



## Proposed amendments to the laws related to the protection of Consumer rights in e-commerce contract

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### บทคัดย่อ

การศึกษาวิจัยนี้มีวัตถุประสงค์เพื่อศึกษาปัญหาเกี่ยวกับการคุ้มครองผู้บริโภคในการทำสัญญาพานิชย์อิเล็กทรอนิกส์ของประเทศไทย ทั้งนี้เนื่องจากการทำสัญญาพานิชย์อิเล็กทรอนิกส์มีความแตกต่างจากสัญญาทั่วไปตรงที่ผู้บริโภคและผู้ประกอบธุรกิจมักไม่ได้มีการเจรจาต่อรองแบบเผชิญหน้ากัน และไม่สามารถตกลงกันเกี่ยวกับข้อสัญญาและเงื่อนไขเดียวกับการทำสัญญาแบบรายข้อได้ ซึ่งเป็นผลให้ผู้ประกอบธุรกิจกำหนดเงื่อนไขและข้อตกลงเกี่ยวกับการทำสัญญาดังกล่าวไว้ล่วงหน้า ด้วยเหตุนี้ ข้อสัญญาส่วนใหญ่จึงมักเป็นคุณแก่ผู้ประกอบธุรกิจ รวมถึงก่อให้เกิดความไม่เป็นธรรมแก่ผู้บริโภค โดยการศึกษาวิจัยครั้งนี้ใช้วิธีวิจัยเอกสารเป็นหลัก และรวมถึงการสัมภาษณ์เชิงลึก การสำรวจแบบสอบถาม และการจัดสัมมนากลุ่ม ผลการศึกษาวิจัยพบว่า สภาพปัจจุบันได้ออกระเบียบว่าด้วยการคุ้มครองผู้บริโภคที่ให้ความคุ้มครองการทำสัญญาห่างโดยระยะทาง เช่นเดียวกับประเทศอังกฤษ ประเทศเยอรมัน และประเทศฝรั่งเศสที่มีกฎหมายที่เกี่ยวข้องกับการคุ้มครองผู้บริโภคในการทำสัญญาพานิชย์อิเล็กทรอนิกส์ที่สอดคล้องกับระเบียบของสภาพปัจจุบัน เพื่อให้ความคุ้มครองสิทธิของผู้บริโภค และเยิวยาผู้บริโภคจากการทำสัญญาพานิชย์อิเล็กทรอนิกส์ที่เป็นลินค์ค่าอุปโภคบริโภค และเนื้อหาดิจิทัล อย่างไรก็ตามประเทศไทยยังไม่มีกฎหมายเฉพาะที่ให้ความคุ้มครองผู้บริโภคจากการทำสัญญาพานิชย์อิเล็กทรอนิกส์ โดยเฉพาะการทำสัญญาจำหน่ายเนื้อหาดิจิทัล ดังนั้น บทความวิจัยนี้จึงเสนอให้มีการตรากฎหมายเฉพาะเพื่อให้ความคุ้มครองผู้บริโภคจากการทำสัญญาพานิชย์อิเล็กทรอนิกส์

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## Abstract

This study provides an examination of the consumer protection issues of e-commerce contracts concluded within Thailand. Unlike traditional contracts, e-commerce contracts are contracts for which traders and the consumers do not meet in person to negotiate and execute the terms and conditions of the agreement. The terms and conditions of e-commerce contracts are prepared in advance by the traders; consequently, they are usually in favor of the traders and unfair to the consumers. The methodology employed in this study includes documentary research, interviewing, questionnaires and group discussion. The findings show that the EU has passed a directive to protect consumers in distance contracts and the UK, Germany, and France have incorporated a directive into its legislation in order to address rights and remedies in relation to the sales of goods, supply of digital content and services contracts, while Thailand has not enacted specific provisions dealing with the protection of the consumers in e-commerce transactions. Hence, this study suggests a *sui generis* system of consumer protection in e-commerce contracts.

**Keyword :** e-commerce contract, consumer rights, digital content

## Introduction

E-commerce plays an important role in the digital economy since it allows traders to integrate processes, reduce operating costs, and reach customers directly through their websites, applications, or social media. In e-commerce contracts, goods can be traded in the form of tangibles or sold as digital content via the downloading and streaming of items such as songs, films, and computer programs.

E-commerce contracts for supplying tangible goods and digital content are considered “distance contracts,” in which consumers are not able to see, test, or inspect

the purchased goods before entering into the contract. Consequently, the nature, characteristics, and functioning of the goods may not match the description provided by traders. In the event that consumers want to change or return the goods, their requests are not likely to be fulfilled due to the liability limitation clauses and the return policies of the traders, resulting in the unfair treatment of consumers. Moreover, most traders do not disclose their names, addresses, or locations of their shops (if any). Without necessary information to verify the integrity of traders in the e-commerce contracts, consumer confidence in online shopping can be shaken.

To address these problems, many countries have proceeded to amend their laws regarding the protections of e-commerce consumer rights. In 2011, the European Parliament and Council adopted the Directive on Consumer Rights (2011/83/EC) covering on-premises contracts, off-premises contracts, and distance contracts, which embraces the e-commerce contracts concluded by traders and the consumers residing in the member states of the European Union. According to the Directive, before consumers are bound by these contracts, the traders are required to display necessary information, including the traders' contact information, the characteristics of the goods or services, the total price of goods or services, a legal guarantee of the conformity of the goods, etc.

After the European Union adopted the Directive on Consumer Rights, Germany amended its civil code by adding those provisions to distance contracts and enacting the Electronic Commerce Act of 2001. The “fair contract terms” for e-commerce contracts are clearly defined in more detail.<sup>1</sup> In France, the consumer protection code (Code de la

consummation) and Law no. 2014-344 on consumer rights (Loi Hamon) contain provisions requiring e-commerce traders to provide, in sales contracts, general conditions of with clear characteristics before the consumers enter into the contracts. Traders are required to provide details and contract terms to consumers. In these distance contracts, additional information (Information du client) regarding the contracts is required, and traders must provide this information to the consumers in the process of offering goods or services.

