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AK Position Paper

# BAK Position Paper on the New Deal for Consumers

COM (2018) 184; COM (2018) 185

www.akeuropa.eu

# About us

**The Austrian Federal Chamber of Labour is by law representing the interests of about 3.6 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 Austrian Federal Chamber of Labour is registered at the EU Transparency Register under the number 23869471911-54.**

**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). 816.000 - amongst others unemployed, persons on maternity (paternity) leave, communityand military service - of the 3.6 million members are exempt from subscription payment, but are entitled to all services provided by the Austrian Federal Chambers of Labour.

Renate Anderl
President

Christoph Klein
Director

# Executive Summary

The Austrian Federal Chamber of Labour (BAK) expressly **welcomes the Proposal for a directive on representative actions for the protection of the collective interests of consumers (COM (2018) 184)**, the aim of which is the effective assertion of consumers' rights.

Both the supplementation of injunctions with declaratory judgments, as well as the possibility of asserting consumers' rights through representative actions, are sensible measures, as is the interruption or suspension of the statute of limitations. The expansion of the scope of application of the Directive by Flight Compensation Regulation 261/2004 or the General Data Protection Regulation 2016/679 is also expressly welcomed by the BAK.

However, in the opinion of the BAK, the details still need some supplementation or amendment. For example, there are no clear rules on jurisdiction or the applicable law; in cross-border cases this creates uncertainty among many consumers regarding the enforcement of legal remedies, which is prejudicial to the intention of the effective assertion of rights. Also, the third party funding to be proved by the qualified entity must not lead to the situation that the system of funding legal costs, and hence the assertion of claims by aggrieved consumers, becomes impossible.

The Commission's second, within the New Deal for Consumers proposed Directive, the so-called **"Modernisation Directive" COM (2018) 185** intends to amend or supplement four directives in the field of consumer protection, namely the Unfair Commercial Practices Directive 2005/29/EC, the Consumer Rights Directive 2011/83/EU, the Unfair Terms Directive 93/13/EEC and Directive 98/6/EC on consumer protection in the indication of the prices of products.

More stringent penalties are to be applied from now on by Member States within the scope of all four directives. Therefore, this proposal defines criteria for the penalties to be applied by Member States and which are to be taken into account when determining the extent of the penalty.

Furthermore, in the case of widespread infringements - also across the EU - in the sense of the Consumer Protection Cooperation (CPC) Regulation (EU) 2017/2394, fines of at least 4% of the annual turnover of the infringing trader are to be imposed. In addition, the Unfair Commercial Practices Directive will introduce new measures, including individual legal remedies for individual consumers.

The Consumer Rights Directive is also to be updated, e.g. by deleting the obligation to provide a fax number, but also by extending its scope of application to contracts on digital services "paid for" by personal data, and by the

creation of additional information requirements for contracts concluded on online marketplaces. Furthermore, an additional ground for exclusion is to be inserted for the deletion of the right of withdrawal, namely in the case of excessive use of the goods by the consumer. This proposed ground justifying the deletion of the right of withdrawal is in no way acceptable from the point of view of the consumer.

# AK's position in detail

**Proposal for a directive on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC**

**Comments on specific articles:**

**Article 1:**
According to Article 1(2) of the proposal, this Directive has the lowest level of harmonisation; this means that Member States can retain or issue regulations on further means under procedural law to bring an action to protect the collective interests of consumers.

Furthermore - in view of the current plan of the Government to eliminate and prevent gold-plating of regulations - a minimum level of harmonisation cannot be accepted where the regulatory scope reserved for Member States is not fully exploited by Austria to the benefit of consumers.

**Article 2:**
According to Article 2(3) the Directive is without prejudice to the Union rules on private international law, in particular rules related to court jurisdiction and applicable law. Therefore, in cross-border cases the question of where the action is to be brought and which law is applicable must be examined in advance when asserting the rights of several consumers via a representative action (possibly combined with redress measures as stated in Article 6).

