May 2007

AK Position paper

Green Paper on the Review of the Consumer Acquis

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About Us

The Federal Chamber of Labour is by law representing the interests of about 3 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 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.

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 million members are exempt from subscription payment, but are entitled to all services provided by the Austrian Federal Chambers of Labor.

Herbert Tumpel
president

Werner Muhm
director

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Executive Summary

- An updating of the EU Consumer Acquis is necessary for several reasons and a positive step for facing the challenges of new market conditions, especially in relation to technological advances.

- Any revision of the Consumer Acquis must reflect the EU's commitment to a high degree of consumer protection at Community level and thus strive to expand and strengthen consumer protection law.

- Measured against that goal, the Green Paper seems vague and half-hearted particularly in its complete omission of several acquis directives, e.g. Directive 90/314/EEC on package travel, package holidays and package tours, and in its failure to describe the planned measures in concrete terms, e.g. for distance selling.

- This omission of several sectors, e.g. energy or transport, also seems illogical given the EU Commission's declared preferences for full harmonisation, horizontal instrument and creation of an EU-wide body of consumer contract law.

- AK has serious reservations about full harmonisation and the blockage it would cause in EU consumer law. It would freeze EU consumer law at the smallest common denominator and take away all leeway in consumer policy at national level. A deterioration of consumer protection law in the individual Member States would be an unavoidable result.

- AK rejects the country of origin and mutual recognition principles. They would subordinate consumer interests to business interests even though consumers are the weaker party to an agreement.

- The Commission's position on conflict of laws is unclear from the Green Paper and the steps proposed in it. The Green Paper runs counter to the efforts to strengthen consumer protection, evidenced particularly in the revision of ROME I.

- AK continues to advocate a vertical approach in the revision of the acquis as the most suitable solution. It might be conceivable, however, to harmonise a handful of terms and principles in a horizontal instrument, too, but always under the assump-tion of minimum harmonisation.

- The issue of a separate body of EU consumer contract law cannot be tackled separate from the development of a common European law of contract. The vague for-mulations and lack of concrete details do not really allow an assessment of this undertaking.

Updating the Acquis and Strengthening Consumer Protection Are Positive Steps

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Preliminary Remarks

AK basically welcomes a revision of the Consumer Acquis.

AK basically welcomes a revision of the Consumer Acquis and concurs with the EU Commission in the need to adjust this body of law to new technological advances, new products and new sales techniques. Greater coordination and harmonisation of consumer protection directives, e.g. of the periods allowed for exercising the right of withdrawal, could be a sensible way of increasing legal certainty for users of the law.

It is important that consumer protection not stagnate in the EU. The EU's commitment to a high level of consumer protection at Community level demands constant efforts aimed at further developing the Consumer Acquis. Worthy of special note on the positive side are several actions discussed in the Green Paper for expanding consumer protection, particularly the revi-sion and amendment of Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees.

AK Highly Sceptical of Full Harmonisation

AK has great reservations, however, about the strategic approach the European Commission wishes to take in the revision of the Consumer Acquis, namely, full harmonisation. Full harmonisation would only reduce the consumer protection standards at national level while freez-ing them throughout the EU at what is generally a modest level.

The EU directive law has since been transposed into national civil statutes and is now firmly introduced and accepted owing to constant application. The trust the justice system and per-sons subject to this law have in this integrative process must be safeguarded. To achieve effective consumer protection, individual Member States must be granted a certain degree of flexibility in consumer policy. It is important that countries can continue to respond to specific national consumer problems with suitable legislation. Ideal coordination must also be achieved between consumer law and national civil law. The usual timeframe for EU legislation alone makes it untenable that an EU Member State be forced to depend exclusively on Community legislative initiatives. Finally, it is feared that full harmonisation would bring about the precise situation the Green Paper seeks to combat, namely regulatory fragmentation, particular between consumer law and other law.

Although not categorically opposed to a horizontal legislative instrument, AK emphasises that it could only support this approach in connection with minimal harmonisation. From our standpoint, only a handful of issues relevant to the entire Consumer Acquis would be suitable for this approach.

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AK is strongly opposed to the subsequent introduction of the country of origin principle.

