



**CONSUMER PROTECTION REGARDING  
PRE-CONTRACTUAL INFORMATION  
ON E-COMMERCE**

**BY**

**MISS NARTCHUTHA NILLEK**

**A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF  
THE REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS  
IN BUSINESS LAWS (ENGLISH PROGRAM)  
FACULTY OF LAW  
THAMMASAT UNIVERSITY  
ACADEMIC YEAR 2015  
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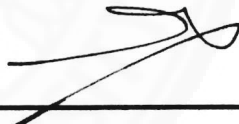
ENTITLED

CONSUMER PROTECTION REGARDING PRE-CONTRACTUAL  
INFORMATION ON E-COMMERCE

was approved as partial fulfillment of the requirements for  
the degree of Master of Laws in Business Laws (English Program)

on August 11, 2016

Chairman

  
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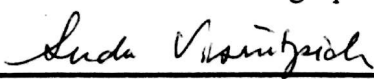
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Thesis Title	CONSUMER PROTECTION REGARDING PRE-CONTRACTUAL INFORMATION ON E-COMMERCE
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Degree	MASTER OF LAWS
Major Field/Faculty/University	Business Laws (English Program) Faculty of Law Thammasat University
Thesis Advisor	Daraporn Thirawat, Doctorat de l' Université
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Academic Years	2015

## **ABSTRACT**

In selling, the asymmetry of information between traders and consumers is one of the most common problems. It refers to goods or service that take place in trading where one party, traders, normally having more information than another party, consumers. It could happen when consumers do not have enough ability to distinguish or inspect the quality of goods and service that they are going to purchase before a contract is made. It is because, sometimes, the relevant information of the goods and services are hardly to find and too costly for the consumers. Meanwhile, traders are having an intense incentive to gather more information as they are the owner of the business concerning about the business prosperity. It shows inequality between both parties which is usually considered as a reason for controlling transactions.

In addition, the information for the consumer is questioned due to the fact that the nature of e-commerce transaction is the absence of face-to-face interaction between traders and consumers so the consumers have no opportunity to examine or test the goods or service or to know the information related to traders before they involve with any transaction. They also rarely know the ways of searching for such

information. For examples, when a consumer does not receive the goods or services, in such case, if the identity of trader is not pre-contractually provided, a consumer may encounter with the contacting trader problem. Moreover, as the absence of physical interaction between trader and consumer in e-commerce transaction, consumer may face with various problems while making purchase electronically due to the contract making process become longer and more complex; the procedure that is required in the process of making contract may be lost which means that consumers may unintentionally enter in to the binding contracts or the risk of an error in electronic document may increase due to the characteristic of the medium. In the worst case, the consumer may not be aware of the buying button which used to pay electronically.

Accordingly, the time before the conclusion of a contract is very important as it enable the potential consumers to truly acknowledge and understand the object of contract details and their rights in order to make an informed consent before dealing with e-commerce transaction in order to prevent post-contract problems. As a result, the number of litigation cases that may cause after the contract is concluded can be reduced. Therefore, the complete and accurate information provided pre-contract is a great importance. Besides that legal control of information disclosure requirements could encourage the growth of e-commerce market as it makes consumers feel more confident to make a purchase than in an unregulated market.

From the study, this thesis discovers that even if Thai law has general laws of consumer protection, it is still lacking of the appropriate legal measures to provide sufficient protection in connection with pre-contractual information on e-commerce. Meanwhile, in foreign law; the European Union imposes the duty on traders to inform consumers of pre-contractual information before the consumers are bound by the distance contracts and additional pre-contractual information requirements for the contract concluded by electronic means in a full harmonization in which member states could not maintain or introduce in their national law provisions more or less stringent. It also imposes the specific consequences when trader fails to provide information in some cases, however, the directive usually leaves the duties on the remedies available for the consumers where there is any infringement of the information requirements to the Member States' internal law; this thesis study on the

law of the United Kingdom, which effectively raises consumers' awareness and has a better understanding of their rights.

Therefore, the thesis proposes four possible approaches as the solutions. The first approach is to issue the Ministerial Regulation by the virtue of section 28 of the Direct Sale and Direct Marketing Act B.E.2545 in order to stipulate specific information which shall be disclosed to the consumer as pre-contractual information on e-commerce. The second approach is that pre-contractual information in the aforementioned recommendation should form a part of the contract. In order to bring the aforementioned solution into practice, the third approach is that when the problems on pre-contractual information on e-commerce arise post-purchase, the burden of proof should be borne by the trader. And the last one, Thai law should stipulate the current remedies available in many laws into one piece of legislation in order to make it easier for consumer to pursue for legitimate remedies.

**Keywords:** Pre-contractual information, E-commerce, Consumer Protection

## ACKNOWLEDGMENT

The completion of this thesis could not be achieved without the support and assistance from my advisors: Dr. Daraporn Thirawat and Dr. Munin Pongsaparn. Thank you for your marvelous guidance, generosity and encouragement given to me for doing this research until it is completed.

I also would like to thank the members of the committee: Professor Wisit Wisitsora-at and Professor Suda Visrutchich for providing useful instructions, information guidelines and important suggestions which have helped me considerably.

I would like to thank my family for their understanding and their continued support, the LL.M. friends for their encouragement and comfort, my dearest friends, Ms.Paweena Tarepakdee, for always being there for me and awesome grammatical corrections and Mr.Kornraset Narkmun, for his well intended advice, always.

In addition, I would like to express my sincere gratitude to the LL.M. Program of Faculty of Law, Thammasat University for providing this valuable academic program and thank you all the staff members.

Miss Nartchutha Nillek  
Thammasat University  
Year 2015

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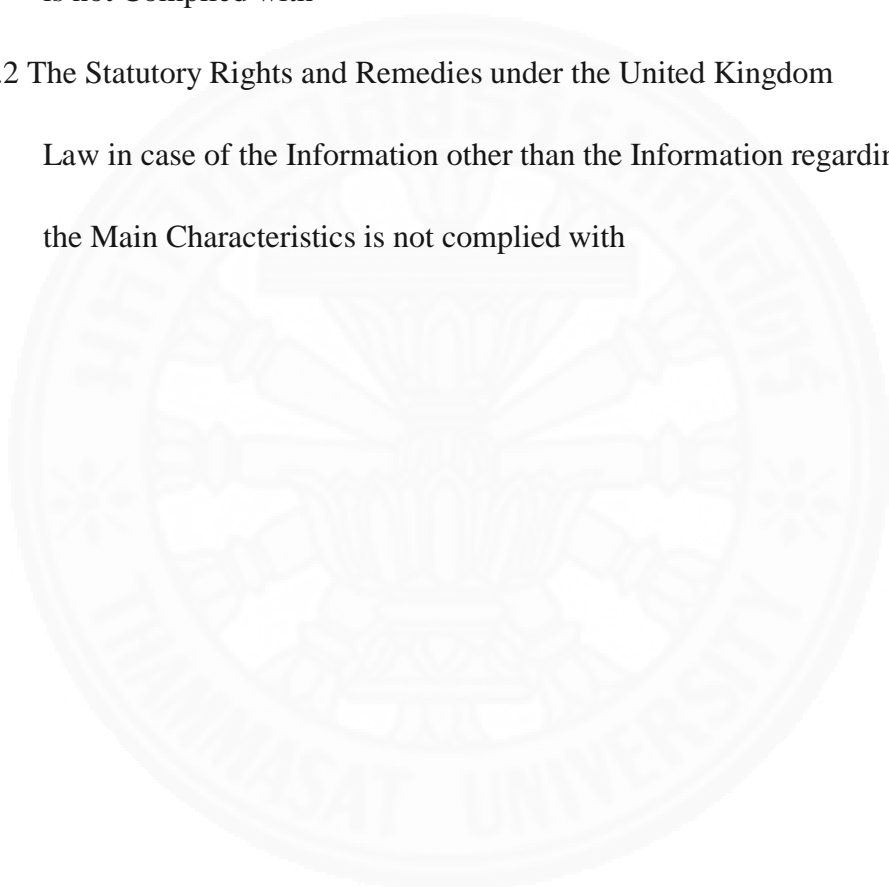
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## CHAPTER 1

### INTRODUCTION

#### 1.1 Background and Problems

Distance selling, one of the popular selling types among others, has been developed through time. It is known as the method where suppliers shall provide goods and services to be shipped or delivered to consumers in remote areas or in different geographical reach. In 1985, Aaron Montgomery Ward, a U.S. merchant, was the one who started the mail-ordered selling strategy by placing an advertisement through catalogs, newspapers, and magazines allowing customers to place their orders by mail.<sup>1</sup> Afterward, modern technology has been playing an important role to the distance selling and gradually shifted the methods of distance selling from mail toward the other channels such as telephone, fax, email and especially internet. The so-called modern technology, “Internet”, had become a crucial factor of the globalization of buying and selling, in which “Electronic Commerce” was invented (hereinafter “e-commerce”). Decidedly, E-commerce is a widely accepted transaction by most consumers since the internet has also become an important part of people’s lives as being seen in the transactions among households, individuals, and traders who want to purchase or sale goods and services mainly on the internet.<sup>2</sup> Nowadays, the use of internet has been increasing substantially and consequently, e-commerce becomes the globe fastest growing marketplace.<sup>3</sup> According to Electronic Transaction Development Agency of Thailand, the value of e-commerce in Thailand was about 2

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<sup>1</sup> Compton's by Britannica. Britannica Online for Kids, “*Aaron Montgomery Ward*”, <http://kids.britannica.com/comptons/article-9339859/Aaron-Montgomery-Ward> (accessed on September 6, 2015)

<sup>2</sup> Electronic Transactions Development Agency (Public Organization), “*Statistic e-Transactions*”, <https://www.eta.or.th/content/e-commerce-survey-2015-press-conference.html> (accessed on September 6, 2015)

<sup>3</sup> Juthamas Thirawat, “**Formation of international Contracts under the 2005 United Nations Convention on the Use of Electronic Communications in International Contracts**”, Faculty of Law, Thammasat University (2013)

trillion baht in both 2014 and 2015. By dividing sector by sector, Business to Consumer (B2C) sector had the highest growth rate with 15.29% in 2015.<sup>4</sup>

E-commerce differs from traditional commerce, where traditional commerce is often based on face-to-face interaction taking places commonly in a shop or other commercial premises; the customer has a greater opportunity to question and purchase directly to the trader, or is able to interact physically with or investigate the items to make sure that they are suitable for them. Thus, the amount of returned items or complaints due to an item being not in line with the claims made by trader is lesser than e-commerce. Inversely, e-commerce does not offer these benefits where the supplier and purchaser are "at a distance" from each other and where the communication between parties is made via the internet.

E-commerce lessens the difficulty of shopping. Elaborately, consumers can make a purchase for a wider range of goods or service from their home, at workplaces or even on the move. With the advantages of 24-hour online shopping, the consumers are not restricted to shop within certain hours. In the past, the accessibility of consumers to the goods and services were limited to their geographical and financial reach. Recently, because of the internet, wider and larger target consumer groups are in reach for traders and greater varieties of goods and services in terms of accessibility or even competitive pricing are better in reach for consumers.<sup>5</sup> Apart from the advantages of e-commerce, there are numerous risks which could occur to consumers due to the nature of e-commerce.

The asymmetry of information between traders and consumers is one of the most common problems in selling. It refers to goods or service taken place in trading where one party, traders, normally having more information than another party, consumers. This problem likely happens when the ability of consumers to distinguish or inspect the quality of goods and services they are purchasing before being bound by the contract is not enough due to the relevant information of those

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<sup>4</sup> Electronic Transactions Development Agency (Public Organization), *supra* note 2.

<sup>5</sup> John Dickie, "Producers and Consumers in EU E-commerce Law", Hart pub (2005) p.6

goods and services are not easily found and too costly for consumers. Meanwhile, traders are having an intense incentive to gather more information as they are the owner of the business concerning about the business prosperity. It shows inequality between both parties which is usually considered as a reason for controlling transactions.<sup>6</sup>

In addition, the information for the consumer is questioned due to the lack of the face-to-face interaction between traders and consumers by the nature of e-commerce transaction resulting in the consumers having no opportunity to examine or test the goods or service or to know the information related to traders before getting involved with any of distance-selling transaction. They also rarely know the ways of searching for such information. For examples, if the identity of trader is not pre-contractually provided, a consumer may encounter problems in contacting trader when a consumer has not received the goods or services.<sup>7</sup> Moreover, as the absence of physical interaction between trader and consumer in e-commerce transaction, consumers may face with various problems while making purchase electronically since the contract making process becomes longer and more complexed; the procedure required in the process of making contract may be lost which means that consumers may unintentionally enter in to the binding contracts or the risk of an error in electronic document may increase due to the characteristic of the medium. In the worst case, the consumer may not be aware of the buying button being used to pay electronically.

The information provided by traders on the website may contain misleading representations or not contain any of the crucial information referring to the offered goods or service or the contract details that consumers should have known. It could lead the consumers to take a different decision than what he or she might have taken. As a result, the consumers conclude the contract by mistake. Thus, pre-contractual information on e-commerce should have system to protect the consumer

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<sup>6</sup> Giesela Ruhl, "*Consumer Protection in Choice of Law*" <http://www.lawschool.cornell.edu/research/ilj/upload/ruhl-final.pdf> (accessed on September 15, 2015)

<sup>7</sup> Dickie, *supra* note 5, at 8.



before they are being bound by the contract as it might lead to some after-purchase problems.

However, it is important for traders to be considerate before providing any information on the internet because traders normally know which kind of information can attract to consumers. As a result, the fraud might be easily discovered by consumers when the information is not true. In addition, when dishonesty occurs; it could lead to a short-run gain with a long-run loss for traders regarding the bad reputation which is created through honesty and commonly known as the precious matter for a good business management. Once traders could earn this reputation, they would be strongly willing to avoid any misrepresentations being able to destroy their credits. If the consumers recognize that they are falling in the insecure or unfaithful circumstances, the complaints over the quality of the goods and services may arise. The satisfaction of consumers influences their future purchases and affects the traders' future of success. Therefore, traders' duty is to run their business morally. Consequently, traders with good reputation could establish long-terms relationships with consumers and create consumers loyalty from repeat business resulting in the win-win situation for both traders and consumers, in which traders can survive and run business with moral while consumers get accurate information of goods or services. As a result, the problems of misleading information may be derogated and, in the meantime consumer rights are being protected. Conclusively, traders and consumers have a harmony of interest.<sup>8</sup>

Accordingly, the time before the conclusion of a contract is very important as it enables the potential consumers to truly acknowledge and understand the objective of contract's details and their rights in order to make an informed consent before dealing with e-commerce transaction in order to prevent post-contract problems. As a result, the number of litigation cases that may cause after the contract

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<sup>8</sup> James D Gwartney, "*Economics Private and Public Choice*", <https://books.google.co.th/books?id=yiCLBQAAQBAJ&pg=PA522&lpg=PA522&dq=good+businessman+should+provide+accurate+information+to+consumer&source=bl&ots=AygAUpaa4R&sig=2Xkolxiabn6gQyrb-E-#v=onepage&q=good%20businessman%20should%20provide%20accurate%20information%20to%20consumer&f=false> (accessed on September, 2015)

is concluded can be reduced. Therefore, the complete and accurate information provided pre-contract is a great importance. Besides that legal control of information disclosure requirements could encourage the growth of e-commerce market as it makes consumers feel more confident to make a purchase than in an unregulated market.<sup>9</sup>

## 1.2 Hypothesis

The current uses of Thai laws are insufficient to manipulate the duties of traders in providing of pre-contractual information and to protect consumers on e-commerce transaction in respect of goods or services. Thus, it is significant to study the proper controlling measures of pre-contractual information on e-commerce in foreign countries.

## 1.3 Objective of Study

- 1) To study the European Union law concerning the pre-contractual information on e-commerce: Directive 2011/83/EU on the consumer rights, Directive 2000/31/EC on e-commerce and the United Kingdom law which are The Consumer Contracts (Information, Cancellation and Additional Charges) Regulation 2013, The Consumer Rights Act 2015 and The Electronic Commerce Regulations 2002.
- 2) To analyze the existing legal instruments in Thailand referring to pre-contractual information on e-commerce and the occurred problems due to insufficient of pre-contractual information duties.
- 3) To evaluate the measures control of pre-contractual information on e-commerce from the analysis of foreign laws in order to rebalance the asymmetry of information between traders and consumers in order to help them making precise and efficient decision.

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<sup>9</sup> Henricus Joseph Snijders and Stephen Robson Weatherill, “**E-commerce Law: National and Transnational Topics and Perspectives**”, Kluwer Law International, (2003) p.18-19

- 4) To propose the appropriate solutions to protect the consumers in pre-contractual information on e-commerce.

#### **1.4 Scope of Study**

This thesis focuses mainly on the measure controlling the e-commerce traders who are under the Thai jurisdiction, legislatives available in foreign countries regarding to pre-contractual information duties on e-commerce compared to Thai domestic law, and the contractual liability.

In addition, the thesis is divided into five chapters and apart from the introduction in Chapter 1, the remaining chapters are as follows:

Chapter 2 Overview of pre-contractual information on e-commerce;

Chapter 3 Consumer protection regarding pre-contractual information on e-commerce under the foreign laws;

Chapter 4 An analysis of the problems related to consumer protection regarding pre-contractual information on e-commerce under Thai laws;

Chapter 5 Conclusions and Recommendations.

#### **1.5 Methodology**

This thesis is based mainly on documentary research including books, journals, publications, researches, legislations, and decisions of the court regarding the information duties on electronic commerce of Thailand and foreign countries. It includes altogether the governmental websites that provides the information of the foreign laws.

## 1.6 Expected Results

- a) Understanding the pre-contractual information on e-commerce and legal measure to strengthen e-commerce market in Thailand
- b) Realizing the problems related to the pre-contractual information on e-commerce under Thai law and recommendable proposal for legislative measures in Thailand
- c) Bringing an enhancing standard of e-commerce in Thailand, and welcoming not only Thais but also foreigners to purchase goods or services on Thai websites
- d) Encouraging Thai traders to be able to compete with competitors worldwide under the same and efficient standard
- e) Reducing exploitation of traders toward an online consumers purchasing goods and services
- f) Elevating confidence in buying goods and services for both existing consumers and potential consumers globally.
- g) Diminishing the loopholes of Thai law on Consumer Protection, particularly on the e-commerce channel.

## CHAPTER 2

### OVERVIEW OF PRE-CONTRACTUAL INFORMATION ON E-COMMERCE

#### 2.1 Definition and Distinctive Nature of E-commerce

E-commerce is defined differently by numbers of organizations; some of them are as follows:

Organization for Economic Co-operation and Development (OECD): “Electronic commerce refers generally to all forms of commercial transactions involving both organizations and individuals that are based upon the electronic processing and transmission of data, including text, sound and visual images. It also refers to the effects that the electronic exchange of commercial information may have on the institutions and process that support and govern commercial activities”<sup>10</sup>

European Commission: “Electronic commerce covers mainly two types of activities – the electronic ordering of tangible goods, which still must be physically delivered using traditional channels such as postal services or commercial couriers; and direct electronic commerce – the online ordering, payment and delivery of intangible goods and services such as computer software, entertainment content, or information services on a global scale.”

Electronic commerce is an exchange of goods and services between related people, which is individuals or organizations or individuals, and organizations by using technology as a medium.<sup>11</sup>

The distinctive nature of e-commerce is ubiquity that consumers can place their orders anytime anywhere. We could see therein e-commerce has shifted the

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<sup>10</sup> Organization for Economic Co-operation and Development, “*Glossary of Statistical Terms, Electronic Commerce*”, <https://stats.oecd.org/glossary/detail.asp?ID=4721> (accessed on September 20, 2015)

<sup>11</sup> ทวีศักดิ์ กาญจนสุวรรณ, กิตติ ภัคดีวัฒนะกุล, “การพาณิชย์อิเล็กทรอนิกส์”, บริษัท เคทีพี คอมพ์ แอนด์ คอนซัลท์ จำกัด (2552) น.3 (Taweesak Kanhanasuwan and Kitti Pakdeewattanakul, “**E-commerce**”, KPT Comp and Consult Limited Company (2009) p.3

physical marketplace forward to electronic marketplace or market space where consumers could globally reach or access through the use of the internet. The interaction between traders and consumers has been developed through chat room, e-mail and etc. E-commerce is a two-way communication that differs from the traditional methods of distance selling, a one-way communication, in which consumers could only receive information but they could not immediately question any additional details. E-commerce has a density of information; consumers can easily get information of the goods and services in order to compare the prices, characteristics, terms and conditions before making a decision to conclude the contract.

## **2.2 The Connection between Pre-Contractual Information, Consumer Protection, and E-commerce**

The trader is generally responsible for providing advice to certain information in order to avoid the declaration of intention under a mistake by the consumer.

