Joint Retail Statement on the Alternative Dispute Resolution Directive

May 2024

EU retail associations 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 upon the EU policy makers to maintain the current well-functioning of the system and not to extend the scope of ADR to unfair or misleading non-contractual or pre-contractual cases (that did not lead to the conclusion of a contract). ADR bodies are not law enforcement bodies, but neutral out-of-court dispute settlement bodies with varying levels of expertise and resources, that aim to solve disputes in an expeditious, low-cost, efficient and amicable manner.

Retailers across Europe highly value the possibility offered by ADR schemes to find amicable solutions to contractual disputes with their customers without having to resort to court. It helps foster good relations with customers by finding the right solution tailored to the specific case, while the voluntary and non-judicial nature of ADR ensures that high litigation costs and the complications of lengthy court cases are avoided. **It is therefore essential that the revision of the Directive on Alternative Dispute Resolution for Consumer Disputes does not result in a modification of the nature of ADR entities and creates legal uncertainty that would discourage traders from joining ADR schemes.**

While the overall purpose of ADR is to save costs and time stemming from litigation, the changes proposed to the Directive are likely to increase costs and time spent on cases, without bringing much added value to consumers. Currently, ADR bodies do not have the expertise or resources to deal with cases that fall outside the scope of the current ADR framework. The extension of the scope of the ADR Directive, which implies a change of role of ADR bodies, would require more qualified staff and bring higher costs. For small countries, finding staff for ADR bodies is already challenging without the extended scope. The way ADR systems are financed differs widely, often it is funded by the public or industry. The extension of the scope would undermine existing well-functioning industry-funded systems, like in the Netherlands. Any structural change could therefore put at risk many well-functioning ADR systems.

Based on the above, whereby we wish to stress that participation in ADR schemes should always remain voluntary. We call upon the co-legislator to amend the Commission's proposal, particularly on three specific aspects:

1. Support the amendment introduced by the Council to delete unfair and misleading practices from the scope of ADR

ADR entities are dispute resolution bodies, they are neither courts nor competent authorities, and are therefore not responsible for interpreting the law. An ADR body's role and competence is to find a solution to a dispute where a consumer has suffered loss or damage as a result of a commercial contract with a trader, whereby the ADR body needs to establish: a) the presence and extent of the loss or damage, b) that the loss is linked to a commercial contract, and c) decide how that loss or damage should best be remedied.

Where a practice is not *explicitly* listed as unfair under the Unfair Commercial Practices Directive (UCPD), only courts are authorised and capable to assess whether that practice fulfils the criteria to be considered unfair and/or misleading. The same goes for unfair contract clauses under the Unfair Contract Terms Directive (UCTD).

Assigning responsibilities to ADR entities typically reserved for courts would raise constitutional concerns as only courts have the power to interpret the law and are strictly bound by the obligation to guarantee fundamental rights, such as the right of defence.

Moreover, it would become unclear who is actually responsible for the interpretation of EU law, especially if the ADR outcome were to contradict the interpretation of the law by a national court or authority.

The ADR Directive must therefore not require ADR entities to interpret the unfair or misleading nature of a practice brought to its attention by a consumer, when this has not explicitly been qualified as such under the UCPD or UCTD. This would otherwise transform ADR entities into judicial authorities, bringing legal unpredictability for enterprises and increasing the number of cases brought to court as traders would become hesitant to take part in ADR schemes, whereas the true objective of ADR systems is the opposite: to reduce courts' workload by providing an alternative *where possible*.

In addition, we wish to draw attention to the fact that, while bundling cases might lower ADR costs, if this is coupled with an extension to non-contractual and pre-contractual situations, this would even further reinforce the influence of ADR entities on the interpretation of EU law, likely beyond that of the courts, the only authorities allowed to interpret legislation.

2. Support the amendment regarding the exclusion of non-contractual and pre-contractual situations that do not lead to the conclusion of a contract from the scope of ADR (Article 1(1), point b).

