some situations the period will be extended. China has only one rule and the period is 30 days. For consumers' obligations, the EU has two rules. The consumer should return the goods to the trader and assume liabilities of mishandling of the goods. China has only one rule. The consumer needs to return the goods to the trader. For traders' obligations, the EU has three rules. They are reimbursement of the payment, multiple or defective goods and acquisition of express consent. China has only one rule. It is the trader that needs to reimburse the payment to the consumer. Requirements of starting point, procedural requirements, effect of withdrawal and exceptions of application only exist in the EU.

B. REASONS BEHIND THE DIFFERENCES

From the comparison the author gets that although both the EU and China have rules of consumer information and right of withdrawal but details of those rules are quite different. The author believes that is because the economic bases, policies and legal cultures of the EU and China are diverse.

1. ECONOMIC BASES

The economic bases of the EU and that of China are different. Economic base determines the superstructure. The varied economic bases of the EU and China determine that the problems faced by the EU and China are not the same, which further leads to the difference of the legislative objectives. Direct selling has existed on the European continent for more than 100 years.¹³⁴ Nowadays, both relatively mature domestic direct selling market and primary transnational market have been

¹³⁴ Seldia, 'the History of Direct Selling' (Seldia, 2015) <
http://www.seldia.eu/index.php?option=com_content&view=article&id=11&Itemid=143> accessed 19
 September 2015

established.¹³⁵ From the statistic of Seldia, direct selling is a large and growing sector within the non-store trade in Europe. It has been constantly grow over the last five years.¹³⁶ Over 5 million people are engaged in direct selling in the EU.¹³⁷ Direct selling companies offer in Europe permanent employment to over 25,000 people and 76% of the products they sell are manufactured in Europe.¹³⁸ Direct selling is Europe's largest provider of independent business opportunities.¹³⁹ However, comparing to the growth of domestic direct selling over the last few years, the cross-border purchases are not optimistic. The original minimum harmonization approach causes a fragmented regulatory framework across the EU resulting in significant compliance costs for businesses that wish to trade cross-border and jeopardizes consumers' confidence.¹⁴⁰ The consequences of the lack of information in direct selling can be used as an example to instruct the fragmented regulatory framework. In Belgium, Hungary, Luxembourg, Malta, Netherlands, Spain, and Greece, lack of information will lead the contract to be considered null and void.¹⁴¹ In Great Britain, lack of information will lead the contract can be enforced by the consumer towards the merchant but not the opposite way.¹⁴² In Ireland, Slovenia and Great Britain, lack of information may lead criminal sanction.¹⁴³ In Bulgaria and Romania, lack of information will cause a fine to the direct selling undertaking. In Italy, lack of information will extend the consumers' right of withdrawal to 60 days.¹⁴⁴ Now the outstanding issue faced by the EU is to full harmonize the fragmented framework of Member States and to complete the internal market of direct selling.

¹³⁵ The aim of the Directive on Consumer Rights is to improve internal market of off-premises sales, which implies that Member States domestic market is relatively mature.

¹³⁶ Seldia, European Statistics (Seldia, 2015)<
http://www.seldia.eu/index.php?option=com_content&view=article&id=22&Itemid=122> accessed 13
 September 2015

¹³⁷ Ibid.

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ Proposal for a Directive of the European Parliament and of the Council on Consumer Protection

¹⁴¹ Ibid. 35

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

The direct selling market of China experiences a flexuous history. In 1980s, a Japanese enterprise called Japan Life enters into Shenzhen. The enterprise sells its mattress though direct selling¹⁴⁵. The enterprise does not receive direct selling license. Since it is in the early period of reform and opening up, Chinese government is not familiar with direct selling, the government does not interfere in the enterprise. On November 14th 1990, the first officially approved direct selling enterprise, Sino-US joint venture of Guangzhou AVON, is established.¹⁴⁶ This marks that Chinese government has accepted direct selling. However, in 1993, illegal pyramid selling causes many disputes, the government decides to interfere in the direct selling market. In 1994, the Administration of Industry and Commerce Department of the State issues a notification on suppression of illegal activities in multi-level pyramid schemes¹⁴⁷, in which it points out that it is necessary to resolutely ban unauthorized enterprises carried out multi-level pyramid schemes. Also in 1994, Finance and Trade Department and the Commerce and Industry Bureau of Shanghai municipal government jointly issue a notification on stop using multilevel level marketing¹⁴⁸. Later in the same year Shanghai municipal government issues an interim measure on management of multi level pyramid schemes in Shanghai, in which it gives a more clear definition on illegal multi-level pyramid schemes¹⁴⁹. On March 28, 1995, the State Ministry of Trade issues a document, formally announced on drafting of the national multi level marketing management measures¹⁵⁰. On September 22, 1995, the office of the State Council issues a notification on cessation of development of multi-level marketing enterprises¹⁵¹, in order to cool the overheating pyramid selling. On January 10th, 1997, the Administration for Industry and Commerce of the State issues an administrative regulation of direct selling. In 1997, pyramid selling begins to be furious, social security becomes unstable. In 1997, the Administration for

¹⁴⁵ He Kaili, *the Development of Direct Selling In China* (1th edn. Law Press China 2004) 7

