The Austrian Implementation of the Consumer Rights Directive : An Outline

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The Austrian Implementation of the Consumer Rights Directive — An Outline

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1. Introduction

On 25 October 2011 the European Union legislator adopted the Directive on Consumer Rights (hereinafter *Consumer Rights Directive* or *CRD*).[(1)] The Consumer Rights Directive is one of the results of reform discussions with respect to a group of eight EU consumer directives enacted in the 1980s and 1990s.[(2)] It repealed the Doorstep Selling Directive and the Distance Selling Directive, added one article to each the Unfair Contract Terms Directive and the Consumer Sales Directive and introduced some new general provisions for a wide range of business-to-consumer (hereinafter *B2C*) contracts.[(3)] Pursuant to Article

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(1) Directive 2011/83/EU of the European Parliament and of the Council on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, 25 October 2011, OJ 2011 No. L 304/260.

(2) These eight directives—commonly referred to as 'the consumer *acquis*' (in the narrow sense)—are the following: (1) Council Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises, 20 December 1985, OJ 1985 No. L 372/31 (hereinafter *Doorstep Selling Directive*); (2) Council Directive 90/314/EEC on package travel, package holidays and package tours, 13 June 1990, OJ 1990 No. L 158/59 (hereinafter *1990 Package Travel Directive*); (3) Council Directive 93/13/EEC on unfair terms in consumer contracts, 5 April 1993, OJ 1993 No. L95/29 (hereinafter *Unfair Contract Terms Directive*); (4) Directive 94/47/EC of the European Parliament and of the Council 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, 26 October 1994, OJ 1994 No. L280/83 (hereinafter *1994 Timeshare Directive*); (5) Directive 97/7/EC of the European Parliament and of the Council on the protection of consumers in respect of distance contracts, 20 May 1997, OJ 1997 No. L 144/19 (hereinafter *Distance Selling Directive*); (6) Directive 98/6/EC of the European Parliament and of the Council on consumer protection in the indication of the prices of products offered to consumers, 16 February 1998, OJ 1998 No. L 80/27; (7) Directive 98/27/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interests, 19 May 1998, OJ 1998 No. L166/51 (hereinafter *1998 Injunctions Directive*); (8) Directive 99/44/EC of the European Parliament and of the Council on certain aspects of the sale of consumer goods and associated guarantees, 25 May 1999, OJ 1999 No. L171/12 (hereinafter *Consumer Sales Directive*).

28 (1) CRD the Member States had to implement the directive by 13 December 2013 and to make the new provisions applicable by 13 June 2014.

This contribution discusses selected issues of the transposition of the Consumer Rights Directive into the national law of one of the Member States —Austria. The contribution starts with a brief summary of the main features of the directive. Subsequently, it provides a short overview of the general regulation of consumer law at the national level in Austria, before dealing with the Austrian implementation of the Consumer Rights Directive. In this context the focus is put on major legal changes, both in direct connection with the directive and indirect in the sense that the Austrian legislator used the example of the directive to align the national regulation of existing issues not falling under the material scope of the directive with the directive's standards. The contribution is rounded off by a short outlook and comments on possible future developments at the national level in Austria.

2. A Brief Overview of the Consumer Rights Directive

As indicated in the beginning of this article, the Consumer Rights Directive was the (partial) consequence of discussions with respect to some older, sectoral consumer directives that were based on minimum harmonisation.[(4)] It was an

(3) For further explanations see Chapter 2 below. In addition to the enactment of the Consumer Rights Directive, the consumer acquis-reform discussions have led to the following changes in the consumer acquis: (1) the 1994 Timeshare Directive was repealed and substantively revised by the 2009 Timeshare Directive (Directive 2008/122/EC of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts, 14 January 2009, OJ 2009 No. L33/10); (2) the 1998 Injunctions Directive was repealed (but—from a content-related perspective—left unchanged) by the 2009 Injunctions Directive (Directive 2009/22/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interests, 23 April 2009, OJ 2009 No. L 110/30); the 1990 Package Travel Directive will very likely be repealed in the near future—in July 2013 the Commission published its Proposal for a Directive of the European Parliament and of the Council on package travel and assisted travel arrangements, amending Regulation (EC) No 2006/2004, Directive 2011/83/EU and repealing Council Directive 90/314/EEC, 9 July 2013, COM(2013) 512 final (hereinafter *2013 Package Travel Directive*).

attempt to overcome the fragmentation of legal rules both at the EU level (which was mainly the result of the inconsistency among the directives with respect to certain legal questions, e.g., with respect to withdrawal rights) and at the Member State level (which was the result of the legislative freedom minimum harmonisation gave the national legislators).[5] The reform project started very ambitiously and aimed to standardise as much of the consumer *acquis*[6] as possible under a common, fully harmonised pillar. Over the years, however, the critique from several sides, most notably coming from the Member States (who feared to lose their legislative powers), consumers and consumer interest groups (who feared to fall victim to a reduction of the protective standards) as well as from some parts of the academia (who, in particular, criticised the 2008 Consumer Rights Directive Proposal[7] – hereinafter *CRD Proposal* – for its unprofessional structure and badly-conceived contents).[8]

In the end, the scope of the project had to be cut back.[9] Most notably, The provisions of the CRD Proposal related to the Unfair Contract Terms Directive

