



November 2008  
AK Position Paper

# Proposal for a Directive on Consumer Rights COM (2008) 614

## About us

**The Federal Chamber of Labour is by law representing the interests of about 3.2 million employees and consumers in Austria. It acts for the interests of its members in fields of social-, educational-, economical-, and consumer issues both on the national and on the EU-level in Brussels. Furthermore the Austrian Federal Chamber of Labour is a part of the Austrian social partnership.**

**The AK EUROPA office in Brussels was established in 1991 to bring forward the interests of all its members directly vis-à-vis the European Institutions.**

### **Organisation and Tasks of the Austrian Federal Chamber of Labour**

The Austrian Federal Chamber of Labour is the umbrella organisation of the nine regional Chambers of Labour in Austria, which have together the statutory mandate to represent the interests of their members.

The Chambers of Labour provide their members a broad range of services, including for instance advice on matters of labour law, consumer rights, social insurance and educational matters.

Herbert Tumpel  
President

More than three quarters of the 2 million member-consultations carried out each year concern labour-, social insurance- and insolvency law. Furthermore the Austrian Federal Chamber of Labour makes use of its vested right to state its opinion in the legislation process of the European Union and in Austria in order to shape the interests of the employees and consumers towards the legislator.

All Austrian employees are subject to compulsory membership. The member fee is determined by law and is amounting to 0.5% of the members' gross wages or salaries (up to the social security payroll tax cap maximum). 560.000 - amongst others unemployed, persons on maternity (paternity) leave, community- and military service - of the 3.2 million members are exempt from subscription payment, but are entitled to all services provided by the Austrian Federal Chambers of Labor.

Werner Muhm  
Director

# Executive Summary

The Austrian Federal Chamber of Labour (AK) has conducted a preliminary review of the proposed directive and is submitting an initial assessment, which is not yet exhaustive or comprehensive by any means.

## AK's Key Concerns

- The revision of the consumer acquis and the proposed directive on consumer rights must update, expand and improve consumer protection in the European Union. A high level of consumer protection must be the point of reference at all times.
- The revision and harmonization of consumer rights must not be used as a pretext for pushing through viewpoints of unbridled economic liberalism.
- AK feels compelled once again to urge that the principle of minimum harmonization be retained. The full and complete harmonization planned is disadvantageous to consumers at national level and EU level in many respects and creates great legal uncertainty.
- At most, a small handful of term definitions and individual legal issues would be suitable for full harmonization.
- Harmonisation must be undertaken without application of the principles of country of origin and

mutual recognition. Anything else would be unreasonable to expect of consumers.

AK demands that a number of further consumer right measures be considered that would greatly improve consumer protection in the EU, inter alia:

## Distance selling:

- The list of exceptions from distance selling and from the right of withdrawal in distance selling must be further culled, e.g. inclusion of Internet auctions in the scope, elimination of the exception for subscription contracts for newspapers, periodicals and magazines.
- Exception provisions for services already initiated during the withdrawal period should be made more stringent in the consumer's favour, as should those for gaming and lottery services.
- The withdrawal period should be extended if for example the consumer is not advised of his right of withdrawal.
- Stricter punishments must be put in place for taking consumers by surprise with cold calls and subsequently concluding a contract.
- Online contracts foisted on consumers must be declared null and void.

- Subscription contracts on the Internet should be able to be terminated at any time.

**Off-premises selling (direct selling):**

- Exceptions from the scope of the right of withdrawal in off-premises selling (direct selling) should be revisited, e.g. for insurance policies.
- The withdrawal period should be extended if for example the consumer is not advised of his right of withdrawal.

**Guarantee:**

- The definition of consumer goods in guarantee should be expanded in particular to include digital products, e.g. software.
- The scope should be extended to cover electricity, gas and water
- The consumer's obligation to report lack of conformity should be struck.
- The consumer should be able to choose repair or replacement.
- Conversion or price reduction after one failed attempt at remedying the lack of conformity
- The presumption period for the guarantee should be extended to two years.
- Direct liability for manufacturers

**Unfair contract terms:**

- The list of terms considered unfair under all circumstances should be expanded.
- Creation of a list of clauses for which the objection "individually negotiated" is also not permitted
- Validity test for surprisingly disadvantageous terms

# The AK position in detail

## **1. Level of consumer protection substantially lowered in some cases**

Following the publication of the Green Paper "Review of the Consumer Acquis", great concerns were voiced about the concept of full harmonisation in particular. AK urgently warned that a model for merging different EU consumer protection provisions based on full harmonisation would substantially lower the level of consumer protection at national level. This proposed directive on the rights of consumers confirms that our scepticism was justified. It represents a step backwards, particularly in consumer rights policy.