The United Kingdom promulgated the Consumer Rights Act of 2015 to strengthen consumer's rights in e-commerce contracts, including provisions on compensation. This Act has provided to traders obligations and liabilities regarding contracts on consumer goods and digital content. The main objective of the Act is to protect consumer rights from unfair contract terms and to establish transparency in e-commerce businesses<sup>2</sup>

In Thailand, the existing laws regarding consumer protection are the Consumer Protection Act B.E. 2522, the Unfair Contract Act B.E. 2540, and the Direct Sales

<sup>1</sup>ICT Law Center, *Contract must be Observed: Consumer Protection in Online Contract* (5 September 2017) ETDA <<https://www.etda.or.th/publishing-detail/online-consumer-protection-on-e-commerce-contract-2.html>>.

<sup>2</sup>Barry D., Jenkins, E., Sumnall, C., Douglas-Jones, B. & Lloyd, D., *Blackstone's Guides to The Consumer Rights Act 2015* (Oxford: Oxford University Press, 2016) 1.

and Direct Marketing Act B.E. 2545. However, these laws have no specific provisions on e-commerce contracts, especially contracts related to digital goods. Most e-commerce contracts are “standard form contracts,” wherein the terms and conditions of the contracts are set by the traders. Most of the terms and conditions of these contracts, however, are unfair to consumers since the consumers do not have the chance to negotiate the terms and conditions of these contracts before entering into them.

The aim of this study is to lay down guidelines for amending the Thai consumer protection law covering e-commerce contracts, including contracts for both tangible and digital goods. The study examines and compares the consumer protection laws in e-commerce contracts among the European Union, the United Kingdom, France, Germany, and Thailand. The consumer protection laws of all these mentioned, except that of Thailand, have specific provisions addressing e-commerce contracts. For that reason, Thai consumer protection law can learn from these foreign laws in order to make necessary amendments relating to the protection of consumer rights when e-commerce contracts are concluded in Thailand.

## Research Objectives

1. To study the theoretical concepts relating to the consumer protection in e-commerce contracts.
2. To examine the issues of the consumer protection in e-commerce contracts within Thailand.
3. To compare the consumer protection laws concerning to e-commerce contracts among the European Union, the United Kingdom, France, Germany and Thailand
4. To analyze the legal issues of the consumer protection in e-commerce contracts and propose a *sui generis* law that can be properly implemented to Thailand.

## Research Hypothesis

E-commerce contract is different from the traditional contract in many aspects. The online traders and the consumers do not meet in person to negotiate and execute the terms and conditions of the agreement. Also, the online traders may apply the unfair contract terms in standard form consumer contract. However Thailand does not have specific provisions dealing with the protection of the consumers in e-commerce transactions. In contrast, the EU countries have passed

the legislations to protect consumers in e-commerce contracts. Hence, Thailand should have a *sui generis* law to protect the consumers in e-commerce contracts.

## Research Methodology

The research mainly study in concern the documentary research, involving the current laws, rules, regulations within the European Union, the United Kingdom, France, Germany and Thailand. The research is also comprised with collecting data by the in-depth interviewing, questionnaires and group discussion.

## Research Findings

This study examines the consumer protection laws governing the e-commerce contracts of the European Union, the United Kingdom, France, and Germany, which are the following:

### *The European Union*

There are three major Directives regarding the protection of consumer rights in the European Union.

The first Directive is Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. The purpose of this Directive is to approximate the laws, regulations, and administrative provisions of the member states relating to unfair terms in contracts concluded between the trader and the consumer.<sup>3</sup> A contractual term that has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contracts, to the detriment of the consumer.<sup>4</sup> A term shall always be regarded as not individually negotiated where it has been drafted in advance, particularly as a standard form contract, and the consumer has, therefore, not been able to influence the substance of the terms.<sup>5</sup> Member states shall lay down that unfair terms used in a contract concluded with a consumer by a trader shall, as provided under their national laws, not be binding on the consumer and that the contract shall continue to bind the parties to those terms if it is capable of continuing without the unfair terms.<sup>6</sup>

<sup>3</sup> Article 1, *Directive 93/13/EEC*.

<sup>4</sup> Article 3.1, *Directive 93/13/EEC*.

<sup>5</sup> Article 3.2, *Directive 93/13/EEC*.

<sup>6</sup> Article 7, *Directive 93/13/EEC*.

The second directive is Directive 1999/44/EC of the European Parliament and that of the Council of 25 May 1999 covering certain aspects of the sales of consumer goods and associated guarantees. The purpose of this Directive is to create an approximation of the laws, regulations, and administrative provisions of the member states on certain aspects of the sales of consumer goods and associated guarantees in order to ensure a uniform minimum level of consumer protection in the EU's internal market.<sup>7</sup> The trader must deliver goods to the consumer that is in conformity with the contract of the sale. Consumer goods are presumed to be in conformity with the contract if they comply with the description given by the trader and the goods possess the qualities that the trader has presented to the consumer as a sample or model.<sup>8</sup> The trader shall be liable to the consumer for any lack of conformity to the sample or model that exists at the time that the goods are delivered.<sup>9</sup> In the case of a lack of such conformity, the consumer shall be entitled to have the goods

brought into conformity free of charge by repair or replacement.<sup>10</sup>

The third directive is Directive 2011/83/EU of the Parliament and Council of 25 October 2011 on consumer rights amending Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and the Council. The purpose of this Directive is, through the achievement of a high level of consumer protection, to contribute to the proper functioning of the internal market by approximating certain aspects of the laws, regulations, and administrative provisions of the member states concerning contracts concluded between consumers and traders.<sup>11</sup> This Directive shall apply, to the extent set out in its provisions, to any contract concluded between a trader and a consumer. It shall also apply to contracts for the supply of water, gas, electricity, or district heating, including those entered with public providers, to the extent that these commodities are provided on a contractual basis.<sup>12</sup> According to Article 6 of Directive 2011/83/EU, before the consumer

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<sup>7</sup> Article 1, *Directive 1999/44/EC*.

