BEUC The European Consumer Organisation

The Consumer Voice in Europe

MODERNISING CONSUMER ADR IN THE EU

The revision of Directive 2013/11/EU on consumer Alternative Dispute Resolution

Contact: consumer-redress@beuc.eu

BUREAU EUROPÉEN DES UNIONS DE CONSOMMATEURS AISBL | DER EUROPÄISCHE VERBRAUCHERVERBAND
Rue d'Arlon 80, B-1040 Brussels • Tel. +32 (0)2 743 15 90 • www.twitter.com/beuc • www.beuc.eu
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Why it matters to consumers

Consumer Alternative Dispute Resolution (ADR) gives consumers and traders the possibility to resolve their disputes out-of-court via the input of a third-party and through a process intended to be simple, fast, and non-expensive. Yet since the adoption of Directive 2013/11/EU ten years ago, ADR has not been running satisfactorily for consumers in all business sectors and in all EU Member States. Changes in the existing regulatory framework are therefore urgently needed to ensure that consumer ADR truly delivers for European consumers.

Summary

Consumer ADR, as provided for under EU Directive 2013/11/EU (the Consumer ADR Directive) and EU Regulation 524/2013 (the ODR Regulation) has not delivered for consumers in many European countries and still not reached its full potential. This is among other things due to a lack of awareness among consumers and traders, difficulties to navigate diverse and sometimes complex national ADR landscapes, as well as a general reluctance from traders to participate in ADR procedures. In October 2023, the European Commission published a new legislative package to modernise the existing regulatory framework. It includes a proposal for a Directive making targeted amendments to Directive 2013/11/EU, a proposal for a Regulation repealing the Regulation that had established the EU ODR Platform and a Recommendation addressed to online marketplaces and EU trade associations having a dispute resolution mechanism. Despite some improvements, the initiative does not address several of the obstacles that have hindered the use of consumer ADR until now. In this position paper, we make several propositions to make it work for consumers.

- **Strengthening the quality of consumer ADR**

The quality of consumer ADR is key to enhance consumers' and traders' trust and to increase their use of the system. Yet concerns about the independence and level of expertise of consumer ADR entities in some countries or sectors have undermined consumers and traders' confidence in the benefits of ADR. Unfortunately, the proposal does not make any changes to the requirements laid down in the 2013 Directive, which yet have turned out to be insufficient. We make several propositions to improve the quality of consumer ADR and to strengthen their independence, autonomy as well as their expertise.

- **Promoting a reasonable extension of the scope of consumer ADR**

The new initiative proposes to significantly widen the material scope of ADR by making it available for almost all types of consumer disputes. Yet a more nuanced approach than the one foreseen in the proposal may be necessary. On the one hand, it is essential to give consumers the possibility to exercise the rights they have in a simple and cost-effective manner. On the other hand, it is also important to maintain the coherence of the whole consumer protection system as well as sound coordination between the work of the different actors involved (consumer protection authorities, sectoral regulators, consumer organisations and others). Furthermore, EU Member States still have very diverse national ADR landscapes and mixed experience with ADR: in some countries (like the Nordics), ADR has been performing well, while in others it has not delivered for consumers. ADR entities

across Europe are also very different in terms of capacity, expertise, resources, etc. These structural differences at national level makes a "one-size-fits-all" approach on the question of the extension of the material scope of ADR difficult for all Member States and for all ADR entities. A more granular approach is needed as some ADR entities may be in a position to deal with unfair commercial practices, but others will not.

Therefore, we recommend a reasonable extension of the material scope of consumer ADR, taking also into consideration differences in the way ADR has been functioning in the Member States. Specifically, the material scope of ADR should be extended to cover specific statutory consumer rights (e.g. right to switch providers) not yet covered under the existing Directive and mandatory pre-contractual trader obligations, for which access to redress for consumers in case of infringement is often still lacking in practice. The possibility for ADR entities to deal with unfair market practices should be possible under conditions further specified below.

- **Making traders' participation in ADR procedures mandatory in sectors yielding a high number of consumer complaints (e.g. tourism and transport).**

In many countries, traders do not participate in ADR procedures, either because they are not required to sign up nor to participate in ADR procedures, or because they do not trust ADR or simply because they do not know that this possibility exists. This is notably problematic in sectors traditionally yielding a high number of consumer complaints, such as in the tourism or transport sectors. Traders' participation in ADR should be mandatory in those problematic sectors. The mandatory nature of ADR could be organised and framed in many ways respecting the different domestic cultures and rules of the Member States.