For example, a dramatic change for the worse as regards unfair contract terms

The proposed model in the draft directive of a black list and a grey list falls far short of the Austrian system of unfair contract provisions and terms, inter alia: the list of terms banned upfront as unfair is much more comprehensive and substantive in Austria. In the proposed directive, unfairness for a number of contract terms is only presumed. In individual cases, a check must therefore always be run to ascertain whether there are circumstances suitable as arguments against unfairness. If the draft directive prevails, then traders will be able to raise the objection for all these terms (e.g. those on

the black list and the grey list) that the terms were negotiated individually.

In Austria, there is a number of strongly incriminated terms for which no such objection is permitted. Furthermore, Austria has more stringent rules governing the validity test for contract terms as regards surprisingly disadvantageous terms. These rules would not be retained under the full harmonisation advocated by the proposed directive.

## **2. Objective of strengthening EU consumer protection unsatisfactorily met with proposed directive**

Efforts to expand and strengthen EU consumer protection are not in sufficient evidence in the proposed directive. Moreover, it appears that solutions at EU level more generous to consumers could fall victim to the revision and consolidation of the consumer acquis. Inputs Requests from the business community were also incorporated under the pretext of clarifying confusing terms and provisions.

Finally, existing EU law is being abandoned without reason. Another fear seems to be proven justified in the process, namely, instead of gearing its efforts toward maximum consumer protection with this project, the EU Commission wants to see consumer

The AK criticises that a strengthening of the EU consumer protection can hardly be deduced from the proposed directive.

The AK worries that the European Commission does not orientate on the highest level of consumer protection and that it comes to a freezing of the consumer protection on a low level.

protection frozen at a modest level throughout the EU.

For example, by introducing an EU-wide duty to report lack of conformity

Previously, each Member State had the option of requiring the consumer to report a lack of conformity, failing which he would lose guarantee rights. Austria and a number of other Member States opted for strong consumer protection in this area and did not introduce this requirement. Now the EU Commission wants to impose it throughout the EU contrary to its commitment to a high level of consumer protection in the EU.

For example, time limitation on the right of withdrawal for a consumer not informed of his right of withdrawal

If the proposed directive prevails, the consumer's right of withdrawal in general and thus also in off-premises selling will be limited to three months if he is not informed about this right. That means the consumer will lose his much better EU legal position for off-premises contracts, namely a right of withdrawal unlimited in time if he is not advised of his right of withdrawal. In addition, this unlimited period also previously applied to breaches of other information requirements in distance selling, not just failure to advise a consumer about his right of withdrawal. Now only this omission is deemed "harmful". This is yet another example of how existing EU law on consumer protection is being whittled away.

### 3. Needed efforts to update EU consumer protection are too little in evidence

At present, the proposed directive is quite a formal compilation of four directives on consumer protection: Directive 85/577/EEC on contracts negotiated away from business premises, Directive 93/13/EEC on unfair terms in consumer contracts, Directive 97/7/EC on distance contracts, Directive 1999/44/EC on consumer sales and guarantees. It is more than disappointing that the proposed directive fails to embrace the declared intention of significantly strengthening consumer protection in the EU. Nor does it appear to reach the objective of supplementing current law and updating it in line with current developments by drawing on experiences won over many years of practice. Ultimately, only a very limited number of proposed actions tackle this problem.

For example, distance selling

A revision of this kind might have been expected particularly for the legal provisions on distance selling. The EU distance selling directive dates from 1997. Online sales techniques were still in their infancy at the time. Following the technical advances over the past decade, the protection afforded by the distance selling provisions is largely sufficient only for classic forms of distribution such as conventional mail-order sales. With use of the Internet becoming cheaper all the time (telemarketing, text messaging, Internet sites), the potential for fraud has

also risen substantially on the supplier side. Distance selling law as it now stands provides too little protection for cases such as these.

It is high time measures be taken to prevent consumer protection provisions from being undermined, particularly the right of withdrawal. A good departure point would be to abandon altogether an absolute limitation of the period of withdrawal to three months or at least extend that period substantially. It is also high time to subject the generous exception provisions that favour business to a critical review and reduce them. These provisions have actually remained largely unchanged. The proposal also retains the lack of clarity about the applicability of distance selling provisions to online auctions. The term "auction" is again defined in a way that permits Internet service providers like EBay not to grant consumers the same legal protection they would enjoy in distance selling.

#### **4. Legal uncertainty due to full harmonisation and lack of impact assessment**

Individual provisions in the proposed directive do show resolve to strengthen consumer protection. However, well-meaning provisions could in fact turn into the opposite at national level if the EU Commission keeps insisting on full harmonisation.

For example, basic information requirements to be fulfilled by traders for all consumer contracts

The proposed directive prefers a general information requirement for all consumer contracts that would obligate the trader to clarify certain terms of the contract. This step is positive but the information indicated as mandatory takes on the quality of an exhaustive list if full harmonisation prevails. Any information requirements extending beyond that would no longer be possible. In particular, the provision (assuming full harmonisation) would eliminate the legal foundation of information requirements that have developed organically at national level in response to acute consumer problems that are not EU-wide problems for various reasons. In Austrian law, a lot of consumer protection is cloaked in information requirements of this kind, e.g. transactions with real estate agents, with builders, in telecom law, in nursing home contract law, trade in periodicals, in connection with flat improvements and renovations, etc.