<sup>8</sup> Article 2.1 and 2.2(a), *Directive 1999/44/EC*.

<sup>9</sup> Article 3.1, *Directive 1999/44/EC*.

<sup>10</sup> Article 3.2, *Directive 1999/44/EC*.

<sup>11</sup> Article 1, *Directive 2011/83/EU*.

<sup>12</sup> Article 3.1, *Directive 2011/83/EU*.

is bound by a distance contract (i.e. an E-Commerce contract) or any corresponding offer, the trader shall provide the consumer with the following information in a clear and comprehensible manner:

1) The main characteristics of the goods or services, to the extent appropriate to the medium and to the goods or services.

2) The identity of the trader, such as its trading name.

3) The geographical address at which the trader is established and the trader's telephone number, fax number, and e-mail address.

4) If different from the address provided in accordance with, the geographical address of the place of business of the trader, and, where applicable, that of the trader on whose behalf he or she is acting.

5) The total price of the goods or services inclusive of taxes, shipping costs, incidental costs, payment, and the delivery process.

6) The cost of using a means of distance communication for the conclusion of the contract when that cost is calculated other than at the basic rate.

7) 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.

8) Where a right of withdrawal exists, the conditions, time limit, and procedures for exercising that right.

9) A reminder of the existence of a legal guarantee of the goods' conformity to the provided description.

10) Where applicable, the existence and the conditions of after-sale customer assistance, after-sales services, and commercial guarantees.

11) The existence of relevant codes of conduct and how to obtain copies of them.

12) The duration of the contract or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract.

13) Where applicable, the minimum duration of the consumer's obligations under the contract.

14) 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.

15) Where applicable, the functionality, including applicable technical protection measures, of digital content.

16) Where applicable, any relevant interoperability of digital content with hard-



ware and software that the trader is aware of or reasonably can be expected to have been aware of.

17) 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 accessing it.

If a distance contract to be concluded by electronic means (an e-commerce contract) places the consumer under an obligation to pay, the trader shall ensure that the consumer, when placing his order, explicitly acknowledges that the order implies an obligation to pay. If placing an order entails activating a button or a similar function, the button or similar function shall be labeled in an easily legible manner with the words “order with obligation to pay” or a corresponding unambiguous formulation indicating that placing the order entails an obligation to pay the trader. If the trader has not complied with this requirement, the consumer shall not be bound by the contract or order.<sup>13</sup>

Since, in the case of a distance contract, particularly an e-commerce contract, the consumer is not able to see the goods before concluding the contract, he or she

should have a right of withdrawal. The consumer shall have the right to withdraw from the contract within 14 days, without giving any reason and without incurring any costs other than those provided by the Directive. In the case of sales contracts, the withdrawal period should expire after 14 days from the day on which the consumer, or a third party indicated by the consumer, acquires physical possession of the goods. In the case of contracts for supply of digital content, in which data are produced and supplied in digital form, such as computer programs, applications, games, music, videos or texts, irrespective of whether they are accessed through downloading or streaming, from a tangible medium or through any other means, the withdrawal period shall expire after 14 days from the conclusion of the contract.<sup>14</sup>

The consumer shall inform the trader of his or her decision to withdraw from the contract before the expiration of the withdrawal period. The consumer may either use the model withdrawal form set out in Annex I (B) of the Directive or make another unequivocal statement setting out his or her decision to withdraw. In addition, the trader may give the option to the consumer to

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<sup>13</sup> Article 8.2, Directive 2011/83/EU.

<sup>14</sup> Article 9, Directive 2011/83/EU.

electronically fill in and submit either the form or a 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 with no delay. The burden of proof for exercising the right to withdrawal from the contract shall be on the consumer.<sup>15</sup>

### ***The United Kingdom***

In the UK, several statutory laws govern the e-commerce contract between trader and consumer. According to the EU, the Electronic Commerce Regulations 2002 establishes legal rules that the online trader must comply with when interacting with the consumer. These regulations, which came into effect on August 21, 2002, incorporate the EU Electronic Commerce Directive 2000/31/EC. The regulations apply to contracts concluded by electronic means over distance when the buyer is a consumer. The regulations imposed an obligation on e-commerce traders to provide information to the consumers before a contract is formed.<sup>16</sup> The online trader must state the terms and conditions in a clear, comprehen-

sible, and unambiguous manner as a technical step involved in placing an order. If the consumer is not informed of how they can amend errors in an order, the contract can be voided.<sup>17</sup> Also, consumers have a right to rescind the contract if the online trader has not made available a means of allowing consumers to identify and correct input errors in compliance with this regulation.<sup>18</sup>

Following the Electronic Commerce Regulations 2002, the Consumer Contracts (information, Cancellation, and Additional Charges) Regulations 2013 came into force on June 13, 2014. These regulations applied to distance contracts, off-premises contracts, and on-premises contracts. It requires that the trader in a distance contract provide pre-contractual information to the consumer before the formation of the contract and that some of this information be provided before the consumer places an order with an obligation to pay.<sup>19</sup> Schedule 2 of these regulations requires that the information be provided in distance contracts, and this includes information on the main characteristics of the

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<sup>15</sup> Article 11, *Directive 2011/83/EU*.

<sup>16</sup> Reg.9, *The EC Regulations 2002*.

<sup>17</sup> Reg.11, *The EC Regulations 2002*.

<sup>18</sup> Reg.15, *The EC Regulations 2002*.

