

Bundesrat

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Decision

of the Bundesrat

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.

The Bundesrat, in its 892nd session on 10 February 2012, pursuant to §§ 3 and 5 of the Act on Cooperation between the Federation and the Länder in European Union Affairs (EUZBLG), took the following decision:

1. The Bundesrat welcomes the Commission's plan to set up a platform offering an independent, transparent, effective and fair way of settling out-of-court cross-border disputes between consumers and businesses, as a way of developing the European internal market and achieving a high level of consumer protection.
2. The Bundesrat welcomes all efforts to remove barriers to trade and promote the internal market, and alternative dispute resolution can contribute to this, under certain conditions.
3. To avoid disparities, the text and content of both the Regulation on online dispute resolution and the Directive on consumer ADR should be brought into line with each other, in the interests of users, in as much as these two legal acts relate to identical areas of regulation.

Many Articles of these two legal acts differ in terms of their wording, without a difference in meaning being intended or understood.

Moreover, the Bundesrat does not understand why certain terms are used in both legal acts but are defined in only one of them, and why, in some cases, reference is made to the other act but, in other places, the definition is repeated.

4. Article 2 of the proposal for a Regulation lays down the scope as being the settlement of "contractual disputes arising from the cross-border online sale of goods or provision of services".

- In some ways, this scope is narrower than that proposed by the Commission in October 2011 in the proposal for a Regulation on a Common European Sales Law. The latter includes, in particular, disputes relating to pre-contractual duties and contracts for the provision of digital goods. Moreover, its definition of cross-border disputes is much wider. The broad definition of establishment in Article 4 of the proposal for a Regulation means that its scope is further restricted compared to the proposed Regulation on a Common European Sales Law, which clearly defines more narrowly the term habitual residence.

The Bundesrat takes the view that the scope of the application of the Regulation on online dispute resolution should therefore be widened, so that it covers all disputes which will be covered by the Regulation on a Common European Sales Law.

- The Bundesrat proposes that the scope of the Regulation be widened to include disputes relating to liability for faulty products within the meaning of Directive 85/374/EEC.

5. The Bundesrat takes the view that, in order to create broad, unimpeded access by consumers and businesses in the EU to on-line dispute resolution procedures relating to cross-border transactions and to promote a well-functioning internal market, regardless of the individual sales form, the scope of application of the proposed Regulation should not be limited to cross-border on-line transactions. Rather, consumers who have concluded a cross-border transaction for example by telephone, fax or in person *in situ* should be able to benefit to the same extent from European on-line dispute resolution via the European online dispute resolution platform (ODR platform). The Bundesrat is thus in favour of extending the scope of this proposed Regulation to all forms of cross-border transaction between consumers and businesses.

6. Furthermore, in the opinion of the Bundesrat, the definitions in Article 4 of the proposed Regulation do not make clear whether the Regulation applies where a service is both offered and ordered online (see the definition in Article 4(c)) or only where the service is also "performed" on-line, to which the restriction in Article 4(d) applies, providing that "off-line services" and "services which are not provided via electronic processing/inventory systems" are not considered as services provided by electronic means. According to this restriction, however, the example on page 8 et seq. of the Commission Communication on "Alternative dispute resolution for consumer disputes in the Single Market" of 29 November 2011, COM(2011) 791 highlighted specifically as an example of the added value of the ADR platform, i.e. booking a holiday on the Internet, would not be included in the scope of the Regulation. If this is not the intention, the Bundesrat would recommend that the wording be clarified.

7. Pursuant to Articles 6(2) and Article 7(3) of the proposed Regulation, the ODR facilitators are responsible for informing the parties of the advantages and disadvantages of the procedures applied by the proposed ADR entities. Pursuant to Article 8(2), however, the parties are to be informed by the ODR platform, with regard to each ADR entity, of any fees, the language or languages in which the procedure will be conducted, the approximate length of the procedure, the need for the physical presence of the parties or of their representatives, if applicable, and the binding or non-binding nature of the outcome of the procedure. This means that the information about advantages and disadvantages set out in Articles 6 and 7 provided by the ODR facilitators should go beyond the criteria set out in Article 8 and necessarily include subjective opinions.

The Bundesrat doubts whether the ODR facilitators set out by the Member States can do this and whether they should be intervening in the market with subjective opinions and give positive or negative opinions of the procedures employed by individual ADR entities on the basis of vaguely defined criteria.

8. The Bundesrat welcomes, in principle, the aim of making alternative dispute resolution more efficient, transparent and popular by laying down maximum periods for the duration of individual resolution procedures, but it points out that the particular complexity of cross-border contractual disputes between consumers and businesses is the result of determining the responsible ADR entity and overcoming any problems associated with language and the application of the law. These steps in the procedure should be taken more into account through the setting of reasonable deadlines. In this context, the Bundesrat considers that the general deadline of 30 days given in Article 9(b) of the proposed Regulation to accomplish the conclusion of the dispute resolution procedure is too short. In the interests of potential users of the procedure, the Bundesrat suggests that the content of the proposed Regulation be brought into line with the

deadline of 90 days in the proposal for a Directive on alternative dispute resolution COM(2011) 793, final, cf BR Document 772/11 and 772/11).

9. Given the particular importance of the European Consumer Centres Network (ECC-NET) for the coordination of cross-border alternative dispute resolution procedures, the Bundesrat would like to emphasise the need for Member States to make greater use of this network in order to implement the current EU approach. It therefore sees particular benefits in appointing the national member of this network as the ODR contact point mentioned in Article 6(1) of the proposed Regulation.

10. The Bundesrat is communicating this opinion directly to the Commission.

