

## Fact Sheet on compensation following a withdrawal (sale of goods)

If used goods come back to the online trader following a withdrawal, many traders are asking questions regarding compensation.

### 1. Use does not exclude the right of withdrawal

Online traders often erroneously believe that the use of the product fully excludes the right of withdrawal.

However, it does not emerge from the law that a right of withdrawal should be generally excluded if the product has been used. In principle, online traders have to accept if consumers open and examine the ordered goods – even if they can no longer be resold.

As a result, the consumer may “**examine**” the products and the **right of withdrawal** does not get lost by doing this. The consumer can still exercise his right of withdrawal.

### 2. Legal basis for compensation

But the consumer may owe the trader a compensation for a diminished value of the goods under certain circumstances (Section 357 (7) German Civil Code, (Bürgerliches Gesetzbuch, BGB)):

*„The consumer has to pay compensation for a diminished value of the goods if*  
*1. the diminished value is resulting from the handling of the goods other than what is necessary to examine the quality, the characteristics and the functioning of the goods and*  
*2. the trader has informed the consumer [...] of his right of withdrawal.”*

### 3. The “whether” of the compensation

The following principle applies: The buyer is expressly permitted to examine the purchased item. However, if the handling goes **beyond** what is “**necessary**” to **examine the quality, the characteristics and the functioning** of the goods, compensation can play a crucial role. The compensation should benefit the trader for the fact that the goods have decreased in value because of the use exceeding the permissible examination.

In determining whether the trader is entitled to compensation, it must be decided on a case by case basis – particularly when there is a use exceeding the examination of the quality, the characteristics and the functioning of the goods which confers compensation.

First, the type of product must be determined specifically. This makes it possible to determine – from an objective point of view – what is necessary to examine the characteristics of the specific product or whether compensation is to be considered. The specific type of product determines whether the depreciation in value is reasonable in accordance with common usage.

#### Practical examples of compensation:

In the so-called “waterbed case”, the German Federal Court of Justice stated that installing a waterbed and filling the mattress should be considered as examination of the item where there is no obligation of compensation (judgment of 03.11.2010, case number: VIII ZR 337/09). Since a bed regularly constitutes a lasting purchase which is not insignificant for one’s own well-being, a three-day use may still be considered an adequate amount of time for an examination. Thus, the court no longer needed to discuss the amount of compensation and its calculation.

By the judgment of 04.04.2012 (case number: 119 C 264/11), the Amtsgericht (Local Court) Cologne decided that a maximum of two days for testing a mattress constitutes an adequate examination of the goods whereas five days of testing the mattress in order to examine the characteristics and the functioning of the goods are not necessary and therefore there is an obligation of compensation. Especially if the mattress was tested for one night, no compensation must be paid (Amtsgericht Bremen, judgment of 15.04.2016, case number: 7 C 273/15).

#### 4. Calculation and amount of compensation

Where it is established that the occurred depreciation in value is attributable to a handling of the goods which was not necessary for the examination, the amount of the depreciation in value has to be determined. There are **no fixed rates and no calculation parameters established by law** for the calculation of compensation. The calculation of the amount of compensation is always determined on a **case by case** basis.

In principle, the calculation of compensation is performed by a **realistic estimate** at what price the goods in the **current state** can still be **offered** and/or **sold**. Both repair costs and costs for cleaning must also be included.

*Example: The original purchase price is €39.90. If the goods in the current state may only be sold for €25.00, the depreciation in value amounts to €14.90. This depreciation in value is to be deducted from the purchase price which the trader must reimburse.*

In principle, the following applies: The amount of compensation must be estimated realistically. In the case of a dispute, only a court can decide as to whether the compensation at the estimated value was actually incurred.

#### Practical examples of the calculation of compensation:

For example, the Amtsgericht Cologne (see above) has estimated compensation of **6 % of the purchase price per night of examination** in the “waterbed case” – without, however, giving further explanations about the basis for the calculation.

In one case that was submitted to us for legal advice, a customer returned a clothes horse in a badly destroyed state. Here it was necessary to deduct depreciation in value amounting to 100 % of the purchase price.

According to the Amtsgericht Bremen, the calculation must be based on the scope of the actual use by the consumer in relation to the probable total period of use. Example: In the case of a useful life of a mattress of 10 years and the purchase price of € 939.79 for both mattresses, the scope of the actual use as basis for compensation may be estimated at about €0.52 for one night of examination on both mattresses (Amtsgericht Bremen, judgement of 15.04.2016, case number: 7 C 273/15).

## 5. Information of the consumer concerning necessary compensation

A further requirement for seeking compensation is to inform the consumer about a possible claim for compensation of lost value.

The consumer is informed by complete instructions on withdrawal as follows: *“You shall only be liable for any diminished value of the goods resulting from the handling other than what is necessary to ascertain the nature, characteristics and functioning of the goods”*.

Members of the Händlerbund use such instructions on withdrawal in the provided legal texts which have to be integrated in the shop as a clearly visible button (e.g. “right of withdrawal”). Furthermore, the instructions on withdrawal have to be provided to the consumer after conclusion of the contract, however not later than the time of delivery of the goods, in a durable medium (e.g. by e-mail, fax, DVD, USB stick or in paper form).