

## MEMORANDUM

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**Memorandum on consumers' liability for any diminished value. See section 24(5) of the Consumer Contracts Act.**

### **The purpose of this memorandum**

The new Danish Consumer Contracts Act introduces a new legal position whereby consumers keep their right of withdrawal when they have used goods to an extent more than necessary to establish the nature, characteristics and functioning of the goods. However, in order that the right of withdrawal will not be exercised at the expense of traders, section 24(5) also provides that consumers are liable for any diminished value of the goods as a result thereof.

The interpretation of this new rule has been questioned by the trade sector. In the light of this, the Danish Consumer Ombudsman along with the trade sector and the Danish Consumer Council have sought to build a mutual understanding of when consumers are liable for any diminished value under section 24(5), and of how the diminished value is determined.

This understanding is only indicative. The final adjudication of such issues falls within the jurisdiction of the courts of law.

### **The Act**

Section 24(5) of the Consumer Contracts Act reads:

*"The consumer shall only be liable for any diminished value of the goods resulting from the handling of the goods other than what is necessary to establish the nature, characteristics and functioning of the goods. [...]"*

### **The Directive**

The first sentence of article 14(2) of the Directive reads:

*"The consumer shall only be liable for any diminished value of the goods resulting from the handling of the goods other than what is necessary to establish the nature, characteristics and functioning of the goods [...]"*

Recital 37 of the preamble stipulates:

*"Since in the case of distance sales, the consumer is not able to see the goods before concluding the contract, he should have a right of withdrawal. For the same reason, the consumer should be allowed to test and inspect the goods he has bought to the extent necessary to establish the nature, characteristics and the functioning of the goods.[...]"*

Recital 47 stipulates:

*"Some consumers exercise their right of withdrawal after having used the goods to an extent more than necessary to establish the nature, characteristics and the functioning of the goods. In this case the consumer should not lose the right to withdraw but should be liable for any diminished value of the goods. In order to establish the nature, characteristics and functioning of the goods, the consumer should only handle and inspect them in the same manner as he would be allowed to do in a shop. For example, the consumer should only try on a garment and should not be allowed to wear it. Consequently, the consumer should handle and inspect the goods with due care during the withdrawal period."*

The issue of consumers' liability for any diminished value is mentioned in the legislative material to section 24(5) and in the reply given by the Danish Ministry for Justice to questions 3, 9 and 10 from the Legal Affairs Committee. The comments were summarised as follows in the report dated 28 November 2013 issued by the Legal Affairs Committee:

*"With regard to the issue of diminished value of returned goods and the issue of how consumers may use goods comprised by a right of withdrawal, the majority attaches decisive importance to consumers only being allowed to handle the goods as they would do in a shop as the clear point of departure under the bill.*

*At the same time, it follows from the Directive that a consumer keeps his right of withdrawal, even if the goods have been used more than the consumer would have been able to do in a shop, but that the consumer is liable for the diminished value in such case. Proper implementation of the Directive requires that this provision is implemented in Danish law. As stated by the Minister for Justice in the reply to question 10 regarding the bill, the provision aims to strike a balance between consumers' and traders' rights and obligations when exercising their right of withdrawal.*

*On the one hand, consumers must have a right to return the goods and exercise their statutory right of withdrawal without such right being made illusory by traders' zealous enforcement of the demand that the item must be returned in the same condition. On the other hand, the right of withdrawal should not be exercised at the expense of the trader in cases where the consumer has chosen to start using the goods. In such cases, the consumer must pay for the diminished value of an item caused by the consumer's use. The majority of the Committee comment that the trader should first assess the diminished value, and the majority have noted that if the goods have been handled in such a way that they have no value, the consumer would not be able to reclaim the purchase price. See the reply to questions 3 and 9. In this connection, the general trading value is decisive. However, it is not decisive whether the trader generally engages in the sale of second-hand goods. The diminished value will always depend on an individual assessment."*

### **Interpretation of section 24(5)**

It appears from the legislative material to section 24 and the report issued by the Legal Affairs Committee that any assessment of the use of goods allowed by consumers to establish the nature, characteristics and functioning of the goods will be based on the general rule that consumers may handle the goods in the same manner as consumers would be allowed to do in a shop.

1. If the handling of the goods does not exceed what you are allowed to do in a shop

According to the wording of section 24(5), consumers will only be liable for any diminished value resulting from the handling of the goods other than what was necessary to establish the nature, etc. of the goods, generally corresponding to what consumers would have been allowed to do in shops selling similar goods according to general practice.