(4) For details see, e.g., the contributions in G. Howells and R. Schulze (eds.), *Modernising and Harmonising Consumer Contract Law* (Munich: Sellier, 2009); M. Artz, 'Vorschlag für eine vollharmonisierte Horizontalrichtlinie zum Verbraucherrecht' in B. Gsell and C. Herresthal (eds.), *Vollharmonisierung im Privatrecht* (Tübingen: Mohr Siebeck, 2009); the contributions in M. Stürner (ed.), *Vollharmonisierung im Europäischen Verbraucherrecht?* (Munich: Sellier, 2010); the contributions in H. Eidenmüller et al. (eds.), *Revision des Verbraucher-acquis* (Tübingen: Mohr Siebeck, 2011); the contributions in B. Jud and C. Wendehorst (eds.), *Neuordnung des Verbraucherprivatrechts in Europa / Zum Vorschlag einer Richtlinie über Rechte der Verbraucher* (Vienna: Manz, 2009).

(5) For details on the fragmentation of consumer acquis rules see, e.g., H. Schulte-Nölke et al. (eds.), *EC Consumer Law Compendium: The Consumer Acquis and Its Transposition in the Member States* (Munich: Sellier, 2008). The study—generally referred to as the Consumer Law Compendium—is also available online at http://www.eu-consumer-law.org.

(6) For a definition of this term see *supra* note 2.

(7) Proposal for a Directive of the European Parliament and of the Council on consumer rights, 8 October 2008, COM (2008) 614 final.

(8) For examples of strong criticism see, e.g., B. Gsell, 'Vollharmonisiertes Verbraucherkaufrecht nach dem Vorschlag für eine Horizontalrichtlinie' in Gsell and Herresthal (eds.), Vollharmonisierung im Privatrecht, 219; M. Schmidt-Kessel, 'Der Vorschlag zur Horizontalrichtlinie im Kontext der Rechtsharmonisierung in Europa' in Jud and Wendehorst (eds.), Neuordnung des Verbraucherprivatrechts in Europa?, 21.

(9) For a discussion of the main differences between the CRD Proposal and the eventually adopted Consumer Rights Directive see, e.g., V. Cap, 'Grundsätzliches zur Verbraucherrechte-Richtlinie: Entstehung, Anwendungsbereich, Zentralbegriffe, Harmonisierungsgrad' in P. Bydlinski and B. Lurger (eds.), *Die Richtlinie über die Rechte der Verbraucher* (Vienna: Manz, 2012), 1.

and the Consumer Sales Directive were removed from the text.[(10)] In addition, the unconditional full harmonisation approach of Article 4 CRD Proposal was mitigated in the sense that the finally adopted text allowed for certain (few) exceptions to this (still) dominant concept.[(11)]

The Consumer Rights Directive itself is divided into six chapters with a total of thirty-five articles. It further includes two annexes. Annex I contains model instructions for informing consumers about their withdrawal rights granted for distance and off-premises contracts (Annex I(A) CRD) and a model form consumers can use for exercising their withdrawal rights (Annex I(B) CRD).[(12)] Annex II aims to simplify the comparison between the provisions of the two repealed directives, i.e., the Doorstep Selling Directive and the Distance Selling Directive, and the new provisions of the Consumer Rights Directive with the help of a 'correlation table'.

The directive basically distinguishes between three different groups of B2C contracts (depending on the way they are concluded): on-premises, off-premises and distance contracts. Several special contractual types are excluded either from the general scope of the Consumer Rights Directive via Article 3(3) CRD[(13)] or from certain groups of provisions, most notably from the right of withdrawal in the case of distance contracts and off-premises.[(14)] Article 5 CRD (i.e., the sole provision of Chapter II) introduces—for the first time ever—certain common, general information requiremens for on-premises contracts.

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(10) The Consumer Rights Directve left both directives basically unchanged and added only a special information provision to each of them – see Articles 32 (for the Unfair Contract Terms Directive) and 33 CRD (for the Consumer Sales Directive) for details.

(11) Article 4 CRD reads as follows: 'Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection, *unless otherwise provided for in this Directive*' (emphasis added). For some exceptions see the analysis in Chapter 3.2 below.

(12) To facilitate the use of the latter one, businesses have to provide consumers with that form in advance, i.e., '[b] efore the consumer is bound by a distance or off-premises contract, or any corresponding offer' (Article 6(1)(h) CRD).

(13) Article 3(3)(k) CRD on the exclusion of contracts for passenger services is an exception to this general exception – it declares some of the provisions (Articles 8(2), 19 and 22) applicable to such contracts.

(14) For details see Article 16 CRD.

Chapter III CRD can arguably be considered as the core part of the directive. It replaces the Doorstep Selling Directive and Distance Selling Directive and (basically)[15] standardises the information obligation and withdrawal rights regime in this context. Formerly existing disparities between distance and off-premises contracts, e.g., with respect to the length of the withdrawal period, were removed. A similar alignment process took place with respect to the group of covered contractual types and material information requirements, which were both in principle standardised for distance selling and off-premises contracts.

