



EUROPEAN COMMISSION

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C(2012) 7067 final

Mr Horst Seehofer
President of the German
Bundesrat
Leipziger Straße 3 - 4
D-10117 Berlin

Dear President,

The Commission would like to thank the Bundesrat for its opinion on the proposal for a Directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) {COM(2011) 793 final}. Let me apologise for the long delay in replying.

The Commission welcomes the detailed observations and suggestions made by the Bundesrat and appreciates this very constructive contribution to the discussion on the Commission's proposals.

The Commission shares the Bundesrat's view that it is necessary that consumers be able to enforce their consumer rights not only before the courts but also by way of alternative dispute resolution. The Commission takes note of the Bundesrat's observations notably on the scope of the proposed Directive, its legal basis and its compliance with the subsidiarity principle.

The proposed Directive, in its Article 1, sets out its objective to improve the conditions for the establishment and the functioning of the internal market by ensuring that disputes between consumers and traders can be submitted to entities offering impartial, transparent, effective and fair alternative dispute resolution procedures. The disparities in the Member States regarding the existence, quality and awareness of alternative dispute resolution procedures as well as the effect of these disparities on the functioning of the internal market are described in the explanatory memorandum to the proposed Directive.¹ The approximation of Member States' laws can thus be based on Article 114 TFEU.

According to the case law of the European Court of Justice, once the conditions for recourse to Article 114 TFEU as a legal basis are fulfilled, the Union legislature cannot be prevented from relying on that legal basis on the ground that consumer protection is a

¹ Cp. also recitals 2 and 3.

decisive factor in the choices to be made.² Indeed, Article 1 of the proposed Directive states not only its intention to improve the conditions for the establishment and the functioning of the internal market but also – in that context – its intention to contribute to a high level of consumer protection.

It is in order to attain a high level of consumer protection that the Commission has chosen to propose a Directive which applies not only to cross-border but also to domestic disputes. It is to be noted that the substantive consumer rights conferred by the Union's consumer law acquis indistinctly apply to cross-border and domestic situations. If the proposed Directive was restricted in its scope to cross-border situations, the disparities in the Member States regarding the existence, quality and awareness of alternative dispute resolution procedures would continue to exist for all domestic disputes. The level of protection would then depend on whether the consumer shops cross-border or domestically. The Commission considers it necessary that consumers enjoy an equal level of protection in both situations.

As point 3.2 of the explanatory memorandum to the proposed Directive sets out, increasing divergence in alternative dispute resolution schemes at Member States level leads to fragmentation of alternative dispute resolution, which in turn contributes to unequal treatment for consumers and traders in the internal market and create diverging levels of consumer redress in the Union. This applies to cross-border disputes as well as to domestic disputes. Relevant action at EU level gives a clear added value in terms of ensuring an equal level of availability, quality and awareness of alternative dispute resolution, and thus an equal level of protection of consumer rights, throughout the Union.

I hope that these clarifications, together with the replies to the more specific points raised in your Opinion (see annex) address the concerns expressed by the Bundesrat.

I look forward to continuing our political dialogue in the future.

Yours faithfully,

*Maroš Šefčovič
Vice-President*

² Cp. ECJ, judgment of 5 October 2000, C-376/98 *Germany v Parliament and Council*, para. 88; judgment of 10 December 2002, C-491/01, *British American Tobacco*, para. 62; judgment of 8 June 2010, C-58/08, *Vodafone*, para. 36 (all on Art. 95 EC).

Annex – Reply to the Opinion of the Bundesrat on the proposal for a Directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) {COM(2011) 793 final}.

1. Consistency with proposed Regulation on consumer ODR

The Commission shares the Bundesrat's view that the proposal for a Directive on consumer ADR, which also provides the basis for the Commission proposal for a Regulation of the European Parliament and of the Council on online dispute resolution for consumer disputes (Regulation on consumer ODR) {COM(2011) 794 final}, should be fully in line, in particular as regards the terminology employed.

The Commission is aware that the German language versions of both legislative proposals use divergent wordings where the text of both instruments should be identical. The issue has been raised in the Council's preparatory bodies, where it has been suggested to make the necessary corrections in the German language version when the final text is adopted by the co-legislators.

2. Scope

The Commission takes note of the Bundesrat's suggestion to extend the proposed Directive's scope to pre-contractual disputes and to align the definition of "cross-border dispute" in Article 4(d) of the proposed Directive to the concept of "cross-border contracts" in Article 4 of the Commission proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law {COM(2011) 635 final}. Furthermore, the Commission takes note of the arguments put forward by the Bundesrat in favour of reducing the Directive's scope as regards late payment and non-payment complaints brought by traders against consumers.

The Commission is convinced that the proposed Directive can only ensure an equal level of consumer protection if it applies irrespective of whether consumers shop domestically or across borders. The Commission is therefore opposed to restricting the proposal's scope to cross-border disputes.