¹⁴⁶ Ibid. 139 10

¹⁴⁷ Notification on Suppression of Illegal Activities in Multi-level Pyramid Schemes

¹⁴⁸ Notification on Stop Using Multilevel Level Marketing

¹⁴⁹ Interim Measure on Management of Multi Level Pyramid Schemes

¹⁵⁰ Ibid. 140

¹⁵¹ Notification on Cessation of Development of Multi-level Marketing Enterprises

Industry and Commerce of the State and the Ministry of Public Security jointly issue a notification on banning illegal pyramid training activities¹⁵². Even though the government has enacted some regulations to organize direct selling market, the result is not ideal. To maintain social stability and to make people live and work in peace and contentment, the government decides to ban direct selling in China. On April 21th 1998, the State Council demands all direct selling enterprises to change to traditional wholesale and retail enterprises. On December 11th 2001 when China enters into WTO, it promises to open distribution service and to formulate laws and regulations on direct selling. These promises are the beginning of reopening direct selling market. Since then a series of actions of Chinese government shows that China would keep its promises. In 2001, the Supreme People's Court makes a reply on how to convict pyramid schemes and disguised pyramid selling. The Supreme People's Court classifies pyramid schemes and disguised pyramid selling to illegal business crimes, which is stipulated in Article 225 of the Criminal Law of PRC¹⁵³. On September 10th 2004, Xiamen direct selling seminar is held, which is aim to help directing the process of legislation of direct selling¹⁵⁴. At the end of 2005, the Administration of Direct Selling Regulations is enacted. The Administration of Direct Selling Regulations reopens Chinese direct selling market with many restrictions. After 5 years' totally forbidden, direct selling becomes legal again. After 2005, direct selling starts to develop in China. In 2006 and 2007 many direct selling enterprises get licenses. After 2008, the Ministry of Commerce slows approval of authorizing direct selling licenses. At present, there are 61 direct selling enterprises in China¹⁵⁵. Among them nearly half are foreign capital enterprises. From the statistics of the Ministry of Commerce, in 2013, the sales of foreign capital direct selling enterprises was RMB 20.9 billions, occupied 96% of total sales of direct selling. In recent 2 years domestic direct selling enterprises have rapidly developed. However, foreign capital enterprises still

¹⁵² Notification on Banning Illegal Pyramid Training Activities

¹⁵³ Criminal Law of People's Republic of China

¹⁵⁴ Ibid. 139 12

¹⁵⁵ Disclose Information of Direct Selling Understandings

dominates the direct selling market.¹⁵⁶ China's direct selling is now still an immature industry even it is going towards regularization and legalization step by step. China's direct selling market develops within a legal structure was formally started from 2005. Up to now it is only 10 years. Unfortunately, there is a big problem that has existed for 10 year and still has no effective resolution. It is the illegal pyramid selling. According to a conservative estimation, in 2010, the existing illegal pyramid selling organizations are about 3000 and more than 12000 people are involved.¹⁵⁷ In 2013, Industrial and Commercial Bureau, the Ministry of Public Security and other 12 bureaus jointly hold a 3 months special activity on cracking down pyramid selling.¹⁵⁸ Liu Wenxi, the Deputy Director of the Investigation Bureau of the Ministry of Public Security, says: 'during the special activity, the public security organ filed 3018 cases and solved 2405 cases. Capturing 3746 criminal suspects and destroying 8089 illegal pyramid selling dens.'¹⁵⁹ In 2015, the Ministry of Public Security solves a transnational illegal pyramid selling case involved 23 countries and 5 hundred millions of people.¹⁶⁰ The most serious problem China faces is to control the security of the direct selling market, distinguish legal direct selling undertakings and illegal pyramid selling dens.

The EU's direct selling market has developed more than 100 years. The EU regulation for direct selling has existed for 30 years. Prior to it, Member States of the EU have their own domestic laws. Comparing China's direct selling market to the EU's, the differences are obviously. The EU's direct selling market is more mature than China's. Different economic bases determine that problems faced by the EU and China is different. Therefore they take different legislative approaches. To the EU, the main goal is to promote the development of the internal market through harmonizing fragmented regulatory framework of consumer protection. Therefore, the EU pays more attention on rules of consumer protection than China. To China, the most

¹⁵⁶ Jiang Ning, 'the Situation of Direct Selling Companies of China' (2013) 12 *Caizhi* 32

¹⁵⁷ Wang Tao, 'Present Situation of Illegal Pyramid Selling in China' (2014) 2 *Chinese Criminology Review* 90

¹⁵⁸ Zhang Rongjun, 'Direct Selling in China' (2015) 8(2) *the Manager* 189

¹⁵⁹ Li Dongdong, Zhuqian, 'the Existing Issues of Direct Selling in China' (2013) 16 *Modern Business* 63

¹⁶⁰ First Case of the Ministry of Public Security in 2015

important target is to protect the safety of the market, to distinguish legal direct selling with illegal pyramid selling and to promote the development of the market. Compare to consumer protection, the government focuses more on maintaining the stability of direct selling market and on controlling the behaviors of direct selling enterprises. Therefore, the depth and width of the requirements of the EU and China are different.