Later on, there is an adjustment from providing information to certain level information for an advice to provide information concerning goods and services. The reason behind this is that an advice is free willing of the trader. However, the consumer protection law prescribes it as a compulsory duty that the trader is required to provide information about goods and service including details of the contract which is to be legally binding.<sup>12</sup>

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<sup>12</sup> ดารารพร ธีระวัฒน์, “รายงานวิจัยฉบับสมบูรณ์ เรื่องสัญญาผู้บริโภค วิเคราะห์เปรียบเทียบหลักเกณฑ์ การคุ้มครองผู้บริโภคด้านสัญญาของต่างประเทศและของไทย”, ศูนย์วิจัยและให้คำปรึกษาคณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ (2557) น.17-18 (Daraporn Thirawat, “**The Full Report of the Consumer Contract: The Comparative Analysis of the Consumer Protection regarding Contracts between Foreign Countries and Thailand**”, Research and Consultancy Institute (2014) p.17-18

Pre-contractual information is the core factor affecting consumer buying decision described as the information process<sup>13</sup> by the research studied by University of Amsterdam, Institute for Information Law (IViR). According to the research, the consumer information being used as a tool to inform and empower consumers, is not only critical to provide them necessary information, but also important to communicate the information with the practical ways that consumer usually interact or gain benefit from. It can be called as “a behavioral information pathway”, in which consumers are engaging with the information as a process, rather than an action.

FIGURE 2.1: Behavioural information pathway



Source:

[http://ec.europa.eu/justice/contract/files/expert\\_groups/discussion\\_paper\\_pci\\_en.pdf](http://ec.europa.eu/justice/contract/files/expert_groups/discussion_paper_pci_en.pdf)

Above is the four steps of the so-called “behavioral information pathway”. First, gaining “Awareness” from consumers on the significance of the information and on which types of information they need that will attract them to engage in the later stage, which are collecting and processing. “Collecting and Processing” can be described for reading and understanding stage resulting in the following step. “Action”, they will act regarding to their processing of information in a particular way. The last step, “Update and Evaluation”, is to follow up and evaluate after they have acted for their choice. Also, it can be seen as to collect information for later change of the better services. Apparently, the information has a strong impact on consumers’ decision making.

<sup>13</sup> European Commission, “EU cloud computing expert group: discussion paper pre-contractual information requirements and cloud services”, [http://ec.europa.eu/justice/contract/files/expert\\_groups/discussion\\_paper\\_pci\\_en.pdf](http://ec.europa.eu/justice/contract/files/expert_groups/discussion_paper_pci_en.pdf) (accessed on November 3, 2015)

Hence, the rationale to specify legal obligation of the trader to provide information are as follows:

1) The asymmetries of information between traders and consumers in the business to consumer transaction (B2C) raise the rationale of pre-contractual information requirements that allows consumer to make an informed decision, in which the decision has been made based upon an understanding of the facts. In order to reduce an inequality in terms of knowledge between parties, the pre-contractual information requirements can be considered as a strong justification for intervention in consumer contracts.

Especially in e-commerce transaction, traders and consumers are trading at a distance. The information is only available to the consumer in the trader's home page address. The goods or services cannot be examined, touched or experienced physically. Consumers apparently receive only limited information on traders and have very little access to the necessary information.

To make a consumer conclude an e-commerce contract with well-informed consent, the consumer must be ensured by the legislation that he or she could receive all essential information in order to make an informed transactional decision before concluding the contract.

2) A business contract might not only be difficult for consumers to understand, but there is also some conflicts of interests between traders and consumers. In practice, traders unilaterally impose the terms and conditions of the contract in a way that benefit their interests. Therefore, the law must provide information to the disadvantaged party in order to make he or she knows and understands and to let them make the contract with truly mutual agreement.

3) Physical interaction between trader and consumer in e-commerce transaction is absent. Thus, consumer may encounter with numbers of problems while making purchase electronically due to the longer and more complexed of the contract making procedure. It reflects concerns of informational change into digital form:



- The procedure that is required in the process of contract making could be vanished, which means that consumers may unintentionally enter in to the binding contracts.
- Because of the characteristic of the medium, the risk of an error in electronic document may increase. Thus, the trader must allow their consumers awareness arisen in the ordering process to detect and correct errors

The right of the consumer to be informed is purposely to protect the consumers in particular. It requires the trader to provide information concerning goods or service as to enhance the ability of the consumer decision-making to purchase. It can be concluded that the duty to provide information is crucial to protect consumers as consumer being perceived mostly as a weaker party comparing to trader in respect of the bargaining power and knowledge of goods and service. The consumer protection law intends to equalize this balance between both parties by insisting the transparency of the information concerning goods and service that must be thoroughly provided in the process of offering information or in the earlier stage before concluding the contract. As a consequence, consumers can reflect their true preferences in making their decisions.

## **2.3 Pre-contractual Information on E-commerce under Thai Law**

### **2.3.1 Introduction**

The sale of goods or service on e-commerce being made by the communication on the internet directly to the consumers in which they have no opportunity to consider conditions or characteristics of the goods and service as an offering for sale between traders and consumers is made at a distance. Therefore, the purchasing decision of consumers is dependent on the details of goods or service which is offered by the trader. Although Thai law has the Act concerning electronic transaction (Electronic Transaction Act B.E. 2544), the Act did not cope with the consumer protection refer to the duty to provide pre-contractual information on

e-commerce. Moreover, it only aims to support the legal status of an e-commerce transaction, such as offer and acceptance, in order to support the validity of the contracts concluded by electronic means.

As there is none of the legislation in connection with consumer protection in controlling specific pre-contractual information on e-commerce under Thai law currently, it shall be decided by analogy to the provision most nearly applicable, and in default of such provision, by the general principles of law.<sup>14</sup> Thus, general principles which are the Civil and Commercial Code (here in after “the CCC”) should be considered and shall be applied therein.

In the CCC, the principle of the right to be informed could be found in general principle by the interpretation of the meaning of juristic act and offer under section 149 and section 354 respectively.

An offering to sell goods or services by traders via electronic channel is regarded as one of “an offer” in which a declaration of intention being made to a person at a distance with an expectation that consumers will purchase their goods. Such act is the immediate purpose of which is to establish the relation between juristic persons. Hence, the meaning of “juristic acts” and “offer” should be interpreted as follows:

According to the CCC, section 149 specifies that “Juristic acts are voluntary lawful acts, which is to establish the relation between juristic persons, to create, modify, transfer, preserve or extinguish rights.”

It is noted that the law of obligations or the relations between juristic persons refers to one party must take one of the action for the other party which foundation of the law is truly based upon the freedom of contract.<sup>15</sup> The voluntary act

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<sup>14</sup> The Civil and Commercial Code § 4.

<sup>15</sup> จี๊ด เศรษฐบุตร แก้ไขเพิ่มเติมโดยรองศาสตราจารย์ ดร.ดาราดพร ธีระวัฒน์, “หลักกฎหมายแห่งลักษณะนิติกรรมและสัญญา”, โครงการตำราและเอกสารประกอบการสอน คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ (2551) น. 21 (Chid Sethaputra Edited by Daraporn Thirawat,

means that the person commits to the juristic acts by their own decisions not by deceive, duress, or mistake and without the intervention of any other causes which could lead them to take any different decision over their true preferences.<sup>16</sup>

The offer under section 354 could be explained that it is the requisition to make a contract which must be made clear and certain in order to be a contract when the recipient accepts the offer. An offering to sell or to buy shall consist of a kind, type, price and quantity of property.<sup>17</sup>

Considering section 149 altogether with section 354, it could be interpreted that the declaration of intention of consumer should be made with the voluntary act and not by a mistake, fraud or duress. Hence, the offering for sale must be clearly informed the information concerning goods and service. From the interpretation, it could be concluded that the right to be informed is actually in the general principles of Thai law that it must be clearly and certainly provided. However, the sections are broadly defined of how the offer should be made. the trader's duty in providing the specific information is not prescribed in order to explicitly protect the consumer.

### **2.3.2 Pre-contractual Information Requirements**

#### **2.3.2.1 Fraud by Silence under section 162 of the Civil and Commercial Code**

There is a duty to provide essential information that the parties should know before concluding a contract in the general principles. According to section 162, it specifies that "in bilateral jurisdiction, if the intentional silence of the parties in respect to fact or quality, of which the other party is ignorant, is deemed to be fraud if it is proved that, without it, the act would not have been made." The act

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**“Juristic Acts and Contracts”**, Textbooks and Documents for teaching Program (2008) p.21)

<sup>16</sup> ศันนทกรณ (จำปี) โสทธิพันธุ์, “คำอธิบายนิติกรรมสัญญา”, วิทยุชน (2550) น. 34-35 (Sanankorn (Jampee) Sothipun, “**Juristic Acts and Contracts**”, Winyuchon (2007) p.34-35

<sup>17</sup> *Id.* p.260.

is fraud if the seller has either duty by law or not by law, but by good morals to inform the fact or quality of the goods; and his intention is to be in silence.

The consequence of a declaration of intention procured by fraud by silence is voidable according to section 162 and section 159 of the CCC. The result of a voidable act is that the juristic act is not ineffectual but valid until it is avoided. When a voidable act is avoided, it is deemed to have been voided since the beginning date that the contract has been made and treated as the act had never been existed before. Hence, in case of the avoidance has not been yet occurred, but the creditor and debtor has done the performance of tender regarding to the juristic act before the occurrence of the avoidance. As a result, according to section 176 paragraph 1, if one party has transferred the property to another party; the receiver must return the property to the performer. When it falls in any situation that the act is impossible if the property cannot be returned to the performer as previous, the party who cannot receive their property back will receive the damages instead. Therefore, when the consumer avoids a juristic act which is voidable, the consumer must return the goods to the trader. However, when the property, occurred with the voidable act which is avoided, is a sum of money, in which there is no law specifying for an interest, the parties have to return just the sum of money to restore to the condition where they were previously in accordance to 176 section paragraph 1 mentioned earlier.<sup>18</sup> The provision only states that there will be restitution only when the act is impossible. In conclusion, the consumer who paid the value via e-commerce will only receive the sum of amount they had paid as the restitution.

Moreover, the restitution is not only restricted to the return of property, but also of action. For example, A made a hire of work contract with B for the building construction, but it is avoided afterward. A must pay the value as the restitution to what B has already done to restore to the condition where they were previously.

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<sup>18</sup> Sethaputra, *supra* note 15, at 165.

Regarding to the consumer's right to obtain information, even there is a duty to provide essential information that consumer should be informed before concluding the contract under section 162; the key issue is how to define the duty of the traders to inform the necessary information by good morals. There are Supreme Court judgments that defined or ruled how to interpret "good morals". For instance, the supreme court judgment number 3382/2525: a plaintiff unknowingly bought a land that is located between high voltage lines which results in an illegal act constructing a building on this land. The Supreme Court judged that the declaration of intention of plaintiff is voidable as it made under a mistake as to a quality of land according to section 157 because the seller or defendant has an intentional silence therein while his duty is actually to inform this fact to plaintiff by good morals.

As the duty to inform by good morals is imprecise and it is only ruled by the court, pre-contractual information on e-commerce is vague on which specific pre-contractual information that trader should provide. Thus, trader might use this loophole to conceal the information that adversely affects to the consumer buying decision.

### **2.3.2.2 Sales by description under section 503 of the Civil and Commercial Code**

In addition, according to the CCC in the provision of sale contract, there is no specific provision stipulating traders' duty to provide specific information before concluding the contract. However, the contract of sale and service through electronic media, such as e-mail and webpage, is the sale of goods and services in the form of communication in order to provide the information to the consumers directly. The objective is to let the consumers in the remote area declare their intention to purchase the goods and services, or to be called Direct Marketing. Moreover, it could also be considered as the sale by description according to the CCC, regarding the Specific Contract of Sale, section 503 paragraph 2, "Referring to the sale by description, the trader must deliver the goods exactly the same as the description." The sale by description is normally the contract made between traders

and consumers in the remote area. Practically, consumer cannot recognize the genuine properties of the goods because they lack opportunity to see and investigate the items, but the pictures and the description describing the properties only what the traders want to advertize to consumers. The description by law could be in the form of words, pictures or any other methods.<sup>19</sup> Whenever the consumers declare the intention to purchase the products or services by believing in the description or the advertising from the traders, the consumer can sue only if anytime the message they believed is “a formal description” or the description describing the details confirming the real properties of the products and services being accounted as the description by law.<sup>20</sup>

However, the description that is overly expressed the actual condition of the products just to attract consumers is not accounted as the sale by description mentioned in the Specific Contract of Sale, section 503 paragraph 2 states. Also, it cannot be bounded the trader to take any responsibility regarding this kind of description. For example, “Coca Cola... Real” is only a statement confirming no real properties of the products. In other words, it can be called as a “Dealer’s Talk”<sup>21</sup> where the trader uses it to persuade or attract consumers, which is allowed to be done legally because it is believed that there will be no one believe this kind of statement.<sup>22</sup>

Therefore, the sale of good and service via electronic media shall be in accordance to the sale by description according to the CCC, where the traders are bounded and must deliver the goods in the same condition as described on the media.

Considering that the description prescribed by the trader is the pre-contractual information. However, it is a freedom to the trader of which

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<sup>19</sup> Supreme Court Judgment number 2762/2524 and 9157/2539

<sup>20</sup> พลอย เจริญสม, “การขายตามคำพรรณนา”, [http://digi.library.tu.ac.th/journal/0051/2\\_1\\_jul\\_2551/30PAGE292\\_PAGE304.pdf](http://digi.library.tu.ac.th/journal/0051/2_1_jul_2551/30PAGE292_PAGE304.pdf) (accessed on February 6, 2016)  
(Ploy Charoensom, “Sales by Description”)

<sup>21</sup> ชัยวัฒน์ วงศ์วัฒนศานต์, “กฎหมายคุ้มครองผู้บริโภค”, บริษัทสำนักพิมพ์วิญญูชน จำกัด (2543) น.280 (Chaiwat Wongwattanasan, “Consumer Protection Law”, Winychon Company Limited (2000) p.280

<sup>22</sup> Charoensom, *supra* note 20

content they want to present to the consumer, given that the goods delivered has to remain in the same condition as per described by the trader. In the case of the unpleasant delivery, where the goods delivered by the trader are happened to be different from the sales by description according to CCC, the provision of obligation will be applied with the sale by description contract as long as they are not in the contradictory to one another since there is no responsibility of the trader mentioned in this section 503 paragraph 2.

### **2.3.2.3 Right to be informed of the Consumer Protection Act B.E. 2522**

The consumer protection law aims to constitute the government as a center to control the operation of an entrepreneur in a correct manner. Hence, consumer protection is of paramount importance as it brings benefit to the general public considered as consumers.

The Consumer Protection Act B.E. 2522 amended by the Consumer Protection Act (the 3<sup>rd</sup>) B.E.2556 defines the consumer rights into four categories which are right to be informed, right to choose, right to safety, right to fair contract and right to be leaded.<sup>23</sup>

According to the Consumer Protection Act B.E.2522, section 4(1) stipulates that consumers are entitled to receive information which includes a description of quality, accurate and sufficient information about the goods or services. And the right to be leaded when the right of consumers under section 4(1) is violated. However, the information provided is broadly defined and it is under trader's discretion.

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<sup>23</sup> The Consumer Protection Act B.E.2522, § 4.

#### **2.3.2.4 Right to be informed of the Direct Sales and Direct Marketing Act B.E. 2545**

The Direct Sales and Direct Marketing Act B.E.2545 (amended by the Direct Sales and Direct Marketing Act B.E. 2550) is of the specific provision which is in connection with consumer protection in respect of e-commerce transaction, unlike other businesses, direct marketing is providing goods and services through electronic medium to attract consumers in the expectation that they would be able to encourage them to purchase their goods and services. However, consumers cannot physically see or tangibly touch. In other words, consumers usually receive the goods and services which are not in accordance to the description provided by traders, yet they also cannot claim their right to terminate the contract. Therefore, to protect the right of consumers in this business area, the Direct Sales and Direct Marketing Act B.E. 2545 has been created.

According to the Direct Sales and Direct Marketing Act B.E. 2545, the meaning of direct marketing is stipulated in section 3 that it refers to the marketing of goods or service in a manner of data communication in order to offer for sale directly to the consumer who live at a distance, and looking forward to an acceptance of each consumer to purchase goods or service from such direct marketing businessman. E-commerce is a trading procedure made through an electronic system where the contract concerning goods or services between a trader and a consumer concluded at a distance. Thus, e-commerce is also deemed as the operation of direct marketing according to the Direct Sales and Direct Marketing Act B.E.2545 (amended by the Direct Sales and Direct Marketing Act B.E. 2550). The right to be informed pre-contractually under this act could be summarized as follows:

In regard of statement contained in data communication for offering to sell goods or service of direct marketing businessman is in accordance to section 28 which states that “statement contained in data communication for offering to sell goods or service of a direct marketing businessman shall be as provided in the ministerial regulations“. However, there are no such ministerial regulations existed according to section 28.



In respect of the data communication for offering to sell goods or service by the direct marketing businessman will comply with section 29 of this Act which stipulates that the provisions of the law on Consumer Protection in respect of Consumer Protection against Advertising shall apply to the data communication for offering to sell goods or service by the direct marketing businessman.<sup>24</sup> Considering from Consumer Protection against Advertising section 22, it states that an advertisement may not contain the statement that is unfair to consumer, or the statement that may cause an adverse effect to the society as a whole. Regardless of the statement concerns with the origin, condition, quality or description of goods or services as well as the delivery, procurement or use of goods or service.

The following statements shall be regarded as those considering as being unfair to consumers or being able to cause adverse effect to the society as a whole:

(1) Statement which is false or exaggerated

False refers to the statement on advertising that is not true; statements which are considered as false have to be able to prove the fact. Hence, statements which cannot be proved the truth of the fact could not be considered as false. For example, the claimed statement which refers to a subjective feeling depends on individual. The subjective feeling cannot be proved since there is no standard measurement, such as beautiful, smart, delicious, fresh or modern. Thus, those are not constituted as false.<sup>25</sup> The result of displaying false advertising could persuade the buying decision of consumers' behaviors to the aim of such advertisement.<sup>26</sup>

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<sup>24</sup> Direct Sale and Direct Marketing Act B.E.2545, § 29

<sup>25</sup> สุขุม ศุภนิത്യ, “คำอธิบายกฎหมายเกี่ยวกับการโฆษณา”, นิตยบรรณการ (2550) น. 24-25 (Susom Supanit, “**The Law regarding Advertisement Explanation**”, Nitibunnakarn (2007) p.24-25)

<sup>26</sup> สุขุม ศุภนิത്യ, “คำอธิบายกฎหมายคุ้มครองผู้บริโภค”, สำนักพิมพ์แห่งจุฬาลงกรณ์มหาวิทยาลัย (2557) น.172-173. (Susom Supanit, “**Consumer Protection Law Explanation**”, Chulalongkorn University Publisher (2014) p.172-173)

Exaggerate refers to the statement that includes both true and false statement; it is not a totally true but it is not entirely false. For example, the supplementary food advertising claims that it is suitable for those who need to strengthen calcium in order to increase their heights. The truth is that calcium is not only the single factor for increasing the heights, but they also include several other factors involved with the increasing heights.<sup>27</sup>

To cope with false or exaggerated under section 22 paragraph two (1), the CPA section 28 states that the Committee on Advertisement shall have the power to issue an order requiring advertisers to substantiate the claims. If the Committee believed that the advertising claims oppose the law and the advertisers cannot prove the claim, it is considered as false or exaggerated advertising.<sup>28</sup>

- (2) A statement which will cause misunderstanding in the essential elements regarding the goods or services, notwithstanding, is based on or refers to any technical report, statistics or anything which is false or exaggerated

According to the notice of the Committee on Advertisement against advertising concerning guidance for accreditation of the advertising statement, it provides an opportunity for traders and advertisers to substantiate the technical report, research results, statistics or any accreditation of an institution or any other person. If an advertiser cannot prove the truthfulness of such claims, the committee shall issue one of the order specified in section 27.

- (3) A statement which is directly or indirectly encouraging the commission of an unlawful or immoral act or which adversely affects the national culture

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<sup>27</sup> Supanit, *supra* note 26.

<sup>28</sup> Supanit, *supra* note 27, at 176.

- (4) A statement which will cause disunity or adversely affects the unity among the public
- (5) Other statements as prescribed in the Ministerial Regulation

The advertising controlled by the CPA is the monitoring system which monitors after advertising has already transmitted through the medium. When advertisements are opposed to section 22 (1)-(5), the Committee on advertisement shall have power to examine the advertising and issue an order according to section 27 as follows:

- (1) to rectify the statement or method of advertisement;
- (2) to prohibit the use of such method for advertisement;
- (3) to prohibit the advertisement or the use of such method for advertisement;
- (4) to correct by advertisement the possible misunderstanding of the consumers in accordance with the rules and procedure prescribed by the Committee on advertisement. In issuing an order under (4), the Committee on Advertisement shall prescribe the rules and procedure by having regard to the interest of the consumers and to the bona fide act of the advertisers.