AK Rejects the Country of Origin and Mutual Recognition Principles

AK is strongly opposed to the (subsequent) introduction of the country of origin principle or the principle of mutual recognition in the Consumer Acquis. AK has explained the reason for its opposition on several occasions, e.g. in connection with Directive 2003/31/EC on certain aspects of electronic commerce and Directive 2006/123/EC on services in the internal market.

The country of origin principle, for example, would require that the legal systems of two coun-tries be considered in the event of a conflict. In every single legal issue, one would have to determine which of the two legal systems would apply. It is unreasonable to expect either consumers or the justice system to accept this degree of regulatory fragmentation. The origin of country principle also encourages competition among Member States to see which business location can offer the lowest degree of consumer protection. Instead of alleviating consumers' distrust of cross-border transactions and their legal certainty, this situation would do the oppo-site and actually increase it. There is no way consumers can know the legal regulations in the supplier's country of domicile and thus also no way for them to assess what is legal. Besides, these cases would be difficult and extremely complicated for the courts to deal with and would make deficits in enforcement inevitable. The practice of the courts with regard to Directive 2003/31/EC on certain aspects of electronic commerce shows this vividly.

The principle of mutual recognition is not concerned with consumer interests and thus the interests of the weaker party in the contract but is geared exclusively to suppliers. If these principles are incorporated in consumer protection law, the EU is giving mere lip service to the goal of putting a higher level of Community protection in place.

Moreover, an approach of this kind would be diametrically opposed to the revision of ROME I and ROME II and the institution of stronger consumer protection in conflict of laws provisions. In AK's view, the best way to overcome consumers' reservations about cross-border trade and services is to ensure that consumer law is extensively applied in the consumer's country of residence by businesses targeting new customers in that country.

Regulatory Gaps in the Green Paper

AK failed to find a comprehensive description of the planned efforts to update and revise the entire acquis. For instance, the EU Commission failed to explain in concrete terms its plans regarding Directive 90/314/EEC on package travel, package holidays and package tours; Directive 98/27/EC on injunctions for the protection of consumers' interests; and Directive 94/47/EC on the protection of purchasers

in respect of certain aspects of contracts relating to the purchase of a right to use immovable properties on a timeshare basis. For the rest, an essential aspect of consumer protection is left virtually unmentioned, namely law enforcement. Further, the Green Paper only touches on the Distance Selling Directive (1997/7/EC) in the context of strategic considerations instead of focusing on the urgent need for adjustments in this very area to address ongoing market and technological developments.

As regards Directive 1999/44/EC on certain aspects of the sale of consumer goods and asso-ciated guarantees, no attention was devoted to issues apparently postponed for the time being, such as actions to be taken at customer service level.

It also remains a puzzle as to why the Green Paper ignored certain sectors like financial services or energy as a whole. This omission seems highly inconsistent, especially considering the Commission's preference for a horizontal instrument and its goal of combating regulatory fragmentation.

EU Law on Consumer Contracts

AK is definitely in favour of a joint legal framework for contract law in the EU. The project for a separate body of comprehensive EU law on consumer contracts is new, however. It is not a promising strategy to take up this subject while simultaneously revising the Consumer Acquis. The issues surrounding the updating and further harmonisation of consumer law are complicated enough and the addition of more issues would lead to an overload. Moreover, this step would be not be an adequate substitute for a body of European contract law. Taking general principles of contract law out of the context of civil law and anchoring them in regulations aimed strictly at consumer protection is problematic in and of itself. It could be seen as a signal in a wrong direction.

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ANNEX 1

Question A

In your opinion, which is the best approach to the review of the consumer legislation?

AK prefers a vertical review of the Consumer Acquis (Option 1). A horizontal instrument for the entire acquis is conceivable but only to tighten up and standardise a handful of concepts and principles, e.g. the notions of consumer and professional or the length of cooling-off periods and the modalities for exercising the right of withdrawal. However, these issues could be resolved just as easily with a vertical revision of the directives. The somewhat lower costs of a horizontal instrument are not really a compelling argument for this option.

AK is not in a position to judge the project of establishing a separate comprehensive body of EU consumer contract law because the EU Commission fell far short in this Green Paper of spelling out the measures for bringing this about. Disengaging general principles of contract law out of the context of civil law and anchoring them as regulations strictly aimed at consumer protection is also problematic. It could be seen as a signal in the wrong direction. Moreover, this approach would only invite further regulatory fragmentation; in this case between consumer contract law and the rest of contract law.

Question A 2

What should be the scope of a possible horizontal instrument?

