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SUBCOMMITTEE IV ON FLANKING AND HORIZONTAL POLICIES

EEA EFTA Comment on the Commission's Proposal for a Directive on Alternative Dispute Resolution and the Commission's Proposal for a Regulation on Online Dispute Resolution

EXECUTIVE SUMMARY

The main views of the EEA EFTA States are the following:

1. Firstly, the EEA EFTA States agree with the intention of ensuring good quality Alternative Dispute Resolution (ADR) by setting criteria in Article 6 on expertise and impartiality, in addition to the other criteria. Quality ADR entities are the key to achieving confidence in the ADR systems among both consumers and traders and hence contributing to trust in the market place. The EEA EFTA States however believe that full coverage for all disputes from the sale of goods and provision of services in different market sectors by ADR entities fulfilling all the exact criteria in the directive is too ambitious, since lack of resources might give constraints to this objective in practice. The Member States should rather be given some leeway in the sense that national established systems not fulfilling all the criteria, but with the same level of quality access to justice should be considered sufficient to comply with the Directive's obligation for full coverage.

2. Secondly, the EEA EFTA States are of the opinion that the obligation of Member States to provide access to ADR should be limited to disputes submitted by the consumer.

3. Thirdly, the EEA EFTA States is concerned by the rather short deadline of 90 days to solve the dispute, and propose that the starting point of the deadline be linked to the actual processing of the complaint by the ADR entity, so for instance when the ADR entity has received all documents needed to deal with the dispute.

4. Fourthly, the EEA EFTA States mainly support the proposal of information to consumers about possibility to seek ADR. The information should however be timely and information overload should be avoided. Therefore, the EEA EFTA States suggest introducing an obligation for traders to provide information about ADR when replying negatively to consumer complaints, and to reinforce the obligation of Member States to generally make consumers and traders aware of ADR.

5. Fifthly, once the Directive is adopted, cooperation and exchange of best practice between Member States should be facilitated. Emphasis should be put on how business and consumer organisations can be involved in the transposition.

6. Lastly, the EEA EFTA States are of the view that the scope of the Online Dispute Resolution (ODR) platform should remain limited to cross-border transactions and not be extended to domestic disputes. A key factor to success is overcoming the challenging of language. Technical solutions for translation are not sufficient; further assistance would also be needed. Furthermore, the ODR platform should be designed to be compatible with national online ODR facilities.

PREFACE

7. The EEA EFTA States have already taken great interest in the Commission's work in this area. Some of the EEA EFTA States took the opportunity to comment on key issues raised in the Commission's 2011 Consultation on the use of alternative dispute resolution (ADR) as a means to resolve disputes related to commercial transactions and practices in the EU.

8. As the proposed Directive and Regulation raises several difficult questions, the EEA EFTA States will focus below on some key issues. The EEA EFTA States reserve the right to complement with further national comments on these and other issues raised by the proposal, in particular the criteria for the ADR entities.

9. In general we welcome the proposals of the Commission. Access to justice for consumers is essential to ensuring consumer confidence in the market place. This is in particular true for cross-border purchases, where the consumer does not possess the necessary means or skills to assess the reliability of the trader with whom he or she enters into a contractual relationship with. According to the Explanatory memorandum approximately 20% of European consumers encounter problems when buying goods and services in the Internal Market. Yet, at the same time, the Commission's study on E-commerce in goods shows that cross-border purchases does not create more problems related to non-delivery or delayed delivery. 16% of cross-border purchases were delayed (18% for domestic cases) and products did not arrive in 5% of cross-border cases (6% for domestic cases).Nevertheless, where problems occur, consumers should be able to have recourse to redress and assistance in doing so.

10. In addressing the challenge of ensuring consumer confidence in cross-border shopping, facilitating dispute resolution seems to be the most effective and appropriate means. The proposals from the Commission are well suited to respond to this need. However, in order to ensure systems which work well in practice, allow for diverse national solutions and provide legal guarantees for all parties, the EEA EFTA States suggest to delve further into some issues and consider possible amendments.

11. The EEA EFTA States would like to emphasise that, even if comments on the proposals are provided, this does not necessarily imply that a final stand has been made on the EEA relevance of the proposals.