The application of Article 7(2) of Regulation (EU) No 1215/2012, whereby an action can be brought against a person in another Member State where the harmful event occurred or may occur, if a matter related to tort is the subject of the action, can result in several differing jurisdictions if consumers from several Member States are affected by the harmful event.

Therefore, BAK calls for clear, special rules on jurisdiction and also on applicable law in order to ensure the fast and efficient assertion of rights.

Therefore, the Directive on representative action should explicitly stipulate - to supplement Regulation (EU) No 1215/2012 - that the qualified entity can choose the jurisdiction of the Member State where it has its registered office, as long as the harmful event occurred there.

Furthermore, to supplement Regulation No 593/2008 (Rome I) and Regulation No 864/2007 (Rome II), the Directive on representative action should stipulate that, according to the choice of the qualified entity, the law of the Member State where the qualified entity has its registered office shall be applied.

Article 2(1) states that the Directive applies to *"infringements [...] of the Union law listed in Annex I that harm or may harm the collective interests of consumers"*. As in Article 1(2) of the Injunction Directive 2009/22/EC to date, the wording in the new Directive should be more specific regarding the term *"infringement"*, as follows: *"For the purposes of this Directive, an infringement means any act contrary to the Directives listed in*

*Annex I as transposed into the internal legal order of the Member States which harms the collective interests referred to in paragraph 1."*

**Article 4:**
Compared to the Injunction Directive, Article 4 of this proposal defines criteria for the qualified entities (i.e. "properly constituted", "legitimate interest in ensuring that provisions of [...] this Directive are complied with" and "a non-profit making character"), whereby regular assessment shall take place to check whether these criteria are complied with. The BAK welcomes the fact that these criteria have been defined in this Directive, since these qualitative criteria will prevent uncontrolled proliferation and will guarantee a certain level of consumer protection.

**Article 5:**
Article 5 states that the qualified entities should be able to do more than merely request an interim and a prohibitory injunction, which was previously the case, but also an adjudicative judgment. The addition of this type of action is welcome from the consumer's point of view. According to Article 5(3) qualified entities shall be entitled to bring representative actions seeking measures eliminating the continuing effects of the infringement on the basis of any final decision. In conjunction with Recital 22, these final decisions can be, on the one hand, the injunctions listed in Article 5(2), but also final decisions of a court or an administrative authority in the context of enforcement activities regulated by Regulation (EC) No 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws.

The BAK welcomes the official safeguard contained in Article 5(4) that qualified entities will be able to link the measures eliminating the continuing effects of the infringement with the measures referred to in Article 5(2). This is a major contribution to the assertion of rights and closes an existing legislative gap because previously the problem existed that the judgments awarded with the injunctions did not have any binding effect for the individual consumer and for consumers who, for example, ultimately had to sue for repayment of the fee, declared illegal by the courts, imposed when blocking a bank card if the company did not declare itself willing to repay the money. Therefore, in cross-border infringements explicit rules on jurisdiction and applicable law are needed, as the BAK has called for in relation to Article 2.

**Article 6:**
Article 6 defines further the measures eliminating the continuing effects of the infringement in accordance with Article 5(3).

Article 6(1) stipulates various redress measures which the trader can be obligated to provide by the redress order. Although this list is not exhaustive, the BAK considers it important to add a claim to removal to this list.

According to Article 6(1), final sentence, Member States may require a mandate before a declaratory decision is made or a redress order issued. From the consumer's point of view the non-binding nature of the requirement for a mandate (opt-out rule) is to be welcomed since this is the only way rights can be asserted effectively. According to Article 6(1), second sub-paragraph, sufficient information must be provided as required under national law to support the action, including a description of the consumers concerned by the action. This description of the consumers

concerned is defined in more detail in Recital 18, whereby the qualified entity should not be required to individually identify all consumers concerned. To ensure clarification, these explanations would be better placed in the enacting terms of the directive.

Article 6(2) stipulates when a declaratory decision regarding the liability of the trader can be issued instead of a redress order, namely, in cases where, due to the characteristics of the individual harm to the consumers concerned, the quantification of individual redress is complex. The word *"complex"* in Article 6(2) should also be interpreted restrictively so that a declaratory decision is issued instead of a redress order in special cases only (as Recital 19 states: *"exceptionally"*).