<sup>19</sup> Reg.13, *The Consumer Contracts, information, Cancellation and Additional Charges, Regulations 2013*.

goods or services, the total price of the goods or services inclusive of taxes, the duration of the contract, and the identity and contact details of the trader. The Regulations also specify the cooling off period right to cancel the sale of good. The consumer has right to cancel the contract within 14 days without giving a reason, if goods were bought at a distance and trader have to give a refund within 14 days of either the trader getting the goods back, or the consumer providing evidence of having returned the goods. However, a contract for the supply of digital content which is not supplied on a tangible medium, the cancellation period ends at the end of 14 days after the day on which the contract is entered into.<sup>20</sup>

In 2015, the UK Parliament promulgated the Consumer Rights Act (CRA) 2015, effective on 1 October 2015, with the aim of enhancing and providing consumer rights with respect to the purchase of goods, services, and digital content. The CRA replaced the existing statutes related to consumer law, including the

Sale of Goods Act 1979, the Sale and Supply of Goods to Consumers Regulations 2002, the Supply of Goods and Services Act 1982, the Unfair Contract Terms Act 1977, and the Unfair Terms in Consumer Contracts Regulations 1999.<sup>21</sup> However, the CRA only applies to B2C contracts.<sup>22</sup> (B2C contracts are contracts between traders and consumers in which the trader is a person acting for purposes related to his/her business when the consumer is a natural person and not a company.<sup>23</sup> The act sets out a requirement for the quality standards of goods and digital content. Under Part 1 of this Act, all products must be of satisfactory quality and fit for their purposes as described.<sup>24</sup> The consumers have a right to reject these contracts when the goods do not meet the requirements. In addition, the Act specifies the obligation of trader to deliver the goods without undue delay, in any event not more than 30 days after the day on which the contract is entered, unless agreed otherwise with the consumer.<sup>25</sup> If the goods are not delivered by a specific date stated in the

<sup>20</sup>Reg.29 and 30 of the Consumer Contracts, information, Cancellation and Additional Charges, Regulations 2013.

<sup>21</sup>Conway L., *Consumer Rights Act 2015* (Briefing Paper Number CBP6588, 18 May 2017) (17 August 2017) UK Parliament <<https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06588>>.

<sup>22</sup>Stone, R. & Devenney, J., *The Modern Law of Contract* (New York: Routledge, 11<sup>th</sup> ed., 2017) 266.

<sup>23</sup>Section 2, *The CRA 2015*.

<sup>24</sup>Section 5, *The CRA 2015*.

<sup>25</sup>Section 28, *CRA 2015*.

contract, the consumer can cancel the contract and ask for a refund.<sup>26</sup>

The CRA 2015 provides consumer rights on sale of goods contracts and adds new rights related to the purchase of digital content. In a contract for the sale of goods, the CRA provides consumers with rights to enforce terms related to the goods. If the goods do not conform to the contract, consumers have the right to reject those goods within 30 days from the date of the receipt of the goods.<sup>27</sup> If the consumers fail to reject the contract within a 30-day period, they have the right to a repair or replacement.<sup>28</sup> The consumer also has a right to ask for a repair or replacement without paying extra costs in a timely manner and at the consumer's convenience. The trader must provide the repair or replacement within a reasonable time and without causing significant inconvenience to the consumer. In the event that the trader cannot repair or change the goods, the consumer has the right to a price reduction<sup>29</sup> (Section 24 of the CRA 2015). The

CRA law requires that the consumer return the goods if the defect is found within 30 days after delivery. If the defect is found after that period, the consumer may request a repair or replacement from a trader or compensation if the trader is unable to repair or replace the good. If the defect persists, the consumer may ask for a price reduction.

In case the trader cannot fulfill his obligation, consumers, according to the CRA law, have the right to reject the contract. The CRA law indicates that consumers can return the goods and claim full reimbursement within 30 days of their delivery. In the case of a rejection of the goods, the consumer must notify the trader or sale representative. After the receipt of the rejection notification, the UK law requires that the trader pay a full refund back to the consumer in addition to any shipping costs that the consumer has previously paid. The UK law also requires that the trader give this refund within 14 days of receiving the rejection notification from

<sup>26</sup> Department for Business Innovation & Skills, *Consumer Rights Act: Goods: Guidance for Business* (20 September 2017) businesscompanion <<https://www.businesscompanion.info/sites/default/files/CRA-Goods-Guidance-for-Business-Sep-2015.pdf>>.

<sup>27</sup> Sections 20, *The CRA 2015*.

<sup>28</sup> Section 23, *The CRA 2015*.

<sup>29</sup> Department for Business Innovation and Skills, *Consumer Rights Act: Digital Content: Guidance for Business* (1 August 2017) businesscompanion <<https://www.businesscompanion.info/sites/default/files/CRA-Digital-Content-Guidance-for-Business-Sep-2015.pdf>>.

consumer or within 14 days after the consumer has proven that the goods were sent back to the trader. The trader must refund the money as the same method of payment that the consumer had previously paid.<sup>30</sup>

Regarding contracts for the supply of digital contents, the CRA law defines “digital content” as meaning data which are produced and supplied in digital form and ensures the right to the repair or replacement of the digital content in a timely manner. In exercising this right, the nature and purpose of the digital content has to be considered. The consumer has right to repair or replacement the goods or digital content which are of unsatisfactory quality, unfit for purpose or not as described. In case the trader cannot repair or replace the goods in a timely matter, the consumer has the right to a price reduction. When the trader cannot fulfill the obligation requested by consumer, the consumer has the right to a refund. The refund must be made within 14 days after the trader agrees to refund to consumer.<sup>31</sup> In addition to the protection of consumer rights, Part 2 of the CRA 2015

provides provisions dealing with unfair contracts. Under CRA 2015, an unfair contract’s terms are not legally binding on consumers; the trader may not rely on unfair terms when defending a legal action brought by a consumer or when seeking to enforce their rights against a consumer.<sup>32</sup> Making a contract between the trader and consumer requires mentioning that the contract will be binding on the consumer and that the contract is considered a fair contract or as meeting the requirements of fair e-commerce contracting.<sup>33</sup> Consequently, if the trader offers the contract without any negotiation with consumer, and it is deemed unfair, the contract may not be legally binding on the consumer.

