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C O M M U N I C A T I O N

from the European Affairs Committee of the Federal Council
to the European Parliament, the Council and the European Commission
pursuant to Article 23f para. 4 of the Austrian Constitution
7 February 2018

COM (2017) 637 final
Amended proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the sale of goods, amending Regulation (EC) No 2006/2004 of the European Parliament and of the Council and Directive 2009/22/EC of the European Parliament and of the Council and repealing Directive 1999/44/EC of the European Parliament and of the Council

When the European Commission tabled a proposal for a Directive on certain aspects concerning contracts for online and other distance sales of goods at the end of 2015, its main intention was to introduce a new and completely harmonised guarantee regime for distance sales. The amended proposal on certain aspects concerning contracts for the sale of goods of 31 October 2017 (COM (2017) 637 final) extends the scope of the directive to all contracts for the sale of goods – including contracts for goods to be produced – regardless of the mode of distribution. Directive 1999/44/EC on the sale of consumer goods and associated guarantees is to be repealed.

The European Affairs Committee of the Federal Council examined the proposal, especially from the viewpoint of aspects concerning traders as well as consumers, and has come to the conclusion that the proposal now on the table is disproportionate and incompatible with the principle of subsidiarity.

Directive 1999/44 on consumer sales and associated guarantees provides for minimum harmonisation of guarantee provisions concerning both traders and consumers, regardless of the mode of distribution.

On the one hand, concerns have been expressed that within the framework of full harmonisation consumer protection standards might be raised to a materially unjustified level, for instance – as provided for in the proposal – through a longer period of time during which the burden of proof for the lack of conformity is reversed in favour of the consumer (two years instead of six months), or a right of choice between repair and replacement also in case of minor defects.

On the other hand, consumer representatives warn against the “blocking effect” of full harmonisation, which might even lead to a lowering of current consumer protection standards. Moreover, as the negotiations on the Consumer Rights Directive showed, full harmonisation of guarantee rules is not a meaningful goal on account of diverging interests of the Member States and their institutions. Even in respect of the proposed directive on the supply of digital content, the scope of which is limited in terms of substance, the Council failed to agree on full harmonisation, but had to limit itself to minimum harmonisation of the duration of the guarantee, with rules on the limitation period being left to the discretion of the Member States.

The Federal Council also considered the following points:

The blocking effect of full harmonisation relates not only to the fact that the specific guarantee rules would have to be fully in accordance with the new directive and that deviations, even if they are to the benefit of consumers, would not be permitted. The directive would impact on core areas of national civil law, amend the latter and thus create substantial legal uncertainty.

Pursuant to Austrian national law and depending on the circumstances of the case, a consumer can invoke non-conformity of the goods received not only on the basis of guarantee law, but also on the basis of the legal provisions on the award of damages. Moreover, non-conformity of goods can also be invoked on grounds of error. If the legal provisions on guarantees for defective goods were fully harmonised, this would constitute an interference with the aforementioned legal institutions of general civil law.

In its motivation of the proposal, which originally was only intended for contracts relating to distance selling and has now been extended in scope to avoid fragmentation of the law, the European Commission refers to the need to stimulate cross-border e-commerce through full harmonisation of guarantee regimes. As in the original proposal, the Commission states in the amended proposal that the new and fully harmonised guarantee rules enable “traders to sell to consumers in all Member States based on the same contractual terms”. The Commission’s working document accompanying the proposal states that traders wanting to sell across borders incur costs of approx. EUR 9,000 per Member State for adapting their contractual terms and conditions to national contract and consumer protection law. Along this line of argumentation, it is stated that, if traders no longer had to adapt their terms and conditions in cross-border e-commerce, savings in a total amount of EUR 10.8 billion could be achieved, according to the Commission’s calculations.

These arguments, intended to underline the potential incentive function of fully harmonised guarantee rules and their ability to stimulate cross-border e-commerce, are difficult to understand. It is true that online traders wanting to sell across borders must review their contracts/terms and conditions (or have them reviewed) to ensure that they are compatible with the law of the consumer’s place of residence. This certainly involves additional work and costs for traders. However, it is wrong to conclude that fully harmonised guarantee rules would save traders such costs. The need to adapt the general terms and conditions to national law is not due to differences in national guarantee regimes, but to other mandatory consumer protection rules. The Commission

seems to overlook the fact that, even today, traders' terms and conditions are not allowed to contain any provision that runs counter to mandatory legal rules, as stated in the Consumer Sales and Guarantees Directive (Article 7.1), which applies at European level. If, in the current situation, guarantee provisions cannot be included in a trader's general terms and conditions, traders will not be able to save money by no longer having to adapt their terms and conditions under a fully harmonised guarantee regime. Thus, the Commission's calculations regarding cost savings are more than questionable.

On the contrary, it will still be necessary for traders to adapt their contracts to national law and costs will still be incurred on account of other mandatory consumer protection regulations (e.g. provisions forbidding unfair terms in consumer contracts). Moreover, it should be borne in mind that traders, particularly SMEs, operating on a purely national basis and not intending to engage in cross-border sales, will derive no advantage whatsoever from the proposed regime, but suffer from the additional burden of even stricter guarantee rules.

The Federal Council recognises the Commission's concern to facilitate cross-border e-commerce in the interest of both consumers and traders, but maintains that the amended proposal, which encroaches upon the core areas of national civil law, is not an appropriate means to this end, as it is disproportionate and therefore incompatible with the principle of subsidiarity. A meaningful new guarantee regime that serves the interest of both parties to a contract cannot be established at EU level.

In view of the fact that the deadline for subsidiarity complaints has already expired, the Federal Council has chosen the instrument of a communication to express its concerns. Aware of the fact that a task force on subsidiarity has been created by Commission President Juncker, the Federal Council reiterates its opinion that an extension of the eight-week deadline for subsidiarity complaints would be appropriate.