Proposal for a Directive on Alternative Dispute Resolution

Scope full coverage

12. The proposal has a broad scope, aiming at covering purchase of goods and services in all market sectors. We fully understand the ambition of aiming at full coverage, in particular since, 14 years after the recommendation on Alternative Dispute Resolution, studies show that there are still large gaps in the Member States. The studies also show that areas of which there is no alternative dispute resolution system vary and that the way of organising ADR differs greatly between Member States due to legal and cultural traditions.

13. We assume that the gaps are partly due to an assessment of the need for ADR in sectors, partly due to resource constraints and partly other reasons. Where business plays a major part, both in establishing and in financing ADR entities, as is the case in Norway, the existence of this kind of ADR entity depends on the sector being organised and willing to contribute. In the policy makers` assessment of the need for alternative dispute resolution for consumers in different sectors, key elements will often be the extent of consumer problems/complaints identified in that sector. Other factors may be the amounts at stake for the consumers, consumer detriment and the importance of a sector for consumer welfare.

14. The proposal aims at achieving what is perceived as a decent level of alternative dispute resolution accessible to all consumers for all contracts. This is done by establishing criteria for ADR entities and obliging Member States to ensure that ADR entities fulfilling those criteria exist.

15. As much as we see the need both for criteria and for full coverage, we deem that ensuring full coverage by ADRs fulfilling the criteria in this Directive is too ambitious, see further comments below under the point on expertise and impartiality.

Scope- trader initiated cases

16. Under the proposal, both consumers and business would be able to submit a dispute to the ADR entity. Given the large gaps in ADR today and hence the effort needed to establish ADR entities in all Member States, the EEA EFTA States are of the opinion that priority should be given to consumer initiated cases. Therefore, at this stage, the obligation of Member States should be limited to provide ADR for disputes being submitted by the consumer. Member States would however still be free to allow for trader initiated cases.

Criteria for ADR entities

17. The proposal sets out criteria which ADR entities must fulfil and comply to. The EEA EFTA States will focus their comments below on Article 6 Expertise and impartiality and Article 8 Effectiveness

Criteria for ADR entities- Expertise and impartiality

18. If we are to achieve true confidence, it is key not only to provide consumers with ADR, but to ensure that it is provided by quality ADR entities. Ensuring that traders also have confidence in ADR is important, in particular where both parties have to agree to submit a complaint to an ADR entity. Since consumer dispute resolution bodies in many cases are initiated and/or organised/financed by the consumer side (Ministries, Authorities, NGOs), they could easily be perceived as biased in favour of consumers. Facilitating trust from both parties is therefore essential. Not only does this provide confidence that one is being treated fairly, but it is also important in order for the parties to accept and respect the outcome. For a consumer who loses a case it may be easier to accept this if he or she knows that at least the case has been dealt with by an entity which can be trusted to be impartial and fair. For a trader who loses a case, trust is an important incitement to comply with the decision, for instance by providing the consumer with compensation for economic loss or replacing a faulty good. For ADRs entities providing non-binding decisions, trust on the trader's side is essential for compliance.

19. However, establishing criteria for ADRs has an inherent challenge. There are many dispute resolution entities in Member States which may provide for a fully satisfactory alternative to ADR entities as described in the proposal. For the EEA EFTA States we would like to provide the example of the Norwegian "Forliksråd" (Conciliation Board) which consists of citizens appointed by the local authorities. These institutions solve 150.000 cases each year, compared to 15.000 solved by civil courts. However, they would not be deemed to fulfil the criteria in the proposal, since the members of the boards are neither business representatives nor consumer representatives in particular.

20. We are aware of a number of changes to the criteria being considered in the dealing with the proposal by the Council and the European Parliament. Already, the dilemma which is becoming apparent is: adjustments to the criteria set out in the proposal may be suggested to ensure that all existing quality ADR entities in Member States are covered by the Directive. However, in the end this would become very detailed, as for many of the "concessions and exemptions" safeguards would need to be added.

21. Therefore, rather than trying to adapt the provisions in detail, the EEA EFTA States suggest that the Member States are given some leeway, in the sense that national systems which do not fulfil all the criteria, but provide consumers with the same level of quality access to justice, should be considered sufficient to comply with the obligation of the Directive to provide full coverage of ADR.

