

**REASONED OPINION**

of the European Affairs Committee of the Federal Council

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

27 June 2018

**COM (2018) 185 final**

**Proposal for a Directive of the European Parliament and of the Council amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules**

**A. Reasoned Opinion**

The project under consideration is incompatible with the principle of subsidiarity.

**B. Grounds for Reasoned Opinion**

The proposal aims at amending four EU Directives (Unfair Commercial Practices Directive, Unfair Contract Terms Directive, Consumer Rights Directive, Price Indication Directive). It is based on a so-called “fitness check”, which certain directives were subjected to. The Federal Council strongly emphasizes the relevance of such checks, as conditions in Member States may change and the need for adaptations to newly arising challenges can thus be identified.

Moreover, the Federal Council underlines that consumer protection at national and international level is taken seriously. However, the Federal Council also wishes to point out that the fitness checks of the aforementioned directives confirmed that they are “fit for purpose”.

According to the proposal, each of the four directives is to be amended to include penalty provisions. From the Federal Council’s perspective, this would result in substantial interference with national enforcement systems, as it obliges the Member States to impose administrative and/or penal

sanctions for any non-compliance with the provisions of the directives. For “widespread” infringements (in the meaning of the new Consumer Protection Cooperation Regulation), monetary fines in a maximum amount of at least 4% of the infringing trader’s annual revenue are to be imposed. In its impact assessment, the Commission itself notes that the option chosen is the most expensive variant.

At present, the modalities of enforcement are decided by the Member States. Austria does not primarily opt for penal sanctions, but rather relies on civil-law enforcement by the courts, especially in cases of unfair contract terms and unfair commercial practices. Other Member States focus on enforcement through penalties imposed under public law. The Federal Council doubts if the introduction of penalties will lead to the desired improvement of consumer protection, as the enforcement systems differ from Member State to Member State and are not equally well suited for application of the system proposed.

In view of the proposed penalty regime, the Federal Council wishes to recall its Reasoned Opinion on the Geo-blocking Regulation (dated 13 July 2016), in which it criticized the obligation to enter into cross-border contracts as substantial interference with the freedom to conduct a business and considered it to be incompatible with the principle of subsidiarity. As it now turns out, this regulation, which is applicable as of December 2018, will have further undesirable effects incompatible with the principles of subsidiarity and proportionality, given the proposals now on the table, especially in combination with other directives, such as the Consumer Rights Directive. Penalties would be imposed as a general rule in all cases of infringement of provisions of any of the four aforementioned directives. However, high penalties conflict not only with the principle of subsidiarity, but also the principle of proportionality. In the case of minor infringements of price indication rules, for instance, such penalties would be disproportionate. In a case of unfair commercial practices, the fairness or unfairness of an advertising measure can only be established through court proceedings. Moreover, such high penalties would also be in violation of the general principle of legal certainty as a fundamental right.

Moreover, the proposal requires as a minimum the contractual remedy of contract termination and the non-contractual remedy of compensation for damages in the case of any unfair commercial practices. This is another provision which the Federal Council regards as incompatible with the principles of subsidiarity and proportionality. It should be borne in mind that even a failure to completely fulfil any of the numerous duties of information under EU consumer protection law may be construed as an unfair commercial practice.

The reservations against an EU regulation in this area should not be misunderstood to mean that consumers suffering a disadvantage should be denied the possibility of legal remedy due under national law and depending on the specific circumstances of the case, e.g. within the framework of warranty provisions, error or compensation for damages.

Recalling its Reasoned Opinion on the proposed (but never adopted) regulation on a common European sales law (dated 1 December 2011) and its Communication on the proposed directive on the sale of goods (dated 7 February 2018), the Federal Council underlines that the proposed provisions would significantly interfere or conflict with central core areas of national civil law, in particular with contract law, and thus lead to an enormous increase in legal uncertainty.

The Federal Council takes note of the fact that the Commission itself allows the Member States to impose certain restriction, e.g. on doorstep-selling, and, in principle, deems contracts made outside the trader's business premises to have no cross-border impact and/or no immediate impact on the internal market, and that rules can be adopted by the Member States themselves in accordance with the principle of subsidiarity. However, according to the Commission's proposal, even contracts initiated by the consumer himself/herself are not exempted from the provisions on contracts made outside the trader's business premises.

The proposal of the Commission to amend Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council for the purpose of better enforcement and modernisation of EU consumer protection rules therefore is in violation of the principles of subsidiarity and proportionality.