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BRUGGER  
JORDIS RECHTSANWÄLTE

# VO 330.226 Wirtschaftsrecht

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# Consumer Protection and E-Commerce

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## Generally applicable rules of law

Remember:

- Error, Mistake
- Fraud
- Warranty
  
- "Laesio enormis"

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**§ 934 ABGB, § 351 UGB: Laesio enormis**



**Case 1: Price 250**  
Buyer may rescind the contract\*

Fair value 100

**Case 2: Price 40**  
Seller may rescind the contract\*

\*Note: The other one can avoid this by paying up to the fair market value.

Only an enterprise can waive its right to rescind

Laesio enormis rules not applicable if:

- "Collector's price" (particular affection)
- Fair value was well known
- Contract was meant as a gift (partial gift)




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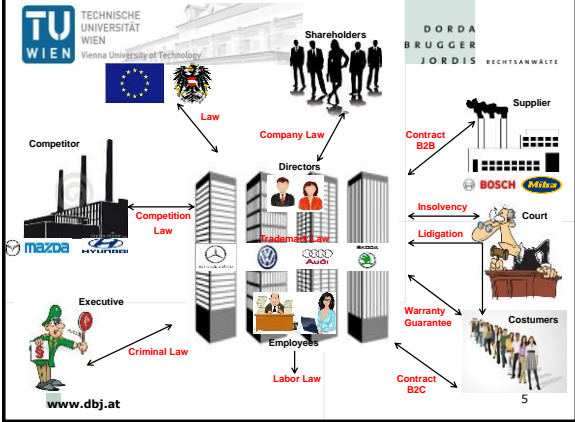
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**Sources of Consumer Protection Law**

- Austrian Consumer Protection Act (Konsumentenschutzgesetz, KschG)
- Fern- und Auswärtsgeschäfte-Gesetz (FAGG)
- Consumer credit law (Verbrauchercreditgesetz, VKrG)
- Time share property law (Teilzeitnutzungsgesetz, TNG)
- Product Liability Act

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**What is Consumer Protection Law?**

- Consumer Protection Law is the special private law of consumers that protects them from the typically economic supremacy of businessmen.
- It applies only in business to consumer (B2C) transactions.

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**Consumer vs Businessman**

- A business is an organisation independently carrying out an economic activity on a long-term basis.
- A businessman is someone who runs a business and acts for this business.
- A consumer is someone who concludes transactions that **do not belong to the operation of his business.**

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**Austrian Consumer Protection Act**

- Applies to transactions involving a consumer and a businessman
- Natural persons carrying out preparatory transactions before starting a business are still considered consumers

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### Austrian Consumer Protection Act

**Special right of withdrawal**

- § 3: **Vertrag außerhalb Geschäftslokal, Messe- oder Marktstand** (e.g. door-to-door sale): **Rücktrittsrecht binnen 14 Tagen** ab Erhalt Urkunde samt Belehrung
- auch bei **Werbefahrten**, bei **Ansprechen auf der Straße**
- auch bei Falschinformationen betr Steuern, Kredit uä (§ 3a)
- FAGG: **14 Tage ab Warenerhalt** bei **Fernabsatzverträgen** (distance selling);
- mangels Info: 1 Jahr + 14 Tage ab Warenempfang

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### Austrian Consumer Protection Act

§ 5: Kostenvoranschläge des Unternehmers an Verbraucher:

- kostenlos
- gelten als gewährleistet

außer wenn anders erklärt/hingewiesen worden ist

Aber B2B: KV im Zweifel unverbindlich; KV kostet angemessenen Werklohn

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### Austrian Consumer Protection

FAGG: Fernabsatzregeln (distance selling)

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### Right of Rescission

- Only in business to consumer contracts (including eBay auctions [4 Ob 204/12x], but never for "normal" auctions).
- Available to the consumers for a period of 14 days, starting with the delivery of the goods to the consumer.
- No reasons are required for such a rescission!

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### Austrian Consumer Protection Act

§ 6: Inadmissible contract clauses (cf Text)

Para 1 ...  
Para 2 ...

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### ABGB – Begriffe – Verbraucherschutz (KSchG)

Angeld	Anzahlung	Reugeld	Stornogebühr	Kaution
<i>Earnest money</i>	Down payment		Cancellation charge	Deposit

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## AGB – ABGB und KSchG

Erste Frage: Sind AGB "vereinbart"? (battle of forms ...)