Even though the Consumer Protection Act against advertising controls the communication of the information concerning goods and services from the business man of direct marketing, it controls solely the information considered as unfair. Due to there is no written duty for traders to provide specific detail, traders might use this loophole to conceal the information that adversely affects consumers' buying decision. In addition, the authority of direct sales and direct marketing board is only to control the communication of information of entrepreneur

considering it as a tool to control after the loss has been occurred rather than to prevent the damage from happening.

According to the Act, trader's duty in providing specific information to the consumer is found only in post-purchase process. The Act specifies that a direct marketing businessman shall have duty to deliver the sales of goods or service document to the consumer which requires that such document has to contain the perceptible Thai language statement and also has to contain the following information:

- (1) the name of the trader and the consumer
- (2) the purchasing date and the delivery of goods and services purchased date
- (3) the right of consumer to terminate the contract which has to be more apparently compared to the general statements.<sup>29</sup>
- (4) Time, place and method of payment
- (5) Place and delivery of goods and services method
- (6) Procedure to withdraw from the contract
- (7) Procedure for returning of goods
- (8) Warranty on goods
- (9) Replacement of goods in case of defective goods occurred

If a direct marketing trader provides no document regarding to the sales of goods or service where the details under section 30 or section 31 shall be identified, the consumer is not bound by the contract.<sup>30</sup>

It could be considered that the provision controls only the process after the contract is concluded. There is no provision to specify trader's duty to provide pre-contractual information on e-commerce. Therefore, traders can choose whether to provide pre-contractual information. As a result, it is possible for

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<sup>29</sup> The Direct Sale and Direct Marketing Act, § 30

<sup>30</sup> The Direct Sale and Direct Marketing Act, § 33

consumers to purchase goods and services on e-commerce without properly being well informed of essential information.

According to section 33 of the Direct Sales and Direct Marketing Act B.E.2545, it stipulates that a consumer shall have the right to terminate the contract within seven days from the date of receipt of goods or service by giving the notification of his intention to the trader. However, this right shall not apply to types, prices or kinds of goods or service which is prescribes in the Royal Decree.

The right to terminate the contract regarding to this provision is an additional part of the CCC. In other words, according to the CCC, terminating the contract requires that there must be a cancellation clause stated in the contract, so that either one of the contract's parties has the right to cancel it. On the contrary, referring to section 33 of Direct Sales and Direct Marketing Act, consumers are allowed to cancel the contract even though there is no cancellation clause prescribed in the contract. This provision allows this special act because of the differences between the sales through direct marketing and traditional commerce. Unlike traditional commerce, consumers have relatively low chance to visualize the real products, and relatively high chance that traders might deliver the products that are not the same as their description provided to consumers.

Considering from the Direct Sales and Direct Marketing Act B.E.2545, it only controls trader duty in providing information concerning the procedure to withdraw from the contract in the sales of goods or service document, or the period that a consumer could acknowledge their right, is after the conclusion of the contract.

### **2.3.3 The Binding Nature of Pre-contractual Information**

There is no specific provision stipulates the binding nature of pre-contractual information as from the study in 2.3.1.1. However, if none of the provision is applicable, the case shall be decided by analogy to the most nearly

provision, and in default of such provision, by the general principles of law.<sup>31</sup> Regarding to the study, the most nearly applicable law would be a sale by description; which specifies that the trader is bound to deliver the goods or service in line with the description. It could be interpreted that the information given pre-purchase is a part of the contract that the trader must follow. However, it is at the trader's discretion whether which contents trader would like to provide.

Apart from the provision specified in the CCC, the Direct Sales and Direct Marketing Act B.E. 2545 provides the binding nature concerning the information provided by trader; if a direct marketing trader does not provide the sales of goods or service document including the details under section 30 or section 31, the consumer is not bound by the contract.<sup>32</sup> However, it is applicable only after the contract is concluded.

#### **2.3.4 Statutory Remedies for Consumer**

The statutory remedies for consumer could be categorized into 2 categories which are the right when information provided pre-purchase is not complied with and the right when pre-contractual information is not provided pre-purchase.

In the first case, when traders deliver the items which are dissimilar to the sales by description which is provided pre-purchase in the CCC, section 503 paragraph 2, where there is no punishment for the traders legislated in the section, therefore the law of obligations and contract shall be applied in this matter since it is not contrary to or inconsistent with the sales by description characteristics. Thus, consumers shall have the right as follows:

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<sup>31</sup> The Civil and Commercial Code, § 4

<sup>32</sup> The Direct Sale and Direct Marketing Act, § 33

### 1) Right to Refusal of Performance

When the traders deliver the products that are dissimilar to the description stated by the traders, it accounts as a part performance or consumers are requested to repay differently as they were supposed to. In this case, consumers have the right to cancel not to take the property regarding to the CCC, section 320. It is incoercible to let the creditors accept a part performance or discordant payment from debtors. Due to the obligation law, debtors have to pay the debt in accordance with the promised condition<sup>33</sup>. However, the refusal of performance must be done wholly, not partially. Debtors may accept the property from creditors as an option, in which the debt of payment will be extinguished.<sup>34</sup>

### 2) Right to Refusal of Settlement

A contract of the sale by description is regarded as a reciprocal contract. Regarding to the CCC, section 369, it stipulates that in a reciprocal contract, one party will not settle unless another party will do or request for the tender of performance. Also, it is applicable only when the payment reached its schedule or due date. This contract allows the contractual parties to mutually be creditors and debtors. The core concept of this contract is that payment made by one party is deemed as a condition allowing them for the requisition of another party's performance<sup>38</sup>. Likewise, traders, who deliver their products in the different conditions per their description, are interpreted as traders had made the discordant payment to the section 320 of the CCC. As a result, consumers, perceived as an obligee of this product delivery, should have the right to refuse the settlement according to the section 369 as per the contract mentioned earlier. Practically, this right can barely be applied to reality for e-commerce business since consumers are required to pay in advance before the goods being delivered.

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<sup>33</sup> The Civil and Commercial Code, § 208

<sup>34</sup> The Civil and Commercial Code, § 321

### 3) Right to Claim for Damages

As claimed by the CCC, section 215, traders who deliver the dissimilar products as per description shall be seen as they repay inconsistently to the obligation. Thereby, responsibility for the damages falls on traders, in which the value of the damages that traders have to repay shall be in accordance to the CCC, section 222; traders have to compensate for the damages for their direct or indirect outcome of their non-performance. Moreover, traders shall be responsible for the damages, in which it is earlier foreseen as a failing circumstance by consumers.

### 4) Right to Rescind from the Contract

The Civil and Commercial Code stipulates 2 conditions of the rescission of contract which are rescission by the contractual clause and by the obligation of law.<sup>35</sup> If the sales contract specifies that consumers can rescind the contract immediately anytime the property being against the description, the consumers can then execute their right decidedly. In doing so, it is freewill for both parties to determine the contractual clause differently from the obligation of law. In case there is no agreement bounded, consumers can cancel the contract upon the obligation of laws, which can be separated into two categories 1) rescission by the general laws and 2) rescission by the other specific laws. Therefore, it is important to follow the statutory interpretation. Elaborately, if the law stipulates the right to terminate the contract specifically, the parties should follow those conditions of the law. In contrast, if there is no provision stipulated, the rescission of the contract in the Civil and Commercial Code section 387-389 shall be applied.

### 5) Right to Replace Goods Regarding Its Defect

Apart from the remedies provided in the CCC, the Direct Sales and Direct Marketing Act B.E.2545 also have the specific remedies provided for consumers who purchase goods through e-commerce channel; the consumers shall have right to be informed of the information concerning the right to replace goods in

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<sup>35</sup> The Civil and Commercial Code, § 368



case of its defect. Section 33 provides that the sales of goods or service document shall contain the information on the replacement of goods in case of its defect. Thus, in case when the goods purchased from e-commerce method is not conform to the description or defect and the consumers have no intention to terminate the contract but remain to receive such goods, they are entitling the right to replace the goods in order to meet the contract requirements.

The right to replace goods under section 31 will be applicable in case as follows:

- 1) When the goods received by the consumer has a defect which is in accordance with the CCC section 472 and
- 2) According to the interpretation of Prof.Kittisak Prokati, when the trader certifies any of the purchased goods or service qualification, such certification shall be a part of the contract and the trader shall be liable for the defected goods when the qualification of the goods certified fails the conformity. In such case, the trader must have an intention to certify the information given pre-purchase as a “formal description” which must not be the description that is overly expressed the actual condition of the products just to attract consumers.<sup>36</sup>

It could be summarized that, in practice, when the goods is not in accordance with the information given pre-contractual by the trader, the consumers shall entitled the right to claim for compensation, the right to rescind from the contract and the right to replace goods in case of its defect

In the case when the pre-contractual information is not provided pre-purchase according to section 162 of the CCC, the consumer shall entitle the right to receive money back as mentioned in 2.3.2.1.

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<sup>36</sup> กิตติศักดิ์ปรกติ, “ผลงานวิจัย เรื่อง ความรับผิดชอบเพื่อชำระคบกพร่องในสัญญาซื้อขาย”, โครงการวิจัยเสริมหลักสูตร มหาวิทยาลัยธรรมศาสตร์ (2532) น.27 (Kittisak Prokati, “**Liability for Defects in Sales Contract**”, Curriculum research project Thammasat University (1989) p.27)

### 2.3.5 Conclusion

Considering from the current Thai laws; the Consumer Protection Act B.E.2522, the CCC, and the Direct Sales and Direct Marketing Act B.E. 2545, consumers who purchase goods or service over the internet shall have the right to be informed some information depending on the trader's discretion. However, there is no provision specify trader's duty to provide specific information before the conclusion of contract. According to an insufficiency in controlling trader's duty to provide pre-contractual information, it could lead the consumers to take a different decision which he or she might have taken. Thus, the consumer made contract under a mistake due to the lack of well-informed information of goods and service for the consumers. The declaration of intention under a mistake could be divided into 2 cases as follows:

#### (1) The Mistake as to an Essential Element of The Juristic Act

The declaration of intention to conclude the contract is void: a party entering into an agreement is under a mistake as to an essential element of the juristic act according to section 156. The essential element of juristic act are, for instance, a mistake as to a character of the juristic act, a mistake as to a person to be a party of the juristic act and a mistake as to a property being an object of the juristic act.<sup>37</sup> Beside these three elements, there are still other factors accounted as essential elements of the juristic act, which are a mistake as to an agreement or a statement of juristic act. When there is an essential value, it might be counted as an essential element.<sup>38</sup> For example, the court had judged that the sales value of the property is as important as the property itself as to an object of the juristic act.<sup>39</sup>

The outcome of the juristic act being voided is that the condition of the parties of this act remains as if they have never been participated in the act before. Shall there be an act of performance regarding to this void act, the party who already paid the debt, where debt does not exists literally, has the right to

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<sup>37</sup> The Civil and Commercial Code § 156

<sup>38</sup> Sethaputra, *supra* note 15, at 108

<sup>39</sup> Supreme Court Judgment Number 6103/2545

claim for the compensation from another party. In the CCC section 172 paragraph 2, it states “The return of a property arising from a void act shall be governed by the provisions on Undue Enrichment of the Code.” Due to the performance being obligated under the void act, the property is considered to be as to an undue enrichment given to the receiver from the performer. Therefore, the law stipulates that the provisions on undue enrichment of code shall be enforced in this case.<sup>40</sup> The provision on undue enrichment of code mentions only the problems arisen from this issue.

For instance, if the performance made under the void act is an amount of money, the section 412 states that the party who receive the property has to return the full amount to another party. The exception is when the receiver has taken it innocently (without knowing that the act is voided), the receiver should return only the remaining property they had left.

For another case, if the performance made under the void act is not an amount of money. The section 413 states that without any intention (not knowing if the act is voided), the receiver can return the property with the remaining condition without any responsibility for the defects of the property. The receiver shall also return the compensation if he or she has taken any for the defects. On the other hand, if receiver takes the property with their intention (knowing if the act is voided), the receiver has to compensate for the defect or losses of the property even if the defect has occurred beyond one’s capability unless the inevitable situation can be proved.

## (2) The Mistake as to Quality of Goods or Person

“If the declaration of intention is made under a mistake as to quality of goods or person, such declaration of intention is voidable” as specified in section 157.”

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<sup>40</sup> อัครวิทย์ สุมาวงศ์ และ ไพโรจน์ วายุภาพ, “คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยนิติกรรม สัญญา”, สำนักอบรมศึกษากฎหมายแห่งเนติบัณฑิตยสภา (2550) น.142 (Akarawit Sumawong, Pairoj Wayuparb, “**The Civil and Commercial Code Explanation Regarding Juristic Acts and Contracts**”, The Thai Bar Institute (2007) p.142)

The declaration of the intention under a mistake as to quality of goods or person is not a mistake in goods or person of the juristic act. In fact, it refers to the party declaring the intention of the juristic act correctly, but the party misunderstands the quality of goods or person as being discordant to the reality. If the quality of goods or person is supposed to be an essential element, the act shall be voidable. Consequently, the results of the voidable act are as mentioned earlier.



### CHAPTER 3

#### CONSUMER PROTECTION REGARDING PRE-CONTRACTUAL INFORMATION ON E-COMMERCE IN FOREIGN LAWS

Nowadays, many foreign countries laws such as the European Union, the United Kingdom have realized the problems related to the asymmetry of information between traders and consumers in providing pre-contractual information on e-commerce since it becomes the globe's fastest growing market place. This chapter shall study on legislation and legal measures in EU directives as it has a wide range of consumer protection in online transaction and up-to-date which could be solved with the problems occurred. It shall further study on the United Kingdom legislation as it is one of the EU countries which must comply with rules that set out in EU directives and especially it also provide the way to accomplish the directives' goals as it depends on the member states to create their own laws.

#### 3.1 Pre-contractual Information under European Union Laws

##### 3.1.1 Introduction

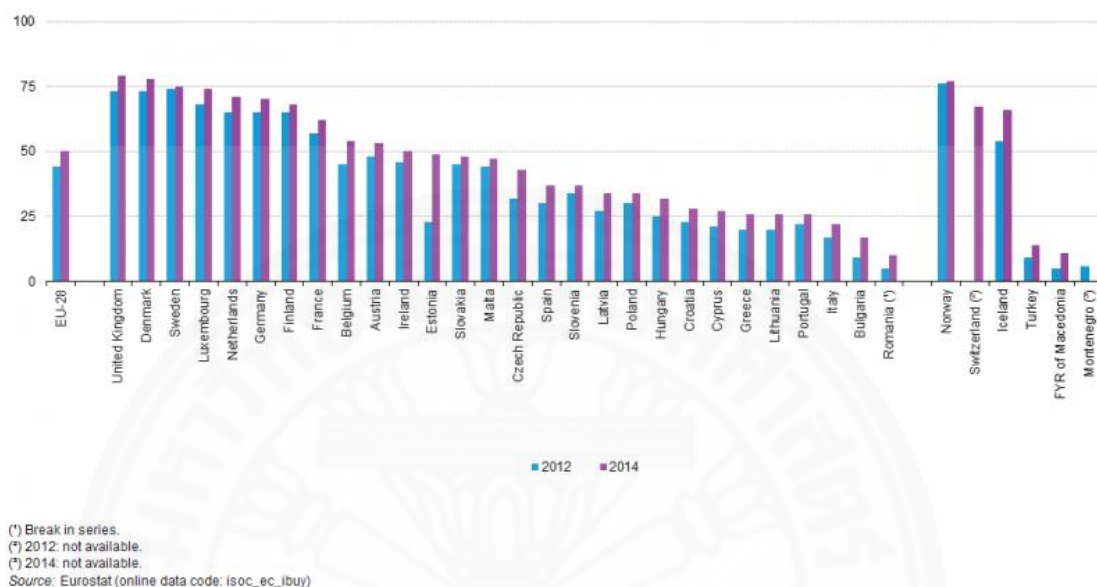
From 2012 to 2014, the proportion of individuals between the age of 16 to 74 in the EU who have ordered goods and services over the internet has increased from 44 percent to 50 percent.<sup>41</sup> To support the increasing use of e-commerce, the EU has implemented rules on the provision of pre-contractual information in order to alleviate the information asymmetry between traders and consumers, it is recommended that the increasing information consumer acquires could enhance consumers' decision on buying product from the internet.<sup>42</sup>

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<sup>41</sup> The European Commission, "*File:Individuals who ordered goods or services over the internet for private use in the 12 months prior to the survey, 2012 and 2014 (% of individuals aged 16 to 74)*", [http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Individuals\\_who\\_ordered\\_goods\\_or\\_services\\_over\\_the\\_internet\\_for\\_private\\_use\\_in\\_the\\_12\\_months\\_prior\\_to\\_the\\_survey\\_2012\\_and\\_2014\\_\(%25\\_of\\_individuals\\_aged\\_16\\_to\\_74\)\\_YB15.png](http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Individuals_who_ordered_goods_or_services_over_the_internet_for_private_use_in_the_12_months_prior_to_the_survey_2012_and_2014_(%25_of_individuals_aged_16_to_74)_YB15.png). (accessed on February 14, 2016)

<sup>42</sup> Catherine Barnard & Steve Peer, "**European Union Law**", Oxford University Press (2014) p.686-687

FIGURE 3.1: Individuals who ordered goods or services over the internet for private use in the 12 months prior to the survey, 2012 and 2014 (% of individuals aged 16 to 74)



Source: The European Commission, *Information society statistics - households and individuals*, available at [http://ec.europa.eu/eurostat/statistics-explained/index.php/Information society statistics - households and individuals](http://ec.europa.eu/eurostat/statistics-explained/index.php/Information_society_statistics_-_households_and_individuals)

In the European Union, consumer protection laws related to pre-contractual information on e-commerce are as follows:

### 3.1.1.1 Directive 2011/83/EU of the European Parliament and of the Council on Consumer Rights

As from 13 June 2014, the Consumer Rights Directive replaces Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts. This directive applies to business to consumer transactions.

The main focuses of Consumer Rights Directive are on: (1) the significance of information's transparency, specifically the pre-contractual

information for distance and off-premises contracts (including as well the on-premises contracts); (2) on firmly acknowledge for any transaction of payment; (3) on the right to cancel distance and off-premises contracts; (4) on controlling any extra charges occurred to pay or to contact traders; (5) on easing the regulation in a particular and core sections to motivate higher growth and increase the confidence of consumers' buying behavior across borders. This directive is also allows consumers to make better choices and secure agreement.<sup>43</sup>

Importantly, the Consumer Rights Directive tries to equalize the responsibilities between traders and consumers when there is a cancellation of contracts or delivery failure. Information on costs and terms of delivery must be clear under transparency focus. In consequence, consumers should express their consent of payment firmly on their commitment to the transaction they are engaging, which should result in lower dispute resolution costs for business and consumer damage

The purpose of the Consumer Rights Directive is to increase consumer protection across the EU in a full harmonization<sup>44</sup> in regard of the consumer information. It establishes also tighter requirements on pre-contractual information and presenting the right of withdrawal period in the uniformity.<sup>45</sup> The directive is applied to distance contracts where trader and consumer have commercial

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<sup>43</sup> Department for Business Innovation & Skills, “*Consultation on the implementation of the Consumer Rights Directive 2011/83/EU*”, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/32690/12-999-consultation-implementation-of-consumer-rights-directive.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32690/12-999-consultation-implementation-of-consumer-rights-directive.pdf). (accessed on September 25, 2015)

<sup>44</sup> Consumer Rights Directive, art. 4. “*Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive.*”

<sup>45</sup> The European Commission, “*DG JUSTICE GUIDANCE DOCUMENT concerning Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011*”, [http://ec.europa.eu/justice/consumer-marketing/files/crd\\_guidance\\_en.pdf](http://ec.europa.eu/justice/consumer-marketing/files/crd_guidance_en.pdf) (accessed on September 25, 2015)

transaction without face-to-face communication<sup>46</sup> which is the main a characteristic of electronic commerce.

**3.1.1.2 Directive 2000/31/EC of the European Parliament and on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market ('Directive on electronic commerce')**

It has formed the elementary legal framework for services provided online in the internal market. This Directive has created in order to eliminate obstacles in the cross-border services provided online in the European Union and to assure business and citizens in cross-border online transactions in legal certainty.<sup>47</sup> Under this directive, it also imposes an obligation on a service provider to provide the specific information “prior to the order being placed by the recipient of the service”.