General protection did not suffice in many cases, and a special approach was required, an approach tailored to the genuine need of these industries and transactions and to pressing consumer problems.

Incoherency and legal uncertainty are generated in general by the ramifications of full harmonization. Consumer protection in all areas not covered by the scope of the directive should presumably remain in the hands of the individual Member States. On the other hand, no deviating provisions should be retained or created in the scope of the directive. However, a good deal of

The AK points out that well-meaning provisions to strengthen consumer protection could in fact turn into the opposite at national level if the European Commission keeps insisting on full harmonisation.

The AK applauds the turn away from the country of origin principle and the principle of mutual recognition in the proposed directive.

uncertainty and ambiguity is created by Article 4 and by staggered and overlapping provisions on scope. The power of full harmonization to block provisions appears to go much further because it is not limited to specific aspects in the regulated areas. The provisions also give the impression that the exclusion of certain areas from the scope is akin to an explicit order to dispense altogether with protective regulations. A more careful synopsis between the individual directives appears necessary, as does a more precise analysis of possible regulatory consequences, especially from full harmonisation, to avoid unfortunate ramifications at the level of EU law and national law.

For example, guarantees in the case of repairs and spare parts

The proposal provides for a full guarantee if a product is replaced under a guarantee, which is entirely in the interest of consumers. However, repairs and the replacement of a spare part are explicitly excluded from this rule. A fact seemingly overlooked in the process is that the hands of national lawmakers are tied by full harmonisation and the provision on this exception at the second level of the scope. They are unable to enact or retain regulations that are more favourable than the above. In Austria, however, a repair under a guarantee is part of general law. Whereas the contracting parties in a business-to-business contract or in private transaction could continue relying on this provision, Austrian consumers would have to fear for loss of

their rights in relation to traders on this point.

## 5. Renunciation of country of origin principle and the principle of mutual recognition

AK applauds the turn away from the country of origin principle and the principle of mutual recognition. It would be unreasonable to expect consumers to deal with 27 different legal systems in cross-border transactions. These principles are also completely detrimental to the objective of the directive to exert a trust-building and encouraging effect on cross-border consumer transactions. Besides, there is a risk of negative competition between Member States as business locations; those states with the lowest standards of consumer protection would prevail in the long term.

Several remarks regarding the individual articles:

### Chapter 1

#### Subject matter, definitions and scope

#### Article 2 Definitions

#### Consumer

The effect in Austria of a full harmonisation of the term 'consumer' would be that transactions consumers enter into to establish a business and become self-employed would be eliminated from the scope of the directive and from the protection of certain provi-

sions, as would transactions related to their trade or business. It is also unclear whether the issue of borderline consumer characteristics and a trade, business or craft can be resolved effectively with the proposed definition and in a way that ensures far-ranging consumer protection. Two examples would be if an employee attends a course in his leisure time but as part of professional continuing education or training or if a trader or employee is solicited to have his interview and photos published for an “Encyclopaedia of Success” and is paid for doing so.

#### **Sales contract**

The insertion of mixed-purpose contracts under this term is not a neat solution in a systematic legal sense. All mixed-purpose contracts would then be addressed and qualified as sales contracts even if they covered largely services.

#### **Goods**

This definition is geared to tangible movable items and is therefore too narrow, especially for digital products such as computer software. In the interest of obtaining a high level of consumer protection and of updating the consumer acquis to take account of new technical advances, it would be advisable to expand the scope on this point.

#### **Distance contract**

The scope of distance selling provisions is broadened slightly. Above all,

‘organised’ distance selling is abandoned as an element of the definition. Even if the trader did not organise his business as distance selling, then phone contacts with consumers, for example, and follow-up closings on the phone would still fall into the scope of the directive.

#### **Off-premises contract**

Off-premises contracts are defined as a counterpart of distance selling and thus the physical presence of the trader and the consumer are introduced as an additional necessary element in the definition of this term. A situation in which the consumer is caught off guard but which does not entail the physical presence of both, e.g. on the phone in a cold call, would then be precluded from the scope. That means the Austrian consumer would lose certain advantages currently afforded him under national law. Cold calls and contracts concluded during them have emerged as a problem in general and cannot be sufficiently combated with the provisions on distance contracts or off-premises contracts. A catchall regulation should be inserted here to counteract this problem.