3. Independence and impartiality of ADR entities

The Commission believes that the proposed Directive contains sufficient safeguards for the independence and impartiality of ADR entities.

4. Rejection of complaints

The proposed Directive aims to ensure that all disputes covered by its scope can be submitted to an ADR entity. In view of the Directive's effectiveness, the Commission is, in general, opposed to granting ADR entities the possibility to reject complaints which have been submitted to them. However, the Commission acknowledges that ADR entities need to ensure that they can operate effectively and that in exceptional circumstances an ADR procedure can be unsuitable for dealing with a dispute.

5. Access to ADR entities; time-limit for the conclusion of ADR procedures

The Commission takes note of the suggestion to clarify that ADR entities should be accessible not only by electronic means but also by conventional means of communication and that the 90-day time-limit provided for in Art. 8(d) of the proposed Directive should relate to the conclusion of the alternative dispute resolution procedure rather than the settlement of the dispute.

6. Determining which ADR entity is competent if there is more than one ADR entity that could hear the case

The Commission does not think that the proposed Directive should determine, in cases where there is more than one ADR entity which could hear the dispute, to which ADR entity the dispute can be submitted. The Commission believes that – in line with the voluntary nature of ADR – it should be left to the parties to decide, in such a situation, which ADR entity should deal with the dispute. The proposal does not restrict the parties' freedom to make such a choice.

In that context, it should be noted that while providing strong incentives for traders to use ADR – through the obligation to inform consumers about the ADR entity by which they are covered and the obligation to state whether or not they commit to use ADR for resolving consumer disputes – the proposed Directive does not establish an obligation for traders to participate in ADR procedures.

7. Information obligation for traders

The Commission takes note of the Bundesrat's suggestion that traders should also provide consumers with the information referred to in Article 10(1) of the proposed Directive when the consumer submits a complaint to the trader, a consumer complaint handling system operated by the trader or a company ombudsman.

Requiring traders to provide the information referred to in Article 10(1) of the proposed Directive on invoices and receipts is an essential tool for ensuring consumers' awareness of ADR and their use of ADR procedures. The Commission does not share the Bundesrat's analysis that this specific information obligation would constitute an excessive administrative burden for traders. It should be noted, in that context, that the information would not extend to more than two lines on the invoices and receipts. Furthermore, given the implementation period of the proposed Directive, traders will be given sufficient time to include relevant adjustments of their tills and commercial documents in the normal course of operation of their business. However, the Commission takes note of the Bundesrat's suggestion that contracts that involve day-to-day transactions and which are performed immediately at the time of their conclusion should be exempt from the information obligation set out in Article 10(1) of the proposed Directive.

8. Limitation and prescription periods

The Commission takes note of the suggestion to include in the proposed Directive a provision to the effect that relevant limitation and prescription periods should be suspended for the entire duration of the ADR procedure. It should be noted, however, that provisions to that effect are already in force in a number of Member States and that

the proposed Directive does not prevent Member States from maintaining or introducing such rules in their national legislation.

9. Publication of beginning and outcome of ADR procedures; name for EU-standard ADR entities

The Commission takes note of the suggestion that the proposed Directive could foresee that ADR entities publish specific information relating to individual ADR procedures. However, the Commission would like to draw the Bundesrat's attention to the concern that an obligation to publish such information could constitute a disproportionate administrative burden for ADR entities.

The Commission will carefully examine the suggestion to introduce a specific name for ADR entities which are in compliance with the quality standards established by the proposed Directive and to permit only such ADR entities to bear that name.

10. Monitoring of ADR entities

The Commission is convinced that in order to attain a uniform application in the Single Market of the minimum quality standards established by the proposed Directive, it is necessary that the proposal provides for a harmonised enforcement framework, as well. The Commission agrees that this enforcement framework must not lead to disproportionate bureaucracy and administrative burden for Member States. It has therefore proposed in Articles 15-17 of the proposed Directive an enforcement framework. The enforcement activities to be performed by competent authorities are intended to include a periodical assessment of ADR entities against the standards set out in chapter II of the proposal. ADR entities that comply with the quality standards established in chapter II of the proposed Directive will be included in a list, ADR entities that do not comply with those quality criteria will be refused entry on the list or be removed from the list.

The Commission takes note of the Bundesrat's view that the limited extent of the enforcement framework envisaged by the proposed Directive might not be sufficiently clear from the wording of Articles 15-17.

11. Support to ADR entities

In its Communication to the European Parliament, the Council and the European Economic and Social Committee "Alternative dispute resolution for consumer disputes in the Single Market" {COM (2011) 791 final} the Commission has identified a number of flanking measures regarding information and training that the Commission intends to implement in order to enhance access to and the use of ADR entities. ADR entities will also benefit from these measures. The Commission will also provide technical assistance to ADR entities for registering with the ODR platform established under the proposed Regulation on consumer ODR. However, the Commission does not intend to financially support the establishment of ADR entities in the Member States.