Several organizations support the idea of the provisions on information requirements that are perceived as a good exercise for a firm which increase consumer confidence and results in increased willingness of consumers to engage in the online activity. The European Consumer Centre Germany states that the provisions on information obligation of the Electronic Commerce Directive influences consumers purchasing behavior on the website because the clear detail of the businesses such as company’s data, price, and technical steps for contract conclusion has power on consumer’s voluntariness to engage in doing business. According to the respondent’s expression, the consumers expect to receive the information of the company, or people related to the products purchased by consumers. In contrast, if the consumers are not well-informed, they will shift their

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<sup>46</sup> Consumer Rights Directive, art. 2(7) “‘distance contract’ means any contract concluded between the trader and the consumer under an organised 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>47</sup> European Commission, “E-commerce Directive”, <https://ec.europa.eu/digital-single-market/en/e-commerce-directive> (accessed on March 5, 2016)



interests from that company to others who provide them more detail. Thus, article 5 of the Directive has increased consumer confidence”.<sup>48</sup>

Additionally, the Director of the Danish consumer organization, European Consumer Centre, also claims that the Directive generates better impact from the demand enhancing provisions; “The information obligations [...] may also enhance consumers’ possibilities of complaining since they can for example write a physical letter of complaint and/or have a lawyer to meet up at the company’s address in case of a larger conflict”.<sup>49</sup>

Thus, besides from the information requirements under the Consumer Rights Directive, traders who conduct transaction online also have to comply with the information requirements under this directive.

Those Directives provide specific rules to pre-contractual information requirements, especially for e-commerce. In summary, traders’ responsibility is to make an availability of the information to consumer before the conclusion of contract which could be concluded and grouped as follows:

### **3.1.2 Pre-contractual Information Requirements for Distance Contract**

Traders shall provide contract information about goods and service to consumer in a clear and comprehensive manner before they are bound by the contract as per these conditions:

- (1) The main characteristics of the goods or service, where applicable.<sup>50</sup>
- (2) The information about trader; trader’s identity<sup>51</sup> and contact details, the exact established geographical location, telephone and fax numbers, e-mail address<sup>52</sup>,

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<sup>48</sup> European Commission DG internal Market and Services Unit E2, “*Study on the Economic Impact of the Electronic Commerce Directive, Final Report*”, [http://ec.europa.eu/internal\\_market/e-commerce/docs/study/ecd/%20final%20report\\_070907.pdf](http://ec.europa.eu/internal_market/e-commerce/docs/study/ecd/%20final%20report_070907.pdf) (accessed on September 1, 2016)

<sup>49</sup> *Id.*

<sup>50</sup> Consumer Rights Directive, art.6(1)(a)

trade registration number<sup>53</sup>, VAT number<sup>54</sup>, any professional body or similar institution which the trader is registered.<sup>55</sup>

(3) The total price; if the total price of goods or services cannot be calculated in advance, the calculation manner should be provided. The total price comprises of any additional charges including taxes, delivery, freight, postal charges. The payable charges should be provided in the case that those charges cannot be calculated in advance.<sup>56</sup>

The hidden charges and costs of the goods and services offered on the internet shall be dictated firmly. “Cost traps” is the situation where consumers were tricked to pay a charge or cost for the “free” service from traders as an example of horoscope and recipes on the internet. This pre-contractual information shall protect consumer from this cost by reassuring that consumers understand and firmly acknowledge the payment condition of such services.<sup>57</sup>

Elevated Price Transparency; the disclosure of total cost of the products and services altogether with any extra fees shall be provided by traders. Shall there be no such information indicated clearly on the website, consumers would not have to pay additionally for an extra cost or services.<sup>58</sup>

(4) Time of delivery or the beginning of the service.<sup>59</sup>

(5) Arrangements for payment<sup>60</sup>, legal guarantees<sup>61</sup>, financial guarantees<sup>62</sup>, after-sales services<sup>63</sup> and complaint handling policy, if applicable.<sup>64</sup>

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<sup>51</sup> Consumer Rights Directive, art.6(1)(b)

<sup>52</sup> Consumer Rights Directive, art.6(1)(c)

<sup>53</sup> E-commerce Directive, art.5(1)(d)

<sup>54</sup> E-commerce Directive, art.5(1)(g)

<sup>55</sup> E-commerce Directive, art.5(1)(f)

<sup>56</sup> Consumer Rights Directive, art.6(1)(e)

<sup>57</sup> European Commission, “*Consumer Rights: 10 ways the new EU Consumer Rights Directive will give people stronger rights when they shop online*”, [http://europa.eu/rapid/press-release\\_MEMO-11-450\\_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-11-450_en.htm?locale=en) (accessed on September 1, 2016)

<sup>58</sup> *Id.*

<sup>59</sup> Consumer Rights Directive, art.6(1)(g)

<sup>60</sup> Consumer Rights Directive, art.6(1)(g)

- (6) The duration and termination of the contract, if applicable.<sup>65</sup>

To prescribe a limitation period of contract's performance is crucial if this information is not indicated since the time of ordering;<sup>66</sup>

- (7) Codes of conduct.<sup>67</sup>

The provisions of this Directive should be conveyed to consumers, so do the codes of practice if available to be said as the best practice of consumer protection.<sup>68</sup>

- (8) Out-of-court complaint and redress mechanism.<sup>69</sup>

(9) In case of returning the goods cannot usually be returned by post, the consumer will have to bear the cost of returning.<sup>70</sup>

Traders should clearly indicate their intention in advance that consumers have to be responsible for the cost if they want to return the goods after changing their mind. At least, the estimated of the maximum expense of returning heavy goods, such as sofa, purchased online on the website to allow consumers being able to make an informed decision.<sup>71</sup>

(10) Member states can either maintain or adjust the contractual information into their own languages of their national law requirements in order to make it easier for the consumers to easily understand the information.<sup>72</sup>

The languages offered for the conclusion of the contract.<sup>73</sup> This information requirement should be available to consumers so that they know which

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<sup>61</sup> Consumer Rights Directive, art.6(1)(l)

<sup>62</sup> Consumer Rights Directive, art.6(1)(q)

<sup>63</sup> Consumer Rights Directive, art.22(1)(h)

<sup>64</sup> Consumer Rights Directive, art.6(1)(g)

<sup>65</sup> Consumer Rights Directive, art.6(1)(o)

<sup>66</sup> Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, Recital 15

<sup>67</sup> Consumer Rights Directive, art.6(1)(n)

<sup>68</sup> Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, Recital 19

<sup>69</sup> Consumer Rights Directive, art.6(1)(t)

<sup>70</sup> Consumer Rights Directive, art.6(1)(i)

<sup>71</sup> *Id.* at 57

<sup>72</sup> Consumer Rights Directive, art.6(7)

<sup>73</sup> E-commerce Directive, art.10(d)

languages are there for them because languages are important factors for the Member states in distance contracts.<sup>74</sup>

(11) If the right to withdraw from the contract exists, a trader shall have duty to provide information concerning the right of withdrawal, the conditions, time limit and process to exercise such right together with the model withdrawal form.<sup>75</sup> As mentioned that distance sales is the transaction that restrict consumers to see the real products before contract conclusion. Therefore, consumers should have the right to withdraw before concluding the contract to allow them to inspect the products.<sup>76</sup>

FIGURE 3.2: Model withdrawal form

B. Model withdrawal form

(complete and return this form only if you wish to withdraw from the contract)

- To [here the trader's name, geographical address and, where available, his fax number and e-mail address are to be inserted by the trader]:
- I/We (\*) hereby give notice that I/We (\*) withdraw from my/our (\*) contract of sale of the following goods (\*)/for the provision of the following service (\*).
- Ordered on (\*)/received on (\*),
- Name of consumer(s),
- Address of consumer(s),
- Signature of consumer(s) (only if this form is notified on paper),
- Date

Source: The European Parliament and of the Council, Directive 2011/83/EU on consumer rights, Annex 1

<sup>74</sup> Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, Recital 8

<sup>75</sup> Consumer Rights Directive, art.6(1)(k)

<sup>76</sup> Commission of the European Communities, “*Proposal for a Directive of the European Parliament and of the Council on consumer rights*”, [http://ec.europa.eu/consumers/archive/rights/docs/Directive\\_final\\_EN.pdf](http://ec.europa.eu/consumers/archive/rights/docs/Directive_final_EN.pdf) (accessed on May 25, 2016)

The information right of withdrawal is one of the most important provisions specified by the Consumer Rights Directive as recital 37 suggests that in the case of selling at a distance, consumers is unable to see the goods before concluding the contract. Consumers shall then have the right to withdraw from the contract within 14 days without the requirement of stating reason.<sup>77</sup> However, when the right of withdrawal does not exist, traders have to provide information of the nonexistence of such right.

The starting period of the right of withdrawal depends on type of contract<sup>78</sup>;

- 1) Service contracts; the day which the contract is concluded
- 2) Sales contracts; the day which the consumer or a third party indicated by the consumer other than the messenger, receives the goods in physical.

### **3.1.3 Additional Pre-contractual Information Requirements for the Contract concluded by Electronic Means**

Prior to the placement of an order, traders shall provide the following information to the consumer;

- (1) Information concerning the order confirmation button<sup>79</sup>

The trader has to reassure that the implication of the obligation to pay is easily be recognized by consumers. For instance, if the payment is supposed to be made by pressing the button, the button shall be labeled explicitly “order with obligation to pay”.

- (2) Whether service provider will collect the contract concluded and whether it is accessible by the consumer.<sup>80</sup>

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<sup>77</sup> Consumer Rights Directive, art.9(1)

<sup>78</sup> Consumer Rights Directive, art.9(2)

<sup>79</sup> Consumer Rights Directive, art.8(2)

<sup>80</sup> E-commerce Directive, art.10(b)

(3) Service provider shall provide the technical procedure, before an order being placed, of the identifying and correcting input errors<sup>81</sup> which provide logical steps that ease customers to correct their errors along the way of their order.

(4) Technical steps to follow to conclude the contract.<sup>82</sup>

Trader has to provide the technical steps information involved when a consumer placing an order in order to make the consumers aware of their involvement in which process and their commitment at which point, respectively<sup>62</sup>. Placing an order is also related to the contract formation. Therefore, it is important that traders should provide not only technical steps, but also legal implications relating to the process of contract formation. Even though consumers will be more familiar to the offline type of contract procedure, in this current situation, where most consumers are international and getting involved in the online business, this requirement is a new nature which is required by the supplier to provide this necessary information mentioned earlier.<sup>83</sup>

For the contract created in a distance and with electronic medium, the trader shall let the consumers be aware of the information noticeably, clearly and “directly before” the consumers place their orders. The information is described in the Directive on Electronic Commerce as follows;

- (1) The main characteristics (Article 6(1)(a));
- (2) The total price (Article 6(1)(e));
- (3) The duration of the contract and the conditions for terminating it (Article 6(1)(o));
- (4) Where applicable, the minimum duration of the contract (Article 6(1)(p)).

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<sup>81</sup> E-commerce Directive, art.10(c)

<sup>82</sup> E-commerce Directive, art.10(a)

<sup>83</sup> Geraint G. Howells, et al., “**Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness**”, Ashgate (2005) p.104

The term ‘directly before’ mentioned above (in the Article 8(2)) are interpreted as ‘immediately before’. The message implies that, according to Recital 39 of the Consumer Rights Directive, it is significant for distance contracts on the electronic medium to ensure consumers by these three ways. First, traders shall provide information that consumers being able to notice and comprehend the principle factors of the contract before placing their orders. Second, the provisions of the Directive should be available right closely before consumers places their orders. Lastly, traders shall provide the clear stage at where consumer can recognize the obligation of payment. To conclude, the trader should provide the clear message to the consumers that placing the order will be obliged to the payment in which the consumers should not be distracted or drawn to other pages or information that is not related to the page used to place their orders.

Accordingly, Article 8(2) of the Directive is practically applied currently to check the detail of their order before making their payment with the ‘buy’ button.

To prove that whether trader has provided pre-contractual specified by this Directive, the burden of proof shall be on trader.<sup>84</sup> As communication used is beyond the consumers’ capability to control this medium, it is important to mention that the burden of proof maybe on traders.<sup>85</sup>

In the case that the fact cannot be proved by the other methods, if pre-contractual information is missing from the confirmation of the contract, trader will become weaker in such situation unless before the conclusion of the contract, he has provided on a durable medium.<sup>86</sup>

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<sup>84</sup> Consumer Rights Directive, art.6(9)

<sup>85</sup> Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, Recital 22

<sup>86</sup> The European Commission, “*DG JUSTICE GUIDANCE DOCUMENT concerning Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011(2014)*”, [http://ec.europa.eu/justice/consumer-marketing/files/crd\\_guidance\\_en.pdf](http://ec.europa.eu/justice/consumer-marketing/files/crd_guidance_en.pdf).

For distance contracts, the adaptation of information requirement should consider the technical limitation of certain media, such as limitation of the number of characters on particular electronic display. Traders therein should provide the information that can meet the minimum of information requirements and link to other sources by a hypertext link, as an example.<sup>87</sup> In addition, consumer can access to the internet not only by computer, but also portable devices which limits the amount of texts that can be sent. In this case, the Consumer Rights Directive stated that trader can restrict the display information on the user's screen as specified in article 8(4) which are (a),(b), (e), (h) and (o) of article 6(1)

- (1) the main characteristics
- (2) the information about trader; trader's identity
- (3) the total price
- (4) the right of withdrawal, the conditions, time limit and process to exercise such right together with the model withdrawal form.
- (5) the duration of the contract and the conditions for terminating it

#### **3.1.4 The Binding Nature of Pre-contractual Information**

All of the pre-contractual information shall be a vital part of the contract, trader can alter such information provided only when consumer has expressly agree on the alteration.<sup>88</sup>

The confirmation of the distance contract concluded shall be provided on the durable medium and it should be available within the appropriate period of time after the conclusion of the contract, and it shall be available before the beginning of the service or at least at the time that the good being delivered because the nature of the electronic medium allows information circulated is often transient unlike on a permanent medium. Therefore, the written notice must be available for

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<sup>87</sup> *Id.* at 76

<sup>88</sup> Consumer Rights Directive, art.6(5)



consumers in the right time of the information for the proper contract's performance.<sup>89</sup>

Regarding to the Consumer Rights Directive, all of the information being referred to in Article 6(1) shall be provided in the confirmation, or else the trader has to provide the detail to the consumer, also, on an durable medium before concluding the distance contract<sup>90</sup> in order to enable the consumer to verify any of the discrepancies information between the terms of the contract against the pre-contractual information.

### **3.1.5 Statutory Remedies for Consumer**

#### **3.1.5.1 In case of the Information regarding the Main Characteristics is not complied with**

Member countries in EU should apply this Directive into their own practices by adjusting their provisions of their penalty rules on the violation. Also, the penalties should be controlled ensuring that they are enforced in an “effective, proportionate and dissuasive” way.<sup>91</sup>

#### **3.1.5.2 In case of the Information regarding Price and any Additional Charges is not complied with**

The consumer shall reject engaging into any payment transaction if the trader provides the contradictory information on the prices, additional charges, or other costs.<sup>92</sup>

The trader shall get the consent from consumers, in which they agree upon the obligation of trader's contract for the potential additional charge, before the contract is bound by the trader and the consumer. Otherwise, the consumer shall be able to request for the compensation if the trader claims for the default

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<sup>89</sup> Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, Recital 13

<sup>90</sup> Consumer Rights Directive, art.8(7)(a)

<sup>91</sup> Consumer Rights Directive, art.24

<sup>92</sup> Consumer Rights Directive, art.6(6)

options (requesting consumers to reject if they do not agree with the extra charge) without getting any consent expression from consumer.<sup>93</sup>

### **3.1.5.3 In case of the Information regarding the Right of Withdrawal is not complied with**

If trader fails to provide information concerning the right of withdrawal, the time to withdraw from the contract will be extended to 12 months counting from the expiration date of the initial period of the right of withdrawal. In contrast, if trader provides the information concerning the right of withdrawal to the consumer within 12 months from the expiration date of the initial period of the right of withdrawal, the period to withdraw from the contract shall end 14 days after consumer receives such information from trader.<sup>94</sup>

### **3.1.5.4 In case of the Information regarding the Order Implies an Obligation to pay is not complied with**

If the trader fails to make the information available concerning the order confirmation button that it is under an obligation to pay, the contract or order shall not bound the consumer.<sup>95</sup>

### **3.1.5.5 In case of the Information other than the Information regarding the Main Characteristics is not complied with**

Member countries in EU should apply by adjusting this Directive to their provisions of their penalty rules on the violation. Also, the penalties should be controlled ensuring that they are enforced in an “effective, proportionate and dissuasive” way.<sup>96</sup>

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<sup>93</sup> Consumer Rights Directive, art.22

<sup>94</sup> Consumer Rights Directive, art.10

<sup>95</sup> Consumer Rights Directive, art.8(2)

<sup>96</sup> Consumer Rights Directive, art.24

## **3.2 Pre-contractual Information on E-commerce under the United Kingdom Laws**

### **3.2.1 Introduction**

In the United Kingdom, consumer protection laws related to providing pre-contractual information in pre-contractual as follows:

#### **3.2.1.1 The Consumer Contracts (Information, Cancellation and Additional Charges) Regulation 2013**

All the businesses that are related to sales of products and services to consumers in UK are applied by the UK's new Consumer Contracts (Information, Cancellation, and Additional Payments) Regulations 2013. Altogether, the Consumer Rights Directive is implemented as a requirement by December 2013 and be enforced by June 2014.

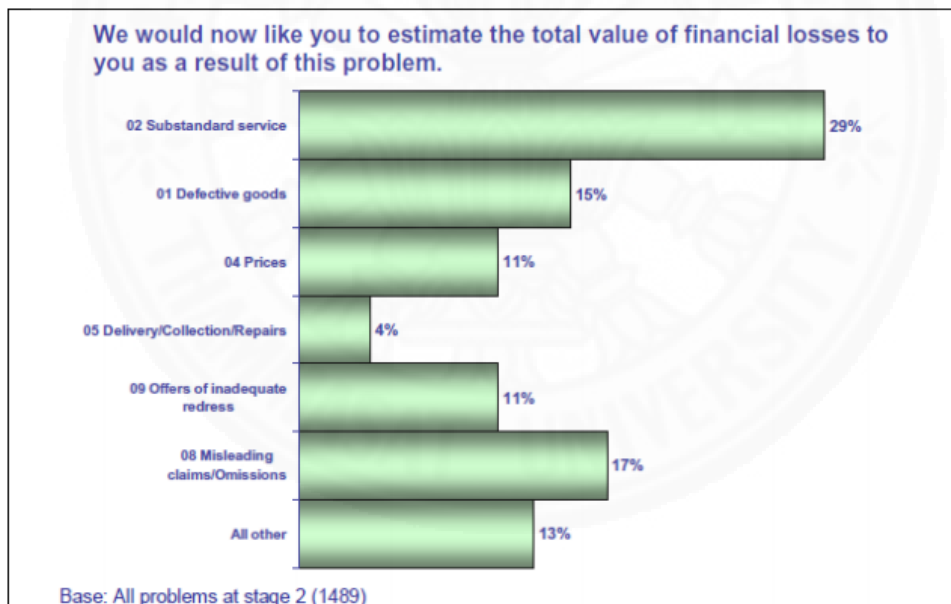
There are researches showed the evidence of the significance of transparent accessible information being expected by consumers. Since consumers expect to make the right purchasing decision, the information on the nature and price of the products are decidedly required. For example, one of the researches from Office of Fair Trading recommends that consumer makes their purchasing decisions below optimal level due to lack of clear and accessible information. The competition of the market would occur when the traders provide transparent information about their prices and the quality of their products. The post-contractual arrangement will guide the market and ease consumers better.

The importance of contractual term problems causing consumer detriment is also noticed as following evidence. Consumer Direct<sup>80</sup> (CD), a government-funded institution, performs as a primary door for consumers searching for advice regarding to consumers problems. Complaints from consumers are recorded including issues relating to the products and services, or other issues raised by consumers. The numbers recorded by CD between 2009 and 2010 are 14,669 consumer complaints which relates to the contractual terms and conditions. Referring to the Chart below, it shows the average value per year regarding to the contractual

term and conditions over £17m reported by individuals and classified by sectors. Even though the Consumer Rights Directive proposal cannot be firmly said that at which level the project will benefit in the better result, it is supposed to gain consumer awareness in any commitment to the contractual transaction.<sup>97</sup>

Critically, 17% of the report accounts for the damage occurred from misinterpretation or inaccurate information. It can be said that this issue is highly noted as one of the main factor causing consumer detriment. As a result, consumer information including pre-contractual information is needed to be improved so that it can aid alleviating this issue proportionally.

FIGURE 3.3: The value of the complaints as reported by the individual consumer and categorized by broad sector.