The definition in the proposed directive also calls for including contracts concluded on business premises but ‘negotiated’ away from business premises. The change would be positive per se and slightly broaden the original scope of the directive. However, the approach taken in the proposed amendment overlooks the fact that the contract or its content is in many cases not the subject of initial contacts away

from business premises. Namely, consumers are often taken to the business premises under a false pretext, e.g. as part of a prize contest or to be handed a gift.

It is also unclear whether this definition would eliminate from the scope of the directive certain circumstances currently covered in Austria, e.g. consumers being approached on the street or outings or similar events being staged for a consumer, who is then taken to the business premises.

Our belief is that the risk of the consumer being taken off guard is especially great in these cases and he therefore needs special protection in these circumstances. 'Negotiated away from business premises' should therefore be eliminated as part of the definition.

#### **Durable medium**

It appears unclear from the definition whether a written confirmation still falls under this term, as it involves no 'storage procedure' but rather the possibility of keeping the written document and thus having it permanently available.

#### **Auction**

The proposed definition does not ensure that Internet auctions that end when a certain period expires will be included in the scope of protection provisions for distance selling. The terms of these contracts are quite similar to regular distance contracts, however, and the risks of consumers

being taken advantage are therefore equally large. There have been no rulings by the supreme court in Austria on this issue, as in Germany, but decisions passed down by lower courts have arrived at similar assessments based on the interpretation of auction as defined in the old distance selling directive.

#### **Intermediary**

The definition of this term is extremely general and imprecise. There is a wide variety of ways to act as an intermediary and to bring about transactions as an intermediary. It is unclear from the definition and the regulations in Article 7 whether all of these forms of intermediation were to be addressed or if the EU Commission just had certain problem cases in mind that it wanted to regulate.

#### **Article 3: Scope**

An attempt is made here to clarify the connection between the proposed directive and various other EU directives but it falls short in our opinion. For instance, no mention at all is made of the EU directive concerning unfair business-to-consumer commercial practices or the EU Regulation on common rules for the operation of air services and the information requirements contained in it. On the whole, the proposal lacks provisions addressing how conflicts arising between the directives are to be resolved. For example, the information requirement on the gross price in this proposed directive does not go as far as the one in the EU Reg-

The AK alerts that the connection between the proposed directive and various other EU directives falls short.

ulation on the operation of air services. It provides that the price must be indicated including all tax but not including all other fees and surcharges the consumer must cover.

Furthermore, Article 3 stipulates that the provisions concerning unfair contract terms (Articles 30 to 39) also apply to package travel, package holidays and package tours. There is a loss in the process, namely certain provisions in the distance selling directive that previously also applied to package travel, package holidays and package tours no longer do, e.g. being sent goods unsolicited, the provision on the fraudulent use of payment cards, etc. No explanation is made as to why this extra measure of protection has been eliminated.

**Article 4:  
Full harmonisation**

AK is firmly opposed to full harmonisation being brought about by the proposed directive. That view notwithstanding, Article 4 must in any case be formulated more precisely and with greater restrictions. Otherwise, full harmonisation could be interpreted as having a general power to block other provisions, which would deprive national lawmakers from regulating even non-harmonised aspects.

**Chapter II**

**Consumer information**

**Article 5:  
General information requirements**

A general information requirement in consumer contracts is positive in itself but AK does not support this provision because of the consequences of full harmonisation. No Member State will in future be able to retain its law on special information requirements or put such requirements in place to respond to acute consumer problems. As a result, all Austrian law on information requirements for consumer contracts could become obsolete, e.g. with regard to real estate agents, in the nursing home contract act (Heimvertragsgesetz), in the builder contract act (Bauträgervertragsgesetz), in telecom law, in the delivery of periodicals, with regard to flat improvements, refurbishment, and the like. National lawmakers must continue to be given leeway for regulation in these areas.

In terms of content, AK supports the information requirements. They are taken from the EU directive concerning unfair business-to-consumer commercial practices. It was from that document that the following subordinate clause also came: "if [the information is] not already apparent from the context." AK views this clause as counterproductive. Far-reaching and general restrictions of this type do not serve consumer interests. Traders will inevitably flock to this exception.

It is also unclear how this requirement is to be fulfilled or, rather, the decision appears to be left to the trader. A provision of this nature is completely devaluated if the trader can choose whether to give this information in writing or orally, whether he conveys it to the consumer in the same medium with which the contract was concluded or whether he is also permitted to notify the consumer in another way. In our view, the required information should be conveyed in any case in writing, in line with the type of contract, separately from information in fine print.

The provision under 1 d stipulates that the trader shall provide information about the complaint handling policy if arrangements for payment, delivery, performance 'depart from the requirements of professional diligence'. This subordinate clause should be deleted; not all consumer rights in this context require a breach of professional diligence.

As regards 1 g, AK is concerned that the conditions for terminating the contract are important for the consumer in general, not just if the contract is open-ended.