This also means that consumers will not be liable for any diminished value resulting from any handling which is also possible in a shop and which is necessary to establish the nature, etc. of the goods.

In its guidelines<sup>1</sup> for understanding the European Consumer Rights Directive, the European Commission (in the following the Commission) states that consumers would normally be able to test the functioning of audio/video products in a shop. Furthermore, consumers would be able to examine and test goods on display. This means that if a product is normally on display without packaging in a physical shop, a consumer should be able to open the packaging to examine the product without any deduction for diminished value being made. However, the consumer should exercise due care when opening the packaging.

However, if an item, e.g. a mobile phone, is provided with protective film, such film may only be removed if absolutely necessary to examine the product in the Commission's opinion.

The Commission further comments that consumers would not be able to perform software configurations on a computer<sup>2</sup>. Removal of labels in clothes would exceed what you are normally allowed to do in a shop. Household appliances, e.g. kitchen appliances, may not be exposed to practical testing.

In cases in which the goods have not been handled more than a consumer would do in a shop, a trader may replace the goods in their packaging, wipe off fingermarks, fold the clothes neatly and close the packaging again without any deduction for diminished value being made.

2. If the handling of the goods exceeds what you are normally allowed to do in a shop, but the value of the goods has not diminished

However, if the handling of the goods exceeds what was necessary to establish the nature, etc. of the goods and what is possible in a shop, the first factor to be considered is whether the handling has resulted in any diminished value of the goods.

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<sup>1</sup> See the guidance document issued by the Commission regarding the interpretation of Directive 2011/83/EU, June 2014, see 46 pp., in the following the "Commission guidance". The guidance document is the Commission's own interpretation of the Directive, which has not been discussed with national enforcement authorities, nor is it binding on such authorities. View the guidance document here: [http://ec.europa.eu/justice/consumer-marketing/files/crd\\_guidance\\_en.pdf](http://ec.europa.eu/justice/consumer-marketing/files/crd_guidance_en.pdf)

<sup>2</sup> The meaning of this is not entirely clear, and the Consumer Ombudsman intends to call a meeting with the Danish Consumer Council and trade associations to discuss it when case law in this area is available.

If the value of the goods has not diminished, consumers can reclaim the full amount in the event of withdrawal. For example, this could be the case if the goods appear to be new when returned by the consumer irrespective of any use thereof, and the trader would be able to sell the goods as new again. Although the new Consumer Contracts Act does not apply the criterion of return "in essentially the same condition and volume", case law relating to section 20 of the Consumer Contracts Act (now repealed) may be applied to some extent in determining whether any diminished value exists that the consumer is liable for. However, as mentioned, the decisive factor must be whether the goods can be resold as new without appreciable costs to the trader. See item 4 for information about damage to packaging.

The goods would normally be deemed to be new even if the trader has to delete a few calling data on a phone or a few digital photos taken by a digital camera.

3. If the handling of the goods exceeds what you are normally allowed to do in a shop, and the value of the goods has diminished

In cases in which the handling of the goods exceeds what is necessary to establish the nature of the goods, and what you are normally allowed to do in a shop, and the value of the goods has diminished, it is necessary to consider how the diminished value can be determined.

In the Consumer Ombudsman's opinion, the legislation must be understood to mean that the value of the goods is the *retail* market price of the goods in the condition in which they were returned.

Thus, it appears from the legislative material regarding section 24(5) that in determining whether the use has resulted in diminished value "*importance should be attached to the general trading value of the goods, when the use is considered. In this connection, it would not per se be decisive at which price the relevant seller would be able to sell the goods through the distribution channel used. The valuation can be based on the general trading value of the goods and consequently the price which a trader would generally be able to get.*" [Our underlining]

It also appears from the Minister for Justice's reply to question 3 from the Legal Affairs Committee that "*[i]n determining whether the value of the goods has diminished, importance must be attached to the trading value of the goods and the price which traders would generally be able to get for goods in the condition in which they were returned.[...]*"

The diminished value of the goods referred to in section 24(5) should consequently be calculated at retail prices. In this connection, significant importance should be attached to the existing price level on the relevant market in the case of sale from traders to consumers for goods in similar condition. However, the price level in the case of sale between traders or sale between consumers should not be taken into consideration.

As a general rule, the diminished value may thus be determined as the difference between the selling price and the *market price* on sale after the return. See the Minister for Justice's reply to question 3 from the Legal Affairs Committee which is quoted above. An objective valuation of the goods must be made, and importance may not be attached to whether the relevant trader engages in the sale of second-hand goods.