22. Should no leeway be given to Member States on the criteria, we would suggest an amendment regarding the criteria for collegial bodies. Article 6.1 sets out criteria for natural persons in charge of ADR, whereas article 6.2 sets out criteria where a collegial body is in charge. The 1998 recommendation included an addition of alternative criteria for collegial bodies, whereby also collegial bodies where the members fulfilled the criteria set out for natural persons were deemed to comply. We would recommend that such a solution should be introduced in the proposal for a directive. The reason for this being that it does not make sense if one natural person

fulfilling the criteria in article 6.1 will be considered a quality ADR entity, whereas a board of 3 persons fulfilling the same criteria would not be complying.

Criteria for ADR entities: Effectiveness

23. The proposal establishes a deadline of 90 days to solve the dispute from the time when the complaint has been received. In the case of complex disputes, the ADR entity may extend this time period. The EEA EFTA states consider this deadline too short, at least the way it is calculated in the proposal. In national consultations on the proposal, this was the one issue that was raised by almost all stakeholders; consumers and business alike, as well as ADR entities, the view being that it would not be realistic.

24. The EEA EFTA States would suggest that the starting point of the 90 day deadline be linked to the actual processing of the complaint by the ADR entity; i.e. to the point in time where the parties have submitted their arguments and facts and the ADR body can actually assess the complaint. This would provide for realistic expectations with consumers and respect of the principle of fairness.

25. It is true that the proposal is open to extension of deadlines for complex disputes. This does not address the concern of the EEA EFTA States. Firstly, complex cases may take more time, but also simple cases may take time if one or both of the parties do not reply speedily. Secondly, not knowing how often this provision would be used in practice and when, it is difficult to provide consumers with fair information about time limits. If 90 days were to be communicated to consumers as a main rule, it could be misleading and create too high expectations with consumers in the large majority of cases. If ensuring consumer confidence is a key goal, ensuring realistic expectations is also essential.

26. The principle of fairness, as reflected in Article 9.1 b) establishes that the parties shall have the possibility to express their point of view and hear the facts and arguments put forward by the other party and any expert's statements. We fully agree with this principle. It may be considered obvious, and maybe therefore not stated expressly in the wording, but this possibility should also include the possibility to comment on the facts and arguments put forward by the other party. This is also necessary, even in cases which are not legally or factually complex. In practice, this means that several rounds of correspondence may be necessary before the case is sufficiently enlightened. For each round, one must also take into account that the parties may need some time to check facts or reflect on how to reply or even seek legal advice or advice from consumer authorities before submitting a reply or comment. This means that 90 days is perhaps too short in many cases.

27. In addition to this, ADRs which deal with cases in meetings of a collegial body, may not meet that often, so this adds further to the time needed.

28. Existing ADR entities may have different ways of dealing with the balance between the principle of fairness and the aim to provide dispute resolution quickly. Preclusive deadlines for submitting complaints, limiting the number of replies/comments can be made, or competence to make decisions based solely on the one party's facts and arguments if the other party does not reply, are such mechanisms. Embarking on such

detailed regulation of procedural rules in the Directive to ensure an efficient process does not seem appropriate.

Information to consumers

29. The proposal seeks to ensure that consumers are adequately informed about the possibility to resort to ADR if complaints are not resolved amicably by contact with the trader.

30. The EEA EFTA States mainly support the proposal on this point, including the obligation of the trader to provide information on ADR on websites and in all general terms and conditions. However, the requirement in Article 10.2 to provide information on invoices and receipts may be too far reaching. At least, the way it is phrased, it would oblige information about ADR on every supermarket receipt and even on a receipt for a cup of coffee.

31. The EEA EFTA States would also suggest that in order to ensure timely information to consumers, the proposal should be amended so that traders would always be obliged to provide information about ADR when replying negatively to a consumer complaint, i.e. not at all accepting the consumer's claim or only partly accepting it. Consumers are daily confronted with extensive information, referrals to general terms and conditions, etc and cannot reasonably be expected to study it all carefully or even look it up. The 2011 Empowerment study shows that only 31% of European consumers had read the terms completely and thoroughly last time they signed a contract and 24% not at all. And even if consumers read terms, these are often lengthy, and the information on ADR may be overlooked or not taken notice of. Concise and clear information at the point in time when it is relevant for the consumer, hence when a dispute arises, is essential.

