EuroCommerce
Retail & Wholesale

Position Paper

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# Paper on the Alternative Dispute Resolution (ADR) Directive

## Introduction

Retailers and wholesalers believe that the current Alternative Dispute Resolution framework (ADR) delivered a high level of consumer protection in the EU with a simple, efficient, fast and usually low-cost way of resolving disputes. We call on policymakers to maintain the current overall framework and scope avoiding substantial changes to the scope of ADR entities, which would go beyond mediation. This approach would maintain the overall high level of consumer protection, the efficiency of ADR systems, keep costs and burdens on companies at a lower level and help deliver mediation quickly and efficiently. This ADR proposal should focus on mediation, while keeping enforcement, penalties, and fines outside the proposal.

## Maintain the minimum harmonization approach and keep the participation of traders voluntary

EuroCommerce advocates for keeping the minimum harmonization approach, allowing each country to decide on the structure and the governance of ADR procedures at the national level. This approach is key to ensure the effective functioning of ADR procedures. Enforcement and litigation cultures (and resources) are still very diversely organized across the EU. This has an important impact on how traders and consumers will work with enforcement and mediation (in some countries mediation is de facto how such disputes are handled, integrating the authorities to some extent, while in others it is not). While the main purpose of ADR is to mitigate excessive costs and provide faster consumer protection solutions, some countries experience more accessible and swifter access to justice, making courts a preferred option above ADR. EuroCommerce contends that maintaining the minimum harmonization approach is crucial for the proper functioning of the system and ensuring a high level of consumer protection.

The well-functioning of ADR systems depends on its voluntary nature and the willingness of both parties to engage in the process and find a suitable solution. This has brought many positive outcomes and solutions without going to court. Making it mandatory for traders that are not willing to participate will change the overall functioning of the ADR procedure and may not improve the functioning of the system. The existing voluntary nature of ADR systems follows a logic that we believe it should be maintained or improved, but not modified by making it mandatory for all traders. A trader may decide not to participate or make the process lengthier and more burdensome, in those cases, ADR systems are not the place to tackle these issues.

Similarly, EuroCommerce contends that there is no imperative need to impose a duty of reply on traders already actively participating in ADR procedures. SMEs often lack understanding and resources,

putting them at risk of potential fines and penalties. For these entities, a 20-working day period may be insufficient. The same applies for any new obligation asking traders to provide reasons when they choose not to participate in an ADR procedure.

Instead, we welcome the Commission's efforts to address the lack of awareness regarding ADR procedures through the introduction of ADR contact points for both traders and consumers. Information for consumers should be as centralized and accessible as possible. For this purpose, and to avoid potential information fatigue, we believe that a new obligation on traders introducing a specialized email address for ADR and separate information in their websites will bring additional costs for companies, especially for SMEs, that do not know or fully understand ADR procedures. Also, displaying the information together may make it difficult for consumers to differentiate between mediation and customer service. This is already indicated in Article 6 of the Consumer Rights Directive, where traders already display their email address for the consumer, among other communication solutions.

Also, traders may not agree with the outcome of the ADR. Depending on the Member State, they may be able not to comply with the ADR outcome and exercise their right to go to court. A public report of companies that do not comply with the outcome could lead to unnecessary reputational damages caused on companies without any real infraction of consumer protection rules.

EuroCommerce observes a lack of enforcement in consumer law when dealing with third-country traders selling directly to consumers. This disparity places trustworthy EU traders at a competitive disadvantage, since they comply with EU law and deal with fines and penalties. We acknowledge the good intentions in extending ADR participation to third-country traders, however, we remain skeptical about its impact on enhancing consumer protection in the EU. The proposed duty of reply, predominantly applicable to EU-based companies, raises concerns about potential fines and penalties. Also, ADR entities could face additional costs trying to reach out to third-country traders that agree to participate in ADR procedures but then do not engage. EuroCommerce recommends a more comprehensive approach to addressing enforcement challenges with third-country traders and refraining from introducing new obligations on EU traders that will not be enforced by third-country traders.

## Avoid extending the scope of the ADR Directive

ADR tools are an excellent tool to provide consumer protection and redress. The purpose of the ADR has always been to settle specific contractual and financial disputes between a specific consumer and a specific trader as an alternative to bringing it to court. Mainly, contractual provisions are considered under the ADR procedures and appropriate redress is given to the consumer if appropriate. However, the extension of the scope risks changing the functioning and the purpose of the ADR Directive, by including non-contractual terms. Especially when pre-contractual terms are already considered by ADR entities when the contract has been concluded. This proposal opens the door to a high level of legal uncertainty and to an increase of cases brought to ADR procedures.

Until today, ADR procedures relate to mediation between trader and consumer. While enforcement, and imposing penalties and fines fall upon the shoulders of national competent authorities and the CPC Regulation. The extension of the scope will give ADR systems additional responsibilities in enforcement, penalties, and fines. ADR bodies are not enforcement bodies and should not be tasked to interpret EU law with an increased scope. It is crucial to avoid legal uncertainty by creating overlapping areas between mediation bodies and enforcement bodies. Also, should not have the responsibility for looking for unfair practices players and inform about noncompliance, leading to unnecessary higher costs. It could be even more complex if ADR bodies' recommendations start to contradict decisions or interpretations of competent authorities. Mediators cannot issue general interpretations of law, issue penalties or other functions which are generally in the competence of

enforcement bodies. We understand the overall reasoning behind these provisions and the aim, but we believe the upcoming revision of the CPC Regulation is a better place to address them.

Not only these issues are already regulated under other pieces of legislation, such as the UCPD, but also, their inclusion will make the ADR entities responsible for dealing with non-specific issues such as Geo-blocking, design of online interfaces or misleading advertising, which are difficult to quantify in terms of consumer redress. The extension to the scope is not compatible with the current ADR framework since the description of the offence for pre-contractual cases is very often made in a very general form. For this reason, adding pre-contractual terms to the scope of the ADR Directive will substantially change the main purpose of the ADR and how this tool works. This goes against the Commission principle of not making substantial modifications of how ADR systems. On top of that, existing ADR entities do not have the knowledge and expertise to deal with such situations. It could increase costs from two sides: from a higher number of cases brought to ADR entities and for the need to acquire that knowledge and expertise.

Existing ADR systems should be simple, efficient, and cost-effective. This has proven to be very effective and beneficial for both, traders and consumers. Extending the scope of the ADR Directive to include pre-contractual terms could significantly diminish the quality of ADR procedures, making them more lengthy, expensive, and unclear. In certain Member States, like in the Netherlands, ADR systems are almost fully funded by the industry, whit very little participation from the public sector or consumers. This already creates excessive costs on businesses. Extending the scope to pre-contractual stages will substantially increase the costs of ADR systems and will make the system slower and less efficient. Considering the low added value of extending the scope and the risk to undermine the well-functioning of the current systems, pre-contractual stages should be removed from the text. Also, where ADR expenses are fully covered by the industry, public authorities should commit to increase the expenditure to fund ADR systems and ensure their well-functioning. Following the example of the Netherlands, where the industry already bears with most of the ADR expenses, the well-functioning of ADR systems is at risk. Member States should be encouraged in the legal text to leverage their public funding of ADR systems, when these situations apply.

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