The difference legislative objective of the EU and China has caused different legal design, which can be proven by distinctive legal structure of the Directive on Consumer Rights and the Administration of Direct Selling Regulations are different.

Firstly, the Directive on Consumer Rights and the Administration of Direct Selling Regulations are at different position in their own legal hierarchy. The Directive on Consumer Rights is a secondary law of European Union, which the Member State must incorporate into their national law. The legislative procedures are quite complicated according to Article 294 of Consolidated Version of the Treaty on the Functioning of the European Union. The Administration of Direct Selling Regulations is an administrative regulation that is legislated and enacted by the State Council. Different status decides different cost of two legal documents. The Directive on Consumer Rights was legislated by the European Parliament and the Council under the help of European Economic and Social Committee and the Committee of the Regions. The Administration of Direct Selling Regulations was legislated and enacted by the State Council without any help. It is easy image the gap of cost between two legislatures.

Secondly, the development route of the Directive on Consumer Rights and the Administration of Direct Selling Regulations are different. The Directive is based on the Doorstep Selling Directive. In 1985, European Economic Community enacts the Doorstep Selling Directive to create harmonized minimum standards of door-to-door selling and to protect the consumers of door-to-door selling. The requirements in the Doorstep Selling Directive are not as sophisticated as the Directive on Consumer Rights. The implement of the Doorstep Selling Directive helped to discover the defects of it. In 2011, the Directive on Consumer Rights is enacted with a view to

simplifying and updating the applicable rules of the Doorstep Selling Directive. Cases brought under the Doorstep Selling Directive help to discover the inconsistencies and unwanted gaps of the Directive. For example, in the Doorstep Selling Directive, there is no regulation on the effect of failure to inform the consumer about the existence of the right of withdrawal. In the *Eva Martín Martín* case¹⁶¹, the judge decided that failure to comply with the obligation to give notice to the consumer of the existence of the right of withdrawal may declare the contract as void. He said, *'In fact, Article 4 leaves it to the Member States to legislate as regards the legal effects of a failure to comply with the obligation to give notice. However, the national court, when hearing a case, has to interpret the whole body of rules of national law so far as possible in the light of the wording and purpose of the Directive. This is to achieve the most effective consumer protection. [...] By the wording 'appropriate consumer protection measure' in the third paragraph of Art. 4 of the Directive, discretion with respect to the determination of consequences for a failure to comply with the obligation to give notice in a particular case is left to the authorities. However, it has to be exercised in conformity with the Directive's aim. [...] Furthermore the Directive guarantees only a minimum level of harmonization, which means that provisions, exceeding this level in a positive way, are fortiori admissible. [...] Therefore the court's declaration that a contract is void may be regarded as an 'appropriate' measure in the sense of Article 4 paragraph 3 of the Directive, in that it penalizes the failure to comply with an obligation, which is essential to create binding intent on the part of the consumer and to attain the level of protection sought by the Community legislature.'* This provision has been amended later in the Directive on Consumer Rights. In the Directive on Consumer Rights, the effect of failure to inform the consumer about the existence of the right of withdrawal will cause that the consumer is not bound by the contract, which has been clearly expressed in Article 6 of the Directive. Based on the flaws uncovered by these cases, rules on consumer protection in the context of direct selling have been further improved and updated in the new Directive.

¹⁶¹ C-227/08 *Eva Martín Martín v EDP Editores SL*. [2009] ECR-I 11939 para 18, 21, 24, 27, 31,32

Unlike the EU, the Administration of Direct Selling Regulations is enacted without precedent to refer. There has been no amendment since it came into force. It is even impossible to find a case actually apply the Administration of Direct Selling Regulations. The Administration of Direct Selling Regulations is more like a decoration on consumer protection in the context of direct selling. The differences on the practice of development and application decide the width and depth of the requirements of the EU and China are different.

2. POLICIES OF CONSUMER PROTECTION

The policies of consumer protection of the EU and China in the context of direct selling are different. The policies of the EU are to establish internal market and promote the interests of consumers and ensure a high level of consumer protection, which have been mentioned in recital 3 and recital 4 of the Directive on Consumer Rights. The Directive is also affected by the consumer policy strategy of the EU for 2002-2011. The consumer policy strategy for 2002-2006¹⁶² had three main objectives: a high common level of consumer protection, effective enforcement of consumer protection rules and the proper involvement of consumer organizations in Community policies. The strategy states that the first object requires *'moving away from the present situation of different sets of rules in each Member State towards a more consistent environment for consumer protection across the EU'*. Concerning of consumer's economic interests the Commission stressed the need *'to review and reform existing EU consumer protection Directives, to bring them up to date and progressively adapt them from the minimum harmonization to full harmonization measures'*¹⁶³. The objectives of the consumer policy strategy for 2007-2013 reflect a high degree of continuity with the strategy for 2002-2006.¹⁶⁴ Under the direction of these policies, the Directive on Consumer Rights merges 4 EU consumer directives into one set of rules. At the same time it is regulating the common aspects in a

¹⁶² Consumer Policy Strategy, COM (2002) 208 Final, [2002] OJ C 137

¹⁶³ Ibid.