Article 6(3)a and b regulates two cases where a declaratory decision cannot be issued, nor a mandate of the consumers required.

According to (a) of the cited law no declaratory decision can be issued in cases where consumers concerned by the infringement are identifiable and suffered comparable harm caused by the same practice in relation to a period of time or a purchase. The word "identifiable" is very unclear, but is clarified in more depth in Recital 20, whereby the court or administrative authority could ask the trader for relevant information, such as the identity of the consumers concerned.

The term *"comparable"* is also very unclear. The BAK suggests that explanations - possibly with examples - for this term be included in a recital. It would be better to replace the wording *"by the same practice"* in Article 6(3)(a) by the wording *"by the same infringement"* in order to establish the widest possible scope of application when issuing a redress order.

In the opinion of the BAK the phrase *"in relation to a period of time or a purchase"* in Article 6(3)(a) should be deleted without substitution. Stipulating a certain period of time is too limiting - several periods of time can be involved - and stipulating a purchase must surely be an editorial error. The guidelines and regulation listed in Annex I of the proposed directive do not necessarily refer to the conclusion of a (purchase) contract, which is why this limitation to a purchase is completely unjustified and unfounded.

The BAK welcomes the fact that Article 6(3)(b) stipulates the public purpose serving the collective interests of consumers when a small amount of loss is suffered; this is an essential prerequisite for not distributing small losses.

In addition, the term *"small"* should be explained in a recital at least.

**Article 7 and Article 15:**
The German version of the introductory sentence to Article 7(2) should clarify that only representative actions to obtain redress are meant. This is made clear in the English version, which differs from the German version of the introductory sentence to Article 7(2). The wording *"representative action for redress"* must be translated by *"Verbandsklage zur Erwirkung von Abhilfemaßnahmen"* in order to state clearly that representative action to obtain redress measures is meant. According to Article 7(2)(a) the third party funding an action for redress should not have any influence over decisions of the qualified entity. If this prohibition is maintained, the system of funding legal actions cannot be sustained because the party funding the action will

normally stipulate the right to have a say, at least in decisions pertinent to the proceedings.

Article 15 regulates funding for qualified entities; paragraph 1 states that procedural costs must not constitute financial obstacles. In the opinion of the BAK, the intended limitation of court fees, etc., is a necessary measure to ensure access to justice.

In the opinion of the BAK, Article 15(2) should be supplemented by adding that the trader should not only be liable for the costs incurred by the qualified entity when informing consumers concerned about the ongoing representative action but should be liable generally for all costs incurred by the qualified entity in relation to the action. Therefore, all pre-proceeding costs for the organisation handling the representative action should be reimbursed.

**Article 8:**
Paragraphs 1-3 of this clause regulate the different options for settlements via redress measures. The BAK welcomes the preference given to settlements for representative action via redress measures.

**Article 9:**
Article 9 stipulates the information on representative actions to be provided by the infringing trader to the affected consumers. Article 9 should clarify that the affected consumers should be notified individually if the relevant data are known to the trader.

**Article 10:**
The effects of final decisions addressed in Article 10 are an important contribution to the effective assertion of rights and are expressly welcomed by the BAK.

In the German version of Article 10(1) and (3) the term *"Rechtsschutzklagen"* is used; it is not used in any other clause in this Directive. The English version *"actions seeking redress"* is clearer. The German translation of the English wording *"Verbandsklagen zur Erwirkung von Abhilfemaßnahmen"* should be used in the German text.

**Article 11:**
According to Article 11 the submission of a representative action shall have the effect of suspending or interrupting limitation periods. The BAK is in favour of this clause which is significant for the effective assertion of rights; the current lack of such a clause has meant that numerous actions for claims which are essentially identical have to be filed in order to prevent the action from becoming time-barred. This regularly results in the courts being overloaded with work - above all in relation to investment lawsuits - and the costs are high, thus creating a barrier to the assertion of rights. The BAK calls for limitation periods to be interrupted since they ensure that enough time remains after a final decision is issued for a solution to the individual claims of consumers to be found.

