



EUROPEAN COMMISSION

*Brussels, 1.9.2016
C(2016) 5591 final*

*Mr Mario LINDNER
President of the Bundesrat
Dr Karl Renner-Ring 3
A – 1017 WIEN*

Dear President,

The Commission would like to thank the Bundesrat for its reasoned Opinion on the Commission's proposal for a Regulation on cooperation between national authorities responsible for the enforcement of consumer protection laws {COM(2016) 283 final}. The Commission appreciates the overall support expressed for cross border enforcement and for a revised Regulation.

As required by Article 114, paragraph 3 of the Treaty on the Functioning of the European Union (TFEU), the proposal is based on a high level of consumer protection and it takes into account the new developments in consumer markets such as the digitalisation and globalisation of business practices. It should contribute substantially to the ambition of unleashing the Digital Single Market, which is a priority for the Union's economic growth.

Cross border enforcement of consumer laws has to become more agile, efficient, and able to respond to the challenges of digital markets that know no national borders. The rate of compliance with the rules is low: our estimates show that 37% of traders in key online consumer markets do not respect Union consumer laws, generating a detriment of EUR 770 million per year for consumers¹.

The Bundesrat is concerned that the proposal contains provisions, in its Articles 10, 11, 12, 15, 20 and 27, empowering the Commission to adopt implementing and delegated acts that the Bundesrat perceives as being in breach of the principle of subsidiarity.

The proposal does not contain any provisions enabling the adoption of delegated acts that would amend the new Regulation or its Annex. The adoption of implementing acts will strictly rely on the provisions of the new Regulation and will operate within their boundaries. Implementing acts will therefore not be able to affect or limit Member States' national enforcement powers. Moreover, Member States are fully associated to the adoption of implementing acts, through the examination procedure under Article 5 of Regulation (EU)

¹ See the impact assessment accompanying the proposal for the CPC Regulation, SWD(2016) 164 final, 25.5.2016, http://ec.europa.eu/consumers/consumer_rights/unfair-trade/docs/cpc-revision-proposal-impact-assessment_en.pdf.

No 182/2011², laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers. Where the Committee under Article 48 of the proposal delivers a negative opinion the Commission would not be able to adopt the implementing measure.

The Bundesrat is also concerned that Article 46 of the proposal that enables the Commission to monitor the implementation of the national enforcement plans is not in line with the principle of subsidiarity.

The purpose of national enforcement plans is to ensure that widespread infringements affecting many consumers in the Single Market are effectively addressed. The proposed enforcement plans would be the basis for determination of common enforcement priorities in the Single Market, agreed upon among the competent authorities. As this process concerns the Single Market as whole, benefits consumers in many Member States and across borders, the Commission is best placed to ensure the monitoring and the full implementation. This cannot be achieved by each Member State alone.

The Commission notes the opinion of the Bundesrat that the new powers for authorities set out in Articles 8 to 11 of the proposal must be in line with the principle of proportionality.

These proposed measures, however, only concern situations with a cross border dimension that Member States cannot address alone. In this context, the Commission has carefully scrutinised the proposal and the accompanying impact assessment so that it fully respects the principles of subsidiarity and proportionality. The proposal builds on the existing framework adopted in 2004 to bridge national jurisdictional limitations and to offer possibilities for national authorities to work together and address concrete issues, so that consumers and traders can fully benefit from the Single Market. The novelties in this proposal are limited to the key elements required to modernise and adapt this cooperation framework to the digital markets.

The proposal does not call into question the freedom of Member States to choose an enforcement system they deem appropriate and to decide whether national enforcement bodies will exercise the proposed powers directly under their own authority or by application to courts. It retains the principle that the Member States shall ensure that the powers are exercised in full respect of their Constitutions, fundamental rights and the principle of proportionality.

The points made above are based on the initial proposal presented by the Commission which is currently in the legislative process involving both the European Parliament and the Council in which the Austrian government is represented.