¹⁶⁴ Ibid.

systematic fashion, simplifying and updating the existing rules, removing inconsistencies and closing gaps. The Directive moves away from the minimum harmonization approach, which means Member States may maintain or adopt stricter consumer protection rules than those provided by those 4 directives. The minimum harmonization approach causes a fragmented regulatory framework across the Community, which has caused significant compliance costs for businesses wishing to trade cross-border.¹⁶⁵ Those significant costs block businesses to sell cross-border to consumers, which in turn reduces consumer welfare.¹⁶⁶ If consumers are precluded access to competitive cross-border offers they do not fully reap up the benefits of the internal market in terms of more choice and better prices.¹⁶⁷ The objective of the Directive on Consumer Rights is to contribute to the better functioning of the business-to-consumer internal market by enhancing consumer confidence in the internal market and by reducing business reluctance to trade cross-border. The objective has been shown in recital 5. The problems behind the Directive on Consumer Rights are that different national consumer protection rules constrain the development of cross-boarder direct selling market. Although prior to the enactment of the Directive on Consumer Rights, there already exist other Directives concerning about the relevant issues stipulated in the Directive on Consumer Rights but those Directives do not realize harmonization. Therefore, the European Union decides to enact the Directive on Consumer Rights to harmonize consumer protection rules of direct selling of Member States to achieve a high level of consumer protection meantime to promote the development of a international direct selling market.

The policies of China is to regulate direct selling market, to strengthen supervision over direct selling activities, to prevent fraud and to protect the legitimate rights and interests of consumers and the public interest. Consumer's protection is not the main goal of the Regulation. Therefore, legislators only draft one article on consumer protection, which is quite different from the Directive on Consumer Rights. The

¹⁶⁵ Proposal for a Directive of the European Parliament and of the Council on Consumer Rights

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

Administration of Direct Selling Regulations is an experimental regulation. According to the Legislation Law of China, the State Council could legislate administrative regulations on the issue that needs legal adjustment under the authorization of the National People's Congress or the Representative of the National People's Congress. After a period of time, if the State Council considers that there should be a law on that specific issue, the State Council should propose the legislative proposal to the National People's Congress or the Standing Committee of the National People's Congress. The Administration of Direct Selling Regulations is a practice of this rule. Before the enactment of the Administration of Direct Selling Regulations, there is no legal document dealing with direct selling. Meantime, China has to stipulate a law on direct selling since the deadline of achieving the commitments China made under WTO is coming. The objective of the Administration of Direct Selling Regulations is stipulated in Article 1, *'These Regulations have been formulated in order to standardize the acts of direct selling, strengthen the regulation of direct selling, prevent fraud and protect the lawful rights and interests of consumers and public interests'*. Different policies determine the varied objectives of the Directive on Consumer Rights and the Administration of Direct Selling Regulations. To achieve those objectives, the EU and China design different legal schemes. Therefore, the width and depth of requirements of the EU and China are quite distinctive.

3. LEGAL CULTURES

The legal cultures of the EU and China are quite different. The EU is ahead of China on the development of modern laws. It has a long history of the development of modern laws. Jurisprudence plays an important role in the development of law in the EU. Diverse theories appear. Core of these theories is that the attitude to treat law as an independent discipline which is divided from policy. Rule of law is a principle that accepted by all members of the EU and also a critical principle of the EU. It primarily refers to that behavior of individuals and behavior of government all should be

constrained by laws.¹⁶⁸ Besides rule of law, limited government and human rights are also widely accepted by the EU. Respect the value of laws and individuals is a culture of the EU. Unlike the EU, China has a long history of rule of man even after the establishment of PRC. In the early 30 years of the PRC, China still treats law a way to rule society.¹⁶⁹ Mao Zedong says that we couldn't use law to rule the public; we should use the Party to rule the people.¹⁷⁰ This has gradually changed in the 1980s. In 1987 The Third Plenary Session of the 11th Central Committee rule by law has been mentioned. The party decides to control the society by law, ensuring that everyone is under the control of law.¹⁷¹ After that the statute of law has been gradually improved. In 1997 the Party firstly mentions the concept of rule of law in the 15th National People's Congress. Until now there is only 30 years that China begins to accept rule of law. Different legal cultures determine that the EU and China attach different level of attention to laws. Consequently, the level of details is quite different.

C. SUGGESTIONS FOR IMPROVING CHINESE LAWS

Rules of consumer information and right of withdrawal have already existed in China even though the details of the rules are quite unclear. Unlike China, the rules of the EU are particular. Since China and the EU are trying to solve the same issues and China is on its way to rule of law, China could refer to the EU's rules on details of consumer information and right of withdrawal. For consumer information, the author does not deem that China will change its own rules in a short time, since the new Consumer Protection is just enacted in 2013. But one important issue needs attention; it is the legal progeny of the trader if they fail to perform his obligation of consumer information. In the EU, if the trader fails to do so, the contract is then not bound to the

¹⁶⁸ the oxford English Dictionary has defined 'rule of law' this way: '*The authority and influence of law in society, esp. when viewed as a constraint on individual and institutional behavior; (hence) the principle whereby all members of society (including those in government) are considered equally subject to publicly codes and process.*'

¹⁶⁹ Li Hongbo, 'Wang Yi, Changing of the Jurisprudence of the Party: From Dong Biwu to Peng Zhen' (2005) 2 Journal of Heilongjiang Administrative Cadre Institute of Policies and Law 6

¹⁷⁰ Guo Daohui, 'Comparative Study of Mao Zedong's Jurisprudence and Ding Xiaoping's Jurisprudence' (2000) 2 Chinese Journal of Law 3

¹⁷¹ Central Committee of the Chinese Communist Party, *Selected Important Document* (1th edn. The Central Literature Press 2011) 9

consumer. In China there is no legal consequence. This makes the consumer information meaningless. Without legal consequences that the trader would not take the requirements of consumer information seriously then the consumer cannot get the information they need to make a rational decision. And this makes the law meaningless. The author deems this issue should be paid attention to.