The English term *"redress actions"* has been translated into German by *"Rechtsschutzverfahren"*. The wording *"Verbandsklagen zur Erwirkung von Abhilfemaßnahmen"* should be used in the German version to make the meaning clearer.

**Article 14:**
The BAK welcomes the fact that the collective interests of consumers will be taken into account when applying penalties, as stipulated in Article 14(3).

**Article 18:**
According to Article 18(2), one year after the entry into force of this Directive the Commission shall assess whether the rules on air and rail passenger rights offer a level of protection comparable to that provided for under this Directive. If that is the case, the Flight Compensation Regulation and the Rail Passenger Rights Regulation in Annex I No 10 and No 15 are to be cancelled.

The BAK is decidedly against this assessment and the cancellation of both these regulations and both these measures should be deleted without substitution. It is not apparent why precisely these two regulations are to be cancelled, since they regulate the rights of many passengers affected at the same time by an infringement and where filing a representative action in combination with a redress order can rapidly help consumers obtain their rights. Let us recall, for example, the case which the Commission likes to quote, when presenting this Directive, of flight cancellations by Ryan Air. In this context the BAK wishes to point out that airlines are almost notorious for rejecting consumers' justified claims and even interventions by consumer organisations not only frequently fail but remain unanswered so that if an action cannot be brought, the claims generally cannot be asserted.

**Proposal for a Directive amending Directive 93/13/EEC, Directive 98/6/EC, Directive 2005/29/EC and Directive 2011/83/EU as regards better enforcement and modernisation of EU consumer protection rules - ("Modernisation Directive")**

**Proposed amendments to the Unfair Commercial Practices Directive 2005/29/EC (UCPD):**

**Article 3(5):**
In the proposed Article 3(5) Member States are to be given the possibility of issuing provisions to protect the justified interests of consumers in relation to aggressive or misleading marketing and sales practices in connection with unsolicited house calls or promotional trips with a commercial aim, if this is justified for reasons of law and order or to respect privacy.

In Articles 57 and 59 of the Austrian Industrial Code, Austria has stipulated that calling on private persons in order to collect orders for goods with regard to certain listed product groups, such as dietary supplements, poisons, medicines and medical aids, is prohibited. Regarding the goods named in Article 57(1) of the Industrial Code, promotional events, including promotional and presales parties, are also prohibited in accordance with Article 57(4).

In accordance with Article 59 of the Industrial Code, orders for goods from private persons can only be accepted when collecting orders in accordance with the provisions of Article 57 of the Industrial Code.

Austria is currently in the midst of infringement proceedings due to the prohibitions listed in Article 57 of the Industrial Code, since in the opinion of the Commission the article goes too far. In view of Appendix I to Directive 2055/29/EC, which contains a list of such practices which are certainly unfair, in the opinion of the Commission there is no room for more prohibitions. During the infringement proceedings, the prohibition of the distribution of cosmetics, watches made of precious metals, gold or platinum goods, jewels and precious stones as well as the prohibition on combining advertising mailshots with competitions, for example, was removed with the amendment to the Industrial Code in 2015. The prohibition of the sale of silver goods was removed in 2008 because it violated the Unfair Commercial Practices Directive.

The proposed version of Article 3(5) addresses aggressive or misleading marketing or sales practices in connection with unsolicited house calls.

In order to maintain the prohibitions in Article 57 of the Industrial Code, which - in the opinion of the BAK - appears desirable in order to protect consumers, Article 3(5) of the proposal on the UCPD must not be geared to aggressive or misleading marketing or sales practices.

The prohibitions contained in Article 57 of the Industrial Code - as stated in Recital 44 of the proposal - are aimed at the protection of older consumers or consumers who otherwise need protection, who could be more easily put under pressure during house calls or promotional events and then buy goods or buy them at a higher price, which they would not otherwise have done. It does not have to be a case of aggressive or misleading commercial practices in such cases.