AK advocates a vertical approach, as mentioned above. If a horizontal instrument is consid-ered, it should apply to cross-border and domestic transactions. However, the AK opposes its blanket application to all consumer contracts. It prefers an instrument with the same areas of application previously covered by the Consumer Acquis. For instance, in Directive 93/13/EEC on Unfair Terms in Consumer Contracts, the scope of application extends to all contracts whereas in Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees, it applies exclusively to the sales agreements defined in the directives.

Question A 3

What should be the level of harmonisation of the revised directives/ the new instrument?

AK favours abiding by the principle of minimum harmonisation regardless of the approach taken to revising the acquis. Minimum harmonisation has proven effective. It gives Member States leeway for national regulations in consumer protection. Governments need this leeway to take appropriate steps to respond to acute consumer problems.

A certain amount of flexibility is particularly required to coordinate the directives with the rest of civil law.

Full harmonisation tends to lead to a worsening of protection for consumers at national level. For example, Austria goes much further in its definition of the term "consumer" and includes transactions for establishing professional self-employment and consumer transactions geared to professional advancement, e.g. training agreements or pertinent continuing training offer-ings from training institutions. This level of protection could probably no longer be maintained with the planned definitions for consumer/professional.

Moreover, the goals set out in the Green Paper can be largely achieved with minimum harmonisation. Innovation and progress in the market can be addressed just as effectively by revising the individual directives. Crossborder transactions by consumers are rising sharply anyway, in our observation. This type of commerce would be boosted most lastingly and positively if steps were taken to ensure that consumers could apply their own legal system in the case of conflicts. ROME I and strong consumer protection in issues involving a conflict of laws is of crucial significance in this context.

Regulatory fragmentation could be countered by full harmonisation yet this problem would merely reemerge in a different form.

Full harmonisation would promote the drifting apart of consumer contract law from the rest of civil law.

AK expressly opposes the origin of country principle and the mutual recognition principle. Both subordinate consumer interests to business interests even though consumers are the weaker party in a transaction.

Question B 1

How should the notions of consumer and professional be defined?

The definitions for consumer versus professional could be aligned in vertical measures or by pursuing a horizontal approach. However, this would not eliminate contradictions. Directives 90/314/EEC on package travel, package holidays and package tours currently apply to any travellers and would then apply only to consumers. This step would restore the coherence of the Consumer Acquis. However, Regulation (EC) No. 261/2004 (establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights) is still geared to all passengers regardless of status, thus granting them the new rights regardless of whether they are being transported by air for private purposes or in relation to their trade, business or profession.

If it comes to full harmonisation, detrimental consequences are expected in Austria from the standardisation of the consumer concept. Austria defines this term very broadly. The definition covers transactions to establish self-employment as well as transactions a consumer could conduct closely associated with his/her trade, business or profession, provided they do not pertain directly to his/her employment or the exercise of his/her trade, business or profession. A departure from minimum harmonisation would mean the protective regulations would no longer apply to these transactions. After all, a distinction for transactions undertaken primarily for trade, business or profession would exclude, for example, contracts on professional training and additional qualifications. It is also not a fair solution for a consumer taking the leap into self-employment in a main or auxiliary form of livelihood, which could succeed but could also fail. Since most consumers take this step with little experience and great uncertainty, one can usually assume an imbalance between the two parties to the agreement.

From this standpoint, BAK prefers Option 2 and abiding by the principle of minimum harmoni-sation.

Question B 2

Should contracts between private persons be considered as consumer contracts when one of the parties acts through a professional intermediary?

AK favours Option 1. Problems rarely arise with consumers who have been advised and supported by a professional intermediary in a legal contractual relationship between consumers. Cross-border transactions between consumers are irrelevant, except at most in e-commerce, e.g. through auction platforms. However, problems arising from these consumers being represented by a professional intermediary are also exceptions rather than the rule.

It appears unsuitable to view matters too one-dimensionally, i.e. to generally apply all con-sumer regulations when a consumer acts through a professional intermediary in a consumer-to-consumer transaction. It would be expedient to apply legally differentiated solutions based on the nature of the individual case. All in all, this is a subject that should be reserved for na-tional legal systems.

Question C

Should a horizontal instrument include an overarching duty for professionals to act in accordance with the principles of good faith and fair dealing?