**Article 7:  
Specific information requirements for intermediaries**

AK refers to the comments it made earlier on the definition of 'intermediary'. A fact also overlooked here is that in many cases not only a contract (with the other consumer) materialises, but also a contractual relationship

with the intermediary. Many intermediaries act for both sides, e.g. this is often the case with real estate agents. That means the trader has independent obligations and bears independent liability in relation to the second consumer, as well. Why should provisions on unfair contract terms not apply here? Their inapplicability is inexplicable and ill conceived.

This proposal merely confirms our view that a general solution must be rejected. At most, a selective provision could be applied to the intermediary issue in cases where problems arise in actual practice, e.g. in our view, in connection with sales, particularly of previously owned vehicles.

**Chapter III**

**Consumer information and withdrawal right for distance and off-premises contracts**

**Article 9:  
Information requirements for distance and off-premises contracts**

The old distance selling directive required the trader to inform the consumer about costs for the use of telecommunications above and beyond the basic rate and the period for which the offer and price is valid. These requirements are missing here.

**Article 10:  
Formal requirements for off-premises contract**

This proposal now introduces formal requirements for off-premises con-

The AK underlines that the conditions for terminating the contract are in general important for the consumer.

tracts, e.g. that the offer and contract must be in writing. This provision is advantageous to consumers.

However, it would not be acceptable for the consumer to be given a copy of the order form on a durable medium other than paper unless the consumer so requests. Even if the trader does use special equipment to accept orders in off-premises transactions, the consumer should in any case receive a paper copy of the order.

Assuming full harmonisation, this requirement would also render obsolete the duty under the Austrian Consumer Protection Act (§ 26a KSchG) of a trader selling periodicals to send a separate confirmation of the order by regular mail. Current Austrian law has more stringent consumer protection provisions aimed at controlling the problem of backdating that would have to be given up in the case of full harmonisation.

**Article 11:  
Formal requirements for distance contracts**

The necessary information shall be given or 'made available'. This wording raises the risk that merely providing this information somewhere on the homepage in the course of an Internet transaction could suffice. Consumer protection is by no means ensured if this information is merely made available.

A departure from information requirements or limited information requirements are proposed, inter alia, in

cases of distance selling which allow limited space or time to display the information, e.g. text messaging. AK believes these restrictions go too far. It is just as indispensable for the consumer to be given information on the identity of the trader and the minimum duration of the contract, about the costs of using the telecommunication medium if they exceed the basic rate, and about his right of withdrawal pursuant to Article 9 b.

**Online contracts foisted on consumers**

Consumer protection organisations in Austria have dealt with thousands of complaints about allegedly free offers on the Internet. The actual charges are buried in the fine print. The existing provisions offer too little protection against this practice. The provisions proposed in the draft directive are also insufficient. A more efficient approach, for example, would be to require the consumer to confirm on an e-mail form he sends in before the online contract takes effect that he has taken notice of the content of the service (and above all the charges for the service) and bindingly agrees to the offer. The content of the e-mail, which must be saveable by the consumer, can also serve as evidence for the agreed contractual content if a dispute arises.

**Cold calling**

Another unresolved problem is unsolicited selling calls for services (cold calling) that take the consumer off guard. Inadmissible phone selling

is booming in Austria and in other Member States. Above all, providers of prize contests and lotteries as well as telecom service providers often engage in phone solicitation without prior permission from consumers. Practice shows that contracts concluded orally are particularly risky for consumers. The distance selling provisions and the possibilities under competition law are insufficient in addressing this problem. Stronger penalties are urgently needed, e.g. so that contracts cannot take effect if illegally initiated in this way.

**Article 12:  
Length and starting point of the withdrawal period**

AK welcomes the extension and standardisation of the period of withdrawal to fourteen days. Withdrawal periods continue to be initiated in different ways. This approach is objectively justified but to protect the consumer in off-premises transactions, it is essential in any case that the period not begin until the contract is concluded. Currently, this period begins when the consumer signs an order form that above all contains advice on his right of withdrawal or in cases where the order form is not on paper, when the consumer receives a copy of the order form on another durable medium. However, the conclusion of the contract need not necessarily coincide with the signing of the order form. Theoretically, the period of withdrawal could expire before the contract actually materialises. Aside from creating yet another factual condition for the starting point of the period of withdrawal, which runs counter to the

standardisation efforts being made, this provision could theoretically mean that the period in Austria could be even shorter than before. Experience in Austria also shows that the risk of falsifying and manipulating dates has to be taken seriously. This provision would make it easy for dishonest traders in this regard. It would be helpful to add the phrase ‘at the earliest from the day when the contract commences’. An even better and safer alternative would be to require the trader to send an order confirmation by regular mail. This latter requirement has the further advantage that it recognises only one general starting point for the period and is thus easier to convey to the consumer.

As mentioned above, full harmonisation in this area would spell an end to a special provision in Austria for trade in periodicals intended to provide special protection to consumers. Backdating of these orders were an everyday occurrence. The trader is therefore required to send an order confirmation by regular mail. The risk of fraud continues to be high in this area. The provision in the proposed directive would afford no real protection against this problem.