### **France**

French law governing the e-commerce is set out in a number of different statutory instruments. However, there are two main laws regarding the consumer protection in e-commerce contract: the French Consumer Code (Code de la Consommation law) and the Hamon Act (Loi Hamon). The Consumer Code defines “a distance contract as any contract

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<sup>30</sup>Barry D., Jenkins, E., Sumnall, C., Douglas-Jones, B. & Lloyd, D., *Blackstone’s Guides to The Consumer Rights Act 2015* (Oxford: Oxford University Press, 2016) 36-44.

<sup>31</sup>Section 45, *The CRA 2015*.

<sup>32</sup>Section 67, *The CRA 2015*.

<sup>33</sup>Section 62, *The CRA 2015*.

concluded between a trader and a consumer under an organized distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded".<sup>34</sup>

Similar to the UK and the EU legislation, the Consumer Code places a general duty on the trader to give information in distance contracts about all the essential characteristics of the goods or services provided under the contract.<sup>35</sup> The Consumer Code specifies that the trader shall inform consumers of this information before the consumer is bound to the contract, and information provided to the consumer must be given in a clear and comprehensible manner.<sup>36</sup> The required information that the trader has the obligation to inform the consumer of stated in The Consumer Code<sup>37</sup> are:

- 1) The product's main characteristics and total price;
- 2) The identity of the trader, which includes its geographical address, telephone number, fax number, and e-mail address;
- 3) The right of withdrawal and the time limit and procedures to exercise the right of withdrawal;
- 4) The existence of a legal guarantee of the conformity of the goods to their description; and
- 5) Where applicable, the functionality, including applicable technical protection measures, of the digital content and any relevant interoperability of the digital content with hardware and software that the trader is aware of or can reasonably be expected to have been aware of.

Under the Consumer Code, the consumer has a period of 14 days to withdraw from a distance contract<sup>38</sup> The withdrawal period expires after from the day on which the

<sup>34</sup> Art. L. 121-16, *Code de la Consommation*.

<sup>35</sup> Policy Department C: Citizens' Right and Constitutional Affairs, *The Potential Impact of the Consumer Rights Directive on the Member States' Contract Law* (20 September 2017) European Parliament <<http://www.europarl.europa.eu/documents/activities/cont/201405/20140521ATT84377/20140521ATT84377EN.pdf>>.

<sup>36</sup> Steennot, R., *Consumer protection with regard to distance contracts after the transposition of the Consumer Rights Directive in Belgium and France* (11 October 2017) Ghent University <<https://biblio.ugent.be/publication/4233862/file/6807506.pdf>>.

<sup>37</sup> Article 111-1 and 121-17, *Code de la Consommation* law.

<sup>38</sup> Art. L. 121-21, *Code de la Consommation* law.

consumer acquires physical possession of the goods. The exercise of the right of withdrawal terminates the obligations of the parties to perform the distance contract or to conclude the distance contract, in cases where an offer was made by the consumer and where the consumer exercises his right of withdrawal before the actual conclusion of the agreement.<sup>39</sup>

Later, the French Parliament passed the consumer law or Law no. 2014-344 on consumer rights (Loi Hamon), on May 17, 2013. It came into effect on June 13, 2014<sup>40</sup> and implemented the Consumer Rights Directive. In cases that a distance contract (vente distance) is made by an online transaction, the Hamon Act modifies the Consumer Code in many areas of consumer protection, including secure distance contracts. The Hamon Act sets out the provisions of the information to be provided before concluding a distance contract (Section 6 of the Hamon Act). Upon ordering, the consumer shall clearly and legibly acknowledge the obligation to effect payment. The order confirmation button shall explicitly state that clicking on it

validates the order; failing that, the contract is void.<sup>41</sup>

The Hamon Act allows a cancellation period of 14 days without any reasons or any penalty, except for the costs of shipping the good back the trader.<sup>42</sup> (In cases that the trader does not inform the consumer of the right to cancel, the cooling period is extended to 12 months. Within this period, if the traders require 14 days, the timeframe indicated in the Hamon Act, the traders must inform the consumers of this information. The timeframe is effective after a notification has been made. In terminating contract, the consumer must send a written letter to the trader by using a form indicated in the contract or by using the letter of intent to terminate the contract.

The Hamon Act also requires that trader provide the date of delivery or the date that the service will be provided. In case the date is not indicated clearly, the trader must deliver the goods without delay or within 30 days after the contract is made. During delivery, the trader must use caution so that

<sup>39</sup> Art. L. 121-21-7, *Code de la Consommation law*.

<sup>40</sup> Bondard, C., *E-commerce professionals and the “Hamon Act” (France’s consumer protection Act)* (11 October 2017) Bondard Cabinet D’ Advocats <<http://bondard.fr/e-commerce-professionals-and-the-hamon-act-frances-consumer-protection-act>>.

<sup>41</sup> Section 9, *The Hamon Act*.