Furthermore, the German translation of *"products"* in Article 3(5) does not conform to the Directive. According to Article 2(c) of Directive 2005/29/EC the word *"product"* was translated as "Produkt" and hence includes both goods and services, including real estate, rights and obligations. Therefore, the German version should also use the term *"Produkte"*.

Article 3(5) should therefore read as follows in the German version: *"Diese Richtlinie hindert die Mitgliedstaaten nicht daran, Bestimmungen zum Schutz der berechtigten Interessen der Verbraucher in Bezug auf ~~aggressive oder irreführende Vermarktungs- oder Verkaufspraktiken im Zusammenhang mit~~ unerbetenen ~~Besuchen~~ Besuchen eines Gewerbetreibenden in der Wohnung eines Verbrauchers oder in Bezug auf Werbefahrten, die von einem Gewerbetreibenden in der Absicht oder mit dem Ergebnis organisiert werden, dass für den Verkauf von ~~Waren~~* ***Produkten*** *bei Verbrauchern geworben wird oder ~~Waren~~* ***Produkte*** *an Verbraucher verkauft werden, zu erlassen, sofern diese Bestimmungen aus Gründen der öffentlichen Ordnung oder des Schutzes der Achtung des Privatlebens gerechtfertigt sind."*

Art 3(5) should read as follows in the English version: *"This Directive does not prevent Member States from adopting provisions to protect the legitimate interests of consumers with regard to ~~aggressive or misleading marketing or selling practices in the context of~~ unsolicited visits by a trader to a consumer's home, or with regard to commercial excursions organised by a trader with the aim or effect of promoting or selling products to consumers, provided that such provisions are justified on grounds of public policy or the protection of the respect for private life."*

**Article 7(4)**

In Article 7(4) UCPD certain information is listed as being material for invitations to purchase. In Article 7(4)d the information on the complaints handling policy is to be deleted. In Recitals 29 and 30 the deletion is justified by this information requirement already being prescribed in the Consumer Rights Directive 2011/83/EU for the later pre-contractual phase, where it is most relevant; this is why the same information is to be deleted from the promotional phase. At this point it should be noted that this may be the case within the scope of application of the Consumer Rights Directive. However, outside its scope of application, e.g. for social or healthcare services, this information requirement would not be stipulated either in the promotional phase or in the pre-contractual phase according to this proposal. In view of the importance of information on the complaints handling policy, this should therefore be retained in the UCPD, also for invitations to purchase.

**Article 11a**

The proposed Article 11a is especially welcome, whereby consumers must be granted individual contractual and non-contractual legal remedies in order to eliminate all effects of unfair commercial practices.

Article 11a(2) stipulates that the consumer can terminate the contract at least unilaterally. According to Article 11a(3) the consumer must be compensated at least for the damage s/he suffers.

If we now take a look at the example of the misleading VW advertisements, which the Commission is so fond of quoting when presenting the New Deal for Consumers directives, then according to Article 11a consumers would have the right to terminate the contract, re-

versing the process of purchase price exchanged for goods vis-à-vis the misleading trader. Also, according to Article 11a, the consumer would have to be compensated for any non-contractual damages which occur as a result of the misleading VW advertisement.

Consumers regularly express their incomprehension to consumer advisory services in the case of complaints or questions about misleading commercial practices once they have been informed that the practice described may well be an illegal and misleading or aggressive practice which can be countered by a prohibitory injunction, but that the consumer has no further individual rights beyond that.

Now, however, with the proposed Article 11a, individual consumers can assert a claim to have all the effects of a misleading or aggressive commercial practice removed, which seems to be urgently needed from the consumer's point of view.

**Article 13**

Article 13 regulates penalties, with paragraphs 2 to 6 being new additions. Article 13 stipulates that Member States must define the rules for penalties applicable to non-compliance with national regulations issued on the basis of the Directive; the penalties provided for this must be effective, proportionate and dissuasive. Article 13(2) redefines criteria which must be considered when applying penalties. For example, the type, gravity and duration or time-related effects of the infringement, but also of the number of affected consumers, also in other Member States, is of relevance. Article 13(2)(g) contains a catch-all clause, whereby other conditions which aggravate or alleviate the elements of the offence must be considered in each case.