<sup>97</sup> Department for Business Innovation & Skills, “*EU Consumers Rights Directive: Pre-contractual Information Requirements for Contracts other than Distance or Off-premises*”, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/32691/12-1000-eu-consumer-directive-pre-contractual-impact.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32691/12-1000-eu-consumer-directive-pre-contractual-impact.pdf) (accessed on March 25, 2016)

Source: OFT consumer detriment report (2008), *available at* [http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.offt.gov.uk/shared\\_offt/reports/consumer\\_protection/oft992.pdf](http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.offt.gov.uk/shared_offt/reports/consumer_protection/oft992.pdf)

The main driving forces in rectifying consumer law are to enhance market growth and performance. Competitive market that function well generate growth through creating incentives for organizations leading them to become more efficient and innovative. Competitive markets are the results when consumers are “active” and “confident” leading to the changes such as a better deal, suppliers switching, and interest in new products. Consumer law reform, as a motive for market competition, can not only empower consumers, but also enhance more effective competition.<sup>98</sup>

First, the purpose of consumer law reformation is to raise consumers’ awareness and have a better understanding of their rights by “consolidating, simplifying and clarifying” consumer law in expectation of the reduced numbers of pieces of consumers law.

Increase of consumers’ awareness on their rights encourages markets to work more effectively due to the confidence of consumers in switching suppliers or new items. When consumers are not confident enough and uncertain for the results of new alternatives products or services, the cost of risk taking might be costly for these consumers where they choose to invest in product searching or take “a risk premium” on the new products. As a result, informing consumers’ right can alleviate the costs of suppliers change, or new products choice. The so-called behavior “inertia” can be overcome, or the situation where consumers prefer familiar choice rather than slightly unfamiliar alternative regardless of their potentiality of better performance.

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<sup>98</sup> Department for Business Innovation & Skills, “*Implementation of the EU Consumer Rights Directive (2011/83/EU)*”, [http://www.legislation.gov.uk/ukia/2013/219/pdfs/ukia\\_20130219\\_en.pdf](http://www.legislation.gov.uk/ukia/2013/219/pdfs/ukia_20130219_en.pdf). (accessed on March 25, 2016)

Second, consumer law reform certifies that the important consumer protections focuses on raising the main market failures, especially information asymmetries between consumers and firms.

Consumers' confidence should also be stimulated by the measures, and also opportunity of an exportation for UK traders. The transparency regarding to the purpose of the Directive for both traders and consumers could reduce the cost of dispute.

The Consumer Rights Directive introduces new provisions being able to apply to most of the consumer contracts, in order to raise a full awareness of payment obligations.

### **3.2.1.2 Consumer Rights Act 2015**

The rational for the enactment of the Consumer Rights Act 2015 could be sought through the view on options to simplify the law regarding to the supply of goods and service under a contract especially on “enhancing consumer confidence by clarifying consumer law: consultation on the supply of goods, services and digital content” which has the view as follows:

According to a study by the University of East Anglia in 2008, even though consumer law currently offers a high level of protection, it is confusing and complex because it has been developed gradually, which results in duplicated law being manifested in outdated language and not equally being enforced.

A review of consumer law by the former Department for Business Enterprise and Regulatory Reform in 2008 shows the controversy and mostly all of respondents have mutually accepted in the idea that simplifying structure and language of consumer law and harmonizing the law into one piece will have a great effect. The enforcers of the business organizations, consumer groups and consumer law accepted that the absent of purity sabotages consumer confidence since they have limited knowledge on their rights and it raises the cost of compliance for business. As a result, those consumers hesitate to purchase from the organization providing only little detail of its business.

It also found that one single law that can deal with consumers' right for purchasing goods and services does not yet exist. The law of consumer protection on purchasing is gradually developed. The courts are those who noticed the conditions of consumer purchasing motives, which are clear and justified information, yet unspoken expectation. The case law allowing consumers rights when this expectation of theirs fails are then developed. When it was firstly composed, the differences between consumers and other types of buyers were not mentioned. Then, this legitimate law was raised to cover also the position where items were supplied not only by sales, but also when the goods are hired. The main sections of this law indicating purchasers' rights on the receipt of sub-standard goods or services are the Sale of Goods Act 1979, the Supply of Goods and Services Act 1982 and the Supply of Goods (Implied Terms) Act 1973. These Acts have been added or developed additionally, including by European legal requirements.<sup>99</sup>

The UK law has been revised in accordant to the European Union to protect consumers. For instance, the Sale of Goods Act 1979 was overwritten from 31 March 2003 to support the consumers' right to request for goods' replacement being a part of a requirement of the Consumer Sales Directive. Previously, European law has been enforced in domestic law with inconsistencies or duplication so that the Sale of Goods Act 1979 has been recognized as 'a disjointed, often incoherent, amalgam...'

Regarding to the sales of goods, there are two effective legislative systems; the traditional UK remedies have been overwritten by parts of EC Consumer Sales Directive (CSD) which cause confusions to consumer or retailers and create unwanted argument between parties. The two systems of legislations result in the law with different language and ideas, as well enforce different burdens of proof

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<sup>99</sup> Department for Business Innovation & Skills, "*Enhancing consumer confidence by clarifying consumer law*", [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/31350/12-937-enhancing-consumer-consultation-supply-of-goods-services-digital.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31350/12-937-enhancing-consumer-consultation-supply-of-goods-services-digital.pdf) (accessed on February 25, 2015)

as mentioned in Consumer Remedies for Faulty Goods, a Joint Consultation Paper by the Law Commission and the Scottish Law Commission

Regarding to the sales of service, the law mentions only few on rights or remedies, or the legitimate right of consumer's status when it fails. Unlike the law regarding to the goods, only one term concerning the expected standard, which implies that the service shall be delivered with "reasonable care and skill" and allows suppliers to indicate the conditions to limit the impact of this term, where necessary. As a result, it is easier to create a proper goods contract rather than services.

Another dissimilarity between the protections for consumers of goods and services is the absence of remedies for service consumers where the consumers right depends on the wider legislation of contract.

In conclusion, there was complexity of the law before the enactment of the Consumer Rights Act 2015. Recently, it is still not easy for parties to understand thoroughly and be clear about their rights and responsibilities, which leads to argumentations being costly for parties and obstructs consumers from exercising their rights.

According to The Government's program of reform, the proposals that follow build on the BERR review of the consumer law regime in 2008 which define that consumer law should be simplified and modernized in order to make it easier for consumers to understand the scope of the transaction. According to the report on the Consolidation and Simplification of UK Consumer Law by Professor Howells, Professor Twigg Flesner and others suggested that the improvement of the consumer contract legislations could be possible if the provisions could be harmonized into one place which is the Consumer Rights Act 2015.

Some provisions of the Directive 2011/83/EU of the European Parliament and of the Council on consumer rights are implemented in the Act. The act in the part which concerns pre-contractual information only deals with the contracts between traders and consumers focusing on the consumer rights and the



trader's obligations to provide information concerning goods and service. It also deals with the consumer's remedies when the trader does not comply with duty prescribed by the act which is the enforcement of information requirements.

### **3.2.1.3 The Electronic Commerce Regulations 2002**

The great number of the Provisions of the E-commerce Directive or Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the internal market is transposed into UK law from the Electronic Commerce Regulation 2002. It provides that a trader shall have duty to provide some information before an order will be placed according to the regulation 9(1), where contracts are concluded by electronic means, the service provider shall provide information in a clear, comprehensible and unambiguous manner to the recipient of a service unless it has been agreed by the parties who are not consumers.

### **3.2.2 Pre-contractual Information Requirements for Distance Contract**

Traders shall make information available to consumer in a clear and comprehensible characteristics before they are being bound by the contract of the following information.<sup>100</sup> The information would be considered as "available" when its accessibility is acknowledged by the average consumers.<sup>101</sup>

- (1) The main characteristics of the goods or service
- (2) The information about trader; trader's identity and contact details, the exact established geographical location, telephone and fax numbers, e-mail address, trade registration number, VAT number, any professional body or similar institution which the trader is registered.

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<sup>100</sup> The Consumer Contracts (Information, Cancellation and Additional Charges) Regulation 2013, Schedule 2, Information referred to distance and off-premises contracts

<sup>101</sup> The Consumer Contracts (Information, Cancellation and Additional Charges) Regulation 2013, art.8

(3) The total price and any additional charges include taxes, delivery charges and any other costs; if the total price of goods or service cannot be calculated in advance, the calculation manner should be provided. The total costs for each billing period or the total costs per month in case of a contract which is not able to determine the fixed period. The total costs of the process to conclude the contract is higher than a basic rate.

(4) Time of delivery or the beginning of the service

(5) Arrangements for payment, Complaint handling policy, after-sales services, financial guarantees and legal guarantees, if applicable.

(6) The duration of the contract if applicable, and the condition to terminate the indetermination contract or the contract that is to be automatically extended.

(7) Codes of conduct.

(8) Out-of-court complaint, redress mechanism and the process to have its access, if applicable.

(9) The cost of returning the goods, in case of a consumer exercises the right of withdrawal.

(10) The languages offered for the conclusion of the contract.<sup>102</sup>

(11) In sales contract, a notification that the trader has duty by law to provide the goods in accordance with the contract shall be indicated.

(12) The minimum duration of the contract.

(13) If the right to withdraw from the contract exists, the trader shall provide the information regarding to the existence of the right of withdrawal, the conditions, time limit and the process to exercise that right in addition to the cancellation form. However, in case where the right of withdrawal is absence, the trader shall provide the information that the consumer is not entitled that right or the conditions under which the right to cancel could be lost.

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<sup>102</sup> The Electronic Commerce Regulations 2002, art.9(1)(d)

FIGURE 3.4: Model cancellation form specified by English law

B. Model cancellation form

To [here the trader's name, geographical address and, where available, fax number and e-mail address are to be inserted by the trader]:

I/We [\*] hereby give notice that I/We [\*] cancel my/our [\*] contract of sale of the following goods [\*]/for the supply of the following service [\*],

Ordered on [\*/received on [\*],

Name of consumer(s),

Address of consumer(s),

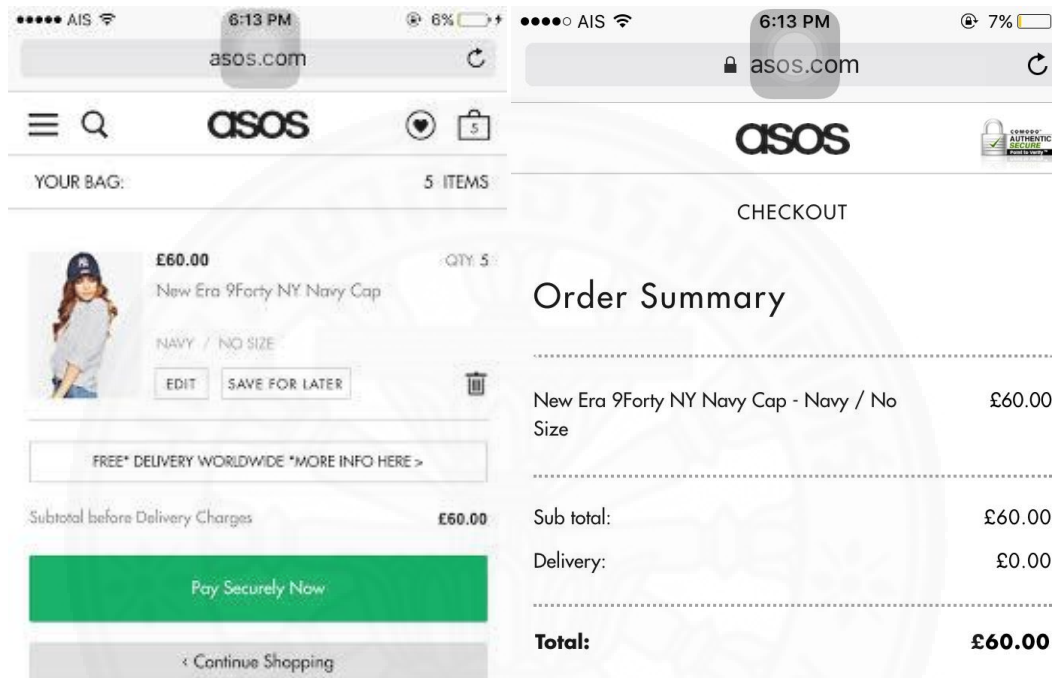
Signature of consumer(s) (only if this form is notified on paper),

Date

[\*] Delete as appropriate.

Source: The Consumer Contracts (Information, Cancellation and Additional Charges) Regulation 2013, Schedule 3

FIGURE 3.5: The example of pre-contractual information provided before concluding the contract on mobile phone, through e-commerce method, which the space allowance to display the information is limited; the main characteristic, trader's trading name, total price.

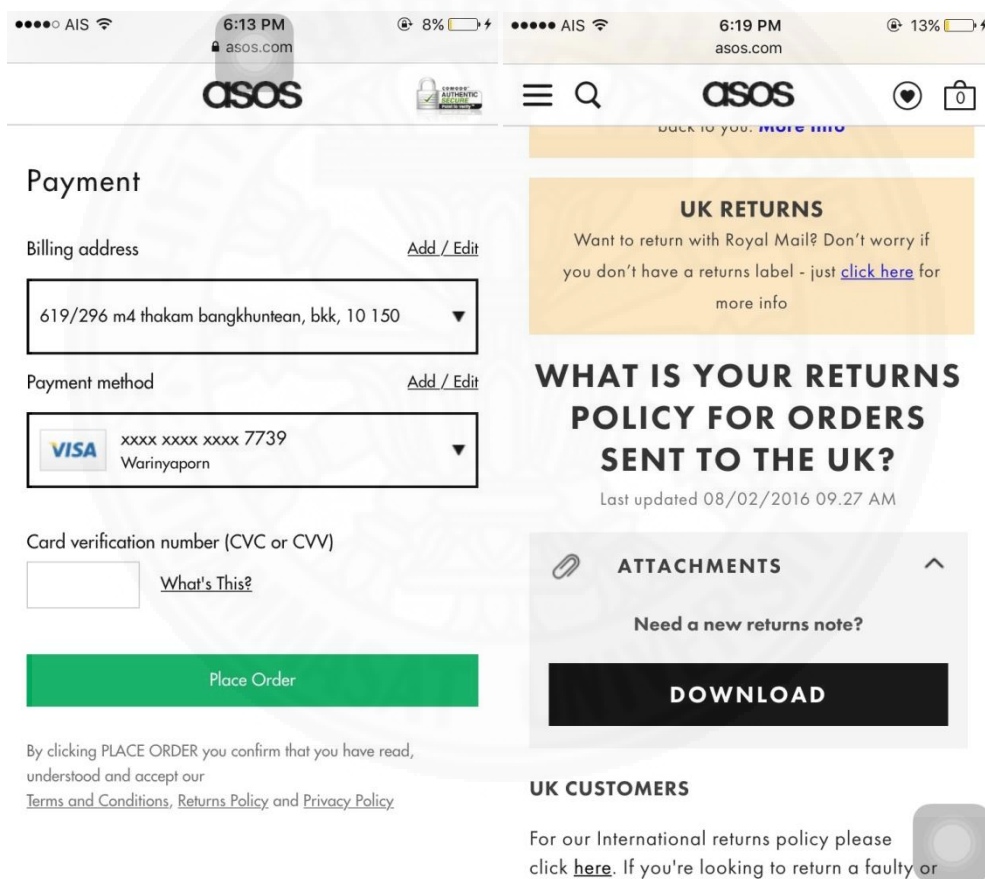


Source: <http://www.asos.com/new-era/new-era-9twenty-adjustable-cap-ny-yankees/prod/pgeproduct.aspx?iid=6438131&clr=Blue&SearchQuery=new+era+cap&pgesize=36&pge=0&totalstyles=67&gridsize=3&gridrow=3&gridcolumn=1>

This page provides information concerning the main characteristic of the goods. As can be seen on the photo, the model wearing the particular product on the sales purpose, a cap, together with the color information and a statement of “NEW ERA 9 Forty NY Navy Cap” describing the characteristic of the cap. Also, it provides the trader's trading name as “ASOS”. After clicking on the “pay securely now” button, the page will lead to the check out process.

In the check-out process, the trader provides the additional information concerning the total costs including delivery charge. After this process, the page will lead to the payment procedure.

FIGURE 3.6: The example of pre-contractual information provided before concluding the contract on mobile phone, through e-commerce method, which the space allowance to display the information is limited; payment method, the right to cancel.




Source: [http://www.asos.com/customer-service/customer-care/help?help=/app/answers/detail/a\\_id/69](http://www.asos.com/customer-service/customer-care/help?help=/app/answers/detail/a_id/69)

This page the trader provides the information concerning the returning policy and the withdrawal form as per attached file.

FIGURE 3.7: The cancellation form of asos.com

ORDER DATE	ORDER NUMBER






### WHAT YOU ORDERED




QTY	PRODUCT CODE	DESCRIPTION	SIZE	REFUND	REASON CODE	EXCHANGE	NEW SIZE	NEW COLOUR	REASON FOR RETURN
									<ul style="list-style-type: none"> <li>1. Looks different to image on site</li> <li>2. Ordered more than one size</li> <li>3. Arrived too late</li> <li>4. Poor quality/faulty</li> <li>5. Doesn't fit properly</li> <li>6. Doesn't suit me</li> <li>7. Incorrect item received</li> <li>8. Parcel damaged on arrival</li> </ul>

#### RETURN OR EXCHANGE SOMETHING FOR FREE

Items can be returned in their original condition within 28 days of receiving your order for **FREE!** Exchanges only apply for the same item in a different size or colour.

Send your unwanted items back using your preferred returns service:

#### HOW TO RETURN TO US:

- ① [Print](#) and complete this form, then pop inside your parcel
- ② Create your return by following the online steps at:  
**[WWW.ASOS.COM/UKRETURNS](http://www.asos.com/ukreturns)**
- ③ Print and attach your shipping label to the outside of your parcel.  
[Not required for Doddle, To-You and Pass My Parcel.]
- ④ Send with your chosen return service.  
Returns will be processed within 7 days from the date of return.

Source:

<http://asos.custhelp.com/ci/fattach/get/15296803/0/filename/United+Kingdom+-+Returns+Note.pdf>

### 3.2.3 Additional Pre-Contractual Information Requirements for the Contract concluded by Electronic Means

Before the order being placed, trader shall provide the following information to the consumer;

- (1) Information concerning the order confirmation button<sup>103</sup>
- (2) Whether service provider will collect the contract concluded and whether it is accessible by the consumer

<sup>103</sup> The Consumer Contracts (Information, Cancellation and Additional Charges) Regulation 2013, Schedule 2

(3) Service provider shall provide the technical procedure of the identifying and correcting input errors before an order will be placed,<sup>104</sup> to allow customers to correct any errors in their order.

(4) Technical steps to proceed in order to conclude the contract<sup>105</sup>

Consumers, as a result, shall gain awareness of their involvement and commitment in any contractual transactions.

Critically, if the contract conclusion's procedure requires consumers to activate a button or any similar options, or if the order needs to be confirmed by activating a button, for an instant option to proceed for the further step, the button must be clearly stated or labelled with the simple and unambiguous phrases by trader so that consumers recognize their obligation to pay while confirming their order<sup>85</sup>. Moreover, the Consumer Rights Directive requires trader to make sure that consumer clearly accepts the condition that the placement of the orders being led to the payment. In doing so, as mentioned earlier, this step is required to be remarkably seen and recognized by consumer in the purchasing process such as the words labelled on the purchasing button. Whether service provider will collect the concluded contract and whether it is accessible.<sup>106</sup>

If the conclusion of the distance contract is made by electronic medium which entails consumer to the payment, the following information needs to be available noticeably and clearly 'directly before' the placement of an order<sup>107</sup>:

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<sup>104</sup> The Electronic Commerce Regulations 2002, art.9(1)(c)

<sup>105</sup> The Electronic Commerce Regulations 2002, art.9(1)(a)

<sup>106</sup> The Electronic Commerce Regulations 2002, art.9(1)(b)

<sup>107</sup> The Consumer Contracts (Information, Cancellation and Additional Charges) Regulation 2013, art.14(2)

- (1) The main characteristics of goods and services<sup>108</sup>;
- (2) The total price, either total amount or in the manner of calculation<sup>109</sup>; including the charges of delivery<sup>110</sup>;
- (3) The total costs for each billing period, in case of a contract being unable to determine the fixed period<sup>111</sup>;
- (4) The duration of the contract, if applicable; or if the contract period is indeterminate, the conditions of termination shall be applied<sup>112</sup>; and
- (5) The minimum duration regarding to obligation of consumers, if applicable<sup>113</sup>.

To prove that whether trader has complied with the information requirements specified by this regulation, the burden of proof shall be on trader.<sup>114</sup>

The conclusion of the distance contract that is made through the limited space or time to show the information as a means of distance communication, traders shall make available of the contract information about goods and service to consumer in a clearly and comprehensibly characteristic before they are bound by the contract as follows:

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<sup>108</sup> Information referred to distance and off-premises contracts of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulation 2013, Schedule 2 (a)

<sup>109</sup> Id. at Schedule 2(f)

<sup>110</sup> Id. at Schedule 2 (g)

<sup>111</sup> Id. at Schedule 2 (h)

<sup>112</sup> Id. at Schedule 2 (s)

<sup>113</sup> Id. at Schedule 2 (t)

<sup>114</sup> Information referred to distance and off-premises contracts of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulation 2013, art.17(1)



- (1) The main characteristics of the goods or service, where applicable
- (2) Trader's identity such as trading name of trader
- (3) The total price and any additional charges include taxes, delivery charges and any other costs. If the total price of goods or service cannot be calculated in advance, the calculation manner should be provide
- (4) The total costs for each billing period or the total costs per month in case of a contract which is not able to determined the fixed period
- (5) If consumers are entitled the right to cancel, the conditions, time restriction and process to exercise such right
- (6) The duration of the contract, if applicable and the condition to terminate the indetermination contract or the contract that is to be automatically extended

The other information required by Schedule 2 of the Consumer Contracts Regulation 2013 can be done with other appropriate ways.