To rules of right of withdrawal, two aspects need attention. Firstly, the effect of withdrawal should be clear. In EU laws, if a consumer exercises his right of withdrawal meaning the contract is terminated. But in China, there is no clear rule on the effect of right of withdrawal. The aim of giving consumers a right to withdraw is to protect consumers from traders' mislead. If the consequence of right of withdrawal is not clear, the consumers will hesitate to exercise this right since they have no idea what results they are facing. This will heavily harm the function of right of withdrawal. Secondly, exceptions of right of withdrawal should be considered. The EU gives exceptions but China does not. Right of withdrawal is a right that is not given to all consumers. The assumption of right of withdrawal is that the consumers are surprised by the trader and then make an irrational decision under the surprise. Therefore, if the trader can prove that none of the two assumptions exists, the right of withdrawal should be canceled. Consumer Protection is important in the context of direct selling but good faith traders' legal interest should also be respected.

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List of abbreviations

1. EU: The European Union
2. OFT: UK Office of Fair Trading
3. PRC: People's Republic of China
4. WTO: World Trade Organization

Treaties

1. Treaty of Rome
2. The Single European Act
3. Treaty of Maastricht on European Union
4. Treaty of Amsterdam
5. Treaty on the Functioning of the European Union
6. Treaty on European Union
7. Treaty of Nice
8. Treaty of Lisbon

Secondary legislation

1. Directive 79/112/EEC, [1979] OJ L 33/1
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3. Directive 85/577/EEC, [1985] OJ L 372
4. Directive 97/7/EC, [1997] OJ L 144/19
5. Directive 1999/44/EC, [1999] OJ L 171/12
6. Directive 2005/29/EC, [2005] OJ L 149/22
7. Directive 2006/123/EC, [2006] OJ L 376/40
8. Directive 2009/72/EU, [2009] OJ L 211/55
9. Directive 2009/73/EC, [2009] OJ L 211/94
10. Directive 2011/83/EU, [2011] OJ L 304/74
11. Directive 2013/11/EU, [2013] OJ L 165/63
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10. C-227/08 *Eva Martín Martín v EDP Editores SL*. [2009] ECR-I 11939
11. Case C-281/12 *Trento Sviluppo srl, Centrale Adriatica Soc. coop. arl v Autorità Garante della Concorrenza e del Mercat* [2013] para 33

Chinese laws

1. Constitution of the People's Republic of China
2. Law of the People's Republic of China on the Protection of the Rights and Interests of Consumers
3. 1993 Consumer Protection Law of the People's Republic of China
4. Product Quality Law of the People's Republic of China
5. Advertisements Law the People's Republic of China
6. Legislation Law of the People's Republic of China
7. Criminal Law of People's Republic of China
8. Contract Law of the People's Republic of China
9. Interpretation of the Legislation Law of People's republic of China

10. Administration of Direct Selling Regulations
11. Notification on Suppression of Illegal Activities in Multi-level Pyramid Schemes
12. Notification on Stop Using Multilevel Level Marketing
13. Interim Measure on Management of Multi Level Pyramid Schemes
14. Notification on Cessation of Development of Multi-level Marketing Enterprises
15. Notification on Banning Illegal Pyramid Training Activities
16. Disclose Information of Direct Selling Understandings
17. Report on the Direct Selling Market of China in 2014
18. Present Situation of Illegal Pyramid Selling in China

Annex with the legal provisions

1. Directive 2005/29/EC, [2005] OJ L 149/22:

ARTICLE 6

1. A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise: (a) the existence or nature of the product; (b) the main characteristics of the product, such as its availability, benefits, risks, execution, composition, accessories, after sale customer assistance and complaint handling, method and date of manufacture or provision, delivery, fitness for purpose, usage, quantity, specification, geographical or commercial origin or the results to be expected from its use, or the results and material features of tests or checks carried out on the product; (c) the extent of the trader's commitments, the motives for the commercial practice and the nature of the sales process, any statement or symbol in relation to direct or indirect sponsorship or approval of the trader or the product; [...]

ARTICLE 7(4)(d)

In the case of an invitation to purchase, the following information shall be regarded as material, if not already apparent from the context: (d) the arrangements for payment, delivery, performance and the complaint handling policy, if they depart from the requirements of professional diligence.

2. Directive 2006/123/EC, [2006] OJ L 376/40:

ARTICLE 4(5)

‘establishment’ means the actual pursuit of an economic activity, as referred to in Article 43 of the Treaty, by the provider for an indefinite period and through a stable infrastructure from where the business of providing services is actually carried out.