The principle of good faith and fair dealing is part of Directive 93/13/EEC on Unfair Terms in Consumer Contracts and constitute the basic criteria for assessing the unfairness of a contract clause.

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The Directive on Unfair Commercial Practices 2005/EC also includes this principle as a benchmark for determining the fairness or unfairness of business practices and is soon set to be transposed in the Member States. AK thus believes it would be premature to generally extend its scope of application to all consumer contracts as part of a horizontal instrument.

It would be better to wait and see first if this new provision proves effective in actual application on unfair business practices before further similar measures are considered. The concept of good faith is recognized in Austrian law. It applies to all legal relationships, not just those between consumers and professionals. Anchoring this principle in EU law exclusively for consumer transactions could erode its significance in general contract law because compliance would only be deemed necessary if a similar imbalance existed between the contractual counterparts as in consumer transactions. No conclusion can be drawn on this point yet.

Question D 1

To what extent should the discipline of unfair contract terms also cover individually negotiated terms?

The scope of application of Directive 93/13/EEC on unfair terms in consumer contracts is formulated quite narrowly on this point. With the restriction at EU level, any contractual provision, no matter how unfair, loses that stigma if a professional and a consumer negotiate it before-hand. However, there are certainly contract terms warranting categorical rejection. This restriction is also based on a fiction, namely that the consumer is always in a position to safeguard his/her interests and rights regarding the additional provisions of a contract in these contract negotiations. The scope of application should thus be extended to individual negotiated clauses in the revision of the Consumer Acquis. AK therefore prefers Option 1 (assuming the above premises).

Question D 2

What should be the status of any list of unfair contract terms to be included in a horizontal instrument?

AK prefers maintaining the status quo, thus Option 1. An optional black or gray list would push the Member States into arranging a smallest common denominator and ultimately be detrimental to consumer protection in the EU as a whole. This step would probably also undermine Austrian consumer protection.

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It would be difficult to maintain in full the regulations on contract clauses in Austria and their systematic approach, i.e. a combination of general clauses with a demonstrative listing of contract clauses that are inadmissible in each case and clauses for which the professional can verify that they were not negotiated individually.

Lists of this kind are disadvantageous in that even a small variation on a contract clause could render that clause formally fair even though it serves exactly the same purpose. A flexible system is therefore indispensable for assessing the unfairness of contract terms. The list of terms annexed to Directive 93/13/EEC on unfair terms in consumer contracts is strictly indicative in character and should remain so.

Question D 3

Should the scope of the unfairness test of the directive on unfair terms be extended?

If done with circumspection, an extension of the scope of the unfairness test to cover the main elements of contract performance would be a sensible supplement to the consumer protection afforded by Directive 93/13/EEC, in AK's estimation. The directive itself goes a certain dis-tance in this direction, including as it does unclear provisions even if they relate to the main subject matter of the contract and the price and excluding only appropriateness from the scope as regards price, but not the question of price changes after the contract is concluded.

The consumer should in any case be able to protect him/herself from unreasonably high prices if he/she is subject to prices dictated by the professional or if he/she is powerless to negotiate and influence prices in his/her own favour under monopolistic supplier conditions. The Green Paper fails to touch on these matters in anything but an abstract way. To make a final assessment of the problem, it would be helpful to have concrete descriptions of possible meas-ures that might be taken.

Question E

What contractual effects should be given to the failure to comply with information requirements in the Consumer Acquis?

From AK's viewpoint, the logical consequence of failing to comply with essential information requirements would be that the cooling-off period would not even begin, i.e. the consumer would be given an unlimited period for withdrawing from the contract. Or the consumer would at least be given a substantially longer period than is granted today, for example, in distance selling. It is feared that further sanctions could overshoot the mark and render the regulations useless in some cases.

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For example, several companies repeatedly succeed in undermining the 3-month period in distance selling and wait until then to present the consumers with a bill. The consumer may not even be aware at that point that he has a valid contract with the company.

One goal should therefore be to align and standardise the consequences of information duties involving especially important content such as details on the right of withdrawal. The existing regulations for doorstep selling, an unlimited right of withdrawal, is the best solution for the consumer and should also be applied to distance selling and timesharing. For the sake of legal certainty, another option would be to establish an even longer period than the 3 months now in place for distance selling or timesharing. Special formal requirements for essential information of this type are also called for. Otherwise, the information can always be buried away somewhere in the fine print. The transfer of information should therefore be highlighted (in terms of printed appearance) and be clearly rendered on a separate form.