As a general rule, traders do not have a duty to repair or restore goods. However, according to the general principles of the law of obligations on the contractual duty of good faith and prohibition against enrichment, a trader may have a duty to take minor and not disproportionate preparatory and restoration measures if the goods can thereby preserve a considerable value on the market. However, the trader should not carry out any preparatory work if the costs thereof are not commensurate with the increased value.

In such cases, the reduction of the claim for a refund may be calculated as the costs associated with preparing the goods for the purpose of selling them again. If, after preparation, the goods can only be sold as second-hand goods, a deduction may be made for additional diminished value.<sup>3</sup>

The report issued by the Legal Affairs Committee states that "*determination of the diminished value will always depend on an individual assessment.*"

Furthermore, item 4.11.3.1 of the general explanatory notes of the bill and the comments on section 24(5) state that, in certain instances because of the consumer's handling of the goods, the refund may be so small that it is not worth the effort for the consumer to exercise the right of withdrawal.

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<sup>3</sup> The guidance document issued by the Commission mentions that the loss may be determined as "the objectively justified loss of income". However, the Directive does not authorise any calculation of the diminished value under the principles of the law of damages.

This should be understood to mean that the consumer's handling of the goods is decisive to the determination of the diminished value. In such assessment, it may be decisive whether a demand for such goods in the relevant condition exists. If no such demand exists, the value could be quite small, and in some cases, the goods may not have any sales value at all. See the Minister for Justice's reply to question 9 from the Legal Affairs Committee stating that if the goods have been mishandled by the consumer to such extent that they no longer have any value, the consumer cannot reclaim the purchase price.

However, the introduction of the new rules may entail that new markets emerge for second-hand goods.

#### 4. Packaging

Issues may be raised as to whether the consumer may open the packaging and whether the opening of or any damage to the packaging could result in the value of the goods diminishing.

According to the wording of section 24(5), the issue of diminished value only concerns the goods themselves. However, the comments on section 24(5) state "*[...]partly how the use, including the opening of or damage to the packaging, etc. has resulted in diminished value of the goods[...].*" On this basis, it may be assumed that the opening of or damage to the packaging may have an impact on the issue of whether the value of the goods has been diminished.

See also the Minister for Justice's reply to question 10 from the Legal Affairs Committee, which must be understood to mean that damaged packaging will not prevent the consumer from exercising his right of withdrawal whereas the trader must be compensated for the diminished value.

It is the opinion of the Consumer Ombudsman that a trader may not prevent consumers from examining the goods by packing them in such a manner that they have de facto been sealed to the effect that the consumer is liable for damage to the packaging if the packaging is opened. However, this does not apply if it is not necessary to open the packaging to establish the nature, characteristics and functioning of the goods, or if the goods are presented in the same way in a physical shop – e.g. that there is generally no exhibit in physical shops.

If the packaging of goods is important for any resale of the goods (which e.g. may be the case for electronics whereas it is hardly important in the case of the sale of clothes if only the removal of an ordinary plastic bag is at issue) it may result in diminished value of the goods if the packaging is discarded or has been damaged after delivery. If the goods are otherwise as new, the diminished value could probably be determined as the price of new packaging if such can be procured or as the difference between the selling price and the market price of new goods without packaging.

#### The burden of proof for goods having diminished value and the amount of the diminished value

Issues may be raised as to who should document that the value has been diminished and as to the amount of such diminished value.

It follows from the comments on section 24(5): *"As a general rule, it is for the trader to prove that the value of the goods has been diminished. If the trader can sustain the burden of proof, it is for the consumer to prove that the diminished value is not due to any use, including testing, of the goods other than what is necessary to establish the nature, characteristics and functioning of the goods."*

It is the opinion of the Consumer Ombudsman that a trader believing that the goods have been affected by use or damaged, and that the full purchase price therefore cannot be repaid, must document this to the customer and the trader must justify the amount of the diminished value. If the trader has sustained the burden of proof, it follows from the general rules of burden of proof that it is then for the consumer to prove that the diminished value is not due to use other than what is necessary to establish the nature, characteristics and functioning of the goods.

As mentioned, in determining the diminished value, an individual assessment should be made on the basis of the nature of the goods, the effect of any use to which the goods were exposed and the market prices.

As a starting point, the trader must determine the diminished value, which will depend on a reasonable and fair estimate in practice.