3. Directive 2011/83/EU, [2011] OJ L 304/74:

ARTICLE 6

1. Before the consumer is bound by a distance or off-premises contract, or any corresponding offer, the trader shall provide the consumer with the following information in a clear and comprehensible manner: (a) the main characteristics of the goods or services, to the extent appropriate to the medium and to the goods or services; (b) the identity of the trader, such as his trading name; (c) the geographical address at which the trader is established and the trader's telephone number, fax number and e-mail address, where available, to enable the consumer to contact the trader quickly and communicate with him efficiently and, where applicable, the geographical address and identity of the trader on whose behalf he is acting; (d) if different from the address provided in accordance with point (c), the geographical address of the place of business of the trader, and, where applicable, that of the trader on whose behalf he is acting, where the consumer can address any complaints; (e) the total price of the goods or services inclusive of taxes, or where the nature of the goods or services is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated, as well as, where applicable, all additional freight, delivery or postal charges and any other costs or, where those charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable. In the case of a contract of indeterminate duration or a contract containing a subscription, the total price shall include the total costs per billing period. Where such contracts are charged at a fixed rate, the total price shall also mean the total monthly costs. Where the total costs cannot be reasonably calculated in advance, the manner in which the price is to be calculated shall be provided; (f) the cost of using the means of distance communication for the conclusion of the contract where that cost is calculated other than at the basic rate; (g) the arrangements for payment, delivery, performance, the time by which the trader undertakes to deliver the goods or to perform the services and, where applicable, the trader's complaint handling policy; (h) where a right of withdrawal exists, the conditions, time limit and procedures for exercising that right in accordance with Article 11(1), as well as the model withdrawal form set out in Annex I(B); (i) where

applicable, that the consumer will have to bear the cost of returning the goods in case of withdrawal and, for distance contracts, if the goods, by their nature, cannot normally be returned by post, the cost of returning the goods; (j) that, if the consumer exercises the right of withdrawal after having made a request in accordance with Article 7(3) or Article 8(8), the consumer shall be liable to pay the trader reasonable costs in accordance with Article 14(3); (k) where a right of withdrawal is not provided for in accordance with Article 16, the information that the consumer will not benefit from a right of withdrawal or, where applicable, the circumstances under which the consumer loses his right of withdrawal; (l) a reminder of the existence of a legal guarantee of conformity for goods; (m) where applicable, the existence and the conditions of after sale customer assistance, after-sales services and commercial guarantees; (n) the existence of relevant codes of conduct, as defined in point (f) of Article 2 of Directive 2005/29/EC, and how copies of them can be obtained, where applicable; (o) the duration of the contract, where applicable, or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract; (p) where applicable, the minimum duration of the consumer's obligations under the contract; (q) where applicable, the existence and the conditions of deposits or other financial guarantees to be paid or provided by the consumer at the request of the trader; (r) where applicable, the functionality, including applicable technical protection measures, of digital content; (s) where applicable, any relevant interoperability of digital content with hardware and software that the trader is aware of or can reasonably be expected to have been aware of; (t) where applicable, the possibility of having recourse to an out-of-court complaint and redress mechanism, to which the trader is subject, and the methods for having access to it. 2. Paragraph 1 shall also apply to contracts for the supply of water, gas or electricity, where they are not put up for sale in a limited volume or set quantity, of district heating or of digital content which is not supplied on a tangible medium. 3. In the case of a public auction, the information referred to in points (b), (c) and (d) of paragraph 1 may be replaced by the equivalent details for the auctioneer. 4. The information referred to in points (h), (i) and (j) of paragraph 1 may be provided by means of the model instructions on

withdrawal set out in Annex I(A). The trader shall have fulfilled the information requirements laid down in points (h), (i) and (j) of paragraph 1 if he has supplied these instructions to the consumer, correctly filled in 5. The information referred to in paragraph 1 shall form an integral part of the distance or off-premises contract and shall not be altered unless the contracting parties expressly agree otherwise. 6. If the trader has not complied with the information requirements on additional charges or other costs as referred to in point (e) of paragraph 1, or on the costs of returning the goods as referred to in point (i) of paragraph 1, the consumer shall not bear those charges or costs. 7. Member States may maintain or introduce in their national law language requirements regarding the contractual information, so as to ensure that such information is easily understood by the consumer. 8. The information requirements laid down in this Directive are in addition to information requirements contained in Directive 2006/123/EC and Directive 2000/31/EC and do not prevent Member States from imposing additional information requirements in accordance with those Directives. Without prejudice to the first subparagraph, if a provision of Directive 2006/123/EC or Directive 2000/31/EC on the content and the manner in which the information is to be provided conflicts with a provision of this Directive, the provision of this Directive shall prevail. 9. As regards compliance with the information requirements laid down in this Chapter, the burden of proof shall be on the trader.