#### **3.2.4 The Binding Nature of Pre-contractual Information**

Any information required by this legislation and provided by traders to consumers shall be accounted as a part of the term of the contract. Any change occurred before or after integrating into the contract shall not be effective if both parties, herein trader and consumer, do not agree upon the contract mutually.<sup>115</sup>

The information of the characteristics of goods and service provided by trader, altogether with other detail of the goods shall be treated as a term of contract. If there is any breach of the pre-contractual information by the trader, it means the breach of the contract. Thus, the confirmation of the contract shall

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<sup>115</sup> The Consumer Contracts Regulations 2013, art.13(6),(7)

include all of the pre-contractual information according to Schedule 2 of The Consumer Contracts (Information, Cancellation, Additional Charges) Regulations 2013 unless trader has provided this on a durable medium before the conclusion of the contract<sup>116</sup> in order to enable the consumer to verify any of the discrepancies information between the terms of the contract against the pre-contractual information. If the trader already provided that information prior to the conclusion of the contract, this step maybe omitted.

In this case, the confirmation of the contract should be acknowledged within an appropriate period of time after the contract concluded, regardless to any circumstances;

(a) not later than the delivery time of any goods supplied under the contract, and

(b) before performance begins of any service supplied under the contract.

The confirmation is effective as soon as when the trader has distributed it or made it available to consumers.

### **3.2.5 Statutory Remedies for Consumer**

The Consumer Rights Directive imposes various information requirements, it also specifies the specific consequences when trader fails to provide information in some cases, however, the directive usually leaves the duties on the remedies available for the consumers where there is any infringement of the information requirements to the Member States' internal law<sup>117</sup> as specified in article 24 of the Consumer Rights Directive, which requires Member States to prescribe penalties for any disobedience of the information requirement, in which the penalties must be "effective, proportionate and dissuasive". Thus, it is necessary to study on

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<sup>116</sup> The Consumer Contracts Regulations 2013, art.16(2)

English law that which remedies are available for consumers when the information requirements are breached.

### **3.2.5.1 In case of the information regarding the Main Characteristics is not complied with**

In UK law, the right to enforce terms about goods and services are different depending on the statutory rights that are breached and the nature of goods and services. When the goods or service differs from the information concerning main characteristics, the statutory rights are as follows:

#### **(1) Statutory rights under a goods contract**

In respect of goods, the Consumer Rights Act 2015 provides consumers' rights when the goods are not conform to information concerning the main characteristics provided by a trader supposed to be treated as an composing part of the contract<sup>118</sup>, the consumer's rights available are as follow<sup>119</sup>:

##### **a) Short-term right to reject<sup>120</sup>**

The right to reject means that the consumer has the right not to accept the goods and terminate the contract. After the consumer has exercised the right to reject, the consumer shall have duty to make available of the goods for trader's collection or return the goods to the trader, if agreed. The trader shall bear the cost of returning of the goods and refund the same amount and same form of money the consumer paid to consumer without undue delay with the latest date of an agreement made by the trader allowing consumers to receive the refund within 14 days.

The short-term right to reject the goods can be exercised within 30 days counting from the day after the following have occurred:

- Trader has transferred ownership of the goods to consumer
- The goods have been delivered

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<sup>118</sup> Consumer Rights Act, art.11(4)

<sup>119</sup> Consumer Rights Act, art.19(3)

<sup>120</sup> Consumer Rights Act, art.20, 22

- If there is any action required by the consumer before the goods can be used and the action has been completed by the trader, after the trader has notified the consumer of such action.

In addition, this section additionally provides that the 30 days' period will be expired during the period that the consumer requests a repair or a replacement. This period is called the waiting period. The waiting period starts counting from the day the consumer requests or agrees to the trader for a repair or a replacement of the goods and when the consumer receives the repair or replacement of the goods, the waiting period immediately ends.

However, after the requisition of repair or replacement, if the goods still do not conform to the contract, the consumer entitles the remaining period of the time limit for short-term right to reject or 7 days after the end of the waiting period, whichever is longer.

#### **b) Right to repair or replacement<sup>121</sup>**

The consumer is entitled to the right to repair or replace the goods when the goods is faulty, without any additional expenses. If the consumer chooses to make such requirements, he or she may not ask for the other of these including the short-term right to reject as the consumer must allow the trader to complete the chosen request within the reasonable time if it would not cause significant inconvenience to the consumer. However, if repair or replacement of the goods is impossible or disproportionate comparing to the other of those remedies, the consumer cannot require neither of such remedies but the right to a price reduction or the final right to reject.

The right starts at the same period of the short-term right to reject. So, it depends on consumer to choose a repair or replacement as a choice to the 30 day right to reject.<sup>122</sup>

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<sup>121</sup> Consumer Rights Act, art.23

<sup>122</sup> Department for Business Innovation & Skills, "*Consumer Rights Act : Goods Guidance for Business*",

<https://www.businesscompanion.info/sites/default/files/The%20sale%20and%20suppl>

**c) Right to a price reduction or the final right to reject<sup>123</sup>**

If the consumer has either required for repair or replacement but it was impossible or if the goods still do not conform to the contract due to one of the following situations:

- The trader failed to fix the problem after provided one repair or one replacement
- The trader can fix the primary problem but the goods still do not conform to the contract because a new problem has appeared
- The trader failed to provide it within a reasonable time after the consumer has requested for the repair or replacement, or the failure causing inconvenience to the consumer,

The consumer is entitled to the right either to keep the goods and request for a reduction in price, or reject the goods and request for a refund which may be deducted due to the depreciation of the goods after the delivery to the consumer. However, if the exercise of the final right to reject is made within 6 months, after trader has transferred ownership of the goods to consumer, the goods have been delivered and if there is an action required by the consumer before the goods can be used and the action has been completed by the trader, after the trader has notified the consumer of such action, the trader must provide a full refund to the consumer. However, there is an exemption to the 6-month rule refunding in full amount in case that the goods comprise of a motor vehicle or the rule causes significant damage to traders, the Secretary of State may have power to stipulate an order to extend the exemption.<sup>124</sup> Then, after the 6-month period, the trader may consider a deduction of reimbursement regarding to the consumer's use of the goods.

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y%20of%20goods\_ALL\_BIS\_GOODS\_GUIDANCE\_SEP15.pdf (accessed on February 20, 2015)

<sup>123</sup> Consumer Rights Act, art.20 and 24

<sup>124</sup> "Consumer Rights Act, Explanatory Note",  
[http://www.legislation.gov.uk/ukpga/2015/15/pdfs/ukpgaen\\_20150015\\_en.pdf](http://www.legislation.gov.uk/ukpga/2015/15/pdfs/ukpgaen_20150015_en.pdf)  
 (accessed on June 20, 2016)

FIGURE: 3.8: Goods Core Remedies Scheme



Source: Department for Business Innovation & Skills

[https://www.businesscompanion.info/sites/default/files/The%20sale%20and%20supply%20of%20goods\\_ALL\\_BIS\\_GOODS\\_GUIDANCE\\_SEP15.pdf](https://www.businesscompanion.info/sites/default/files/The%20sale%20and%20supply%20of%20goods_ALL_BIS_GOODS_GUIDANCE_SEP15.pdf)

## (2) Statutory rights under a service contract

The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 stipulate trader's duty to make available of the certain information concerning service before the consumer is bound by a contract. The information required by the Regulations can be split into two categories: information relating to the performance of the service and other information, both are

supposed to be treated as a term of the contract.<sup>125</sup> In case of the service does not comply with the contract, the remedies applied to those information will depend on which information that the trader have not complied with. However, this part will explain the remedy concerning information relates to the performance of the service as follows:

If a trader does not perform the service in accordance with the given information relates to the performance of the service, the consumer has the right to require for the repeat performance or the price reduction.

**a) The right to require repeated performance**

The consumer has the right to request the trader to re-perform the service without any expenses. If the consumer asks to do so, the trader must perform the services wholly or partially depending the necessity contributing to service's conformity completion. Also, the service must be provided within a reasonable time and without causing significant inconvenience to the consumer. However, in case of the re-performance is impossible, the consumer cannot request such performance from the trader.

**b) The right to price reduction**

In case of the consumer cannot request for re-performance as it is impossible or the consumer has the right to request for re-performance but it causes significant inconvenience to the consumer or the trader does not make it within a proper time, the consumer shall entitle the right to price reduction instead. The right to price reduction is the deduction of the service price in an appropriate amount or in the full amount, where appropriate. Once the consumer and the trader have agreed for price reduction, the trader must give the refund that the consumer has already paid without undue delay which is within 14 days after the date agreed upon. Unless the consumer agrees otherwise, the refund must be in the same kind as the consumer used to pay for the service.<sup>126</sup>

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<sup>125</sup> Consumer Rights Act, art.50(3)

<sup>126</sup> Consumer Rights Act, art.56(3),(4),(5)

In conclusion, if the trader is in breach of pre-contractual information concerning the main characteristics of goods, digital content and services, it is considered as a breach of contract as the pre-contractual information required to be treated as a part of the contract. The consumer is entitled to the right as follows:

**Table 3.1: The Statutory Rights and Remedies under the United Kingdom Law in case of the Information regarding the Main Characteristics is not Complied with**

Statutory rights	Remedies
Goods do not conform to information regarding main characteristics	<ul style="list-style-type: none"> <li>• The short-term right to reject</li> <li>• The right to a repair or replacement</li> <li>• The right to a price reduction or the final right to reject</li> </ul>
Service is not performed in line with information that has been given regarding main characteristics of the service	<ul style="list-style-type: none"> <li>• The right to repeat performance</li> <li>• The right to a reduction in price</li> </ul>

Besides the case where the goods or service does not conform to the information specified in the contract but the trader fails to conform to the information requirements, consumers could make a complaint about the contravention of this requirement to the concerned enforcement authority or the court. Then, they may grant an injunction, interdict or order on such terms, where appropriate, in order to assure that this requirement shall be complied with.<sup>127</sup>

<sup>127</sup> The Consumer Contracts (Information, Cancellation and Additional Charges) Regulation 2013 art. 44, 45



### **3.2.5.2 In case of the Information regarding Price and any Additional Charges is not complied with<sup>128</sup>**

According to The Consumer Contracts (Information, Cancellation and Additional Charges) Regulation 2013, a trader has duty in providing the price as follows before the contract is concluded:

- 1) Price including any additional delivery charges and any other costs or if those charges cannot be calculated in advance, the calculation manner should be provided.
- 2) The total costs per billing period in the contract which the duration is indeterminate or a contract contained a subscription.
- 3) The cost of returning in case that the consumer exercises the right to cancel.

In case of the information regarding price and any additional charges is not complied with, those costs shall not be borne by the consumer.

### **3.2.5.3 In case of the Information regarding the Right of Withdrawal is not complied with<sup>129</sup>**

The Consumer Contracts (Information, Cancellation and Additional Charges) Regulation 2013 stipulates trader's duty in providing the right to withdraw from the contract, if it exists. And also the conditions time limit and process to exercise that right. In case of the information regarding the right of withdrawal is not complied with, the effect of the breach depends on two circumstances as follows:

- 1) In the period of 12 months starting from the first day that the withdrawal right exists<sup>130</sup>, the trader provides the consumer of such

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<sup>128</sup> The Consumer Contracts (Information, Cancellation and Additional Charges) Regulation 2013 art. 13(5)

<sup>129</sup> The Consumer Contracts (Information, Cancellation and Additional Charges) Regulation 2013, art.31

information concerning the right to cancel; the cancellation period ends at the end of 14 days after the consumer receives the information.

2) If the trader does not provide information concerning the right to cancel within 12 months after the day it would have ended in case of trader provides such information before consumer is bound by the contract; the cancellation period ends

#### **3.2.5.4 In case of the Information regarding the Order Implies an Obligation to pay is not complied with<sup>131</sup>**

When the consumer places the order, the trader must reassure that the consumers explicitly know their obligation to pay for that order. If the process to place an order involves activating a button or a similar function, the trader must make sure that the consumer acknowledges the obligation to pay in an apparent manner by the word “order with obligation to pay” or the any other word with the same meaning that placing an order involves automatically an obligation to pay. In case of the information regarding the order implies an obligation to pay is not complied with, the consumer is not bound by the contract.

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<sup>130</sup> The Consumer Contracts (Information, Cancellation and Additional Charges) Regulation 2013, art. 30

- (2) If the contract is— (a) a service contract, or (b) 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.
- (3) If the contract is a sales contract and none of paragraphs (4) to (6) applies, the cancellation period ends at the end of 14 days after the day on which the goods come into the physical possession of— (a) the consumer, or (b) a person, other than the carrier, identified by the consumer to take possession of them.
- (4) If the contract is a sales contract under which multiple goods are ordered by the consumer in one order but some are delivered on different days, the cancellation period ends at the end of 14 days after the day on which the last of the goods come into the physical possession of— (a) the consumer, or (b) a person, other than the carrier, identified by the consumer to take possession of them.
- (5) If the contract is a sales contract under which goods consisting of multiple lots or pieces of something are delivered on different days, the cancellation period ends at the end of 14 days after the day on which the last of the lots or pieces come into the physical possession of— (a) the consumer, or (b) a person, other than the carrier, identified by the consumer to take possession of them.
- (6) If the contract is a sales contract for regular delivery of goods during a defined period of more than one day, the cancellation period ends at the end of 14 days after the day on which the first of the goods come into the physical possession of— (a) the consumer, or (b) a person, other than the carrier, identified by the consumer to take possession of them.

<sup>131</sup> The Consumer Contracts (Information, Cancellation and Additional Charges) Regulation 2013, art.14(3),(4),(5)

### **3.2.5.5 In case of the Information other than the Information regarding the Main Characteristics is not complied with**

When the consumer supplied inaccurate information other than the main characteristic of goods or service, the statutory rights are as follows:

#### **1) Statutory rights under a goods contract**

According to the Consumer Contracts (Information, Cancellation and Additional Charges) Regulation 2013, section 13 indicates traders' duty in providing information to the consumer before the contract is made. The information other than information about the goods which is the main characteristics of goods being treated as a part of the contract<sup>132</sup>, when trader is in breach of such provision, the consumer has the right to claim for any cost incurred as a result of the breach up to the full amount of the price being paid for the goods. In other words, the full amount of the good's value will be reimbursed to the consumer.<sup>133</sup> If the cost incurred from the breach exceeds this amount, the consumer may be able to seek for other remedies.<sup>134</sup>

#### **2) Statutory rights under a service contract**

If the information other than the main characteristics of service, information about the trader as an example, is not complied with, the consumer is entitled to the price reduction in an appropriate amount up to the full being paid by the consumers. And the refund must be in the same form, which could be any facility that the consumer uses by way of payment.<sup>135</sup>

The statutory right of the consumer in case of the trader involving in breach of pre-contractual information concerning information other than the main characteristics of goods and service could be summarized as follows:

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<sup>132</sup> Consumer Rights Act, art.12(2)

<sup>133</sup> Consumer Rights Act, art.12(5)

<sup>134</sup> Consumer Rights Act, art.19(9)

<sup>135</sup> Consumer Rights Act, art. 56(5)

**Table 3.2: The Statutory Rights and Remedies under the United Kingdom Law in case of the Information other than the Information regarding the Main Characteristics is not complied with**

<b>Statutory rights</b>	<b>Remedies</b>
In case of goods: conformity with the information other than the main characteristics under a goods contract	The right to recover the costs incurred from the trader, up to the amount the consumer has paid
In case of service: conformity with the information other than the main characteristics under a service contract	The right to recover the costs incurred from the trader, up to the amount the consumer has paid

In addition, the case where the information other than the main characteristics of the goods or service specified in the contract does not comply with but the trader does not conform to the information requirements, consumers could make a complaint about the contravention of this requirement to the concerned enforcement authority or the court. Then, they may grant an injunction, interdict or order on such terms, where appropriate, in order to assure that this requirement shall be complied with.<sup>136</sup>

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<sup>136</sup> The Consumer Contracts (Information, Cancellation and Additional Charges) Regulation 2013, art.44, 45

**CHAPTER 4**

**AN ANALYSIS OF THE PROBLEMS RELATED TO CONSUMER PROTECTION REGARDING PRE-CONTRACTUAL INFORMATION ON E-COMMERCE UNDER THAI LAW**

The survey of Thailand's Internet User Profile 2015 had survey from 10,434 participants. It shows that the major reason that leads them to make a decision to purchase goods and services online is the information regarding goods and services provided on the website.<sup>137</sup> On the other hand, the rest of the participants who decided not to buy through online channel due to the following reasons; first, they afraid of being cheated (57.6%). Second, they have no chance to touch or try on the goods before they make a purchase (42.1%). Third, there are no goods that they want (32.2%). Fourth, they like to go shopping by themselves (20.8%). Fifth, they have no opportunity to meet trader in a person (18.2%). The other problems (4.5%).<sup>138</sup>

As the pre-contractual information on e-commerce might lead to some after-purchase problems, the survey of Thailand's Internet User in 2015 represents that when consumers have encountered with after-purchase problems, only some of them choose to claims for damages. The reason of their ignorance is because the value is not high enough; Supreme Court judgment relating to section 162 is mostly about immoveable property because of its high value and worthiness to bring the case to the court as its high cost of procedure unlike moveable property. The other reasons stated on the survey are as well a waste of time, the procedure to make a complaint or where to make a complaint is unknown by a consumer and the others which could be calculated in 7.2 percent, 5.0 percent, 6.4 percent, 1.1 percent respectively.<sup>139</sup>

In order to support the fact that the claim a consumer could make is not high, there is the statistic of the average amount of money spent per purchased of goods and services made in the internet in 2013 amounted just only 2,557 baht. 40.7

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<sup>137</sup> Electronic Transactions Development Agency (Public Organization), "*Thailand Internet User Profile 2015*", <https://www.eta.or.th/publishing-detail/thailand-internet-user-profile-2015.html>. (accessed on November 11, 2015)

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

percent of consumers spent about 501-1,000 baht per one purchase, and about the 33.7 percent spent between 1,001-5,000 baht per purchase.<sup>140</sup> In 2014, Electronic transaction through mobile devices has become popular as Electronic Transactions Development Agency has collected information of Thailand's internet user profiles. The survey result shows that the highest amount of money people use to purchase goods and services through mobile devices are 10,000 baht for 6.8%, not exceeding 1,000 baht per purchase for 42.0%.<sup>141</sup> From the past-2-years statistics, it shows that the value per purchase is not high enough, when damage occurred; bringing the case to the court is not recommendable as the cost of procedure is costly or may cost greater than the amount that a consumer would claim for the compensation.

According to the characteristics of direct marketing sales through e-commerce, where consumer makes purchasing decision based on the description provided by trader and cannot see or investigate the products physically. However, the requisition of advanced payment from consumers to traders can be assumed that the trader has a greater chance to not act complying with their performance while the consumer has already done their payment reciprocally. This decreases the bargaining power of consumers. In the case of the trader refuses their performance as promised in the contract, the consumer, by then, shall not be able to claim their right of retention as a statutory tool to negotiate with the trader. As a result, the breach of the contract by trader can happen easily since the trader normally receives the payment in advance, in which there is no risk for trader upon this issue.

As can be seen recently, there is no law and regulations that shall be implemented to protect consumers on some issues regarding to the specific pre-contractual information. In turn, problems may arise due to lack of knowledge on necessary information before entering the contract, which can be analyzed in this chapter as follows;

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<sup>140</sup> Electronic Transactions Development Agency (Public Organization), *“Thailand Internet User Profile 2013”*, <https://www.eta.or.th/publishing-detail/thailand-internet-user-profile-2013-th.html>. (accessed on August 25, 2015)

<sup>141</sup> Electronic Transactions Development Agency (Public Organization), *“Thailand Internet User Profile 2014”*, <https://www.eta.or.th/publishing-detail/thailand-internet-user-profile-2014-th.html> (accessed on August 25, 2015)

#### **4.1 Problems related to the Pre-Contractual Information concerning Process to Conclude the Contract**

The common problem which usually occurs in trading transaction through e-commerce is that the consumer places an order by mistake. The complexed process of products' ordering might cause confusion to the consumer. When placing an order, a consumer has to click on a purchase button provided on a website. Unfortunately, this button might not be explicitly labeled as an obligation to pay. Some of the consumers may unintentionally buy the product, but just keep searching for the information of the product they are interested in, or they are just browsing for the product they want and unintentionally clicking on a button that is used to buy on a website. Sometimes, trader's website may conceal this with an ambiguous phrase, such as 'register', 'confirm' or 'order now' and in addition a trader may put on some redundant phrases which may, in a direct way, hide the obligation-to-pay-phase.

