

Translation of letter

From: Mario Lindner, President of the Austrian Bundesrat, Vienna

Date: 13 July 2016

To: President Juncker

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At its meeting on 13 July 2016, the EU Committee of the Bundesrat, during the course of its discussions concerning the EU document

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

the enclosed reasoned opinion in accordance with Article 23g(1) of the Federal Constitutional Act (B-VG) in conjunction with Article 6 of Protocol No 2 on the application of the principles of subsidiarity and proportionality.

Enclosure

REASONED OPINION

of the EU Committee of the Bundesrat of 13 March 2013 pursuant to Article 23g(1) of the Federal Constitutional Law (B-VG) 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. Opinion

Major elements of this Proposal are currently incompatible with the principle of subsidiarity.

B. Justification

The Commission states that the general objective of the Regulation against geo-blocking is to improve consumer access to goods and services within the internal market. Welcome as this aim is, the Committee doubts that the Proposal is the proper vehicle for achieving it. The resulting obligation to contract has an inappropriate effect in that it is excessive, therefore unnecessarily impinging upon the competencies of the Member States; for this reason alone it violates the principles of subsidiarity and proportionality.

The EU Committee notes that while the aim of the Proposal, i.e. to create greater legal certainty regarding those factors justifying customer discrimination and those which do not, is to be supported, it doubts whether this aim can be achieved in this manner.

Regarding the express ban on discrimination in several different cases, we note among other things that the cases contain conditions which are rather untypical of consumers' cross-border purchasing habits. In other words, the standard case of online distance selling (where the online trader offers to deliver the goods) lies outside the scope of this Proposal and cannot be covered, for good reason.

The focusing of activities on a different Member State means, in legal terms, that under Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter 'the Jurisdiction Regulation'), in case of dispute the consumer may bring the trader to court in his or her country of residence, or that the consumer has to be brought to court by the trader in that country.

However, while many important areas such as rules on unfair terms or guarantees have been harmonised by law to a minimum level in the EU, there are still major gaps. Therefore, in order to conform to the law and to avoid being faced with costly warning letters from abroad, expert advice is needed in each Member State, not only regarding the review and amendments of terms and conditions, but also on whether different pre-contractual information requirements apply in the relevant Member State. Although the Consumer Rights Directive fully harmonised certain aspects, such as a Europe-wide withdrawal period of 14 days in the case of distance contracts, there is no similar harmonisation for pre-contractual information requirements, in spite of the frequent statements to the contrary, to give businesses reliable guidelines and legal security. Under the Consumer Rights Directive these requirements apply alongside those under the Services and E-Commerce Directives; indeed, the Member States can stipulate additional requirements in line with these Directives.

Even if it were possible to conclude an agreement on a choice of applicable law with consumers, the binding provisions on the law applying in the consumer's country of residence, pursuant to Article 6(2) of the Rome I Regulation on the law applicable to contractual obligations affect those cases in which the trader focuses his offer on the relevant Member State. ECJ case-law already contains important guidelines on when such focusing takes place.

Conscious of this highly complex legal situation, in the field of civil-law consumer protection alone, the provision whereby distance traders are to be obliged to deliver to any consumer in any Member State was not included in the Consumer Rights Directive as requested by the European Parliament. Instead, traders were merely obliged to inform the consumer on their websites 'whether' delivery restrictions applied.

The new Proposal, while not imposing an obligation to deliver, seeks to impose an obligation to contract in three specific cases, for example when the trader sells the goods but does not deliver

them to the Member State in which the customer resides; the customer collects the goods or arranges for their delivery. The principle of non-discrimination in Article 18 TFEU states that Member States and their institutions may not discriminate on the grounds of nationality. The Proposal in question, however, while quoting the bans on discrimination, fails to recognise that there is a major difference if a Member State itself discriminates, for example in its legislation. For that reason the TFEU does not contain a ban on discrimination for private individuals. Although it is unclear at the present time whether the Proposal contains an obligation to contract, the imposition of such an obligation would seriously restrict the freedoms to pursue a gainful activity and to carry on a business, as well as the principle of party autonomy; it would not achieve the stated aim, and in addition violates the principle of subsidiarity.

It is important to bear in mind that in general terms the imposition of an obligation to contract is a serious restriction of party autonomy and the freedom to conclude contracts, two major elements not only of Austrian civil law, and which are protected by the freedom to carry on a business enshrined in Article 16 of the Charter of Fundamental Rights. Numerous binding consumer law provisions already restrict freedom of contract in content terms. The principle of that freedom has, however, remained mostly intact for justified and well-considered reasons.

Every existing undertaking, start-up or SME must, as part of the freedoms to pursue a gainful activity and to carry on a business, enshrined in the Charter, be allowed to determine its own 'sales area', to expand its sales gradually to certain regions in its own country of establishment, and then perhaps even to other Member States, in line with its business planning, or not as the case may be. To restrict this entrepreneurial freedom by imposing a general obligation to contract cannot be justified as a matter of principle, and is therefore disproportionate because the very essence of entrepreneurship is that the entrepreneur must bear the commercial risk.

The exception in Article 5(2) of the Proposal allows payees to charge a cost-oriented fee for certain transactions which do not correspond to the identical provisions of the new Payment Services Directive (PSD II). This results in a gap in protection for Austrian consumers, as this country already has an optional additional protection clause which forbids the charging of fees by the payee for the use of a certain payment instrument (§ 27 paragraph 6(2) of the Payment Services Act (ZaDiG)).

Article 62(5) of the PSD II contains the option for Member States to forbid additional fees. Austria already made use of this option, included in the PSD I, in § 27(6) ZaDiG. However, this

option is no longer present in the Proposal at issue. Therefore Article 5(2) must be amended to read that the provision only applies if the Member States have not made use of their optional rights in Article 52(3) of Directive 2007/64/EC (in future Article 62(5) of Directive (EU) 2015/2366).

The Commission assumes that no costs and risks (would) arise for the trader if he does not deliver the goods to the customer, who would have to collect the goods. This assumption is likely to be too narrow in scope.

Traders fear that they will have to create logistics systems and/or take measures to enable such collections, and to deal with any guarantee claims and withdrawals, as this self-collection also falls under distance contracts.

Business representatives also feel that the Proposal would be counter-productive and would lead to a decrease in the number of SME traders and a concentration of trade in a few major firms, thus hindering online trade rather than encouraging it, as the Commission intends.