ARTICLE 7

1. With respect to off-premises contracts, the trader shall give the information provided for in Article 6(1) to the consumer on paper or, if the consumer agrees, on another durable medium. That information shall be legible and in plain, intelligible language. 2. The trader shall provide the consumer with a copy of the signed contract or the confirmation of the contract on paper or, if the consumer agrees, on another durable medium, including, where applicable, the confirmation of the consumer's prior express consent and acknowledgement in accordance with point (m) of Article 16. 3. Where a consumer wants the performance of services or the supply of water, gas or electricity, where they are not put up for sale in a limited volume or set

quantity, or of district heating to begin during the withdrawal period provided for in Article 9(2), the trader shall require that the consumer makes such an express request on a durable medium. 4. With respect to off-premises contracts where the consumer has explicitly requested the services of the trader for the purpose of carrying out repairs or maintenance for which the trader and the consumer immediately perform their contractual obligations and where the payment to be made by the consumer does not exceed EUR 200: (a) the trader shall provide the consumer with the information referred to in points (b) and (c) of Article 6(1) and information about the price or the manner in which the price is to be calculated together with an estimate of the total price, on paper or, if the consumer agrees, on another durable medium. The trader shall provide the information referred to in points (a), (h) and (k) of Article 6(1), but may choose not to provide it on paper or another durable medium if the consumer expressly agrees; (b) the confirmation of the contract provided in accordance with paragraph 2 of this Article shall contain the information provided for in Article 6(1). Member States may decide not to apply this paragraph. 5. Member States shall not impose any further formal precontractual information requirements for the fulfilment of the information obligations laid down in this Directive.

ARTICLE 11

Exercise of the right of withdrawal 1. Before the expiry of the withdrawal period, the consumer shall inform the trader of his decision to withdraw from the contract. For this purpose, the consumer may either: (a) use the model withdrawal form as set out in Annex I(B); or (b) make any other unequivocal statement setting out his decision to withdraw from the contract. Member States shall not provide for any formal requirements applicable to the model withdrawal form other than those set out in Annex I(B). 2. The consumer shall have exercised his right of withdrawal within the withdrawal period referred to in Article 9(2) and Article 10 if the communication concerning the exercise of the right of withdrawal is sent by the consumer before that period has expired. 3. The trader may, in addition to the possibilities referred to in paragraph 1, give the option to the consumer to electronically fill in and submit either the model withdrawal form set out in Annex I(B) or any other unequivocal statement

on the trader's website. In those cases the trader shall communicate to the consumer an acknowledgement of receipt of such a withdrawal on a durable medium without delay. 4. The burden of proof of exercising the right of withdrawal in accordance with this Article shall be on the consumer.

ARTICLE 13

1. The trader shall reimburse all payments received from the consumer, including, if applicable, the costs of delivery without undue delay and in any event not later than 14 days from the day on which he is informed of the consumer's decision to withdraw from the contract in accordance with Article 11. The trader shall carry out the reimbursement referred to in the first subparagraph using the same means of payment as the consumer used for the initial transaction, unless the consumer has expressly agreed otherwise and provided that the consumer does not incur any fees as a result of such reimbursement. 2. Notwithstanding paragraph 1, the trader shall not be required to reimburse the supplementary costs, if the consumer has expressly opted for a type of delivery other than the least expensive type of standard delivery offered by the trader. 3. Unless the trader has offered to collect the goods himself, with regard to sales contracts, the trader may withhold the reimbursement until he has received the goods back, or until the consumer has supplied evidence of having sent back the goods, whichever is the earliest.

4. Constitution Law of PRC:

ARTICLE 89

Article 89

The State Council exercises the following functions and powers:

(1) to adopt administrative measures, enact administrative rules and regulations and issue decisions and orders in accordance with the Constitution and the law; (2) to submit proposals to the National People's Congress or its Standing Committee; ... (5) to draw up and implement the plan for national economic and social development and the state budget; (6) to direct and administer economic affairs and urban and rural development; [...]

5. Legislation Law of PRC:

ARTICLE 8

Only national law may be enacted in respect of matters relating to:

(8) fundamental economic system and basic fiscal, tax, customs, financial and foreign trade systems; [...]

ARTICLE 9

In the event that no national law has been enacted in respect of a matter enumerated in Article 8 hereof, the National People's Congress and the Standing Committee thereof have the power to make a decision to enable the State Council to enact administrative regulations in respect of part of the matters concerned for the time being, except where the matter relates to crime and criminal sanctions, the deprivation of a citizen's political rights, compulsory measure and penalty restricting the personal freedom of a citizen, and the judicial system.

6. 2013 Consumer Protection Law of PRC:

ARTICLE 8

A consumer shall have the right to knowledge of the true facts concerning commodities purchased and used or services received. A consumer shall have the right to require relevant information of a business operator providing commodities on price, place of origin, producer, usage, functions, specifications, grade, main ingredients, date of production, date of expiry, certificate of inspection, operation manual and after-sale service, or of contents, specifications and fees of services in respect of commodities or services as the situation requires.

ARTICLE 21

A business operator providing commodities or services shall issue a purchase or service voucher to consumers in accordance with relevant State regulations or commercial practices. A business operator must issue a purchase or service voucher where requested to do so by a consumer

7. The Administration of Direct Selling Regulations of PRC:

ARTICLE 1

These Regulations have been formulated in order to standardize the acts of direct

selling, strengthen the regulation of direct selling, prevent fraud and protect the lawful rights and interests of consumers and public interests.