In Thai law, nothing mentioned about the pre-contractual information requirements for the order-to-be-confirmed button. Thus, it is possible that consumers could buy the goods or service without any knowledge that they are bound by the contract or made a payment already. In the other word, the consumer could conclude the contract under a mistake. Entering the contract by mistakenly declaring the intention by consumers could be applied to the declaration of a mistake as to a juristic act which the juristic act could be voided and the parties shall return the property in accordance to an undue enrichment of the code. However, it is unlikely to prove in practice that consumers have placed their orders unintentionally, and normally traders believe that consumers place their orders with intention and no compensation shall be reimbursed.

Comparing the Thai law to the rules of the foreign laws which are article 10(a) of E-commerce Directive and article 9(1)(a) of the Electronic Commerce Regulations 2002, it indicates trader's duty in providing information concerning technical steps leading to conclude the contract in order to make the consumer aware of the process leading to their involvement and the point of their commitment.

Moreover, article 10(c) of E-commerce Directive, article 9(1)(c) of the Electronic Commerce Regulations 2002 specifies trader's duty in providing information of the technical procedure in identifying and correcting input errors before placing an order, which take reasonable steps to allow customers to correct any errors in their order.

Furthermore, article 8(2) of the Consumer Right Directive and article 14(4) of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulation 2013 also requests the information concerning the order-confirming button. Traders shall make sure that consumer clearly accepts the condition that the placement of the orders being led to the payment. In doing so, as mentioned earlier, this step is required to be easily seen and recognized by consumers in the purchasing process such as the words labeled on the purchasing button as an instance 'order with obligation to pay'. If the trader fails to make available of the information concerning the confirming button that it is under an obligation to pay, the contract or order then shall not be bound by the consumer.

From the study of foreign laws, several organizations support the idea of the provisions on information requirements, which are perceived as a good exercise for a firm in an increases consumers' confidence and willingness of consumers to engage in the online activity. Some of those information; the technical steps leading to the conclusion of the contract influences on consumer's voluntariness to engage in doing business. This statement can be as well interpreted that the information requirement of the technical steps navigating to the conclusion of the contract has a positive impact on consumer's purchasing engagement on e-commerce. Additionally, it is to prevent consumers to accidentally conclude the contract by allowing consumers to correct their errors during ordering process. Regarding all the reasons mentioned above, the technical step to follow to conclude the contract, information concerning the order confirmation button and the information concerning the technical procedure of the identifying and correcting input errors are considered as material information on e-commerce which Thai law should then stipulate trader's duty in providing such information pre-contractually.



## 4.2 Problems related to the Content of Pre-Contractual Information

### 4.2.1 Pre-contractual Information Concerning Identity of Traders and Contact Details

The court in New York has defined geography on the internet that it is completely intangible to geographic classification. Most users who access the internet never know the physical location of internet resources. Actually, in computing, those internet resources do have “addresses” on the network which are logical addresses instead of geographical addresses in real spaces.<sup>142</sup>

In addition, the geographical origin of internet resources has no dependable way to verify, for example, creating from an e-mail or from a ‘dot.com’ web address. A Web address or e-mail address may end up with an indication of geographical origin such as ‘.th’ or ‘.fr’ indicating an origin of such address which are in Thailand or in France respectively. However, it is a primary evidence of the geographical origin which could be in the contrary as it could not be assured that these resources come from which countries. For example, the German shop has a geographical address in Germany may end their Web-site with ‘.uk’ in order to sell their goods to UK consumers.<sup>143</sup> The ambiguity of the trader identity may mislead and cause problems of both pre- and post- purchases. Thus, it is difficult for consumers to know traders’ identity from the indication of web addresses if trader does not provide his identity and contact details on his website.

As section 29 of the Direct Sales and Direct Marketing Act B.E.2545 stipulates that the provisions of the law on Consumer Protection in respect of Consumer Protection against Advertising shall apply to the data communication for offering to sell goods or services by the direct marketing businessman. Considering from Consumer Protection against Advertising, section 25 states that trader are obliged to inform the status and other details about the trader to the consumer only

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<sup>142</sup> Michael Geist, “*Cyber Law 2.0*”, [http://www.bc.edu/content/dam/files/schools/law/lawreviews/journals/bclawr/44\\_2/03\\_TXT.htm](http://www.bc.edu/content/dam/files/schools/law/lawreviews/journals/bclawr/44_2/03_TXT.htm). (accessed on February 1, 2016)

<sup>143</sup> Dickie, *supra* note 5

upon the prescription of Committee on Advertisement. Accordingly, the sale of the other goods and services besides from the prescription, the trader is not obliged to provide information about himself to the consumer.

Considering to Thai law and regulations, specified in Direct Sales and Direct Marketing Act B.E.2545 section 30, trader shall provide consumer the sale document of their goods and serviced including trader's name, consumer's name on it. This statements implies to the knowing of consumers on traders' information after the contract would be concluded. Also, doing business on e-commerce, consumer is expected to make a payment in advance for their orders. Moreover, specific information of the traders might be limited and not enough to let consumers contact the trader when there is an emergency.

In addition, information about trader is regarded as a material matter in order to make a purchase as it is in connection with the execution of contract and the person who responsible for the conformity of the sale contract. Individual, or a party, is accounted as an essential element of a juristic act. If the consumer confirms the contract under a mistake, the contract shall be voided according to the CCC section 156. Both parties shall return the property as stated in an undue enrichment of the code as mentioned earlier.

A mistake as to a juristic act, when occurred, the burden of proof will be carried by consumers, considered as a plaintiff, according to the Civil Procedure Act.<sup>144</sup> This is to throw an incidence onto consumer, and can be interpreted that a problem solving is treated as a treatment, not a prevention. Therefore, defensive measure should be executed to prevent consumers from getting involved in a contract unknowingly. Elaborately, there shall be requirement of trader to provide pre-contractual information to consumers before the entering into contract formation containing the inevitable information including trading name, address, and contact point. This is to let consumers have confidence in their trade partners before any contract formation occurred.

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<sup>144</sup> The Civil Procedure Code, § 84

Considering from article 6(b) the Consumer Rights Directive and article 13 of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, they stipulate trader's duty to provide the information about trader in a clear and comprehensive manner; trader's identity and contact details, the exact established geographical location, telephone and fax numbers, e-mail address, trade registration number, VAT number, any professional body or similar institution which the trader is registered.

Meanwhile, under the law of the United Kingdom, according to article 19(5) the Consumer Rights Act 2015 specifies the remedy for the breach of such duty that if the trader does not provide an accurate information about himself, the consumer has the right to claim for any cost incurred as a result of the breach up to the full amount of the price paid for the goods so the consumer could receive a full refund.

According to the European Consumer Centre Germany, the trader's identity and contact information influence the consumer's buying decision.<sup>145</sup> As stated in Chapter 3, the Director of the Danish consumer organization, European Consumer Centre, also claims that the Directive generates better impact from the demand enhancing provisions; "The information obligations [...] may also enhance consumers' possibilities of complaining since they can for example write a physical letter of complaint and/or have a lawyer to meet up at the company's address in case of a larger conflict".<sup>146</sup> Thus, Thai law should regulate that the information of trader's identity and contact details needs to be provided by traders before the conclusion of the contract as an advantage for consumers.

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<sup>145</sup> European Commission, Supra Note 48, page 27

<sup>146</sup> European Commission, Supra Note 48, page 25

#### **4.2.2 Pre-contractual Information Concerning Main Characteristics of the Goods or Services**

Before purchasing any items, the description of characteristics, quality, durability, limitation, usability condition, caution of the goods are essential factors affecting on purchasing decision made by consumers. However, purchasing good and services through e-commerce channel, consumers will acknowledge these qualifications of the items or services from trader's description prescribed on their website only. It can be said that trader is the sole controller of the necessary information. Additionally, trader is revealed that they provide only positive and persuasive information. Though consumers thoroughly consider on the information, there is still a high risk in placing the order.

Regarding to the Thai law and regulations, if the trader does omit the necessary information for consumers purchasing decision on intention, this is compared to the fraud by silence, which in turn, the contract shall be voidable according to the CCC section 162.

Moreover, in the case of no provision stipulated the responsibility of trader on pre-contractual information over characteristics of goods and services, consumers might misunderstand the information into other directions. This may cause consumer to enter a contract transaction under a mistake as to a juristic act section 156 or a mistake as to quality of good or person section 157 depending on each situation mentioned earlier.

The remedies available for consumer under Thai law in case of the goods is not in accordance with the pre-contractual information by the trader, the consumers shall be entitled to the right to replace goods, the right to claim for compensation and the right to unilaterally terminate the contract.

Considering from article 6(1)(a) of the European Union Directive and article 13 of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, traders shall provide information about the main

characteristics of the goods or services, where applicable, to consumer in a clear and comprehensible characteristic before they are bound by the contract.

Under the law of the United Kingdom, according to article 19(3) of the Consumer Rights Act 2015, it specifies the remedy in case of the information provided by the trader concerning the main characteristics is not complied with. If the trader violates any of pre-contractual information concerning the main characteristics of goods, it is a breach of contract as that pre-contractual information required to be treated as a part of the contract. The consumer would have the right to exercise an enforcement of the terms about goods and service which are difference depending on the statutory right which is breached and the nature of goods and service.

In case of goods contract, the consumer is entitled the short term right to reject, the right to repair or replacement and the right to price reduction or the final right to reject.

In case of service contract, the consumer is entitled the right to require repeat performance and the right to price reduction is the reducing of the service price in an appropriate amount up to the full price, where appropriate when the consumer has right to require for re-performance but it caused significant inconvenience to the consumer or the trader does not make it within a reasonable time.

In addition to the case where the goods or service does not conform to the information specified for the pre-contractual stage but the trader does not conform to the information requirements, article 44 of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 stipulates that consumers could complain about the contravention of this requirement to the concerned enforcement authority or the court. Then, they may grant an injunction, interdict or order on such terms, where appropriate, in order to assure that this requirement shall be comply with.

According to the study, the evidence showed in the researches supports the importance of information transparency as the main concern expected from consumers.

Since consumers expect to make the right purchasing decision, the information on the nature of the products are decidedly required. For example, one of the researches from Office of Fair Trading indicates that consumer makes their purchasing decisions below optimal level due to lack of clear and accessible information. The competition of the market would occur when the traders provide transparent information about the quality of their products. With this reason, the information in regard of the main characteristics of the goods and services is crucial for consumer buying decision in which Thai law should specify trader's duty in providing this information pre-purchase.

#### **4.2.3 Pre-contractual Information Concerning Price**

If the total cost of a goods or service cannot be calculated in advance, the consumer would not be able to know the exact rate they should pay as they are not informed or communicated for the price calculation. For example, the telephone services cost is calculated on the actual usage. Sometimes, the price shown is not a final price; excluding tax, delivery costs and others additional cost. In addition, some goods or services could not determine the duration of the contract, such as subscribing TV channels and Wi-Fi. All of the three areas could cause the consumer problems in planning their expenses.

From the study of the current Thai law, the notification of the Central Commission on Prices of Goods and Services regarding the display of prices of goods or services B.E. 2558 controls the display of retail prices which must be shown the price per unit and other costs in a clear and complete manner. However, in this notification, there is no specification of total costs which might include, such as the prices of goods or services, taxes, freight, delivery, and postal charges.

In the case that trader only provides gross listed prices, not net prices that consumer should pay, given that the tax and additional charges are exclusive, the price shown on the website are perceived as a whole amount of payment consumers should pay. However, if trader provides no prices relating to the contract, but consumer enters to the contract and realize later that there are differences between the prices on website and the net price they should pay. Under Thai law, it could be considered that trader deceitfully persuade consumers to make a contract by causing consumer a mistake as to the price. As a consequence, the contract is formed but under a mistake as to the sale transaction.

Besides the provisions stipulated as mentioned above, there is still a mistake as to other factors. For example, a mistake as to the total cost, the Supreme Court judged within the decision 6103/2545 that the plaintiff declared his intention to sell a dispute of land at 52million baht, but the contract of the realty was made at 4million baht. The defendant knew the price is actually higher than 36million baht, and it is considered as a contract made under a mistake as to the price deceived by the broker. Although the mistake is not considered as a mistake as to a character of the juristic act, a mistake as to a person to be a partner of the juristic act or a mistake as to a property being an object of the juristic act, but the negotiated price is considered as essential as a property being an object of the juristic act. This resulted that plaintiff declared the intention under a mistake as to an essential element of the juristic act. Regarding to the CCC section 156, the act was void; section 172, the act was under the nullity and the property shall be processed as undue enrichment of the code; section 412, the restitution shall be fully returned.

However, in this case, the fact could potentially fall into either these two categories which are a mistake as to an essential element of a juristic act or by fraud where trader deceitfully pursue consumer over the price. According to Prof. Jeed Settabut, he stated that the most imperfection shall be mainly concerned because a void act, an act to be completely cancelled, has a greater imperfection than a voidable act, an act to be avoided.<sup>147</sup> Therefore, the contract made through

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<sup>147</sup> Sethaputra, *supra* note 15, at 218-220

e-commerce shall be void under a mistake as to essential element of a juristic act. The performance of the property made between two parties is considered as an undue enrichment of the code.<sup>148</sup>

As previously described in detail, an author personally believes that consumers shall have the right to know the price structure. The price is supposed to be the main factor influencing the buying decision of consumer. As a prevention of the complexity and difficulties to consumer, the information shall be thoroughly described. Otherwise, it would happen as it did to the court to consider if the act should be void, if the act is made under a mistake or even the act should be compensated under the condition of the undue enrichment of the code. Apparently, the information is crucial and consumers should have the right to know the explicit final price before they bound by the contract in order to evaluate their purchasing power.

From the study of the foreign laws which are article 6(e) of the Consumer Rights Directive and article 13(1)(a) of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, the objective of this Consumer Rights Directive is to reduce any hidden charges or costs on e-commerce deceived by the traders from occurring by the word “free” services and to encourage consumers on gaining an awareness of the final price completion. The information concerning price is being prescribed that the trader shall have duty to provide the total price before the consumer is bound by the contract; if the total price of goods or service cannot be calculated in advance, the calculation manner should be provided. Any additional charges include taxes, delivery, freight, postal charges. The payable charges should be provided in the case that those charges cannot be calculated in advance. If the trader fails to comply with the information requirement concerning the total price, the consumer shall not bear those charges or costs as specified in article 6(6) of the Consumer Rights Directive and article 13(5) of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.

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<sup>148</sup> Sumawong, *supra* note 41, at 142



All reasoning mentioned above manifest the significant of the information concerning the price, in which Thai law should specifies trader's duty in providing pre-contractual information concerning price including any additional charges.

#### **4.2.4 Pre-contractual Information Concerning Other Information included in Contract**

In reality, trader who knows better about the information refers to the goods and service may provide misleading information which prevents consumer from gathering accurate information and making an efficient choice. This would lead the consumers to exercise a decision differently from their incurred action. Moreover, consumers could be exploited from the consequences of concluding a contract without being well-informed of their rights, details of the goods and services, price or terms and conditions of the contract that can take advantages from them. For example, an exclusive clause of consumer's right or the contract term which states that trader has no responsibility for a replacement of goods, a refund or any defective or faulty goods in any case.<sup>149</sup>

Considering from the current Thai law which is applicable to the duty to provide contract details; the Direct Sales and Direct Marketing Act B.E. 2545 is the main statutory law to control e-commerce transaction referring to trader's duty to provide contract details. However, it is control only the process after the contract is concluded. The provision stipulates that the trader in a direct marketing transaction has duty to deliver specific document referring to goods or services transaction to the consumer. Furthermore, it specifies the content contained in such document has to be a perceptible Thai language statement, the name of the consumer and the trader, the date purchase, the date of delivery of the goods or service, and the right of withdrawal. The act has no provision specifying trader's duty to provide

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<sup>149</sup> Electronic Transactions Development Agency (Public Organization), "*Online Consumer Protection on e-Commerce*", <https://www.etda.or.th/publishing-detail/online-consumer-protection-on-e-commerce-contract.html> (accessed on January 20, 2015)

pre-contractual information on e-commerce. Therefore, traders can choose whether to provide pre-contractual information resulting in consumers purchasing goods and services on e-commerce without proper knowledge of any essential information contained in the contract.

Besides the contents clarified in 4.2.1 to 4.2.3, it can be clarified that if consumer declare an intention to do the contract to the person or the goods properly without any mistake as to person (trader) or goods, which are essential elements of a juristic act but misunderstand the characteristic of the person or the goods which is distorted from the fact, the declaration of intention, in this case, is voidable. The mistake as to a characteristic of the person or the goods is indeed happened due to the motivated cause to involve in entering the contract. Should these characteristics be considered as essential elements or not, it needs to be investigated case by case.

Basically, it shall be considered depending on the type of the juristic act declared with intention whether its properties irrelevant to any of performance or duty of this act. If the properties are irrelevant to the act, the property is not an element to the juristic act unless another party will declare the importance of that property.<sup>150</sup> On the other hand, if there is no agreement on the mutual special property between trader and consumer, the following detail needs to be taken into consideration including date of delivery, specified date, location, the method of payment, the mean of transportation, and the exchange of the defected goods. All of these details account for the details relating to the performance of juristic act, and they are essential element of the juristic act. If trader does not inform this information to consumer, according to the section 157, the contract shall be voidable. When the contract is avoidable by consumer, it shall be accounted as a void act since in the beginning. The status of another party shall be restored unless it is impossible for the performance, which consumer would be reimbursed instead. Personally, an author can express that if the content is not related to the performance or any duty regarding to the juristic act, the consumer shall not get compensated when detriment occurred.

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<sup>150</sup> Sumawong, *supra* note 41, at 112

Comparing to article 6 and 8 of the Consumer Right Directive and article 13 of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, apart from the information in 4.2.1-4.2.3, specify that traders shall provide contract information about goods and service to consumer in a clear and comprehensible characteristic before they are bound by the contract as follows: time of delivery or the beginning of the service, arrangements for payment, legal guarantees, financial guarantees, after-sales services and complaint handling policy, if applicable, the duration and termination of the contract, if applicable, codes of conduct, out-of-court complaint and redress mechanism.

In addition, article 8(2) of the Consumer Rights Act and article 14 of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 further requires the additional requirement for the distance contract conclude through electronic method which places the consumer under an obligation to pay that the trader shall provide information clearly and remarkably concerning goods and service which are the main characteristic, the total price, the duration of the contract and the termination condition, the minimum duration of the contract, if applicable in the close vicinity before the consumer places his order. Furthermore, where the medium is limited with space and the amount of text that can be sent, article 8(4) of the Consumer Rights Directive and article 13(4) of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 state that trader can restrict the displayed information on the user's screen as follows: the main characteristics, the information about trader; trader's identity, the total price, the right of withdrawal, the conditions, time limit and process to exercise such right together with the model withdrawal form, the duration of the contract and the conditions for terminating it.

The remedy available in article 19(5) of the Consumer Rights Act 2015 is that if the information other than the main characteristics of goods or service provided by the trader, for example, information about the trader, is not complied with, the consumer is entitled to the price reduction in an appropriate amount which could be up to the full amount the consumer paid. In addition to the case where the information other than the main characteristics of the goods or service specified in the

contract does not comply with but the trader does not conform to the information requirements, article 44 of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 stipulates that consumers could make a complaint about the contravention of this requirement to the concerned enforcement authority or the court. Then, they may grant an injunction, interdict or order on such terms, where appropriate, in order to assure that this requirement shall be complied with.

#### 4.2.5 Pre-contractual Information Concerning Right of Withdrawal

Sales by description in the manner of communication through electronic medium in expectation of consumer's declaration of intention to purchase goods and services, where the description is not the same as those prescribed on the website, the Direct Sales and Direct Marketing Act B.E. 2545 has stipulated the provision to protect consumer to be able to exchange the products purchased from direct marketing later. The act stipulates that consumer shall have the right to unilaterally rescind the contract regardless to the reason to rescind which is different to the normal sales contract from the CCC. However, it shall refer to the section 357, 358 and 359 mentioned earlier.<sup>151</sup> Thereby, the provision allows consumer to rescind the contract within seven days counting from the day of the good received or service performed by direct marketing.