<sup>42</sup> Section 9, *The Hamon Act*.

the goods are not damaged and are delivered in a good condition as indicated in the contract. However, if damage is found, regardless of the causes, the consumer can claim his protection right with no cost within 2 years of the date of the receipt of the merchandise or after receiving proof of good return. A consumer wishing to terminate the contract must return the goods to the seller within 14 full days of the termination of the contract, and the consumer must be responsible for the shipping cost of returning the goods. However, if trader did not provide such information in advance to the consumer, the consumer does not have to be responsible for these<sup>43</sup>

### **Germany**

In Germany, e-commerce contracts are considered distance contracts. Section 312c of the German Civil Code defines “distance contracts” as contracts for which the trader, or a person acting in the trader’s name or on his behalf, and the consumer exclusively avail themselves of a means of distance communication when negotiating and concluding the contract, except where the conclusion of the contract does not take place in the context of a sales or service-provision scheme organized for distance sales. The

means of distance communication are all the means of communication that can be used to initiate or to conclude a contract, without requiring the simultaneous physical presence of the parties to the contract, such as letters, catalogues, telephone calls, faxes, emails, or text messages sent via the mobile telephone service (SMS), as well as messages broadcast and sent via teleservices.

Section 312d clearly provides that the trader is obliged to inform the consumer of essential information before the contract is concluded. Information that must be provided to the consumers according to the German Civil Code and Article 246(a) of the German Introductory Act follow.

- 1) The essential characteristics of the goods or services to the extent appropriate to the means of communication and to the goods and services.
- 2) The identity of the trader, such as the trade name and the address of the place where the business is established, its telephone number, fax number and e-mail address if applicable, and, where appropriate, the address and identity of the trader on whose behalf he or she is acting.
- 3) The business address of the trader and, where applicable, the address of the trader

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<sup>43</sup>Section 23, *The Hamon Act*.

on whose behalf he or she trades, whom the consumer may contact with any complaint when that address differs from the address in point 2.

4) The total price of the goods or services, including all taxes and duties, or, in cases where the price cannot reasonably be calculated in advance due to the nature of the goods or services, the nature of the price calculation and, where applicable, any additional freight, delivery or other costs, or, where such costs cannot reasonably be calculated in advance, the fact that such additional costs may be incurred.

5) The cost of using the means of distance communication required for the contract, provided that the cost to the consumer exceeds the costs of using the means of distance communication.

6) The terms of payment, delivery, and service, the date by which the trader must deliver the goods or provide the service and, where appropriate, the trader's procedure for dealing with complaints.

7) The existence of a statutory right to address any defect in the goods.

8) If applicable, the existence and conditions of customer service, after-sales service, and warranties.

9) Where applicable, the duration of the contract or the terms of the termination of

contracts or of automatically renewed contracts.

10) Where applicable, the minimum duration of the consumer's obligations under the contract;

11) Where applicable, the fact that the trader may require the consumer to provide a deposit or other financial security and the conditions of this requirement.

12) Where applicable, how digital content works, including applicable technical protections for the content.

13) Where applicable, restrictions on the interoperability and compatibility of digital content with hardware and software, to the extent that such restrictions are or should be known to the trader.

14) Finally, 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.

In addition, Article 312g of the German Commercial Code states that the consumer has the right of withdraw. The withdrawal period is 14 days. It begins when the contract is concluded. If the consumer withdraws from his or her declaration of intention within that period, the consumer and the trader are no longer bound by their

declarations of intention to conclude the contract.<sup>44</sup>

If a trader uses teleservices to conclude a contract for the supply of goods or the rendering of services (i.e., an e-commerce contract), he or she must provide the customer with reasonable, effective, and accessible technical means by which the customer may identify and correct input errors before placing his or her order. Sellers must also communicate to the customer, clearly and comprehensibly, the information in sufficient time before sending his or her order, confirm the receipt of the order without undue delay by electronic means for the customer, and provide the customer with the opportunity to retrieve the contract terms, including the standard business terms when the contract is concluded, and save them in a form that allows for their reproduction.<sup>45</sup>

## Discussion

This part concerns the analysis on the protection of consumer rights in e-commerce contract in Thailand. There are several laws relating to consumer rights protection under e-commerce contracts in Thailand, such as the Consumer Protection Act B.E. 2522, the Unfair Contract Act B.E. 2540, and the Direct Sales

and Direct Marketing Act B.E. 2545. Based on a comparative study between foreign laws and Thai law regarding guidelines for consumer rights protection under e-commerce contracts, there are four issues that are worth discussing.

**The first issue** is concerned with the information to be provided to consumers before the consumer is bound by the contract. The e-commerce contract is a contract made between traders and the consumers when they do not meet in person to negotiate and the consumers do not have an opportunity to inspect the tangible goods or digital goods before purchasing. Before the consumer is bounded by the contract, the trader must provide detailed information about the goods to the consumers, which includes the identity of the trader, the characteristics of the goods, their total price, the arrangement of payment, the delivery of goods, the right to withdraw, and a legal guarantee, as well as other necessary information that affects the consumer's decision when entering the contract. According to Thai consumer law, consumer rights are addressed in The Consumer Protection Act B.E. 2522 as amended by the Consumer Protection Act (No.2) B.E. 2541. The Act recognizes consumers' rights to receive information about

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<sup>44</sup> Article 355, *German Commercial Code*.

<sup>45</sup> Section 312i, *German Civil Code*.

and a description of the quality of the goods or the service accurately and adequately, including mandatory labeling and the disclosure of factually true information. This information must not lead to misunderstanding or to unfair treatment. Consumers must be informed about their right to enter the contract without being taken advantage of by the trader.<sup>46</sup> Also, under the Unfair Contract Act B.E. 2540, the consumers have right to receive a fair contract. If the specific terms of a contract are unfair, they are not binding on consumers.<sup>47</sup> However, there are no specific provisions related to pre-contractual information requirements for the trader to provide information to the consumer before the contract is made.