ARTICLE 3

For the purposes of these Regulations, the term “direct selling” means a form of distribution by which a direct selling enterprise recruits direct sellers to directly market products to end consumers (hereafter, the “consumers”) outside the fixed business premises. For the purposes of these Regulations, the term “direct selling enterprises” means enterprises that have been approved in accordance with the provisions hereof to sell products by way of direct selling. For the purposes of these Regulations, the term “direct sellers” means persons that directly market products to consumers outside the fixed business premises.

ARTICLE 25

Direct selling enterprises shall set up and implement a sound goods replacement and return system. Consumers may, within 30 days of the purchase of a direct selling product that has not been unsealed, request to the direct selling enterprise and its branch or the local service outlet or to the direct seller that marketed the product for replacement or return of goods on the strength of the invoice or sales voucher issued by the direct selling enterprise. The direct selling enterprise and its branch, the local service outlet or the direct seller shall handle replacement or return of goods on the basis of the price marked on the invoice or sales voucher within seven days after the consumer has made the request for replacement or return of goods. Direct sellers may, within 30 days of the purchase of a direct selling product that has not been unsealed, request to the direct selling enterprise and its branch or the local service outlet for replacement or return of goods on the strength of the invoice or sales voucher issued by the direct selling enterprise. The direct selling enterprise and its branch or the local service outlet shall handle replacement or return of goods on the basis of the price marked on the invoice or sales voucher within seven days after the direct seller has made the request for replacement or return of goods. Where a consumer or direct seller requests replacement or return of goods in circumstances other than those

stipulated in the preceding two paragraphs , the direct selling enterprise and its branch, the local service outlet or the direct seller shall handle replacement or return of goods in accordance with the provisions of the relevant laws or regulations or the stipulations in the contract.

ARTICLE 48

If a direct selling enterprise violates Article 23 hereof, the matter shall be handled in accordance with the relevant provisions of the Pricing Law.

Zusammenfassung

Diese Masterthese untersucht mit komparativen Methoden Regelungen zum Konsumentenschutz im Bereich des Direktverkaufs in der EU und China. Direktverkauf als einer der geschichtlich ältesten Vertriebswege entwickelte sich gemeinsam mit der Entstehung menschlicher Kulturen. Beim modernen Direktverkauf handelt es sich um eine Transaktion außerhalb der Geschäftsräumlichkeiten bei der Käufer und Verkäufer persönlich anwesend sind. Bei dieser Transaktionsart sind Käufer einem stärkeren Druck durch Händler ausgesetzt und der Informationsvorsprung der Händler ist stärker ausgeprägt.

Die Autorin greift aus den relevanten Schutzmaßnahmen zwei heraus: Verbraucherinformation und Rücktrittsrecht.

Sowohl die EU als auch China haben Regeln zur Verbraucherinformation und zu Rücktrittsrechten entwickelt um Konsumenten im Kontext des Direktverkaufs zu schützen, wobei der theoretische Hintergrund und die praktischen Probleme der die EU und Chinas in den eigenen Direktverkaufsmärkten ähnlich sind, die Regelungen zum Konsumentenschutz jedoch unterschiedlich: Generell sind die Regelungen der EU umfassender und tiefgreifender. Einige Bestimmungen zur Konsumenteninformation und zum Rücktrittsrecht existieren sowohl in der EU als auch in China. Hier handelt es sich um Bestimmungen betreffend die Grundelemente einer Transaktion, über die Konsumenten informiert werden müssen, und die Fundamentalstruktur des Rücktrittsrechts. Andere Bestimmungen, die auf unterschiedliche Wirtschaftsstrukturen und -politik zurückzuführen sind, sind spezifisch für die EU bzw. China.

Abstract

This master thesis uses comparative study to discuss consumer protection in the context of direct selling in the EU and China. Direct selling as one of the oldest distribution channels in history began appearing alongside the development of civilizations. Modern direct selling is an off-premises transaction between physically present consumers and traders. In this kind of transaction, consumers get more pressure from traders. The asymmetry of information is more serious than traditional sales. Among all measures of protection relevant, the author only illustrates two measures: consumer information and right of withdrawal.

To protect consumers in the context of direct selling, both the EU and China chose to develop rules on consumer information and right of withdrawal. The theoretical background and practical problems which the EU and China face in their own direct selling markets are similar, but the EU and China have developed different rules on consumer protection in the context of direct selling. Rules of the EU are wider and deeper than China. Some rules of consumer information and right of withdrawal exist in both the EU and China. These are mostly rules either concerning the basic elements of a transaction, about which consumers have to be informed or rules delineating the fundamental structure of right of withdrawal. Some rules only exist either in the EU or China due to the different economic bases, policies and legal cultures of the EU and China.

To sum up, since the EU's direct selling market is more mature and the EU's policy is to promote the internal market through full harmonization of fragmented framework of consumer protection of Member States, the EU's rules are more comprehensive and detailed. Compared to the EU, China's direct selling market is an infant and the policy of Mainland China is to maintain the stability of the direct selling market through governmental regulation. For this reason, rules of consumer protection in the context of direct selling in China are less numerous and more superficial.