AK does not believe the legal remedies for breaching other information duties and legal remedies above and beyond the right of withdrawal, e.g. additional damages, should be lumped together indiscriminately. It prefers a differentiated approach to them instead. They should also be closely intermeshed or aligned with the rest of national contract law. These issues should be left to the national legal systems to handle. Another problem associated with putting general and uniform EU-wide legal remedies for consumer business in place is that the content of consumer law and the rest of civil law might ultimately drift apart and develop in different directions.

Question F 1

Should the length of the cooling-off periods be harmonised across the Consumer Acquis?

AK favours a harmonisation of the cooling-off periods. Coherence on this point would increase legal certainty for consumers and make it much easier to instruct consumers about their rights in consumer information and educational activities. AK envisions a general exten-sion of the right of withdrawal to 14 (calendar) days throughout the EU to ensure a high level of consumer protection. At the same time, the following modalities would be established: Every day of the week, Saturdays, Sundays and holidays included, should be counted as part of the withdrawal period. The beginning of the withdrawal period should also be fixed: The first day of the period would be the day following the event that triggers the period. A rule could also be put into Community law that dispatching the declaration of withdrawal within the period suffices as compliance with the withdrawal regulations.

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However, a single regime for all rights of withdrawal is not always expedient. An exception should be considered for timesharing. A 14-day withdrawal period would be too short in AK's estimation. Timesharing transactions are based on highly complex contracts that put a major financial burden on consumers. Moreover, these transactions are always concluded on holidays. A cooling-off period of just 14 days could therefore expire before an average trip is even over without the consumer having a chance to weigh the pros and cons of this investment based on objective information. From this standpoint, BAK urges that a 1-month withdrawal period be considered.

AK therefore prefers Option 2, but with more consumer-friendly cooling-off periods.

Question F 2

How should the right of withdrawal be exercised?

To afford consumers more protection, they should be able to exercise their right of withdrawal free of unnecessary conditions, e.g. certain formal requirements or the need for a registered letter. AK would favour a solution that elevated this scope of protection to the standard across the EU. Written notifications do have the basic advantage of better traceability for both parties. A standardization at this level would therefore be reasonable and acceptable from a consumer policy perspective.

Question F 3

Which costs should be imposed on consumers in the event of withdrawal?

EU consumer law should clearly commit to allowing consumers to exercise their right of withdrawal free of charge. Various charges should not stand in the way of consumers withdrawing from contracts under which they have legal rights of withdrawal. Professionals' interests are safeguarded anyway in national regulations and principles of unjust enrichment on the reversal of contracts. AK therefore advocates Option 1.

Question G 1

Should the horizontal instrument provide for general contractual remedies available to consumers?

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Question G 2

Should the horizontal instrument grant consumers a general right to damages for breach of contract?

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Further developing consumer law at EU level and thus expanding the Consumer Acquis is undoubtedly necessary and important. AK does have reservations about the project to institute a separate comprehensive body of EU consumer contract law independent of a common European reference framework. It is important to keep in mind that this would open up a gap in civil law. Different laws would then apply depending on whether a person was acting in his/her capacity as consumer or conducting purely private transactions or whether two professionals were involved as the two parties to a transaction.

To make matters more difficult, the Green Paper is much too general in its explanations on this initiative. The value of planned general clauses of this kind depends on an overall assessment of the level of regulation in the individual Member States and on clarification of protection deficits and thus of the need for harmonisation. The Green Paper contains no information and explanations on this matter. To make a serious assessment of the project to put a separate body of EU-wide consumer contract law in place, the planned consumer protection measures must be cloaked in concrete terms and more information has to be given on the nature and quality of the planned measures.

AK therefore advocates that for the time being, these issues be left to the national legal systems or that they be dealt with as part of efforts to develop a body of common European contract law for application throughout the EU.

Question H 1

Should the rules on consumer sales cover additional types of contracts under which goods are supplied or digital content services are provided to consumers?

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Question H 2

Should the rules on consumer sales apply to second-hand goods sold at public auctions?