In addition, the Direct Sales and Direct Marketing Act B.E. 2545, as amended by Direct Sales and Direct Marketing Act (No.3), B.E. 2560, which became effective on September 15, 2017, set out the new provisions that enhance consumer protection and also impose more stringent regulations and

obligations on traders in distance contracts. The Act defines “direct marketing” as the marketing of goods and services by means of communicating information, in order to directly offer goods and services for sale, to remote consumers, with the expectation that consumers will accept the purchase of such goods and services from the direct marketing operators.<sup>48</sup> However, the Act has been amended to exclude certain types of sales of products or services via e-commerce (in other words, certain types of e-commerce businesses) to be announced in a separate Ministerial Regulation later.<sup>49</sup>

This act assigned the obligation of the trader in direct marketing to provide information that shall comply with the Ministerial Regulation before the contract is made.<sup>50</sup> Yet, there is no enforcement of this regulation. However, European Union law, including the laws of the United Kingdom, France, and Germany, has required traders to provide necessary information to consumers on a durable medium before the consumer

<sup>46</sup> Supanit, S., *Explanatory Notes on Consumer Protection Law* (Bangkok: Chulalongkorn University Press, 9<sup>th</sup> ed., 2014) 154.

<sup>47</sup> Sotthibandhu, S., *Commentary on Juristic Acts and Contract* (Bangkok: Winyuchon Press, 12<sup>th</sup> ed., 2016) 530.

<sup>48</sup> Informed Counsel, *Direct Sales and Direct Marketing Act: New Compliance Obligations for Business Operators* (6 October 2017) Tilleke and Gibbins <<https://www.tilleke.com/resources/direct-sales-and-direct-marketing-act-new-compliance-obligations-business-operators>>.

<sup>49</sup> Horayangura, N. & Suwanprateep, D., *Exemption for E-Commerce from the Direct Sales and Direct Marketing Act* (10 October 2017) Baker and McKenzie <<https://www.bakermckenzie.com/en/insight/publications/2017/08/exemption-e-commerce-direct-sales>>.

<sup>50</sup> Section 28, *The Direct Sales and Direct Marketing Act B.E. 2545*.



is bound to the contract. The required information includes the identity of the trader, the characteristics of goods, their total price, means of the arrangement of payment, means of the delivery of goods, the right to withdraw and legal guarantees, the period for which the contract will be binding, technical prevention measures, and the information on how the remedy will be given. It is worth noting that there is a penalty for the trader who violates this law.

**The second issue** is the problem of the delivery of the document concerning the purchase and sell of goods or service. As required by the Direct Sales and Direct Marketing Act (No. 3), B.E. 2560, the trader has a duty to deliver documents regarding the sale and purchase of goods or services to the consumer. In detail, the document shall contain the Thai language statement that can be read and understood easily. They shall specify the names of the purchaser and seller, the date of the purchase and delivery of goods or services, and the consumer's right to terminate the contract. Notification of the right to terminate a contract shall be written with letters that can be seen clearer than other messages (Section 30 of the Direct Sales and Direct Marketing Act (No. 3), B.E. 2560). If the trader violates

or fails to comply with the law, the sale of the goods or services is not binding on consumers<sup>51</sup>

In addition, the Act appoints authority to the Direct Sales and the Direct Marketing Commission to determine the contracting document. It requires that a document shall include:

- (1) The name of the buyer and seller;
- (2) The due date, place, and method of payment;
- (3) The place and method of delivery of the goods or services;
- (4) Procedures regarding contract termination;
- (5) The return method;
- (6) The warranty; and
- (7) The exchange policy in case of damage or a defect.

The details required to be included in the document concerning the purchase and sell of goods or service shall be published in the Government Gazette. However, regulations on the document have not yet been issued to address the problem of the e-commerce contract. As yet, the online traders who did not register their businesses under this Act do not have an obligation to deliver the document concerning the purchase and sell of goods or service to their consumers, and the

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<sup>51</sup> Thirawat, D., *Consumer Contract* (Bangkok: Thammasat University Press, 2017) 159-160.

consumer may suffer from the lack of detailed information--e.g., details on the delivery time, legal guarantee, and the right to the repair or replacement of goods or a refund. These are required to be stated clearly in documents regarding the sale and purchase of goods.

According to the EU Directive and the laws of the United Kingdom, France, and Germany, there is no requirement to deliver written forms of documents regarding the sale and purchase of goods or service. However, in distance contracts, the trader has to define the details of the contract via the electronic media and shall deliver information on the goods and services available to the consumer in a way appropriate to the means of distance communication used and in plain and intelligible language. Insofar as that information is provided through a durable medium, it shall be legible. The trader must provide that information to the consumer on a durable medium before the conclusion of the distance contract. Hence, the consumer can access to contract's detail via electronic media.

Addressing **the third issue**, the problems of the consumers' rights in e-commerce contract, the general principles stated in the Civil and Commercial Code stipulate that, in the case of defective goods delivered, the seller is liable whether the seller knows or does not know that the defect exists.

The buyer has the right to file a lawsuit against the seller for a defective product liability claim within 1 year from the time of noticing the defect. While the Direct Sales and Direct Marketing Act B.E. 2545 has not regulated the consumer's right to request a repair or replacement of goods directly, there is a provision on the consumer's right to terminate the contract provided.

Consumer rights under the EU Directive specify the right to withdrawal from a distance contract within 14 days of the date that the consumer acquires physical possession of the good, which is similar to the laws of France and Germany. In the UK, CRA 2015 set forth new provisions to ensure the right of consumers in the contract for sale of goods, contracts for the supply of digital contents, and the service contract. In the contract for the sale of goods, consumers are eligible to have defective goods repaired or replaced. Consumers have the right to reject goods within 30 days; if the consumer does not exercise that right, it leads to the right of repair or replacement. When the trader fails to repair or replace the goods, then the consumer can claim a price reduction or a final right to reject the goods. In a contract for the supply of digital contents, CRA 2015 prescribes to the consumer the right to have the trader repair or replace the content within due course. If the trader is unable to repair or replace the digital



content in time, the consumer can demand a price reduction for the content. If the trader fails to meet that demand, the consumer can request a refund from the trader.