Wenn ja: nächste Fragen:

**Geltungskontrolle**

- § 864a ABGB: ungewöhnliche Inhalte in AGB unwirksam, wenn nachteilig **und** überraschend (objektiv ungewöhnlich)

**Auslegung**

- § 915 Teil 2 ABGB: undeutliche Äußerung wird zum Nachteile desjenigen erklärt, der sich derselben bedient hat

**Inhaltskontrolle** (geltungserhaltende Reduktion auf zulässigen Inhalt)

- § 879 Abs 3 ABGB: Nebenpflicht in AGB unwirksam, wenn gröblich benachteiligend
- § 6 Abs 1 KSchG: Jedenfalls nicht verbindlich (Liste ...)
- § 6 Abs 2 KSchG: Nicht verbindlich, wenn nicht im einzelnen ausgehandelt (Liste ...)
- § 6 Abs 3 KSchG: AGB-Klausel unwirksam, wenn unklar oder unverständlich.
- § 1396a ABGB: Zessionsverbot zwischen Unternehmen nur wirksam, wenn im einzelnen ausgehandelt

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## Austrian Consumer Protection Act

### § 9: Prohibition of disclaimer of warranties

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## Consumer Protection Law

- Prohibition of wage assignments for claims that are not due (§ 12)
- Special provisions regarding acceleration clauses (Terminsverlust § 14/3 VerbrKrG:
- Restriction regarding jurisdiction clauses (§ 14)

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**Special provisions for some forms of contracts with consumers**

- Contracts regarding package holidays (Pauschalreisegesetz)

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**E-Commerce**

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**E-Commerce Law**

- In E-Commerce transactions the parties are not physically present.
- Data is transmitted online and upon individual request.
- E-Commerce is not bound to national frontiers.
- Indirect E-Commerce: contracts are concluded online; goods are delivered offline.
- Direct E-Commerce: conclusion of contract, delivery and payment are online.

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**E-Commerce Act**

- Applies in case of "services of the information society" – every form of sale of goods or provision of services, which are provided electronically in distance selling upon individual request of the receiver, normally for a consideration.
- Covers not only consumer transactions, but **also business to business** transactions and services between consumers.

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**E-Commerce Law II**

- According to the E-Commerce Directive (and the Austrian E-Commerce-Gesetz ECG) every commercial provider must give **information** on his website:
  - Name and address
  - E-mail address
  - where the provider is registered (trade register number)
  - relevant supervisory authority
  - Value-added tax identification number
  - prices and indication whether these prices are net or gross prices

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**Furhter Obligations of Providers**

- Giving users the possibility to save and reproduce the General Terms and Conditions (if used)
- Providing appropriate mechanisms for users to detect and correct errors
- Sending an electronic confirmation immediately after conclusion of contract

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### E-Commerce Law III

- Electronic declarations shall be deemed received when they can be retrieved by the party to which they are addressed under ordinary circumstances.

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### Sanctions for violation of ECG

- Group lawsuit ("Verbandsklage")
- Administrative penalty
- Unjustified competitive advantage means violation of Unfair Competition Law (UWG)

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### Responsibility of Access/Host Providers

*Limited if they act as providers for content of others and do not have any influence on the content itself.*

- **Access-Provider:** transmits information for others, providing infrastructure – no liability (§ 13); similarly: **Caching** (§ 15)  
ECJ 24 Nov 2011, C-70/10, *Scarlet Extended SA* : Not obligatory to install a system for filtering peer-to-peer communication as a preventive measure.  
CJEU 27 March 2014, *UPC Telekabel Wien, Constantin Film Verleih, Wega Filmproduktion, kino.to*: **An internet service provider may be ordered to block its customers' access to a copyright-infringing website**
- **Host-Provider:** saves information by order of a content provider – liability only in case of not removing the illegal content *immediately upon actual knowledge of the illegality of the content* (§ 16); similarly: **Linking** (§ 17)  
LG Hamburg 24 April 2012, 310 0 461/10: *Youtube* shall install a word filtering system to prevent copyright infringement (but audioscreening is not required)

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**Responsibility of Providers**

- Search engine operators: no liability for the content of results (§ 15)
- Obligation of Access- and Host-Providers to give all necessary information about their customers to the court if it is needed to prosecute an offence

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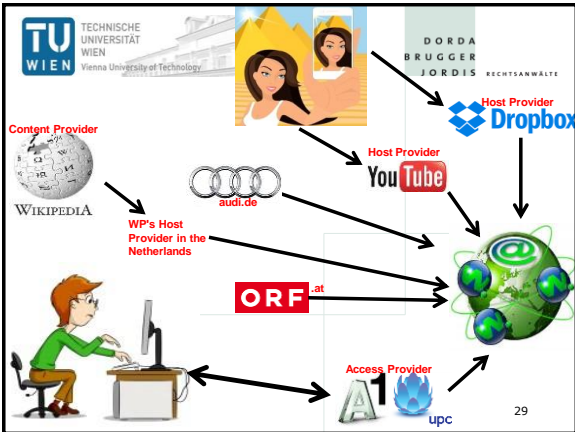
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**Unsolicited Communications**

- EU: Directive 2002/58/EC
  - Opt-in system mandatory for email or SMS messages directed to natural persons.
  - Opt-out **or** opt-in system possible for legal entities
    - Germany, Austria: opt-in (=> unsolicited communication is illegal)
    - UK: opt-out
- US: CAN-SPAM Act
  - General opt-out system

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### Unsolicited Communications - Austria

Telecommunications Act 2003

- Prohibited (unless prior consent or customer relationship = opt-in), e.g.:
  - Cold Calls for marketing purposes
  - Email or SMS messages for direct marketing purposes or mass email/SMS
- Prohibition applies generally, not only in favour of consumers
- If customer relationship or consent: refusal possible at any time
- Administrative offence with fines up to EUR 37.000 (email or SMS)/EUR 57.000 (calls)

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