Expanding the scope of the pertinent Directive 1994/44/EC on certain aspects of the sale of consumer goods and associated guarantees would be a sensible step for improving EU-wide consumer protection. Even extending it to cover contracts on the use of digital content would have a substantial effect in clearing up aspects of distance selling and thus help to avoid problems in distinguishing what falls within the scope of protection and in cases of doubt. The combination of Options 2 and 3 should be pursued and a further development of EU consumer law (as part of a vertical revision of the Directive).

AK advocates a similar approach to the exception of second-hand goods sold at public auctions.

This exception can also be eliminated as part of the revision of the Consumer Acquis.

Warranty law in Austria has been thoroughly reformed. The main consumer policy pillars in the EU Directive were transposed for the handling of warranties for consumer goods sales not only in the narrow sense but, for the most part, in a general sense as well. They apply to movables and immovables. The warranty period also applies to immaterial objects. New and second hand goods sold at public auction are covered as well. For the rest, the warranty regulations also apply to all types of contracts on a payment basis (unless special warranty rules exist).

Question I 1

How should delivery be defined?

AK favours maintaining the status quo (Option 4). There is no need for a precise definition for the reasons cited. The remarks in the Green Paper do not even put forth problems arising from greatly diverging definitions of delivery in the various Member States with tangible disadvantages for consumers. Special consumer protection measures on this point are therefore not necessary. This issue is closely intertwined with general contract law and should therefore not be taken out of that context to create a separate consumer protection law and a separate rule.

Question I 2

How should the passing of the risk in consumer sales be regulated?

In AK's experience, problems with the passing of risk occur only occasionally in distance selling. Under Austrian law, for example, the risk is passed to the consumer when the goods are handed over to the shipper. Since the transposition into Austrian law of Directive 97/7/EC on the protection of consumers in respect of distance contracts, consumers can circumvent any disadvantageous consequences by exercising their right of withdrawal. Actually, one could consider improving consumer protection for this limited aspect, e.g. by expressly linking the passing of risk to the moment of handover to the consumer, as part of a vertical revision of the directive.

However, AK is firmly opposed to a general regulation for all types of contracts. This issue, too, is closely intertwined with general contract law and should not be taken out of that context to create a separate consumer protection law and a separate rule.

Question J 1

Should the horizontal instrument extend the time limits applying to lack of conformity for the period during which remedies were performed?

AK favours maintaining the status quo and does not see the need for EU-wide regulation. AK is unaware of concrete problems not resolvable with the instruments of general contract law. A separate consumer protection right is neither necessary nor opportune in this context. The legal instruments on interruption or suspension of the running of the period of limitation should not be subject to regulation confined to a specific point; it is essential to maintain harmony on this issue with general contract law at national level.

Question J 2

Should the guarantee be automatically extended in case of repair of the goods to cover recurring defects?

Extending the guarantee period would in any case be in the interest of consumers.

Austrian law solves this problem by having a new guarantee period of 2 years begin again if a good is repaired or replaced under guarantee; it is limited to defects actually remedied; i.e. only the recurrence of this defect gives rise to guarantee claims for the entitled party to the contract. Moreover, this legal rule is general in nature, i.e. it applies all parties entitled under a guarantee, not just consumers.

AK advocates a vertical solution in this sense only if a full guarantee is extended, i.e. in any case 2 years, for the remedying of the defect. Any stricter rules in the individual Member States can also be retained. Otherwise, the absurd situation would arise of putting consumers in a worse situation than professionals B2B.

Question J 3

Should specific rules exist for second hand goods?

AK has always favoured a two-year guarantee for second-hand goods. Uniform periods provide greater legal clarity and certainty to law users, both consumers and professionals. Besides, professionals are not liable for wear and tear if the other party to the contract is informed in advance of the second hand condition of the good in a clear and comprehensive performance description.

AK thus prefers Option 1. As regards the regulation approach, AK advocates a vertical revision of EC Directive 44/1999.

Question J 4

Who should bear the burden to prove that the defects existed already at the time of delivery?

Reversing the burden of proof in favour of the consumer for a period of six months following delivery would greatly simplify the situation for the consumer. The fact that the consumer enjoys no relief as regards burden of proof after this six months cancels out the value of an extension of the guarantee period to 2 years:

The consumer soon comes into a bind in arriving at a mutual solution, especially with technical equipment. Expert assistance is often needed. AK would welcome a further extension of the reversal of the burden of proof to strengthen consumer protection because the seller is better placed to furnish proof (indirectly also by contacting the manufacturer).

