

24.01.12

Decision

Of the Bundesrat

- Chamber of European Affairs -

Proposal for a directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Resolution (EC) 2006/2004 and Directive 2009/22/EC (Directive on alternative dispute resolution)

COM (2011) 793 final

On 24th January 2012 the Bundesrat's Chamber of European Affairs adopted the appended Opinion pursuant to Article 12 Letter b TEU.

The Decision was drafted and adopted pursuant to § 45 i of the Bundesrat's Rules of Procedure.

Annex

Proposal for a directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Resolution (EC) 2006/2004 and Directive 2009/22/EC (Directive on alternative dispute resolution)

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1. The Bundesrat agrees with the Commission that the implementation of consumer law by means of alternative dispute resolution should also be facilitated. Resolution of disputes outside the framework of state courts may be advantageous for parties to a conflict. In particular, alternative dispute resolution is often less expensive, more accessible and more procedurally flexible than dispute settlement through state courts.
2. The Bundesrat supports the Commission's goal of continuing to foster cross-border retail trade and in particular cross-border electronic business transactions. Increased utilisation of the possibilities afforded by cross-border trade can indisputably offer benefits to both consumers and companies. The Bundesrat is therefore open to the idea of introducing confidence-building measures or additional incentives for cross-border trade at the EU level, provided that such measures are objectively justified and fall within the scope of the EU's competences.

3. The Bundesrat considers that the draft directive on alternative dispute resolution as currently tabled is not based on a viable legal basis stipulated in the Treaties that would justify EU activity in this respect. The proposal also fails to comply with the subsidiarity principle.
4. The draft directive on alternative dispute resolution is not covered by the proposed legal basis of Article 114 TFEU in as much as it envisages the establishment and funding of a comprehensive infrastructure comprising extrajudicial dispute resolution bodies to deal with consumer disputes pertaining to the purchase of goods or the provision of services even in the case of disputes affecting only one Member State (i.e. purely domestic disputes).

In the justifications provided for the draft directive it is stated that the possibility of fostering cross-border retail trade by enhancing consumer confidence in alternative dispute resolution systems constitutes the requisite link to Single Market issues as stipulated in Article 114 TFEU.

In the Bundesrat's view it is at least conceivable that the existence of an infrastructure for alternative dispute settlement in cross-border disputes might strengthen consumer confidence in cross-border trade and increase consumer demand for products and services offered in other Member States. However, in the case of purely domestic transactions, there is no sound reason for obliging Member States to adopt measures for a legal protection system for alternative dispute settlement with a view to promoting cross-border trade. Adopting provisions on purely domestic disputes will have no identifiable impact on consumers' propensity to make cross-border purchases.

Such provisions are also not necessary to ensure a smoothly functioning alternative dispute settlement system for cross-border disputes. Separate specialist extrajudicial dispute settlement bodies could be created to deal with cross-border disputes that give rise to particular additional difficulties (language to be deployed for conflict resolution, determination of applicable law etc.).

There is no need to have recourse to dispute settlement bodies for domestic disputes to ensure that this system functions. In the light of the number of disputes and the extent to which this mechanism would encroach upon Member States' competences, the Bundesrat takes the view that this approach would not be proportionate even if it were to be assumed that cross-border retail trade may become more significant in the future.

5. Other possible legal bases, such as Article 81 Sub-section 2 Letter g TFEU or Article 169 Sub-section 2 Letter b TFEU would also not provide a valid basis for the draft in its present form. Measures under Article 81 Sub-section 2 Letter g TFEU are required to contribute to developing cross-border judicial cooperation in civil cases with a cross-border component. In terms of this legal basis pertaining to competences too, the EU would therefore be limited to addressing measures for cross-border disputes. In the field of consumer protection, Article 169 Sub-section 2 Letter b TFEU only affords scope to the EU to act in respect of measures that support, complement and monitor the policies of the Member States. However, opting to establish and finance a comprehensive system for alternative dispute resolution for all consumer disputes arising from contracts for the sale of products or the provision of services would not simply constitute supporting Member States' consumer protection policies in cases where numerous dispute settlement bodies already exist and could be taken as a foundation for implementing measures in this context. The provisions envisaged in the directive on alternative dispute settlement represent a fundamental decision to move, for the first time, towards a comprehensive system with state oversight and specific quality requirements.
6. In as much as the draft directive on alternative dispute settlement also envisages the establishment, funding and monitoring of a comprehensive infrastructure comprising extrajudicial dispute resolution bodies, it also breaches the subsidiarity principle in the strict sense of the term. Extending measures in this context to encompass domestic cases is not necessary to ensure the smooth functioning of the Single Market for the reasons adduced above. For purely domestic cases, it is sufficient for provisions on alternative dispute settlement to be adopted by the Member States. EU action in this context would only provide added value in the case of cross-border disputes, as adopting

measures to organise alternative dispute settlement procedures in the case of cross-border disputes, and establishing arrangements for such procedures, would be more viable at the supraordinate level.

7. The Bundesrat therefore considers it appropriate to limit the scope of application of the proposed directive to cross-border cases, in keeping with the draft Regulations from the European Parliament and the Council on a Common European Sales Law (BR Official Document 617/11 and on 617/11) and on Online Dispute Settlement (BR Official Document 774/11 and on 774/11), as well as with the currently valid Mediation Directive (Directive 2008/52/EC of the European Parliament and the Council of 21st May 2008 on certain aspects of mediation in civil and trade cases; OJ L 136 of 24th May 2008, p. 3).