Chapter IV CRD—succinctly titled 'other consumer rights'—comprises several general provisions for contracts falling under the regime of the Consumer Rights Directive.[16] It contains rules on the delivery of goods[17]; a prohibition of surcharges for the use of means of payment[18]; a consumer-friendly provision on the passing of risk[19]; restrictions on charges for the use of telephone lines installed by traders to facilitate contacts by consumers (with respect to concluded contracts)[20]; and strict rules on charging any other surcharges.[21]

Chapter V CRD contains—in addition to some 'administrative' rules—provisions on the enhancement of enforcement of the Consumer Rights Directive regime[22] and—somewhat unexpected at this point of the directive—a provision on intertia selling.[23]

Chapter VI finally rounds the directive off with inter alia the aforementioned insertion of a new Article 8a in both the Unfair Contracts Terms Directive and

(15) Chapter III contains several simplifications for certain types of contracts – see, e.g., Articles 7(4) and 8(6) CRD.
(16) For a limitation of the scope of Chapter IV CRD see Article 17 CRD.
(17) For details see Article 18 CRD.
(18) See Article 19 CRD that prohibits charging consumers 'fees that exceed the cost borne by the trader for the use of [a given] means [of payment]'.
(19) For details see Article 20 CRD and—with respect to the consequences for the Austrian legislator—the explanations in chapter 3.2.5 below.
(20) For details see Article 21 CRD and—with respect to a clarification by the Austrian legislator—the explanations in chapter 3.2.2 below.
(21) See Article 22 CRD for details.
(22) For details see Article 23 CRD.
(23) Article 27 CRD.

the Consumer Sales Directive[24] and some further 'administrative' provisions.

3. The Implementation of the Consumer Rights Directive in Austria

3.1 The Legal Regulation of Consumer Law in Austria in General

Austria belongs to the group of Member States that take a disintegrative approach with respect to regulating consumer law at the national level in the sense that (at least most of) the pertinent provisions are to be found in special laws, i.e., outside of the main private law code—in the case of Austria outside of the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*; hereinafter *ABGB*[25]).

The central consumer law source is the Austrian Consumer Protection Act (*Konsumentenschutzgesetz*; hereinafter *KSchG*[26]). Enacted in 1979, the KSchG has been subject to numerous reforms, not seldomly because of the need to implement EU directives. Over the years the reforms have led to some complexity and confusion, not least because new provisions were inserted between already existing ones and the relationship between existing concepts and new EU standards was difficult to align. In addition to the KSchG, several areas are regulated in smaller, more sectoral laws. Prominent examples are the Distance Financial Services Act (*Fern-Finanzdienstleistungs-Gesetz*; *FernFinG*[27]) or the Timeshare Act (*Teilzeitnutzungsgesetz 2011; TNG 2011*[28]). I will briefly return

(24) See *supra* note 10.

(25) Austria thus takes a different approach than, e.g., Germany with its BGB or the Netherlands with its *Burgerlijk Wetboek*, which both integrate consumer law into their civil codes. It is, however, not the only country that takes a disintegrative approach. For prominent European examples see, e.g., Italy with its *codice del consumo* or France with its *code de la consommation*. Also Japan follows this approach—in 2000 Japan introduced its Consumer Contract Act (消費者契約法) that overs B2C contracts.

(26) BGBl I No. 140/1979 as amended.

(27) BGBl I No. 62/2004 as amended. The FernFinG implemented the Directive 2002/65/EC of the European Parliament and of the Council concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, 23 Sepember 2002, OJ 2002 No. L271/16 ('Financial Services Distance Contracts Directive').

to the issue of fragmentated regulation of consumer law issues later in this article.[29]

3.2 An Overview of the Autrian Implementation of the Consumer Rights Directive

3.2.1 General Comments

Austria implemented the Consumer Rights Directive relatively late. The bill for the implementation act, the Consumer Rights Directive Implementation Act (*Verbraucherrechte-Richtlinie-Umsetzungsgesetz*; hereinafter *VRUG*),[30] passed the National Council (*Nationalrat*) in late April 2014 and the Federal Council (*Bundesrat*) in mid-May 2014 and was promulgated on 26 May 2014. The elections to the National Council in late September 2013 were surely one reason for the delay. The implementation date envisaged by Article 28 CRD (13 December 2013) coincided with the final negotiations for the formation of the new government that was sworn in on 16 December 2013. Another reason for the delay was the question of how to best implement the Consumer Rights Directive. The opinions were divided and slowed down the process.[31]

Although it was adopted relatively late, the VRUG was enacted soon enough to make its provision applicable by the due date of 13 June 2014. The VRUG implemented the Consumer Rights Directive narrowly. This basically means that the government—in principle—decided to 'copy out' the provisions of the Consumer Rights Directive and paste them into national law, even in those (narrow) areas where the directive allowed for stricter provisions. The VRUG

(28) BGBl I No. 8/2011. The TNG 2011 implemented the 2009 Timeshare Directive and repealed an older TNG – the TNG 1997 (again a special law) that had implemented the 1994 Timeshare Directive.

(29) See Chapter 4 below.