In response to the more technical comments in the opinion the Commission would like to refer to the attached annex.

² Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, OJ L 55, 28.2.2011, p. 13–18.

The Commission hopes that the clarifications provided in this reply address the issues raised by the Bundesrat and looks forward to continuing the political dialogue in the future.

Yours faithfully,

*Frans Timmermans
Erster Vizepräsident*

*Vera Jourova
Member of the Commission*

ANNEX

The Commission has carefully considered each of the issues raised by the Bundesrat in its reasoned Opinion and would like to offer the following clarifications.

Enforcement of consumer legislation across the EU lacks the adequate common grounds which are needed to face the current technological challenges. Under its Articles 8 to 11, the proposal requires Member States to equip competent authorities with the minimum range of powers they need to work together faster and more efficiently to address unlawful practices, especially those taking place on-line. An alignment of the minimum powers between EU authorities is something which cannot be achieved through individual action at national level but has to be established at Union level, to make sure that authorities can cooperate based on powers which are consistent and compatible. Without this common ground non-compliant traders would exploit gaps in enforcement by relocating to Member States whose authorities are not equipped to tackle unlawful practices.

Proportionality and necessity are unalienable principles of Union law and of administrative laws of the Member States. They govern the choice of measures necessary to stop the infringement, amongst those available in Article 8 of the proposal, and to remove the harm caused by it. They also govern the use of each minimum power ensuring that, based on the specific facts and circumstances of each case, the adopted investigative and enforcement measures do not exceed what is necessary to stop the infringement and to remove its harmful effects.

The power to order consumer compensation or to request restitution of profits in Article 8 (2) (n) and (o) of the proposal is essential to remove the harm caused by transnational infringements, restore the level playing field in the market that has been distorted through the collection of unjust profits, and deter traders engaged in cross border activities from committing or repeating such conducts. This is particularly the case where the infringement produces a relatively limited harm spread over a large number of consumers, so that total harm is eventually substantial. In such cases, the possibility to act on behalf of consumers is needed, as many of them would not be in a position to activate redress or compensation mechanism, even less so in a cross-border context.

As it is the case for the current Regulation, the proposal retains the principle that Member States are free to chose the best enforcement solution for their legal system and, in particular, whether national enforcers will exercise the proposed powers directly under their authority or through application to court.

The purpose of the implementing acts referred to in Articles 10, 11, 12, 15, 20 and 27 is to set the details of the functioning of the information systems through which requests and other confidential communications and documents need to be exchanged; to simplify and enable exchanges of requests and other information among competent authorities, to set deadlines for replies to those requests and to enable clear and comprehensive notifications, exchanges of documents and information based on common templates. These are technical measures that would be adopted within the scope of the provisions of the proposed new Regulation and can in no way amend or extend its scope.

More in particular, the implementing measures foreseen in Article 10 of the proposal are necessary to establish the conditions for the implementation and exercise of the minimum powers of competent authorities referred to in Article 8, in particular for the power to order consumer compensation, the power to close down a website and the power to order restitution of profits obtained as a result of infringements.

The implementing measures foreseen in Articles 11(4), 12(5) and 15(7) of the proposal are necessary to implement information and enforcement requests, set the time limits for reply to these requests, establish standard forms that are needed to implement the information system (Article 43 of the proposal) through which all requests and replies, as well as other documents will be exchanged, as well as other details of procedures and of the day to day functioning of the mutual assistance mechanism. They aim to ensure a coherent, effective and efficient functioning of the mutual assistance mechanism.

The implementing measures foreseen in Articles 20 and 27 of the proposal are needed to ensure effective functioning of the new mechanism to address widespread infringements that may cause substantial harm to consumers. These implementing measures would include standard forms for notifications, notices and other exchanges among the competent authorities that should take place through the information system (Article 43 of the proposal), details and procedures for the implementation of rights of defence of traders in the context of the procedures against widespread infringements.