In any case, the BAK welcomes the possibility of applying stricter penalties. However, regarding the catalogue of criteria it must be ensured that these criteria are in fact taken into consideration in practice by the competent administrative authority or courts. For example, it is unclear how an authority can determine the number of consumers affected, also those in other Member States.

In the case of widespread infringements and widespread infringements across the whole EU in the sense of the CPC Regulation fines can be imposed of at least 4% of the annual turnover in the relevant Member State.

The BAK welcomes this mandatory imposition of fines in the case of widespread infringements.

However, in the opinion of the BAK the possibility of the confiscation of proceeds should also be included in Article 13. Infringing traders will not be discouraged by fines which lie marginally below the illegal profit. Only the confiscation of illegal profits will achieve the prescribed dissuasive, effective and proportionate effect.

Regarding the wording, Articles 20 and 20(a) of the Penal Code (StGB) in the version of the Federal Law Gazette I (BGBl I) 2010/108 could provide orientation - as proposed by Wessely in the journal VbR (Verbraucherrecht) 2018/27 with the title "Public Enforcement im Verbraucherrecht".

When deciding on the allocation of revenues from fines the collective interests of consumers shall be taken into account, according to Article 13(5). This is, of course, welcome from the consumer's point of view.

However, the relevant Recital 12 states that "at least a part of the revenues from fines" should be allocated to consumer protection. The limitation of only a part of revenues to be allocated to consumer protection in Recital 12 should be deleted, in the opinion of the BAK.

**No 11 of Annex I**
According to the proposal, No 11 of Annex I to the UCPD should be supplemented so that the provision of information based on an online search by a consumer for the purposes of sales promotion is to be considered a misleading sales practice in itself if the trader has paid for this sales promotion, without this being made clear from the contents or (new) from the search results. The expansion of this prohibition per se to the results of an online search is also welcome from the consumer's point of view.

**The proposed amendments to the Consumer Rights Directive 2011/83/EU (CRD):**

**Article 2**
In Article 2 current definitions are supplemented or further definitions introduced. According to Article 2(6), services should also now be understood to include digital services and service contracts also includes contracts for digital services. The concept of digital content should be explained in more detail using examples. Finally, new terms must be defined, namely a contract for the provision of digital content which is not provided on a physical data carrier, digital services, a contract for a digital service, and the online marketplace and an online GUI.

A contract on the provision of non-physical, digital content and a contract for a digital service should not only include contracts against payment but also contracts whereby a consumer provides the trader with personal data or agrees to their provision, unless the personal data of the consumer are processed by the company solely in order to provide digital content or the digital service or in order that the company can comply with mandatory legal requirements and the trader does not process these data for other purposes.

Regarding these new or supplemented definitions, it should first be said that they should comply with the definitions in the current proposal for a directive on certain contractual aspects of the provision of digital content. Furthermore, these definitions now clarify that contracts for the provision of non-physical, digital content as well as contracts for a digital service for which personal data are provided should come under the scope of application of the Consumer Rights Directive.

The clarification provided on the requirement regarding the pecuniary nature of contracts on the provision of digital, non-physical content is welcome.

Nor can anything be said, from the consumer's point of view, against the adaptation to such contracts for non-physical digital content against payment in Article 7(3), Article 8(8) and Article 16(m) regarding the immediate provision of the service.

The inclusion of contracts on digital services within the scope of application of the Consumer Rights Directive means that the corresponding additions to information requirements in Article 5(1)(g) and (h) in Article 6 (1)(r) and (s) are required and appear necessary in the opinion of the BAK.

**Article 6(1)(c)**
Article 6(1)(c) updates the information requirements regarding contact data of the trader. The requirement to provide a fax number is to be deleted, the telephone number should not merely be given *"where available"* and a new addition is the information on other online means of communication which ensure that the consumer can store correspondence with the trader on a permanent data carrier.