(30) Bundesgesetz, mit dem das allgemeine bürgerliche Gesetzbuch, das Konsumentenschutzgesetz und das Verbraucherbehörden-Kooperationsgesetz geändert werden und ein Bundesgesetz über Fernabsatz- und außerhalb von Geschäftsräumen geschlossene Verträge (Fern- und Auswärtsgeschäfte-Gesetz – FAGG) erlassen wird (Verbraucherrechte-Richtlinie-Umsetzungsgesetz – VRUG); BGBl I No. 33/2014.

(31) See Chapter 4 below for a brief comment.

furthermore led to only little changes outside the scope of the Consumer Rights Directive, although one could have expected that the legislator would have taken the opportunity to more closely align not directly affected contracts and/or contractual situations with the regime of the directive. I will also return to this issue shortly.[32]

The consequences of the VRUG can be basically classified into three categories: (1) changes of the KSchG, (2) changes of the ABGB and (3) the creation of a new special consumer law—the Distance- and Off-Premises-Contract Act (*Fern- und Auswärtsgeschäfte-Gesetz*; *FAGG*)[33]—to deal specifically with the issues regulated by Chapter III CRD. With the introduction of the FAGG existing provisions on distance and off-premises contract were separated from the KSchG, where both had been regulated prior to the adoption of the VRUG. While the KSchG-provisions relating to distance contracts were deleted, § 3 KSchG ('on doorstep selling contracts'), i.e., the provision that built the basis for off-premises contracts was (basically) kept alive. It must, however, be noted that its scope was narrowed down, as most doorstep selling contracts now fall under the regime of off-premises contracts as covered by the Consumer Rights Directive. This led to some interesting consequences that I will discuss shortly.

3.2.2 The Implementation of the Consumer Rights Directive in the KSchG

The changes in the KSchG relate, in principle, to the provisions in Chapters II ('consumer information for contracts other than distance or off-premises contracts) and IV CRD ('other consumer rights').[34] Chapter II CRD was implemented by a new § 5a KSchG (that replaced the former § 5a KSchG on distance selling

(32) See chapters 3.2.2-3.2.4 below.
(33) Article 4 VRUG titled 'Bundesgesetz über Fernabsatz- und außerhalb von Geschäftsräumen geschlossene Verträge'.
(34) One provision that was not implemented by the VRUG is Article 19 CRD on the prohibition to charge for feed for the use of means of payment 'that exceed the cose borne by the trader for the use of such means'. This omission did, however, not happen by mistake. It is the consequence of the fact that a similar provision already exists in Austrian law—the relevant provision can be found in § 27(6) Payment Services Act (*Zahlungsdienstegesetz*; *ZaDiG*).

contracts). The Austrian legislator decided to strictly follow the standards introduced by the Consumer Rights Directive and did not make use of the option granted by Article 5(4) CRD to go beyond the minimum harmonised list of paragraph 1. It did, however, decide to apply Article 5(3) CRD and declared the information requirements contained in Article 5(1) CRD/§ 5a(1) KSchG not applicable for contracts that involve day-to-day transactions that are immediately performed upon the conclusion of the contract (§ 5a(2) no. 1 KSchG).

The other provisions of the Consumer Rights Directive that were transposed into the KSchG are all based on full harmonisation. The—compared with their counterparts in the directive—almost equally worded §§ 6c (implementing Article 22 CRD on additional payments), 7a (implementing Article 18(1) CRD regarding the delivery period for goods)[35], 7b KSchG (implementing Article 20 CRD on the passing of risk) are good examples for a nearly identically worded implementation.

An attempt to clarify an unfortunate-worded provision of the Consumer Rights Directive can be found in § 6b KSchG. § 6b KSchG implements Article 21 CRD on extra fees for communications with the trader by telephone via telephone lines that the trader operates 'for the purpose of contacting him'. In such situations Article 21 CRD asks to ensure that 'the consumer, when contacting the trader is not bound to pay more than the *basic rate*' (emphasis added). As, for example, *Johannes Stabentheiner* rightly observes, the term 'basic rate' (*Grundtarif*) is vague in the sense that it is neither defined by any European legislation nor by Austrian laws.[36] The Austrian legislator thus decided to choose a more easily understandable wording. Pursuant to § 6b KSchG the trader is—in the covererd scenario—'not allowed to charge the consumer ... for this'. From a

(35) In this context it should be noted that it was not necessary to implement Article 18(2) CRD, because §§ 918-921 ABGB already addressed this issue (in more detail) and Article 18(4) CRD allows for additional provisions at the national level.

(36) J. Stabentheiner, 'Das Verbraucherrechte-Richtlinie-Umsetzungsgesetz', *VbR* (3/2014), 68, 73.

compatibility perspective this wording seems unproblematic, as it aims to ensure that the consumer has only to pay for the ordinary use of the telephone line (i.e., 'the basic rate').

3.2.3 Changes to the Doorstep Selling Regime of the KSchG

An interesting change of the KSchG relates to its § 3 on the right of rescission in the case of doorstep selling contracts (hereinafter § *3-withdrawal right*). § 3 KSchG was first introduced with the adoption of the KSchG in 1979 and thus is older than the European doorstep selling withdrawal regime that was introduced by the Doorstep Selling Directive in 1984 (but now repealed by the Consumer Rights Directive).