One should also question the exceptions again, i.e. not compatible with the type of defect and the nature of the product. Shorter shelf lives for food, for example, should be covered. Art 5.3 of EC Directive 44/1999 does not clearly indicate whether the reversal of the burden of proof applies if something was already wrong with the good at an earlier point in time as regards shelf life or if this reversal is incompatible with the nature of the good and the defect. This point should be clarified. The reversal of the burden of proof should also apply to less durable goods, at least for a shorter period of time.

AK prefers Option 2, including supplementary clarification for less durable products (under the premises given above).

Question K1

Should the consumer be free to choose any of the available remedies?

The rules on recourse to legal remedies are in any case too complicated in respect of the consumer's right to choose between the first-line remedies of repair and replacement. The consumer is hardly in a position to verify whether a given remedy is disproportionate for the seller, as verification is geared to the costs in that individual case, and therefore can seldom disprove disproportionateness. It is beyond the consumer's capabilities to weigh the interests involved based on a reference system with so many different criteria: costs of the two legal remedies, disproportionate nature of the costs, value of the non-defective good, severity of the defect and any inconvenience for the transferee. The consumer's freedom to choose therefore often exists only on paper; the benefits for the consumer are less tangible in actual practice. AK therefore advocates an improved right to choose at least at this level (first-line remedies).

Of course, the consumer's position would be substantially strengthened were he/she free to choose any of the available remedies from the start (except termination of contract) as indicated in Option 2. The right to choose between the legal remedies should therefore be expanded in a vertical revision of EC Directive 44/1999.

Option 3 overlooks the fact that a consumer could have a special interest in withdrawing from a contract in cases other than the unavailability of other legal remedies; e.g. in the case of a repair that fails but is basically possible; if deadlines are exceeded; if the consumer has lost trust in the professional.

Question K2

Should consumers have to notify the seller of the lack of conformity?

In Austria, lawmakers refrained from putting a duty to notify in place, with good reason in AK's estimation. The introduction of this kind of duty to notify would have had severe disadvantages for consumers and abuse is unlikely. Consumers are generally interested in submitting a complaint about a defect quickly so they can have a functional product again as soon as possible. The only thing that takes time in this context is to obtain advance information on asserting a warranty claim. As a result, inexperienced and unknowledgeable consumers are the ones who are penalized. Moreover, one should avoid regulations that do nothing more than open up further arenas in a section of the law already riddled with complex and difficult issues.

AK also expresses its concern that the goals defined for the Green Paper – namely revising the Consumer Acquis in particular to further strengthen consumer protection across the EU – are in fact pointing in a different direction if a duty to notify the seller about defects has to be put up to a discussion. Incidentally, ten Member States have not made use of this option detrimental to consumers.

AK is opposed to the general introduction of such a duty (i.e. opposed to Option 1 and Option 2). It would be in keeping with a commitment to strong consumer protection in the EU to abolish this duty (Option 3).

Question L

Should the horizontal instrument introduce direct liability of producers for non-conformity?

Introducing direct liability of producers could put consumers in a much better legal position when concluding sales agreements abroad or across borders. In particular, the primary statutory warranty remedies could be implemented without undue effort and expense if the seller is domiciled abroad and the producer has an EU-wide network of distribution partners and customer service centres. The consumer would also have a further contact point if his/her contractual partner went bankrupt or shut down the business. The Green Paper's deliberations on consumer goods guarantees and customer service in this direction have lost none of their relevance.

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These measures might also help to avoid disadvantages for consumers arising from statutory warranties and product guarantees that run parallel to each other. For consumers, these two legal instruments are indistinguishable in actual practice. As a result, consumers often have difficulty asserting their rights efficiently and optimally if defects occur. In many cases, they let the seller persuade them that they would be better off contacting the producer (representative) about their problem.

A cofactor in deciding whether to put a separate liability for producers in place is to ensure that a clear-cut and simple solution can be created for consumers. The consumer should not have to distinguish which defects he/she has to assert against the seller and which ones he/she has to assert against the producer. It would be equally useless to put a rule in place that did not enable all legal warranty remedies against the producer, i.e. the consumer should be able to use secondary legal remedies under the same conditions as against the seller.

AK therefore prefers Option 2, noting, however, that the exact features of producer liability will decide whether AK will actually support this undertaking. The EU Commission failed to include possible details in its remarks. Consumer protection in this area could just as well be improved in a vertical approach, as mentioned several times already.

