

COMMUNICATION

**from the European Affairs Committee of the Federal Council
to the European Commission, the Council and the European Parliament
pursuant to Article 23 f (4) of the Federal Constitutional Act
30 March 2016**

COM (2015) 634 final

Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content

and

COM (2015) 635 final

Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods

Communication pursuant to Article 23 f (4) of the Federal Constitutional Act

The Directive on certain aspects concerning contracts for the online and other distance sales of goods is to introduce a new guarantee regime for purchases of goods at a distance.

The Directive on certain aspects concerning contracts for the supply of digital content is to fully harmonise the rules on conformity of digital content, remedies available to consumers in cases of lack of conformity of digital content with the contract, as well as the right to terminate long-term contracts and the right to unilateral modification of existing contracts.

The European Affairs Committee of the Federal Council has examined the proposal for a Directive on certain aspects concerning contracts for the online and other distance sales of goods, especially with a view to aspects concerning sellers, on the one hand, and consumers on the other hand, and has come to the conclusion that the draft submitted is to be rejected.

In the opinion of the European Affairs Committee of the Federal Council, the instrument

proposed would create a complicated, parallel guarantee regime that is not materially justified. As regards legislation on guarantees for sellers and consumers, a minimum level of harmonisation has already been achieved with the Directive on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees; therefore, the proposal for a specific guarantee regime, which deviates from the aforementioned Directive, would lead to an unnecessary and undesirable fragmentation of the law. Moreover, serious reservations have been expressed with regard to full harmonisation.

On the one hand, one of the concerns to be borne in mind in the context of full harmonisation is the possibility of consumer protection standards being raised to an unjustified level: for instance, as provided for in the proposal, an extension of the period of reversal of the burden of proof in case of non-conformity (two years instead of six months), or the right to terminate the contract for reasons of minor defects. On the other hand, consumer representatives warn against the “blocking effect” of a fully harmonised regime, which might ultimately lead to a lowering of the current level of consumer protection (e.g. introduction of an obligation of notification and rejection, which is currently not provided for in the proposal).

Moreover, as the negotiations on the Consumer Rights Directive have shown, full harmonisation of the guarantee rules was not possible on account of the diverging interests of the Member States and their institutions. This is a point to be borne in mind, especially in view of the plans of the European Commission to extend the proposal for a Directive to classic, stationary retail trade upon completion of the evaluation of the Consumer Sales Directive.

Reservations have also been expressed with regard to the proposal of a Directive on certain aspects concerning contracts for the supply of digital content, although it has to be conceded that uniform European rules do not yet exist in this area. However, the draft contains numerous inconsistencies and lacks in clarity; a thorough analysis and a revision of the provisions proposed will therefore be necessary. As a matter of principle, efforts to secure an adequate level of consumer protection in the supply of digital products throughout the European Union are to be welcomed. However, gaps in the current legislation on guarantees can be closed – as has been the case in Austria - through an extension of the scope of the Consumer Sales Directive to contracts on the supply of digital content.

Questions arise, in particular, with regard to the differentiation of the provisions of the draft from and/or their compatibility with other provisions of EU law in the fields of consumer, copyright and data protection. The wide scope of the proposal, which is to encompass

contracts in which the consumer “actively provides counter-performance other than money”, is innovative, but it may give rise to problems, as the protection granted by the Directive is to be extended to consumers who receive digital content in exchange for personal data.

In view of the almost complete absence of mandatory objective criteria for the wording of the primary prerequisites for the conformity of digital content with the contract, consumers may be at a disadvantage. Sellers of digital content are in a position to evade their guarantee obligations by specifying a low or even negative value for their performance.

From the viewpoint of legal certainty, the complete absence of fixed deadlines for the exercise of rights under guarantee rules is yet another problematic issue. However, Member States are free to rely on national prescription rules in order to “ensure legal certainty”. The intended provisions regarding the burden of proof should be reconsidered with a view to a fair and well-balanced solution.

Finally, the provisions regarding compensation for damages are unclear and likely to be misunderstood, which is of particular importance in view of the principle of full harmonisation. Therefore, in the opinion of the European Affairs Committee of the Federal Council, this is an area that should remain within the sole responsibility of the Member States.