Because the Doorstep Selling Directive was a minimum harmonised directive, Austria was allowed to keep and/or introduce rules that went/go beyond the standard of the Doorstep Selling Directive. Most notably, the § 3-withdrawal right is also applicable in certain cases, where the contract is concluded *in* the trader's premises, if the consumer is—from his perspective unpreparedly—taken to the trader's premises by the trader or his representative.[(37)] In addition, the § 3-withdrawal right is not subject to a comparable, extensive exclusion of B2C contracts as listed in Article 3(2) Doorstep Selling Directive. In principle, the scope of § 3 KSchG is thus broader than the scope of the Doorstep Selling Directive (and broader than the scope of off-premises contracts under the Consumer Rights Directive).[(38)]

The § 3-withdrawal right is interesting in particular because the Austrian legislator decided not to get rid of it, but to uphold it for those situations and contractual types that do not fall under the newly introduced FAGG, i.e., under the act that now covers distance and off-premises contracts. Because the—at least at first sight—similar looking concept of off-premises contracts is now

(37) For details see § 3(2) KSchG.
(38) For a (shorter) list of exclusions see § 3(3) KSchG.

regulated by the FAGG, one could have thought that the Austrian legislator would have opted to abandon the § 3 KSchG-withdrawal right regime, in particular because the concept of off-premises contracts covers most contractual situations that fall under the § 3-withdrawal right regime. However, because the scopes of doorstep selling contracts (Article 3 KSchG) and off-premises contracts (FAGG) slightly differ, it makes sense that Article 3 KSchG was kept alive. Nevertheless, in order to remove unnecessary dispartities in the legal regulation of the two regimes, the § 3-withdrawal right was subject to certain changes in accordance with the relating provisions of Chapter III CRD and its Austrian counterpart, the FAGG.

A look at the changes reveals that they—in line with Chapter III CRD and the FAGG—led to certain improvements for consumers. First, the VRUG extended the withdrawal period from one week to fourteen days (§ 3(1) KSchG). Second, in the case of sales contracts the period commences, in principle, (at the earliest) upon 'the day on which the consumer or a third party other than the carrier and indicated by the consumer acquires physical possession of the goods'.[39] The former rule of § 3(1) KschG regulated the commencement of the withdrawal period as follows: '[T]he time limit shall commence upon delivery to the consumer of a document containing at least the name and address of the entrepreneur, all information required to identify the contract and instructions on the consumer's right of rescission, *but at the earliest on the date on which the contract has been brought about*' (emphasis added)—even if (in the case of a sales contract) the consumer had not yet received possession over the good. Third, there is no special form requirement for exercising the withdrawal right anymore. While former § 3(4) KSchG stipulated that 'in order to be legally effective, notice of rescission shall be given in writing', the newly worded § 3(4) KSchG states as follows: 'The declaration of withdrawal is not subject to any

(39) The commencement of the period further requires that the trader fullfills his information requirements (see § 3(1) KSchG for details).

formal requirement.'[40]

There is no light without darkness though. Aligning the withdrawal period with the standards of the CRD led to one major step backwards for consumers. Neither under the old system nor, in principle, under the new, aligned § 3-withdrawal right regime the withdrawal period commenced/commences before the trader fulfilled his information requirements. If the consumer was/is not fully informed in line with the requirements set forth in § 3 KSchG, the withdrawal period only commenced/commences upon the day the trader would have fulfilled/fulfills his information obligations. Under the old regime there was no upper limit to this 'open' period. As long as the trader did not fullfill his information obligations, the consumer had the right to withdraw—theoretically eternally. In accordance with Article 10 CRD and § 12 FAGG the withdrawal period of the aligned § 3-withdrawal right now, however, expires—at the latest—12 months and 14 days after the withdrawal period would have started, had the trader initially correctly informed the consumer about his withdrawal rights.

Two additional issues should be noted in the context of the § 3-withdrawal right. First, unlike the withdrawal period and the question of how to exercise the withdrawal right, the consequences of exercising the withdrawal right were left unchanged and thus deviate from the relevant provisions by the CRD and the FAGG for distance and off-premises contracts.[41] Second, § 3(3) KSchG added two further exceptions to the already existing exceptions to the § 3-withdrawal right regime. The first one (no. 4) is a logical exception: contracts falling under the FAGG are excluded from the application of § 3 KSchG. The second

(40) Although the second sentence of now-§ 3(4) KSchG stipulates that the withdrawal right is deemed to be exercised, if the consumer 'sends the withdrawal declaration within the period [of 14 days]', this should not be understood as requiring written form. Orally declared withdrawals must be considered as being sufficient. In a similar sense, e.g., P. Kolba and A. M. Kosesnik-Wehrle, 'Leitfaden Rücktrittsrechte im Kern des Konsumentenschutzes', *VbR* (2014), 78, 80. This understanding is in line with Article 11(1)(b) CRD that allows for informing the trader with the use of 'any ... unequivocal statement setting out his [i.e., the consumer's] decision to withdraw from the contract.'