**Article 13:  
Omission of information on the right of withdrawal**

Previously, breaches of other information requirements also resulted in the long period. Now only the omission of information on the right of withdrawal is deemed ‘harmful’. The level of consumer protection would thus

The AK welcomes the extension and standardisation of the period of withdrawal to fourteen days.

be lower than in current EU law, a fact AK finds unacceptable. It must be clarified whether complete omission of information on the right of withdrawal renders the short period obsolete or whether efficient penalties are also in place for the partial omission of information.

Furthermore, consumers would lose their much better position in EU law in off-premises contracts presently in force, whereby an omission of information on the right of withdrawal results in an unlimited period of withdrawal. One could argue in favour of limiting the right of withdrawal for reasons of legal certainty, even after an omission of information on the right of withdrawal or a breach of other information requirements. It would also be reasonable to standardise this period throughout the EU, but this has to be done in a way that ensures a high level of consumer protection. A high level of consumer protection would certainly not be served by setting the three-month period from the distance selling directive. For the rest, it should be noted that several Member States have instituted much longer periods and some have no time limitation at all on the right of withdrawal. For instance, Austria at present has no time limitation for a large portion of off-premises contracts while Germany has no time limitation for off-premises contracts or distance selling. If the aim is to establish a general absolute time limitation, one should consider at least a longer period.

Moreover, cases of fraud are especially rampant in distance selling. Dishonest traders often wait until the three-month period expires to send reminders. To prevent traders from undermining the consumer's exercise of the right of withdrawal in this way, this right should be unlimited in time or at least end at a much later date if the trader does not provide the consumer with information on the right of withdrawal. After all, it is in the trader's power to have only the short period apply to a contract. All he has to do is provide correct, comprehensive information, hand over all contract documents, and inform the consumer of his right of withdrawal.

**Article 16:  
Obligations of the trader in case of  
withdrawal**

Under Austrian law, whenever a contract is rescinded, i.e. not just consumer contracts, the trader is required to reimburse the payment immediately, not within thirty days. In actual practice, a transfer of money is usually handled more quickly. If a special provision is to be created, it would be better to abide by the provision in the old directive, namely immediate reimbursement, but at the latest within thirty days.

Finally, a special provision on this issue for the consumer does not even appear necessary or, to avoid fragmentation of contract law, sensible. It should be subject to national general provisions on contract law regarding rescission of contracts.

The AK is opposed to the obligations of the consumer in case of withdrawal to return the goods within a certain period.

**Article 17:  
Obligations of the consumer in case of withdrawal**

AK is opposed to a provision of this kind that dictates that the consumer return the goods in the course of exercising his right of withdrawal within a certain period. Ultimately, the only effect this provision has is to make it unnecessarily difficult or impossible for inexperienced consumers to withdraw from the contract. That cannot be the object of a consumer protection standard. For the rest, it is often unclear to which address the goods are to be returned, which type or mode of transport are to be used, and whether the consumer is even obligated to return the goods. The consumer should suffer no disadvantages from his uncertainty on these matters or his possible clarification of them with the trader, which could take quite a long time. For the rest, it is never useful to enact statutory consumer protection provisions that unnecessarily raise the potential for conflict in the relationship between consumers and traders. No general provision is required in this instance in our view. A possible problem can be resolved effectively in this area, too, on a case-by-case basis applying the general provisions of contract law.

Coverage of the cost of returning the goods should only be demanded if so agreed and not just if the trader 'has agreed to bear that cost'.

A positive aspect is that the seller receives no compensation for diminished value of the goods if he fails to provide notice of the withdrawal right. Another

positive note is that the consumer bears no cost for services performed during the withdrawal period.

**Article 19:  
Exceptions from the right of withdrawal**

Unfortunately, little has changed in the exceptions from the right of withdrawal.

Contracts on services where performance has begun, as agreed, before the end of the withdrawal period

At present, consumers have no right to withdraw from contracts on services where performance has begun, with the consumer's prior express consent, before the end of the withdrawal period. We know from actual practice, however, that this provision has great potential for abuse. Internet subscription services increasingly cite this exception, equating the retrievability of the service with an act of performance.

The proposal now at least stipulates for services that the consumer must give his prior express consent for performance to begin. That is not enough, however. Exceptions from the right of withdrawal should be limited solely to services where such an agreement is objectively justified, i.e. where the trader incurs a (material) cost in connection with performing the service. Above and beyond that, the exception should be negotiated in detail. At the same time, the trader should have to inform the consumer that the latter will lose his right of withdrawal if performance commences immediately.