The deletion of the phrase *"where available"* in connection with the provision of the telephone number, email address, or other online means of communication is welcome from the consumer's point of view since information on how the consumer can contact the company quickly is material and important information. The inclusion of other online means of communication, as long as the consumer can store the correspondence on a permanent data carrier, is also welcome since it takes account of rapidly changing possibilities related to communication services.

**Article 6a**
Article 6a should define additional information requirements for contracts concluded on online marketplaces. The term *"online marketplace"* is defined in Article 2, line 19, whereby consumers conclude online contracts with traders via the online GUI (i.e. via the website, see Recital 18 on this point) of the online marketplace.

The information requirements listed in Article 6a apply when the consumer concludes a distance or off-premises contract on this online marketplace or is bound by any corresponding offer. Accordingly, the information requirements only apply to the service provider of the online marketplace.

In the opinion of the BAK, these additional information requirements applicable to the provider of the online marketplace should also apply when the consumer concludes a contract via another online GUI, but is directed to the website of the third party, e.g. via a link, through the online marketplace because the information requirements stipulated in Article 6a are material for the consumer also on comparison websites, where consumers often do not conclude a contract, but are simply routed to the website of the vendor.

Therefore, the focus should not be on the conclusion of a distance or off-premises contract on the online marketplace; instead a general information requirement should be stipulated for the online marketplace.

Furthermore, in the opinion of the BAK, these information requirements should also be complied with by service providers of online marketplaces whose establishment is not located in a Member State, but whose business activity is carried out in a Member State.
Finally, the wording from sentence 2 of Recital 19 should be inserted in the enacting terms of Article 6a in the introductory sentence, stating that information must be provided in a clear and comprehensible manner.

Regarding the information requirements to be listed, it should be noted that - in conjunction with Recital 19 - information is to be provided on the main parameters for ranking offers, but this information requirement is limited in Recital 19 so that only information on the main standard parameters used must be given, without addressing individual searches. This raises the question whether the mere statement of the standard parameters used can give the

necessary information apparently desired by the Commission on the ranking of offers. Therefore, this limitation contained in Recital 19, last 3vgrfcmjüand penultimate sentences, should be +deleted.

Article 6 is also lacking a provision whereby the operator of an online marketplace is liable in addition to the actual contractual partner or is liable as a trader for false, incomplete or omitted information in accordance with Article 6a, e.g. on omitted information on the contractual partner of the consumer, insofar as the consumer was given the impression that the contractual partner was a company.

**Article 13(3) and Article 16(n)**
The proposed amendments to Article 13(3) must be seen in conjunction with the newly proposed Article 16(n) and the corresponding amendment to **Annex I Part A**, i.e. in the model instructions on withdrawal, No 4 "Effects of withdrawal".

Article 13 regulates the obligations of the trader in the event of withdrawal. According to the new paragraph 3, the trader now may withhold the reimbursement until he has received the goods back, unless the trader has offered to collect the goods himself. The provision that the trader does not have the right to withhold reimbursement if the consumer has supplied evidence of having sent back the goods should be deleted.

According to Article 16(n) there is no right of withdrawal if goods are used during the withdrawal period to such an extent that would not have been necessary to examine the condition, properties and functionality of the goods.

However, according to current legislation there is a right to withdrawal even in the case of excessive use. The current wording of Article 14(2) states that the consumer shall only be liable for any diminished value of the goods resulting from excessive use.

The BAK is strongly against the expansion of the right to withhold reimbursement contained in Article 13(3) in combination with the deletion of the right to withdrawal in the case of excessive use of the goods.

In the opinion of the BAK, there is no factual justification for this approach and there is no evidence of the need for such amendments. Contrary to Recitals 34 to 36, these proposals do not make for a balanced relationship between a high level of consumer protection and the competitiveness of traders.

In practice this approach means that, in the case of cancellation until the goods are received by the trader, consumers will have no certainty whether the trader will accept their right to withdrawal or whether they have made excessive use of the goods - in the opinion of the trader. Should the trader be of the opinion that excessive use has been made of the goods, and therefore the consumer has no right to withdraw, the consumer is faced with the problem of proving that s/he has not made excessive use of the goods and faces the problem of receiving the goods back again. The consumer would (perhaps again) have to bear the costs of the goods being shipped back to the consumer.