(41) See § 4 KSchG for details.

exception (no. 5) refers to cases where the consumer makes his contractual declaration in the absence of the trader. In this case the consumer would not be considered to be exposed to a situation of 'pressure' or 'being taken by surprise' and thus should not be entitled to enjoy a withdrawal right. An exception to this exception is added to no. 5: (unlike the FAGG) § 3 KSchG applies in 'absence' cases if the consumer is pressured by the trader to give his contractual declaration in his absence – this is in line with pertinent Austrian case law.[(42)]

3.2.4 The FAGG

From a structural perspective, the most far-reaching change was the enactment of a special law to cover the issues regulated in Chapter III CRD, i.e., distance and off-premises contracts. As mentioned earlier, the FAGG separated the withdrawal regime with respect to these two types of contracts from the KSchG (but, as just explained, left § 3 KSchG in place to cover certain 'doorstep selling contracts' that do not fall under the new FAGG regime).

The FAGG follows the standards of the CRD to a great extent—in principle, because the (basically) fully harmonised regime of Chapter III CRD did not allow for any deviation with respect to the issues and contracts regulated in Chapter III. Nevertheless, there are a (very) few differences between the FAGG and Chapter III CRD. Some of them were necessary to 'remedy' the vague wording of the CRD or answer to—seen from an Austrian perspective—its unsuitable terminology. In other cases, the legislator decided to apply the same standards in some situations and/or contracts not covered by the respective provisions of Chapter III CRD. Finally, Austria had to make decisions with respect to the regulatory options contained in Chapter III.

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(42) For details on this issue see, e.g., the Explanatory Memorandum to the VRUG Proposal, 14, available at http://www.parlament.gv.at/PAKT/VHG/XXV/I/I_00089/fname_343429.pdf.

In the following brief analysis I will focus on these issues, and will (in principle) not deal with the provisions that were basically just ‘copied’ from the CRD. Comments on the latter one can already be found in the general literature on the CRD.[(43)]

First, it should be mentioned that the FAGG covers slightly more contractual types and situations than Chapter III CRD. For example, with respect to the definition of the term ‘consumer’ the FAGG refers to § 1 KSchG, the Austrian standard definition of this term. It is wider than the definition in the CRD and encompasses especially also transactions by natural persons at the preparation stage for the launch of a business (§ 1(3) KSchG) and transactions by certain associations if they do not pursue any commercial purpose.[(44)] In addition, the exception of § 1(2) no. 3 FAGG regarding healthcare contracts is narrower than the exception of Article 3(3) lit b CRD and does not include healthcare contracts regarding the distribution of medication and medicinal products via distance selling. Thus, the information and withdrawal regime of the FAGG remains applicable with respect to these contracts. The fully harmonised CRD does not prohibit such an extension—applying the same standards to contracts not covered by the CRD is not forbidden by full harmonisation.[(45)]

A technical difference between the FAGG and the CRD lies in the—for Austrian standards—broad definition of the term ‘sales contract’ used by the CRD (Article 2(5) CRD). Whereas under the latter one *any* kind of ‘mixed-contracts’, i.e., contracts that have as there object both goods and services, fall

(43) See, e.g., the contributions in Bydlinski and Lurger (eds.), *Die Richtlinie über die Rechte der Verbraucher*.

(44) For details on these and other—seen from an EU-level perspective—atypcial definitions of the term ‘consumer’ see, e.g., G. Kathrein and T. Schoditsch, ‘§ 1 KSchG’ in H. Koziol, P. Bydlinski and R. Bollenberger (eds.), *ABGB Kurzkommentar* (4th edition, Vienna: Verlag Österreich, 2014), § 1 KSchG Recitals 1 et seq.; A.M. Kosesnik-Wehrle, ‘§ 1’ in A. Kosesnik-Wehrle (eds.), *KSchG – Konsumentenschutzgesetz* (3rd edition, Vienna: Manz, 2010), § 1 Recitals 1 et seq..

(45) It should further be mentioned that for some contracts that are basically excluded from the scope of the FAGG, § 8(4) FAGG lays down some contra-exceptions and declares several information and transparency obligations applicable if such contracts are concluded by electronic means. This applies to the exceptions in §1(2) no. 2, 3 and 8 FAGG – see §8(4) FAGG for details.

under the category of sales contracts, if the general requirements (i.e., the trader's obligation to transfer the ownership of a good to the consumer and the consumer's obligation to pay) are fulfilled, the traditional Austrian understanding of 'sales contracts' requires that the goods-related element is the *predominant* element. Thus, wherever the CRD exclusively addresses 'sales contracts', the FAGG had to use the terms 'sales contracts' and—in addition—'other contracts that involve the purchase of a good'.[(46)]

§§ 3 ('Definitions' implementing Article 2 CRD for distance and off-premises contracts), 4 ('Information obligations' implementing Article 6 CRD) and 5 FAGG ('Providing information in the case of off-premises contracts [in general]' implementing Article 7(1) and (2) CRD) are contents-wise principally similar to the relevant provisions of the CRD.[(47)] In the context of the transposition of Article 6 CRD it should further be noted that Austria did not make use of the minimum harmonised rule of Article 6(7) CRD to introduce (or maintain) special language requirements that aim to ensure that the consumer can easily understand the information provided by the trader. The introduction of such a provision arguably would not have been necessary anyway, as—especially with respect to contractual terms and conditions—§ 6(3) KSchG already addresses this issue in general by asking for clarity and transparency.