ADR entities are dispute resolution bodies with the objective of finding a settlement in a dispute between a consumer and a trader, in case the consumer has incurred damage or loss as a result of a contract (e.g. purchase, lease, or rent) with that trader. If there is no contract, the existence or the extent of the consumer's loss or damage, and therewith any possible compensation, is uncertain and should be assessed by a court instead of an ADR entity.[1]

Including pre-contractual situations that did not lead to a contract in the scope of the Directive would radically undermine the functioning of ADR. Without a contract, an ADR entity will not be able to assess whether there is a loss/damage to compensate. This would lead to a considerable increase in unfounded or inadmissible disputes overburdening the system and discouraging traders from participating in ADR. We suggest maintaining the structure of the ADR system that has proven to be useful in terms of consumer redress and reduction of cases brought to court. It would be illogical to

[1] For instance, a hypothetical case where a retailer advertises a product with certain features and characteristics that differ from reality, and a consumer visits the retailer's website and does not purchase the product, but feels subject to a misleading practice and thus resorts to an ADR scheme. Since no contract was concluded, there is no tangible loss to be compensated. Therefore, ADR cannot solve this issue.
Similarly, in a hypothetical situation where a retailer fails to provide at the pre-contractual stage payment terms on its website before a purchase is made, and a consumer does not purchase anything but decides to bring the case to ADR. Since no contract was concluded, it is impossible to quantify any actual loss or damage suffered by the consumer. Again, ADR will not be able to solve the issue.

include non-contractual and pre-contractual situations that did not lead to the conclusion of a contract in the scope of ADR schemes.

Finally, we wish to point out that damages arising from unfair and misleading practices (when they did not lead to the conclusion of a contract) are difficult to quantify in terms of consumer redress, as well as discrimination based on the place of residence or nationality. In this regard, the upcoming review of the CPC Regulation is the right place to address these cases.

3. Clarify the scope of cross-border complaints

It is important to clarify and limit the scope of application for dealing with cross-border complaints of ADR bodies. Very few ADR bodies have the knowledge, and financial means to begin dealing with disputes that originate from countries outside of the ones they operate in. One of the consequences of an unclear legal freamwork is that ADR bodies which deal with e-commerce disputes would be inundated with requests coming from this area. Additionally, ADR bodies that operate in countries with well established and functioning practices would be subject to pressure coming from neighbouring countries.

Concluding remarks

The added value of ADR entities is their ability to be agile and help consumers and traders reach amicable solutions without having to go via courts. The ADR system has proven to be an efficient and effective way to settle disputes. This success should not be undermined by extending their role outside of their legal competence, or to cases that would finally be inadmissible.

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About Ecommerce Europe

Ecommerce Europe is the united voice of the European Digital Commerce sector, representing the interests of companies selling goods and services online to consumers in Europe. Our mission is to act at EU level by engaging with policymakers to create a better regulatory framework for all e-merchants. Ecommerce Europe is a platform where our members can stay informed, exchange best practices, and define common positions on EU legislation impacting the sector. Follow our work on LinkedIn and Twitter.

About EuroCommerce

EuroCommerce is the principal European organisation representing the retail and wholesale sector. It embraces national associations in 27 countries and 5 million companies, including leading global players and many small businesses. Over a billion times a day, retailers and wholesalers distribute goods and provide an essential service to millions of business and individual customers. The sector generates 1 in 7 jobs, offering a varied career to 26 million Europeans, many of them young people. It also supports millions of further jobs throughout the supply chain, from small local suppliers to international businesses. EuroCommerce is the recognised European social partner for the retail and wholesale sector. Find more information on our website, on X, and on LinkedIn.

About Independent Retail Europe

Independent Retail Europe is the European association that acts as an umbrella organisation for groups of independent retailers in the food and non-food sectors. Our members are groups of independent retailers, associations representing them as well as wider service organizations built to support independent retailers. Independent Retail Europe represents 23 groups and their 462.000 independent retailers, who manage more than 737.000 sales outlets, with a combined retail turnover of more than 1,385 billion euros and generating a combined wholesale turnover of 604 billion euros. This represents a total employment of more than 6.620.000 persons. Find more information on our website, on X, and on LinkedIn.