### **Newspapers, periodicals and magazines**

It is unclear why newspapers, periodicals and magazines should be exempted from the right of withdrawal. If the sale of individual newspapers, periodicals and magazines is exempted (reversing the sale could be handled without difficulty in this case, too), then a right of withdrawal should in any case be granted when a subscription contract is concluded. No apparent business interest worthy of consideration would stand in the way of doing so.

### **Internet auctions**

Nor is there any justified reason to exempt Internet auctions from the right of withdrawal. The distance selling provision, particularly the right of withdrawal, should apply to each auction on the Internet that ends when the specified time expires and not with the acceptance of a bid because none of the other people bidding at the same time wants to submit a higher bid. Consumers are in need of the same protection – absence of goods, lack of opportunity to inspect them – in auctions of this type as with regular purchases of merchandise. At the same time, disadvantages for the trader are kept within reasonable limits. If a different treatment prevailed, Internet traders could easily circumvent the protective provisions by shifting to Internet auctions.

The AK criticises the complete exception of leisure services, particularly tourist services, in the consumer rights.

### **Gaming and lottery services**

In this context, it has to be clarified that only the direct provider of these services is exempted from the scope, not companies, which, for example, undertake to register consumers for various prize contests or to have them participate in lotteries through gaming communities. A more differentiated provision of this kind would have a great practical effect. These service providers are booming, at least in Austria, and hide behind this exception provision.

### **Article 20: Excluded distance and off-premises contracts**

The excluded distance contracts here are largely taken from the old directive. On a positive note, contracts on house construction and the like are no longer exempted from the scope. After all, there is no special reason for not including the sale of real estate, especially since the purchase of a property and the building of a house are often linked in actual practice. Under this premise, it would be incomprehensible to treat the contracts differently. It is also difficult to understand why there should be no right of withdrawal from contracts of this kind if the contract is concluded off-premises.

AK has also objected on numerous occasions to the complete exception of leisure services, particularly tourist services. Once again, we miss a more detailed analysis of this subject, informed above all by the idea of

strengthening consumer protection in the EU. A more differentiated provision would be conceivable, e.g. basic right of withdrawal, exception in the case of last-minute bookings of tours or hotels.

Austrian law recognises no exceptions from the scope of the right of withdrawal in the case of traders utilising off-premises transactions as a sales technique. As the proposed directive gives no leeway for special treatment, Austrian consumers would once again be in a worse legal position, e.g. for insurance, as a result of full harmonisation.

AK would also point out at this juncture that several aspects covered by the old distance selling directive are missing in this draft directive. For example, Article 8 stipulated contract cancellation and the refunding of payment if fraudulent use is made of a payment card in distance selling.

#### **Chapter IV**

##### **Other consumer rights specific to sales contracts**

###### **Article 21: Scope**

The impression here is that spare parts are to be exempted from the guarantee, also in connection with Article 26. The provision says explicitly that the scope does not extend to spare parts; Article 26 stipulates that if goods are replaced, a full guarantee applies again to the new goods, but no such guarantee applies in the case

of a repair or a spare part replaced in the course of a repair.

Water, electricity and gas were excepted from the definition of 'goods' in Article 1.4. The objective scope of guarantee law is much broader in Austria and also covers these products.

###### **Article 22: Delivery**

Against the backdrop of full harmonisation, the obligation to deliver the goods within thirty days unless agreed otherwise could also worsen the Austrian consumer's legal position. Under the Austrian General Civil Code (§ 904 ABGB), he can demand the goods be delivered immediately if no deadline has been agreed to. A provision like the one above could create a situation in which traders had a better position in accordance with the general legal principles of Austria. This provision should therefore be dispensed with, also in the interest of achieving a higher level of consumer protection. This issue should be left to general national contract law or the obligation to deliver immediately should be anchored in the provision.

The obligation previously applied only to distance selling, but in that context, to services. This provision would also be inconsistent from that viewpoint. If there is a detectable need to protect consumers here it exists most likely in relation to service providers.

The AK objects to the legal uncertainty for the consumer after a product is replaced and a defect reappears again.

**Article 23:  
Passing of risk**

Defining the passing of risk as the time when the consumer has acquired the material possession of the goods would be suitable for clearing up certain disadvantages for consumers in Austria in distance selling.

**Article 26:  
Remedies for lack of conformity**

AK fails to understand why the seller should now be able to choose whether to remedy the lack of conformity by repair or replacement under the proposed directive. Until now, the consumer made this decision; under the EU directive, this decision could be overridden if one legal remedy involved disproportionate effort by the trader compared with the other. This provision often came to nought, as the consumer could seldom counter the argument of disproportionate effort, especially cost, of one remedy versus the other. The consequence to be drawn from this should not be to turn the hands of EU consumer protection law back and take this right away from consumers. Rather, consideration should be given as to how this provision might be sharpened in favour of consumers, e.g. by allowing them to demand of traders express and precise information on the disproportionate effort involved and evidence of it.