§ 6 FAGG implements Article 7(4) CRD regarding the simplified information requirements in the case of 'repair or maintenance' off-premises contracts. Austria decided to fully implement the optional simplification granted by the CRD—the last sentence of Article 7(4) CRD gave the Member States the chance to decide between requiring the same standards as for ordinary off-premises

(46) See, e.g., §§ 11(2) no. 2, 14(3) FAGG.

(47) With respect to Article 6(1) lit h CRD on the trader's information obligation with respect to the withdrawal rights, the respective Austrian provision, i.e., § 4(1) no. 8 FAGG led to a clarification in the sense that it explicitly explains that the obligation includes providing the consumer with the model withdrawal form and not (only) informing him about its existence. This understanding is undeniably in line with the CRD, but was necessary, as the German translation of the CRD was ambiguous.

contracts and introducing a simplified regime.

In § 9(2) FAGG the Austrian legislator implemented some aspects of the regulatory option of Article 8(6) CRD. The option concerned distance contracts concluded by telephone. Member States had the options to 'provide that the trader has to confirm the offer to the consumer who is bound only once he has signed the offer or has sent his written consent ... [and to] provide that such confirmations have to be made on a durable medium'. Austria made use of these options, but decided to make them applicable (only) to *service* contracts concluded by telephone, more precisely: to such contracts under the condition that the trader initiated the telephone call.

§ 11 FAGG shows one terminological key difference between the FAGG and the CRD. While the latter one uses the term 'withdrawal' (*Widerruf*), the legislator decided to use—in line with existing similar provisions, most notably § 3 KSchG—the term 'rescission' (*Rücktritt*) instead. Although the choice of the terminology does not have an effect on the right itself, one has to note that the term rescission is used relatively broadly in Austrian law and is not limited to withdrawal rights as understood by the CRD or the repealed Doorstep and Distance Selling Directives. The term rescission is, for example, used also for cases of delay in delivery and the related right to 'rescind' from the contract (§§ 918 and 920 ABGB).[48] To clearly differentiate the withdrawal right from such kind of rescission rights, the legislator could have introduced this new term, i.e., 'withdrawal'. However, from the perspective of consistency ('rescission' is already used in cases similar to the FAGG, such as in § 3 KSchG), preference was given to the traditional term, i.e., 'rescission'.

§§ 16 and 18(1) no. 11 FAGG (implementing Articles 14(4) lit b and 16 lit m CRD) finally contain an important clarification with respect to the withdrawal right in the case of the delivery of digital content that is not supplied on a

(48) For more details from the perspective of the drafters see Explanatory Memorandum to the VRUG Proposal, 30-31.

tangible medium (hereinafter *digital content contracts*). Article 16 lit m CRD exempts such contracts from the withdrawal rights regime 'if the performance has begun with the consumer's prior express consent and his acknowledgment that he therby loses his right of withdrawal'. This refers to the (in practice arguably very likely) case where the delivery of digital content should start before the lapse of 14 days after the day of conclusion of the contract—i.e., before the period for withdrawing from digital content contracts would (pursuant to Article 9(2) lit c CRD) usually end (hereinafter *early performance*). The devil is in the details though. Article 14(4) lit b CRD excludes the consumer's obligation to bear the costs for the supply of digital content in case of withdrawal. The consumer is freed from this obligation only if (at least) one of the three following alternative conditions occurs: (i) the consumer does not give 'his prior express consent to the beginning of the performance before the end of the 14-day period'; (ii) the consumer does not acknowledge 'that he loses his right of withdrawal when giving his consent'; (iii) 'the trader has failed to provide confirmation in accordance with Article 7(2) or 8(7) [CRD]'. This third alternative requirement refers to the required information for distance contracts, including the trader's confirmation of the just mentioned points (i) and (ii).[49]

This leads to an interesting' situation. Pursuant to the general provision of Article 16 lit m CRD the consumer should lose his withdrawal right, if he (in an early performance situation) gives his prior express consent and acknowledgement—regardless of whether or not the trader provides him with the confirmation listed in Article 14(4) lit b(iii) CRD. Pursuant to Article 14(4) lit b, however, the consumer would *not* lose his withdrawal right if he (in an early performance) gave his prior express consent and acknowledgement (Article 14(4) lit b(i) and (ii) CRD), because otherwise, i.e., if one said that he would lose his right in such a situation, Article 14(4) lit b(iii) CRD would be totally meaningless. The latter

(49) See Article 8(7)(b) CRD.

one explains that the trader's confirmation of the consumer's consent is essential for the trader to be able to charge for the supply of digital content if the consumer withdraws. But how could the consumer withdraw if he lost his withdrawal rights in fulfilment of the requirements of Article 16 lit m CRD (repeated in Article 14(4) lit b(i) and (ii)) already?