The Direct Sales and Direct Marketing Act B.E. 2545 section 33 states that

*“In purchasing of goods or service from a direct sales or from a sale through direct marketing, a consumer shall have the right to terminate the contract ...within seven days from the date of receipt of goods or service. ...The provisions of paragraph one shall not apply to types, prices or kinds of goods or service prescribed in the Royal Decree”*

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<sup>151</sup> วีรวัฒน์ จันทรสุมบุรณ์, “คำอธิบายและสาระสำคัญของพระราชบัญญัติขายตรงและตลาดแบบตรง พ.ศ. 2545”, นิติธรรม (2549) น. 60-61 (Theerawat Jantarasomboon, “**Explanation of the Direct Sales and Direct Marketing Act B.E.2545**”, Nititham (2006) p.60-61)

This implies that if the products and services are listed in the Royal Decree, consumer shall not be able to cancel the contract because the right to terminate the contract will not be able to apply.

Nevertheless, the Direct Sales and Direct Marketing Act B.E. 2545 section 30 together with section 31, there are provisions prescribed over the duty of businessman in the direct marketing on the sales document which requires the specification of the necessary information, one of those is the right to terminate the contract. The information concerning the termination of contract shall be insisted with the outstanding written form and be easier to be seen than other information. To be concluded, the goods and service sold in the direct marketing can be classified into two types, which are

- 1) Goods and service, in which consumer has the right to terminate the contract regarding to section 30 together with section 31 and
- 2) Goods and service, in which consumer has no right to terminate the contract due to the product list on the Royal Decree according to section 33

The law stipulates that the businessman shall inform that the right of contract termination exists after the conclusion of the contract, where consumer cannot recognize if the right does exist. Consumer apparently has to take risk purchasing goods or services by description without any chance to see the real products and without knowing that the termination right is applied to which goods and service. It is perceived as a proper action in accordance to the Royal Decree, the Direct Sales and Direct Marketing Act section 33 paragraph 2, the information should be clearly stated and consumer should be well informed on the condition of this termination.

Considering from article 6(1)(h) of the Consumer Right Directive and article 13(a) of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, it indicates that before the contract is made, if the right to withdraw from the contract exists, the trader shall provide the information regarding to the existence of the right of withdrawal; the conditions, time

limit and the process to exercise that right in addition to the cancellation form. However, in case where the right of withdrawal is absent, the trader shall provide the information that the consumer is not entitled that right or the conditions, of which the right to cancel could be lost. In case of the information regarding the right of withdrawal is not complied with, the cancellation periods shall be extended.

From the study, in order to make the consumers being aware of their right on e-commerce, Thai law should prescribe trader's duty in providing pre-contractual information concerning the right of withdrawal.

#### **4.3 Problems related to the Burden of Proof of Pre-Contractual Information**

Due to an insufficiency in providing pre-contractual information under Thai laws considering from the Consumer Protection Act B.E.2522, the CCC, and the Direct Sales and Direct Marketing Act B.E. 2545, it leads to the conclusion that the consumers enter into the contract without being well-informed of the information regarding goods and services. Consequently, consumers are more likely to make a declaration of intention under a mistake as a consumer, who has less information if compared to traders or called information asymmetry, have some difficulties to reflect their true preference in decision-making. In addition, when the consumers want to claim that the contract made under a mistake, they, as a plaintiff, will bear the burden of proof according to the Civil Procedure Act; if consumers allege any fact in support of their claim or answer, the burden of prove of such fact shall lies on the party alleging it.<sup>152</sup> So, the burden of prove concerning the informed or not being informed of an essential information in e-commerce transaction bears by the consumers unless the claims relate to manufacturing, assembly, design, composition of the goods, the service or any acts, it will be subjected to the Consumer Case Procedure Act B.E.2551 that if the court considers that facts are the exclusive knowledge of the traders, trader will bear the burden of proof.<sup>153</sup> Thus, it could be considered that when the consumers want to claim that the contract is not in line with the pre-contractual information that

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<sup>152</sup> The Civil Procedure Code, § 84

<sup>153</sup> The Consumer Case Procedure Act B.E.2551, § 29

they were given, the burden of proof concerning the pre-contractual information in e-commerce transaction shall be borne by the consumers.

The problem is on the new technology, or the internet, in which the communication used is out of control by the consumer.<sup>154</sup> The traders could easily open a website and penetrate into international market easily; it is comparable to the circumstance that consumers could also access to any shopping website created by those traders in this online world. With this ability, the traders could use this chance to adjust the information on the website.<sup>155</sup> After purchasing, the trader may change the information provided on the website. If the problems arise in post-purchase stage, consumers may not be able to rely on the information they received at the first place as a burden of proof to the court.<sup>156</sup> The burden of proof shall, therefore, on the trader.

Considering from the foreign laws; article 6(9) of the Consumer Rights Directive and article 17 of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 specify the burden of proof in this case that to prove that whether trader has provided pre-contractual, the burden of proof shall be on trader.<sup>157</sup>

From the study, to prove that whether trader has provided pre-contractual, Thai law should stipulate that the burden of proof shall be on trader due to the communication used is beyond the consumers' capability to control this medium, it is important to mention that the burden of proof maybe on traders.<sup>158</sup>

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<sup>154</sup> Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, Recital 22

<sup>155</sup> Dickie, *supra* note 5, at 26.

<sup>156</sup> Dickie, *supra* note 5, at 28.

<sup>157</sup> Consumer Rights Directive, art.6(9)

<sup>158</sup> Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, Recital 22

#### **4.4 Problems related to the Statutory Remedies for Consumer**

From the study, the statutory remedies available for the consumer under the Thai jurisdiction in case of the pre-contractual information is not complied with could be found in many laws which are the Civil and Commercial Code, the Consumer Protection Act B.E.2522 and the Direct Sale and Direct Marketing Act B.E.2545 which could cause confusion to the consumers to pursue their remedies.

In addition, some of remedies is still in need for the interpretation from the academic which is the right to replace goods in case of its defect under section 31 of the Direct Sales and Direct Marketing Act B.E.2545 mentioned in 2.3.4. The right to replace goods only explicitly specified only in case of its defect which could cause confusion to the consumers that in case where the goods is not in line with the information traders have certified pre-purchase, whether they can claim for the right to replace goods.

In the law of the United Kingdom, from the consultation on the supply of goods, services and digital content in July 2012, it also incurred with the aforementioned problems. For example, regarding to the sales of goods, there are two effective legislative systems; the traditional of the United Kingdom remedies have been overwritten by parts of EC Consumer Sales Directive which cause confusions to consumer or retailers and create unwanted argument between parties.

A review of consumer law by the former Department for Business Enterprise and Regulatory Reform in 2008 shows the controversy and mostly all of respondents have mutually accepted in the idea that simplifying structure and language of consumer law and harmonizing the law into one piece will have a great effect.

According to The Government's programme of reform, the proposals that follow build on the BERR review of the consumer law regime in 2008 which define that consumer law should be simplified and modernized in order to make it easier for consumers to understand the scope of the transaction. According to the report on the



Consolidation and Simplification of UK Consumer Law by Professor Howells, Professor Twigg Flesner and others suggested that the improvement of the consumer contract legislations could be possible if the provisions could be harmonized into one place which is the Consumer Rights Act 2015.

Thus, the remedies available for consumer under Thai law should be simplified by assemble all statutory remedies into one piece of legislation in order to make it easier for consumer to pursue for legal remedies.

#### **4.5 Conclusion**

Legal problem relating to the requirement of pre-contractual information in direct marketing business is that the business run by consumer is the decision maker solely upon the description on the electronic screen, taking other factors into consideration such as other information and images provided by trader. Obviously, accurate and necessary information is crucial influencers on consumer purchasing decision.

Nowadays, the law and regulations executed provide insufficient information on trader's duty in requiring pre-contractual information that should be necessary for consumer purchasing decision. For instance, information of trader; which is considered as a vital factor to consider further on the performance related activities as expected in the sales contract document, goods and service detail; in which trader usually provide only persuasive sides of their products without limitation disclosed, price; which shall be net price provided on the website not gross listed price, the contractual clause to be bound by two parties, and the right to terminate the contract unilaterally regarding to consumer protection law; which normally consumers will acknowledge only after the contract is concluded.

Although consumers can refer to a mistake as to an essential element of the juristic act in order to make the act void, a mistake as to a quality of person or property of the juristic act, a fraudulent act or a fraud by silence in order to make it voidable, or executing the termination right regarding to the Direct Sales and Direct

Marketing Act B.E. 2545, all of these actions are considered as a treatment after problems occurred, not a defensive act. The business through e-commerce, it generally requires consumer's advanced payment which generates some troubles. For example, consumer cannot contact trader to take responsibility for their guilt. Consumer has to waste their time and money spent on trader's prosecution, where sometimes the value of the good is not that worthy to do so. To protect consumer on the e-commerce, the requirement of specific pre-contractual information should be implemented to balance with the limited knowledge consumers received from trader. Moreover, consumer can consider carefully before making any buying decision and getting involve into the contract.

Information provided by traders encourage consumers to exercise their purchase, while lack of information demotivate consumers from buying due to the lack of confidence and trustworthiness on traders. It could be concluded that the more information consumers acquired, the more confident they could have in e-commerce transaction. From the study, it is obvious that Thai domestic laws prefer a remedial measure to a preventive one, in which damage has to occur first, and not to prevent it. These problems may constitute obstacles to e-commerce market that consumers lose confidence to buy via internet.

Accordingly, pre-contractual information is necessary to be manipulated in order to prevent post-contractual problems and make a consumer being well-informed before dealing with e-commerce transaction. It could be concluded that legal control of information disclosure requirements could encourage the growth of e-commerce market as it makes consumers feel more confident to make a purchase than in an unregulated market.<sup>159</sup>

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<sup>159</sup> Henricus Joseph Sniders and Stephen Robson Weatherill, *E-commerce Law: National and Transnational Topics and Perspectives*, P.18-19 (Kluwer Law International (2003))

## CHAPTER 5

### CONCLUSION AND RECOMMENDATIONS

#### 5.1 Conclusion

Comparing the controlling measures of the Direct Sales and Direct Marketing Act B.E. 2545 to measures of the foreign countries, it can be concluded that the contract of direct marketing can cause problems to consumers because the trader is in a distant area and consumers cannot see the goods and service physically. Additionally, the pre-contractual information received from the trader is not enough for consumer to make the proper buying decision. From the study of Thai law and foreign laws, the main significant factor of this type of business, direct marketing, is to focus on the pre-contractual information and the information of the consumers' right. However, there are some differences between those of Thai law and those of foreign laws as follows;

Unlike foreign countries' law and regulations, consumer protection according to Thai law has no specific requirement of pre-contractual information written in detail. For example, Directive on consumer rights and Directive on electronic commerce is implemented in the law of member states. Those mentioned in this thesis is United Kingdom's composing of The Consumer Contracts Regulation 2013, The Consumer Rights Act 2015, The Electronic Commerce Regulations 2002. These laws specify the duty of trader clearly on the required pre-contractual information concerning goods and service, contract details and also the information concerning consumer rights, and remedies that consumer will receive when the trader act discordant to the contract. In contrast, Thai law, the protection of consumers' right in receiving pre-contractual information on e-commerce is ineffective although there are some laws supporting the right of consumers to acknowledge the pre-contractual information before entering into the contract as follows;

1) Duty to inform the declaration of intention and the juristic act in accordance to the CCC section 149 together with section 354. It could be interpreted that the declaration of intention of consumer should be made with the voluntary act

and it should not be made by mistake, fraud or duress. Hence, the offering for sale must be clearly informed the information concerning goods and service. From the interpretation, the right to be informed is actually in the general principles of Thai law that it must be clearly and certainly provided. However, it is broadly defined of how the offer should be made. It does not prescribe trader's duty in providing the specific information in order to explicitly protect the consumer.

2) The right to receive pre-contractual information in fraud by silence regarding to the CCC section 162. The act is fraud if the seller expresses his intention to be in silence although he has duties by law or even when he does not have a duty by law, but by good morals to inform the fact or quality of the goods. As the duty to inform by good morals is imprecise and it is only ruled by the court, pre-contractual information on e-commerce is uncertain that which specific pre-contractual information that trader should provide. Thus, trader might use this loophole to conceal the information that adversely affects to the consumer buying decision.

3) The right to receive the property with the qualification as same as description provided as per the principle of Sales by Description regarding to the CCC section 503 paragraph 2, considering that the description prescribed by the trader is the pre-contractual information. However, traders have freedom on the presence of the content on their webpage, given that the goods delivered has to be in the same condition as per described by the trader.

4) The right to receive information regarding to the Consumer Protection Act B.E.2522, section 4(1). Considering that the information provided is broadly defined and it is under trader's discretion.

5) The right to receive information statement contained in data communication for offering to sell goods or service regarding to the Direct Sales and Direct Marketing Act B.E. 2545 provides that data communication shall be manipulated by the ministerial regulations according to section 28; however, it has not been yet enacted. Moreover, section 29 of this Act which stipulates that the provisions of the law on Consumer Protection in respect of Consumer Protection against

Advertising shall apply to the data communication for offering to sell goods or services by the direct marketing businessman, it solely controls the information which is considered as unfair. There is no written duty for traders to provide specific detail. In addition, the authority of direct sales and direct marketing board is only to control the communication of information of entrepreneur considering that it is to control after the loss has been occurred rather than to protect the damage from happening. According to the Act, trader's duty in providing specific information to the consumer is found only post-purchase process.

From the study, the problems related to consumer protection regarding pre-contractual information on e-commerce under Thai law could be summarized as follows:

Firstly, the ordering process on e-commerce may have several stages which cause confusion to the consumer. Thus, when placing an order, the consumers, unintentionally enter into a contract or even make mistakes during the purchasing process. This brings the issues why trader should take reasonable and logical steps to allow consumers correcting the errors of their order before the contract concluded.

Secondly, with an ambiguity to identify trader's geographical location on the internet, considering to Thai law and regulations, traders are obliged to inform information concerning the status and other details about the trader to the consumer only upon the prescription of Committee on Advertisement. Accordingly, the sale of the other goods and service besides from the prescription, the trader is not obliged to provide information about himself to the consumer.

Thirdly, information concerning the main characteristics of the goods or service, considering from Thai law, it does not mention about the trader's duty providing specific information which affects to the consumer buying decision before he or she places an order.

Fourthly, with insufficient information requirement of traders from the notification of the Central Commission on Prices of Goods and Services regarding the displaying prices of goods or services B.E. 2558, the consumers may face problems of

misleading, and difficulties in planning or calculating their expenses and purchasing power.

Fifth, other information included in Contract Considering from the current Thai law, it controls only the process after the contract is concluded.

Sixth, right of withdrawal, as the goods and service sold in the direct marketing can be classified into two types in which the consumer is entitled the right to terminate the contract and those who do not have such right. The non-existence of pre-contractual information in this situation could cause consumer to take risk purchasing goods or services by description without knowing that the termination right is applied to which goods and service.

Seventh, when the consumers want to claim the contract being made under a mistake, they, as a plaintiff, will bear the burden of proof according to the Civil Procedure Act. However, as easily adjusting information or closing down the website of the traders, the plaintiff could find difficulties in collecting the document as the burden of proof to the court.

Eighth, the statutory remedies available for the consumer under the Thai jurisdiction in case of the pre-contractual information is not complied with could be found in many laws which could cause confusion to the consumers to pursue their remedies. In addition, the right to replace goods only explicitly specified only in case of its defect which also could cause confusion to the consumers whether they can claim for the right to replace goods in case where the goods is not in line with the information traders have certified pre-purchase.

Due to an insufficiency in providing pre-contractual information under Thai laws considering from the Consumer Protection Act B.E.2522, the CCC, and the Direct Sales and Direct Marketing Act B.E. 2545, it leads to the conclusion that the consumers enter into the contract without being well-informed of the information regarding goods and services. Consequently, consumers are more likely to make a declaration of intention under a mistake as a consumer, who has less information

comparing to traders or called information asymmetry, have some difficulties to reflect their true preference in making a decision. These are loopholes the traders might use to facilitate themselves in selling goods or service, while the consumers are being exploited with the insufficient pre-contractual information that lead to affect adversely the consumers buying decision. As a result, it would negatively influence consumer confidence in purchasing goods or services via e-commerce channel and thus, consequently, it could affect to the whole industry and stability of the economy. Therefore, in order to harmonize interest between both parties, the consumer protection in pre-contractual information should be taken seriously and enacted under Thai law.

Nowadays, the European Union law and English law indicate that pre-contractual information is crucial and they have started to control the traders' duty in providing specific pre-contractual information on e-commerce by law in order to resolve asymmetry of information in the B2C transactions. With this law, it could bridge the gap of information asymmetry where the consumers have sufficient information and full ability to make accurate buying decision. Thus, it is mandatory to study law in foreign countries in order to seek the suitable solution for Thailand.

## **5.2 Recommendation**

According to the aforementioned analysis on the problems regarding pre-contractual information on e-commerce under Thai law, the study shows that the lack of pre-contractual information on e-commerce can cause many of the post-purchase problems to consumers. Thus, in order to reduce the gap of the asymmetry of information between traders and consumers and to create consumer confidence in e-commerce transaction, a consumer should have the right to be informed regarding the pre-contractual information; Thai law should propose the provision of pre-contractual information on e-commerce and also the consequences of non-compliance with the information requirement in an appropriate measure as follows:

- 1) By the virtue of section 28 of the Direct Sales and Direct Marketing Act B.E.2545, the Ministerial Regulation should be enacted in order to stipulate the

specific information which shall be disclosed to the consumer as a pre-contractual information on e-commerce as follows:

*“Before the contract is concluded, the trader must provide the consumer of the following information:*

- (1) The main characteristics of goods and service.*
- (2) Identity of the trader, contact details such as telephone and fax numbers, e-mail address and geographical addresses, trade registration number, VAT number.*
- (3) The total price of the goods or service including taxes or if the prices cannot be precisely calculated in advance, the calculation method should be provided.*
- (4) The right of withdrawal, if it exists or the non existence of the right of withdrawal, the conditions, time limit and process to exercise such right.*
- (5) Details of the potential contract*
- (6) Place and delivery procedure of the goods or service*
- (7) the technical steps to proceed in order to conclude the contract*
- (8) The technical procedure, before an order has been placed, of the identifying and correcting input errors*
- (9) when placing the order is implied an obligation to pay the trader, it shall be labeled in a clearly and comprehensibly manner with the words “order with obligation to pay”*

2) Pre-contractual information in the aforementioned recommendation should form a part of the contract. Thus, the details contained in the sales of goods or service document should contain all pre-contractual information required in section 28 allowing the consumers to verify whether contractual information is in accordance with the pre-contractual information provided pre-purchase. If the consumers find it is not in accordance thereof, they could exercise the right of withdrawal. In addition, the traders should provide such confirmation on a durable medium, such as e-mail, and SMS, where the information is stored, and it could be accessible in the future with an



unchangeable information which is stored at the beginning in order to benefit the consumers of the potential problems after purchase. Thus, the information contained in the purchase and sell document stipulated in section 31 paragraph 2 of the Direct Sales and Direct Marketing Act B.E.2545 shall include “*details under section 28*”

3) In order to bring the aforementioned solution into practice, when the problems on pre-contractual information on e-commerce arise post-purchase, the burden of proof should be borne by the trader. Thus, section 29 of the Consumer Case Procedure Act B.E.2551 should be additional included the following statement;

*“As regards compliance of the requirements for pre-contractual information provided by the Direct Sales and Direct Marketing Act B.E.2545, the burden of proof shall be borne by the trader.”*

In such case, where the fact cannot be proved by any other methods, if pre-contractual information is missing from the sales of goods or service document, trader will become more vulnerable in such situation unless he has provided the information on a durable medium before.

4) Thai law should stipulate the current remedies available in many laws into one piece of legislation in order to make it easier for consumer to pursue for legitimate remedies. In addition, the consumer rights of non-compliance of the trader with the information requirements should depend on the types of pre-contractual information as follows:

4.1) The main characteristics of the goods or services

In case when the trader act's does not comply with the pre-contractual information provided concerning the main characteristics of the goods, if the consumer does not mean to exercise the unilateral right to terminate the contract but remaining to receive the goods, the law should explicitly stipulates the right to replace the goods in case of the goods is not in line with the information provided pre-purchase in order to benefit the consumer interest.

#### 4.2) Price

In the situation where the consumer declared an intention under a mistake as to the total cost. The trader should be responsible for any additional cost that he did not pre-contractually provide to the consumer by himself, thus, consumer should not be bound by the contract or order.

#### 4.3) The Right of Withdrawal

In order to comply with the Royal Decree to be issued in accordance with section 33 paragraph 2 of the Direct Sales and Direct Marketing Act B.E.2545, the law should enact the consumer's right to be explicitly informed of the information concerning on the territory of their termination depending on each contract.

Moreover, if the information concerning the right of withdrawal has not been provided pre-contractually by the trader, the duration to exercise the right of withdrawal should be extended as prescribed in the European Union Directive or the United Kingdom law, according to a study in chapter 3.

#### 4.4) Information concerning Details of the contract other than the main characteristics

Thai law should endorse the consumer's right from the non-compliant and inaccurate information to recover either the cost or upto the full amount of value at the time consumers had purchased.

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