

## Case Details

### Case Details

National ID	1 Ob 110/05s
Member State	Austria
Common Name	link
Decision type	Other
Decision date	27/09/2005
Court	Oberster Gerichtshof (Supreme court)
Subject	
Plaintiff	
Defendant	
Keywords	

### Directive Articles

Distance Selling Directive, [Article 6, 1.](#)

### Headnote

If, during the withdrawal period, a consumer has used the purchase item for many hours and far in excess of the time one might reasonably take for a product trial, leading to wear and tear and a reduction in the item's value – such that the supplier is no longer able to sell it as new, but rather is forced to sell it as “used” and substantially lower the asking price – then, under § 5g KSchG (in line with art 6 para 2 of the Distance Selling Directive), it is acceptable to request an appropriate usage fee and a charge to offset the costs of the reduction in the item's value.

### Facts

The buyer ordered a flat-screen monitor from the defendant's website and, as agreed, collected the item from the defendant's shop after paying in cash. The packaging was opened at this stage, the physical condition of the monitor examined and the presence of all accessories checked. Ten days later, the consumer declared his withdrawal from the contract and returned the item to the shop. At this point, the monitor's “time used” counter showed that it had been used for over 43 hours. As the monitor had already been used extensively, the defendant was forced to sell it on to another party with a substantial discount. As a result, he refused to reimburse the full purchase price, arguing that, under domestic law on unjust enrichment, he was entitled to charge for usage.

### Legal issue

The OGH concurred with the legal arguments put forward by the defendant. The OGH ruled as follows on the question of whether charging a consumer a usage fee where he has legitimately exercised his right of withdrawal is in breach of the Distance Selling Directive.

Article 6 of the Directive does not contain any provision on what happens to a distance-selling contract when a consumer exercises his right of withdrawal. There are also no regulations in article 6 on the question of how the contract is to be settled or to what extent the consumer is liable should the goods purchased under the contract have suffered wear and tear or be (partially) impossible to sell on. Equally, the Directive does not provide guidance on the question of whether the consumer has a duty to pay compensation to cover the usage costs, nor on which yardstick should be used to determine which party is at fault. As such, art 6 has no far-reaching or clear provisions on this question. Rather, in line with the fundamental essence of the Directive, it focuses simply on the overall aims.

Recital 14 of the Directive supports this notion. It states that it is up to Member States to set further provisions and requirements for cases where a consumer exercises his right of withdrawal. Making use of the room for manoeuvre domestic legislators had in this field, Austrian legislators transposed the Directive with §§ 5a to 5i KSchG.

If § 5g KSchG is to be interpreted in line with the Directive (as required), it is imperative to begin by determining the precise aim of article 6. Recital 14 of the Directive stated that a consumer should be entitled to a right of withdrawal because, prior to concluding the contract, he would have no practical opportunity to see the product or to understand the precise nature of the service. He would also typically have received no individual advice from the seller. Thus, the right of withdrawal was designed to give the consumer the opportunity to check the product on receipt thereof and, as applicable, to withdraw from the contract. It was designed to ensure that the consumer was safeguarded against the threat of making ill-considered purchases as a result of advertising or marketing techniques. Thus, a consumer concluding a distance-selling contract was supposed to be placed on an even footing with a buyer able to assess and examine the goods before purchase. Only the withdrawal option would enable a consumer to enjoy the benefits of distance selling while being in a position comparable to that of an individual who is able to examine thoroughly the object of a contract before agreeing it. As such, in accordance with the view taken by the Council in passing the Directive, it was essential to limit the consumer's expenses to the postage costs of returning the item, since otherwise the right would amount to nothing more than a technical legal entitlement.

In terms of a consumer's right of withdrawal, the government bill on the KSchG provisions relating to the conclusion of distance-selling contracts states that during the withdrawal period – which begins when the item is delivered – a consumer is entitled to use the item. However, if this usage is not to result in the consumer's forfeiting his right of withdrawal, he should, in accordance with § 4 KSchG, be obliged, where applicable, to pay a usage fee and to cover any loss in the item's value resulting from his usage. Furthermore, the government bill states that such a provision is permissible under the Directive since it (only) excludes any more extensive demands – such as an administration or transfer fee – and not compensation claims or claims under the law on unjust enrichment. Under § 5g KSchG, payment to cover the consumer's actual usage of the service provided under the contract constitutes an "appropriate" usage fee. Thus, "costs" are not relevant in this context.

The OGH concluded that, interpreting the provision in line with the Directive, a supplier's entitlement to charge a usage fee or a fee to cover any loss in the item's value as per § 5g KSchG could only be considered incompatible with the right of withdrawal under art 6 of the Directive if the consumer was charged a usage fee or a fee to cover the item's loss in value when he had in fact merely examined the item or, in accordance with the provision, briefly used it in order to test it. Any such charges incurred by a consumer in exercising his right of withdrawal would constitute an unfair penalty under the Directive and would be tantamount to preventing or making unduly difficult the proper exercising of this right. Since, in the case of contracts concluded in person, it was generally possible to examine the item free of charge, this also had to be possible in the case of distance-selling contracts. If not, the consumer would be in a worse position.

However, the case under examination was fundamentally different. In this case, it was not simply a question of the consumer's "testing" the monitor. Rather, he had used it. Given the extensive use he had made of it, there was no blurred distinction between examining and using a product, as there often were in other cases. The Directive makes no provisions for cases in which such extensive use has been made of the item before the right of withdrawal was exercised. As such, domestic legislators had room for manoeuvre in order to supplement the Directive. In this case, there was no suggestion that § 5g KSchG, drafted to this end, went beyond the scope of this "room for manoeuvre". The Directive's aim – to safeguard consumers against the threat of being exposed to undue pressure to reach a decision when they wished to exercise their right of withdrawal – was not in any way in jeopardy if, in line with the law on unjust enrichment, a consumer was charged an appropriate usage fee and a fee to cover any loss in the item's value caused by wear and tear as a result of his usage.

A penalty would only be unacceptable under the Directive if the domestic provision entitled the supplier to charge such a high usage fee that this was tantamount to a fine and, on financial grounds, would amount to denying de facto the consumer's right of withdrawal. However, the stipulation that a usage fee must be "appropriate" countered this danger. Thus, in cases of extensive usage, § 5g KSchG prevented all risks being unilaterally shifted to the supplier and struck a balance between a consumer's and supplier's interests.

#### Decision

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