The Austrian legislator solved this issue by adding the trader's confirmation requirement directly to the exclusion provision of § 18(1) no. 11 FAGG (i.e., the national equivalent of Article 16 lit m CRD) itself. Put differently, § 18(1) no. 11 FAGG clarifies that the consumer only loses his withdrawal rights if *all three* requirements listed in Article 14(4) lit b CRD are fulfilled. The consumer thus has to give his prior express consent and acknowledgment that he loses his right of withdrawal if he asks for 'early' delivery, *and* the trader must provide the consumer with the required information/confirmation. Only if these requirements are fulfilled does the consumer lose his withdrawal right.[(50)] Although this solution might look 'stricter' than the wording of Article 16 lit m CRD might indicate, it is arguably in line with the Consumer Rights Directive, because the omission of the condition echoed by Article 14(4) lit b(iii) CRD in the directive's Article 16 lit m happened very likely by mistake.[(51)]

3.2.5 Changes in the ABGB

Earlier in this contribution I mentioned that the adoption of the VRUG further led to minor adjustments in the ABGB. More precisely, the VRUG had an effect on, in particular, two provisions: §§ 429 and 905 ABGB. Although both changes were only 'cosmetic' in the sense that they clarified the meaning of the two provisions in line with existing case law, both should be briefly mentioned, because they show how the implementation of the Consumer Rights Directive

(50) For more details from the perspective of the drafters see Explanatory Memorandum to the VRUG Proposal, 35-37.

(51) In a similar vein, e.g., the Explanatory Memorandum to the VRUG Proposal, 36-37.

was used to improve the transparency of related general law provisions.

§ 7b KSchG implemented Article 20 CRD on the passing of risk of loss or damage to a good in contracts where the trader sends the good to the consumer. Unless the consumer commissions the carrier on his own initiative, i.e., without the trader's suggestion or offer to ask that specific carrier, the risk does not pass from the trader to the consumer before the consumer (or a third party indicated by him other than the carrier) acquires physical possession of the good (Article 20 CRD and § 7b KSchG). This rule deviates from the general Austrian rule on the passing of the risk for contracts that are fulfilled by sending off the good (*Schickschuld*)[(52)], which previously was used also for B2C *Schickschuld*-contracts. Pursuant to the previous wording of § 429 ABGB, which deals with property law-related consequences of goods that are sent to another person (but was also used for clarifying the passing of the risk), sent goods were declared as handed over at the moment of sending them off, if the recipient himself determined the means of sending or gave his consent to the used means. Case law developed this concept further and declared this provision applicable in cases where the good is sent 'by due means' (*auf verkehrsübliche Weise*) without the consumer's prior determination or consent.[(53)] This traditional rule clearly differs from Article 20 CRD, which takes a consumer-friendlier approach. Although it was necessary to implement Article 20 CRD for B2C contracts—this was, as just explained, done by § 7b KSchG—the legislator clearly wanted to avoid major changes to the long-established *general* rule of § 429 ABGB. Thus, it was decided to implement Article 20 CRD narrowly, i.e., only with respect to B2C cases. At the same time the legislator changed the wording of § 429 ABGB in line with established case law. This means that the consequences of

(52) This concept refers to cases where the obligor has to perform at the obligor's place by dispatching the good to the obligee.

(53) For details see, e.g., B. Eccher and O. Riss, '§ 429' in Koziol et al. (eds.), *ABGB Kurzkommentar*, § 429 ABGB Recital 2; T. Klicka and A. Reidinger, '§ 429' in M. Schwimann and G. Kodek (eds.), *ABGB Praxiskommentar Band 2* (4th edition, Vienna: LexisNexis, 2012), § 429 Recital 2.

Schickschuld-contracts are now different, depending on whether a contract is a B2C contract or not.

To make the issue of the general passing of the risk more visible (and more easily understandable), the legislator further decided to add a new paragraph to § 905 ABGB, which deals with the place of performance.　Thus far, a rule on the passing of the risk was missing in the Austrian law of obligations—the property law-rule of § 429 ABGB had been used as its basis instead.　The new paragraph, § 905(3) ABGB now addresses the passing of risk in the case of *Schickschuld*-contracts.　For these cases the new provision states that the rule of § 429 ABGB applies. (Also this, however, was only a cosmetic change.)

4. Conclusion and a Brief Outlook

The VRUG transposed the Consumer Rights Directly narrowly into Austrian law.　For the most part, the fundamental maximum harmonisation approach of the directive did not give the legislator any chance to deviate from its provisions. But even with respect to those issues that were not fully harmonised or even not covered, Austria did not decide to introduce innovative changes.　The (arguably) biggest change that was not compulsory in the sense that Austria would have been forced to implement certain provisions of the directive relates to the traditional withdrawal rights regime of § 3 KSchG for 'doorstep selling contracts' other than those falling under the scope of the withdrawal provisions of Chapter III CRD and the FAGG.

The implementation of the Consumer Rights Directive is, however, not the end of the story.　In particular the decision to create a new, coherent law on distance and off-premises contracts, the FAGG, shows that the Austrian legislator thinks ahead.　The next couple of years might lead to a major reform of the body of Austrian consumer law, both with respect to its structure and its contents.　As, for example, *Stabentheiner* explains, the introduction of a new, more comprehensive, revised and better structured special consumer law, the Consumer Law Act (*Verbrauchergesetzbuch*), is currently heavily discussed.[54] The implementation of the Consumer Rights Directive might have come too early to realise this project, but it gave the discussion on the future of Austrian consumer law a new impetus. It will be interesting to see how the matter further evolves, in particular because there are further EU projects, most notably the proposed Common European Sales Law, in the pipeline that might have an effect on Austria's plans to develop its consumer law further.

(54) See, e.g., the explanations in Stabentheiner, 'Das Verbraucherrechte-Richtlinie-Umsetzungsgesetz', 68-69.