In the opinion of the BAK, this planned regulation would de facto undermine or erode the right to withdrawal because in individual cases the consumer will find it difficult to provide evidence and per-

haps s/he will, with regard to the legal uncertainty as to whether the withdrawal will be accepted, not exercise it at all, above all when the goods concerned are not of high value and s/he risks also having to bear the shipping costs if the goods are returned to him/her.

**Article 14(4)(b)iii**
Article 14(4)(b)iii is to be deleted. The consumer will not, if the right to withdrawal is exercised, have to compensate for the full or partial provision of non-physical, digital content if the trader omitted to provide confirmation of the contract, including confirmation of previous express agreement at the start of execution of the contract.

According to Recital 37 this condition in Article 16(m) of the Consumer Rights Directive is not relevant to exercise the right to withdrawal; therefore, it should be deleted.

However, Austria has included this condition in Article 18(1) line 11 FAGG (Austrian Distance Selling Act) as a correction, otherwise the legal consequences of Article 14(4)(b)iii could not be applied due to the lack of the right to withdrawal. So Austria has included the obligation to provide confirmation in Article 18(1) line 11 FAGG (on this point see *Hammerl* in *Kosesnik-Wehrle*, KSchG[4] (Austrian Consumer Protection Act) (2015) Article 16 marginal note 14).

The BAK advocates maintaining the provisions of Article 18(1) line 11 FAGG and hence including the condition of Article 14(4)(b)iii in Article 16(m).

**Article 16(a)**
Article 16(a) is to be amended so that the condition of cognizance by the consumer that s/he will lose the right to withdrawal on full fulfilment of the contract is deleted. Recital 32 justifies the deletion in that in the case of early provision of the service only the agreement of the consumer must be obtained but not cognizance that s/he will lose the right to withdrawal on full fulfilment of the contract.

Contrary to the decision of the Supreme Court 8 Ob 122/17z, whereby compliance with the information requirement in accordance with Article 4(1) FAGG is not a precondition for the forfeiture of the right to withdrawal, academics also represent the opinion that the express request of the consumer presupposes that the consumer is informed of the fundamental existence of the right to withdrawal (see *Hammerl* in *Kosesnik-Wehrle*, KSchG[4] (Austrian Consumer Protection Act) (2015) Article 18 marginal note 5).

Now the notification that the consumer will lose the right to withdrawal on complete fulfilment of the contract - in accordance with Recital 32 in conjunction with Article 7(3) and Article 8(7) - is to be deleted.

The BAK is against deleting this condition and calls for compliance with the information requirements according to Article 6(1)(h)(j) and (k) to be included in Article 16(a) as the condition for the abolition of the right to withdrawal in the case of early provision of the service. For the sake of coherence the information requirement in accordance with Article 6(1)(k) should also be included in Article 14(4)(a)(i).

The consumer advice service has noted repeated complaints in relation to carpet cleaning service providers. Consumers call - for example, in response to an advertisement in a daily newspaper - a carpet cleaning company and

agree an appointment at home to view the carpets to be cleaned and possibly then conclude a contract. From the consumer advice service we know that consumers - without being properly informed of their rights and obligations in connection with early provision of the service - often conclude a contract to clean carpets where the fee is much higher than stated in the advertisement and the substantial price increase is completely untypical for the sector.

At any rate consumers should have the right to withdrawal from such contracts in the case of an invalid request, because the consumer was not properly informed, for immediate provision of the service.

**Article 24**

Regarding Article 24 which contains new provisions on penalties, we refer to our opinion expressed above on Article 13 of the UCPD in view of the identical wording of the proposed article.

We also refer to our statements at the beginning on Article 13 of the UCPD in reference to the proposed amendments to the Unfair Contract Terms Directive (93/13/EEC) in consumer contracts and the proposed amendments to Directive 98/6/EC on consumer protection in the indication of the prices of products, which has regulated anew the penalties to be applied by Member States.

Should you have any further questions
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