Question M 1

Should a horizontal instrument provide for a default content of a commercial guarantee?

In actual practice, consumers are generally not in a position to distinguish between a statutory warranty and a commercial guarantee. This inability can have negative consequences for the consumer. In many cases, guarantees do not offer what warranties do. If the consumer is unaware of the difference, he/she can often make a spur-of-the-moment decision and run the risk of reducing his/her rights. Against this backdrop, consumers would benefit if the law stipulated the default content and scope of a guarantee. Producer guarantees are also excellent and popular means of promotion and businesses often use them in this way for their brand equipment and products. From that standpoint, guaranties without substance are extremely problematic.

AK therefore believes default rules would improve the customer's legal position (Option 2). It is conceivable, for example, that if precise information on the scope and content of the guaran tee is not given, the guarantor could be obliged to grant the rights under the statutory warranty or at least an EU-wide repair or replacement of goods not in conformity with the contract at its own expense, either for the period of the likely service life or for two years.

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It is important to note, however, that the producer extends this guarantee voluntarily. If requirements are too strict, commercial guarantees could lose their current significance.

Consumer protection could be improved by subjecting the directive to a vertical revision (under the indicated premises).

Question M 2

Should a horizontal instrument regulate the transferability of the commercial guarantee?

This step would benefit both consumers and businesses, because it renders products more marketable. Producer interests would undoubtedly have to be safeguarded in the event of abuse or in situations where proof is difficult to furnish, i.e. third-party culpability, for example, still has to be pleadable against the subsequent purchaser even if it stems from the previous owner. The transferability of a commercial guarantee under certain circumstances could therefore be put up to discussion in a vertical revision of the directive (Option 2). What applied above also applies in this context. If conditions are excessive, they could be counterproductive in ultimately causing the producer to dispense with guarantees altogether.

Question M 3

Should the horizontal instrument regulate commercial guarantees limited to a specific part?

AK assumes that Art 8 of Directive 44/1999/EC addresses all types of guarantees and thus guarantees limited to certain parts of a product. The producer's set duties of information apply in a limited scope that takes account of this circumstance; i.e. in this case too the producer must indicate the content of the guarantee and its major features and clearly explain especially the limited scope of the guarantee. A special rule is therefore superfluous. At most, a more precise rendering of the content the directive on this point might be appropriate as part of a vertical revision.

Question N

Is/are there any other issue(s) or area(s) that requires to be explored further or addressed at EU level in the context of consumer protection?

AK takes the liberty of summarising once again the unresolved issues or the issues not addressed by the Green Paper.

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For the purpose of revising the Consumer Acquis, AK would have welcomed a presentation of the content of the relevant directives along with the concrete updates and improvements under consideration, i.e. in particular Directive 90/314/EEC on package travel, package holidays and package tours, Directive 98/27/EC on injunctions for the protection of consumers' interests, Directive 94/47/EC on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of a right to use immovable properties on a timeshare basis. The lack of suggestions regarding the injunction directive leaves an essential aspect of consumer protection entirely underexposed: law enforcement.

The suggestions on the directives that were covered fell short of expectations as well. For example, to round out consumer protection, one important task would have been to develop producer duties to stock spare parts and single parts at customer service level or at least to discuss duties to inform consumers about the time periods in which spare and single parts are available. In the distance selling rules, the list of exceptions has proved to be too farreaching in some cases (e.g. all tourist services) or as too vague in others (e.g. goods whose nature makes them unsuitable for return shipment).

Another major gap in AK's view is the exclusion of various sectors like energy, transportation or financial services from this project of revising and standardising the existing Consumer Acquis. The omission of these important sectors seems all the more inconsistent in light of the EU Commission's preferences for full harmonisation and a horizontal approach to the review of the Consumer Acquis.

The idea of putting in place a separate body of European consumer contract law remains vague due to the many general clauses being considered and the lack of concrete details. It cannot really be assessed at this point. The EU Commission has yet to analyse the relation-ship between this body of law and a common frame of reference and the bodies of national contract law and to formulate the problems involved.

After reading the Green Paper on a Revision of the Consumer Acquis, one has the impression that it is incomplete; the commitment at EU level for strong consumer protection and its expansion seems half-hearted as a result.

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