The position of consumers is also worse than in the old directive on consumer good sales in the event that the same defect reappears more than once: He is entitled to withdraw from

the contract only after the same defect has reappeared more than once; in other words, he has to accept several attempts at remedying the situation. AK urges that the consumer be allowed to withdraw after one failed attempt to remedy the defect. In addition, the same defect must reappear more than once "in a short period of time." That too is extremely counter-productive and not consumer-friendly: Aside from the problem of defining what short period of time might be acceptable as such, this provisions suggests by implication: That consumers must accept yet another attempt at remedying the defect in any case if the same defect reappears after an extended period of time.

**Article 28:  
Time limits and burden of proof**

The provision that a two-year guarantee period begins anew after a product is replaced and a defect reappears again is basically positive and well-intended, however, once again it triggers legal uncertainty. The reverse could be concluded, namely that if lack of conformity is remedied by repair, a new guarantee period for that actual defect is no longer triggered. Against the backdrop of full harmonisation, it would not be possible to improve the consumer's position. That is odd in this case, especially considering that traders in Austria enjoy more protection in this same situation. Why are different standards applied to a remedying of the lack of conformity by a complete replacement versus by repair with or without replacement of a spare part? This is another inexplicable aspect

and makes this provision appear not thought-through.

### **Consumer's duty to report the lack of conformity**

AK firmly rejects the creation of a general obligation to report a lack of conformity within two months. Austria chose not to adopt the option in the EU directive on this point for good reason and in the interest of reasonable consumer protection. A host of other Member States of the EU did the same and did not make use of this option. It is inexplicable for AK how this provision can be reconciled with the much-touted objective of achieving a high level of consumer protection. A fact overlooked here is that it is in the consumer's own interest to realize guarantee claims quickly. The effect of this obligation to report a lack of conformity is therefore to exclude ill-informed and inexperienced consumers who have demonstrably not safeguarded their interests.

### **Presumption period**

The EU Commission obviously sees no need to strengthen consumer protection with regard to the length of the presumption period. Nothing has changed: The period for which any lack of conformity shall be presumed to have existed is limited to just six months.

## **Chapter V**

### **Consumer rights concerning contract terms**

#### **Article 31: Transparency requirements of contract terms**

Point 2 of this article stipulates that contract terms must be 'available' to the consumer so he has an opportunity to become acquainted with them. Although the validity test put in place here goes somewhat further than before, it is formulated too fuzzily and does not in fact go far enough. From a consumer's standpoint, AK would welcome a general standard that contract terms have to be handed over to the consumer before or at the conclusion of the contract along with instructions on their use, whether the contract comes about as the result of off-premises selling or distance selling. Terms not handed out should not be deemed to be part of the contract. The company would bear the burden of proving that it fulfilled its duty.

Austria also has a general provision on the validity test for contract terms that is intended to protect against surprisingly disadvantageous terms. There is a fear that this norm might not be able to stand up against the full harmonisation efforts of the EU Commission either, as it affords a more stringent level of protection.

Basically, the trader must obtain the express consent of the consumer for any additional payment. AK welcomes the penalty in point 3 for a breach

The AK advocates retaining minimum harmonisation to avoid a reduction of the national consumer protection.

of this obligation involving the trader obtaining the consumer's consent using default options on an Internet site. It should also be clarified however that additional payments are not part of the contract unless otherwise agreed and therefore the trader has no claim to them or the consumer can demand their reimbursement.

**Articles 33, 34 and 35:  
Burden of proof, terms considered unfair in all circumstances, and terms presumed to be unfair**

AK feels the need for a high level of protection in this area too. Inter alia, the system for checking the content of contract terms is much more comprehensive and substantive in Austria. For instance, terms considered unfair in all circumstances should no longer be able to be considered even if negotiated individually. A consumer's power to negotiate is actually quite modest in reality. Moreover, most consumer transactions are mass transactions with no leeway for negotiation. Therefore Article 33 will not play a big role in actual practice. Nonetheless, it should be deleted for reasons of legal clarity and consumer protection and to avoid unnecessary legal disputes between consumers and traders. The EU Commission should therefore check to see in which terms it can refrain from having this objection by the trader be valid.

With full harmonisation and the adoption of the EU regulatory system for all unfair business terms, consumers in Austria will suffer an even more serious deterioration of their legal position.

That is because Austria also has a number of other terms for which the only admissible objection is that they are individually negotiated; their unfairness is unquestioned and not just presumed as on the gray list in the proposed directive.

Furthermore, Austria has more stringent rules on the validity test for contract terms as regards surprisingly disadvantageous terms. Incidentally, companies can continue to rely on this protection because it is a general provision that covers more than just consumers.

AK has always advocated retaining minimum harmonisation in this area. Otherwise, decades of well-balanced Austrian law on this issue, reinforced by extensive case law, would be annihilated and national consumer protection would be reduced substantially with regard to unfair contract terms.



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