32. Another measure which could be important in addressing the problem of information overload is reinforcing the obligation of Member States to generally make consumers and business more aware of ADR. Such awareness raising should be complemented by more detailed information to those entities, organisations, authorities and others who consumers and business would turn to in order to seek information if they "know there is something, but not what or where".

Language

33. Language skills or lack of such, creates opportunities – and barriers. Traders who create different language versions of their website, facilitate for more consumers to purchase goods and services from that website. Likewise, consumers who understand different languages may profit from purchasing from websites which do not provide information in all languages.

34. The findings of a recent Danish study indicate that the issue of language, in particular after-sales, so for instance if a problem arises and the consumer needs to contact the trader, seems to be a barrier to trade to a much larger degree than not knowing which law applies and knowledge of legal rights to return goods. (Regarding consumer

priorities of factors creating confidence: "Being able to contact the internet store in a language I understand" rated no 1 and "knowing which law apply" rated no 14.)

35. Language is another essential element of making ADR cross-border work in practice. The Directive does not deal with this issue to a large extent, only requires the ADR to provide information on "the language or languages in which complaints can be submitted and the ADR procedure conducted (article 16.1 (f). It could be considered to require ADR entities to be able to deal with one other language besides the language of the Member State in which it is situated. However, we recognise that this may be too burdensome, in particular for smaller ADR entities.

36. The other obvious means of addressing the challenges related to language will in the view of the EEA EFTA States be recognising the role of the facilitators, see comments on the ODR proposal.

Brussels Regulation and Lugano Convention

37. The proposal raises issues related to the Brussels I Regulation and the parallel Lugano Convention on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters. For those EEA EFTA States which are part of the latter, there may be a need to clarify certain aspects, in particular in relation to jurisdiction and to what extent ADR entities would be considered "courts" under these rules. But this does also not necessarily imply that a final stand has been made on the EEA relevance of the proposals. The question of EEA-relevance must be clarified.

Follow-up

38. It is imperative that, once the Directive is adopted, further initiatives from the Commission are taken to facilitate the establishment of ADR entities systems in those countries without such systems today or which have gaps. An example of such facilitation could be a workshop dealing with the next steps and allowing for exchange of strategies and "best practice". European umbrella organisations on the consumer and industry side can play an important role in the establishing of efficient national systems. As another element, consultations with stakeholder organisations could stimulate a positive allocation of support. It is observed that Businesseurope has taken a positive stand on the proposal and it would be beneficial if the readiness to support it is followed up with its national members.

Proposal for a regulation on online dispute resolution

Scope

39. The scope in the Commission's proposal is limited to cross-border transactions, where goods and services have been ordered online. The EEA EFTA States are of the view that this is the correct focus and priority.

40. We are aware of the ongoing discussion of whether the scope should be extended to domestic disputes. The EEA EFTA States strongly recommend that the scope is not

amended in this way. It would be overly bureaucratic if national disputes should be directed through an EU platform. We recognise the point made by some that for consumers it is not always easy to know from which country the trader operates, particularly for online purchases, but directing all national disputes through an EU platform would be too heavy a means to address this problem. In our view, the European Consumer Centre (ECC) in the consumer's country should be able to provide assistance if consumers have problems in establishing whether it is a cross-border dispute or not.

Language and technical issues

41. Language is a challenge, as described above under the comments on the ADR proposal. The proposal foresees technical translation facilities to be provided by the Commission. The experience with machine translation does not always guarantee a good result when used for ADR case handling. The need for assistance from facilitators, both to consumers and to national ADR entities should not be underestimated.

42. Finally, the EEA EFTA States would also like to emphasise the importance of the ODR platform being compatible with national electronic or online dispute resolution systems. Many of the national ADRs currently have electronic internal case handling systems, possibilities for submitting complaints online or even full online dispute resolution. This must be taken into account when designing the platform.