

REASONED OPINION

of the European Affairs Committee of the Federal Council

of 13 July 2016

pursuant to Article 23g (1) of the Federal Constitutional Act in conjunction with Article 6 of Protocol No.2 on the application of the principles of subsidiarity and proportionality

COM (2016) 289 final

Proposal for a Regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC

A. Reasoned Opinion

Some important parts of the project under consideration are incompatible with the principle of subsidiarity.

B. Grounds for Reasoned Opinion

According to the Commission, the general objective of the regulation addressing the issue of geo-blocking is to give consumers better access to goods and services in the internal market. While the objective as such is highly commendable, the suitability of the means proposed is doubtful. The contracting obligation provided for in the proposal is excessive and appears to be inappropriate, as it unnecessarily interferes with the competence of the Member States and, thus, violates the principles of subsidiarity and proportionality.

The European Affairs Committee of the Federal Council wishes to point out that the objective of the proposal, i.e. to create greater legal certainty as to which factors justify and which do not justify a

discriminatory treatment of customers, is a project to be supported, but doubts if this objective can be achieved by the means envisaged.

As regards the explicit prohibition of discrimination in several cases, it is to be noted that the circumstances of these cases do not appear to be typical of the cross-border buying habits of consumers. In other words, the standard case of an online purchase (in which the online trader's offer also includes delivery of the goods) is not within the scope of the regulation – and cannot be included for good reason.

As the activities are directed to another Member State, proceedings can be brought against the trader by the consumer in the Member State where he is domiciled and/or the trader would have to bring proceedings against the consumer there in the event of a dispute, pursuant to the Regulation on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters.

Numerous important areas, e.g. rules on unfair terms or the provisions of guarantee law, have been subject to minimum harmonization through European directives, but are still not equivalent. Therefore, in order to act in accordance with the law and not to be confronted with expensive written warnings from abroad, it will be necessary for traders to resort to expert advice in each individual Member State for the review and adaptation of his general terms and conditions and to find out if other pre-contractual duties of information are to be observed in that Member State. Certain aspects, such as the right of withdrawal from a distance contract within fourteen days of its conclusion, have been fully harmonized at European level through the Directive on Consumer Rights. Although the pre-contractual duties of information are frequently held to be fully harmonized, full harmonization ensuring reliability and legal certainty for traders has not been achieved in this respect. According to the Consumer Rights Directive, its duties of information apply in addition to the duties of information pursuant to the Services Directive and the E-Commerce Directive. Moreover, the Member States are free to provide for additional duties of information in accordance with these directives.

Although it would be possible, in principle, to conclude a choice-of-law agreement with consumers, pursuant to Art.6 para.2 of the Rome I Regulation the mandatory provisions on contracts of the law of the country where the consumer has his habitual residence prevail in those cases in which the trader directs his offer to the respective Member State. The jurisprudence of the CJEU already provides essential indications as to when such directing of the trader's offer is deemed to occur.

In view of the extremely complex and unclear legal framework in the area of consumer protection under civil law, a provision obliging distance traders to supply goods to any consumer in any Member States in the form of a contracting and delivery obligation, as originally demanded by the European

Parliament, was not included in the Consumer Rights Directive. Instead, traders were obliged to inform consumers on their websites “if” there are any delivery restrictions.

Based on the proposal now under consideration, traders are to be subject not to a delivery obligation, but to a contracting obligation in three specific cases, including the case of a trader selling goods but not delivering them to the Member State of the customer; instead, the goods are collected or organized to be collected by the customer. In accordance with the principle of non-discrimination pursuant to Art.18 TFEU, Member States and their bodies must not discriminate on grounds of nationality. The proposed regulation, while quoting the prohibitions of discrimination, overlooks the fact that there is a significant difference between discrimination by a Member State itself, for instance within the framework of its laws, and discrimination by private individuals. The TFEU therefore does not contain a provision forbidding discrimination by private individuals. In its present wording, the Commission’s proposal does not state clearly if a contracting obligation applies. Imposing a contracting obligation would constitute a serious interference with the freedom to engage in a gainful activity, the freedom to do business and the principle of private autonomy; it does not serve the achievement of the desired objective and furthermore infringes against the principle of subsidiarity.

It is important to bear in mind that imposing a contracting obligation generally constitutes a serious interference with private autonomy and/or the freedom to enter into contracts, which is not only a fundamental pillar of the Austrian Code of Civil Law, but is also protected, inter alia, by Article 16 of the Charter of Fundamental Rights regarding the freedom to conduct a business. In the area of consumer protection, numerous mandatory provisions already limit the freedom of contract in substantive terms. To date, the principle of the freedom to enter into contracts, according to which it is at the parties’ discretion to decide if and with whom they wish to enter into a contract, has remained largely untouched – for justified and well considered reasons.

Within the framework of the freedom to engage in gainful work and the freedom to do business, as enshrined in the Fundamental Rights Charter, every trader, every start-up and every SME must have the right to determine its “sales territory” and to expand, step by step, into certain areas of its country of establishment or into other Member States, depending on his entrepreneurial plans, or not to do so. Restricting the trader’s freedom through a general contracting obligation is unjustified and disproportionate, as it is in the nature of entrepreneurial activity that the business risk is borne by the trader.

According to the exception provided for in Art.5 para.2 of the proposal, payees are allowed to demand cost-based charges for certain payment services; this applies to payment transactions that

do not fall under the literally corresponding provision of the new Payment Services Directive (PSD II). This results in a gap in the protection of Austrian consumers, as an optional and more extensive protective provision in Austrian law states that the collection of charges by the payee for the use of a given payment instrument is not permitted (Sect.27 sub-sect.2, second sentence, Austrian Payment Services Act).

Art.62 para.5 PSD II contains the option of a prohibition of additional charges to be transposed into national law by the Member States. Austria availed itself of this option, which was already provided for in PSD I, in sect.27 sub-sect.6 of its Payment Services Act. The option to forbid additional charges has not been taken into consideration in the proposal under consideration. Therefore, the respective provision must be amended so as to limit the applicability of para.2 to cases in which Member States have not exercised their optional rights under Art.52 para.3 of Directive 2007/64/EC (future Art.62 para.5 Directive (EU) 2015/2366).

The Commission assumes that neither costs nor risks arise for traders, if they do not offer delivery services but only offer goods to be collected by the customer. This assessment may fall short of to the actual situation.

Traders are concerned that they may have to set up functioning logistic systems or take other measures to ensure that the goods can be picked up by their customers, handle guarantee cases and deal with cases of withdrawal from cross-border contracts, since supplying goods for pick-up by the customer also qualifies as distance selling.

In the opinion of trade representatives, the project would be counterproductive, diminish the number of suppliers in the SME segment, and reinforce the trend towards concentration in the hands of a few large suppliers, which in turn would hinder online trade instead of promoting it, as intended by the EC.