With respect to **the last issue**, the exercise of the right of withdrawal and its effect, the principles of contract termination are based on the regulations in the Civil and Commercial Code. The right of the party to terminate the contract shall be in accordance with the contract or otherwise provided by the law. Neither party shall have the right to terminate the agreement without any contract or legal right, such as in the case of a contract in which it is specifically stated in the contract that if any a breach of contract occurs by one party, the other one can terminate the contract. In addition, the right to terminate the contract may also arise from the provision of the law itself, such as the right to terminate the contract if the other party is unable to pay the debt within the deadline.

In case of a distance contract, the Direct Sales and Direct Marketing Act B.E. 2545 states that the consumer has the right to terminate the contract by sending a notice of intent to the trader within 7 days from the date of the receipt of the goods or services. Then, the consumer must return the goods to the trader, and the trader shall refund the full

amount paid by the consumer for the purchase of those goods or services within 15 days of the date of receipt of the notice of intent to terminate the contract.<sup>52</sup> However, Thai consumer laws do not have specific provisions dealing with contracts for the supply of digital contents.

Compared with the European Union, where regulations on the termination of a distance contract are available, a deadline for terminating the contract by giving the consumer the right to withdraw the distance contracts is within 14 days without any reasons or costs. A cooling period of 14 days starts from the date the consumer acquired the goods, while that of the digital content contract starts from the date of the contract. In the UK, the CRA 2015 requires that consumers return the goods and receive a full refund within 30 days of delivery. The consumer shall indicate to the trader that he or she is rejecting the goods and treat in the contract as at an end, then the trader is accountable for a full refund to the consumer within 14 days of receiving the cancellation request and receiving the goods back from the consumer. In the case of a digital content contracts, assuming that the trader cannot proceed to repair or replace merchandise within a reasonable time or is unable to provide a discount, the consumer is

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<sup>52</sup> Section 33, *The Direct Sales and Direct Marketing Act B.E. 2545*.

entitled to claim a refund within 14 days of the date that the party agrees to a refund. Furthermore, the laws of France and Germany have set criteria for the termination of distance contracts similar to those of European Union: the consumer can terminate the contract within 14 days of the date of delivery; however, the criteria for the termination of digital content contracts have not been defined explicitly.

Besides the documentary research, the data has been collected from the in-depth interviewing, questionnaires and group discussion. The questionnaire results reflect the views of consumers that most of them tend to prefer online shopping than traditional in-store. The research stated that almost 82.67% of consumer respondents have made an online purchase. There were 49.19% of respondents tend to buy the four requisite and 48.59% of them tend to buy cosmetic and health care products and 43.95% of them have booked the airline tickets and hotel reservation through online sites. However, there were 63.33% of respondents have had an experience with a delayed delivery and they were not satisfied with the quality of goods and services. Also, there were 50.17% of respondents have been victims of online fraud and 44.67% of them are not satisfied with the product warranty. The research found that 78.40% of respondents

need to know about the contract terms which include the termination of contract, product replacement, refund and other remedies.<sup>53</sup> In addition, the study found the feedbacks of stakeholders by using in-depth interviewing and conducting a focus group. The study showed that Thailand did not have the specific provisions which can cope with the problem of e-commerce contract in order to protect the consumer from buying the goods and services and there are no explicit rule on digital content.

## Conclusion and Recommendations

As mentioned earlier, e-commerce is an important factor driving the digital economy, particularly e-commerce business between traders and consumers. Still, most consumers are reluctant to take advantage of the benefits of e-commerce contracts, as they are uncertain whether their rights will be ultimately protected. Most traders usually use adhesion contracts to bind the other party, wherein the essential details have not been provided, such as contact information, terms of return, documentation or evidence of receipt, and costs that may be incurred when the merchandise or goods need to be returned. Notably, the existing laws of Thailand, namely the Civil and Commercial Code, the Consumer Protection Act, B.E. 2522, the Unfair Contract

<sup>53</sup>The questionnaire has been collected from 500 people in Bangkok and Metropolitan.

Terms Act, B.E. 2540, and the Direct Sales and Direct Marketing Act B.E. 2545, do not contain explicit provisions on related matters. In consequence, the trader applies such agreements in order to eliminate or limit their liability, and thereby treats consumers unfairly. However, many countries have amendment their laws to protect consumer rights in e-commerce contracts.

Therefore, the recommendation of this study is to create a *sui generis* law in accordance with the Consumer Protection Act, B.E. 2522 in order to protect consumers in the e-commerce contracts. That law should include the following provisions;

1) To establish the trader obligation to provide essential information about the trader and the characteristic of goods on a durable mediums, including details about the product, its total price, the arrangement of payment, the delivery of goods, the right to withdraw and a legal guarantee, the period for which the contract will be binding, technical prevention measures before the consumer is bound by the contract, and further information that is substantial in the contract in order to secure the consumers' purchasing decision with the provision of adequate information.

2) When the goods delivered to the consumer do not conform to the contract for

sale of goods, the law should assure additional rights to consumers --namely, the right to request the repair or replacement of goods as well as the right to request a price reduction in the event that the goods cannot be repaired or replaced and the right to reject the goods.

3) When the digital content delivered to the consumer do not conform to the contract for supply of digital content, the law should assure rights to consumer regarding the sale of digital content, particularly the right to request repair or replacement digital content. A repair or replacement has to be provided within a reasonable time or without significant inconvenience to the consumer. Also, the law should assure the right to request a price reduction if the merchandise cannot be repaired or replaced as well as the right to claim a refund.

4) To provide the cooling-off period of cancellation, allowing the consumer to terminate the contract and request a refund within 14 days without giving a reason, if goods were bought at a distance, or within 14 days of the date a contract for digital content was entered into. The trader shall give a refund to the consumer within 14 days of receiving the goods back, or the date of receiving the notification of cancellation from the consumer.<sup>54</sup>

<sup>54</sup>The authors acknowledge financial support from the Government Budget Research Grant (Integrated Budgeting).

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