Additional recommendations include (among other things):

- The **geographical scope of ADR** and application to non-EU traders: we propose to introduce additional requirements to make it work for consumers, in particular requiring non-EU traders to sign up to an ADR scheme in the country/ies where they sell their products or services.
- The **supervision of consumer ADR**: we propose to maintain all reporting requirements for ADR entities and to strengthen the role of Competent Authorities.
- Ways to improve **information and assistance** to consumers: we propose to clarify the way traders inform consumers about ADR and the role of ADR contact points.
- The **bundling of consumer complaints** by ADR entities: we propose to introduce some requirements for consumer ADR entities when bundling consumer complaints.
- The new EU **digital tool** expected to replace the EU ODR platform: we propose to further reflect on the role and design of the new digital tool announced by the European Commission.
- The Commission **Recommendation** for online marketplaces: we insist on the need to keep a clear distinction between traders' internal complaint-handling procedures (which are post-sales customers services) and independent ADR to avoid confusing consumers.

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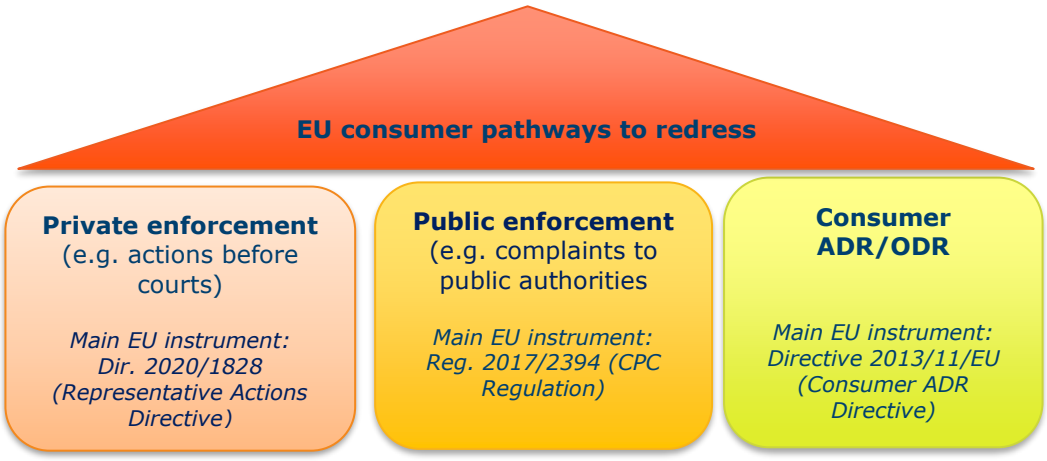
1. Introduction

1.1. ADR/ODR: an important pathway for consumers to obtain redress

Alternative Dispute Resolution (ADR) gives consumers and traders the possibility to resolve their disputes out-of-court via the input of a third-party (a consumer ADR entity). It may take different forms (conciliation, arbitration, or others) and lead to various outcomes (non-binding recommendations, binding decisions, etc.). The objective is to give consumers access to a simple, fast, and cost-effective route to solve their domestic and/or cross-border disputes. As shown below, alongside actions before courts and complaints to public authorities, ADR is one of the pathways available to consumers to enforce their rights. It is particularly relevant for low-value claims when consumers have no incentive to vindicate their rights before courts.



1.2. 2013: a modernised EU framework for consumer ADR

In 2013, the EU adopted Directive 2013/11/EU (the Consumer ADR Directive) establishing a new regulatory framework for consumer ADR across Europe.[1] It pursued three main policy objectives:

- First, it intended to enhance the **quality** of consumer ADR in Europe. The Directive built on the previous European Commission Recommendations 98/257/EC[2] and 2001/310/EC[3] and laid down several quality requirements for ADR entities. Those requirements apply to the setting up and the functioning of consumer ADR entities as well as to the outcomes of ADR procedures. The Member States had to designate Competent Authorities at national level entrusted with the task of monitoring the work of ADR entities operating in their respective countries as well as ensuring their ongoing compliance with the quality requirements of the 2013 Directive.
- Second, the Directive intended to promote **full coverage**, meaning that consumer ADR had be available for all consumers in most economic sectors.[4]
- Third, it intended to **raise awareness** of consumers and traders, and for this purpose, established some information obligations for traders.

[1] Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes
[2] Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes
[3] Commission Recommendation 2001/310/EC on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes.
[4] Some specific sectors were excluded from its scope (Art. 2(2) of Directive 2013/11/EU).

Importantly, the 2013 Directive followed **a minimum-harmonisation approach**. This means that the EU legislation only foresaw general requirements that Member States were free to complement if they wanted to ensure a higher level of consumer protection and that they could also further adapt to their domestic contexts. The reason for this approach was that some countries (e.g., the Netherlands, Nordic countries, France, etc.) already had experience with consumer ADR long before the Directive was adopted. In those Member States, consumer ADR had been shaped by domestic and/or sectorial considerations, and models significantly diverged across Europe. The 2013 Directive neither intended to wipe out the past nor to impose a one-size-fits all approach. Rather, it sought to preserve national differences and built on pre-existing national ADR structures.

In parallel, the EU also set up an Online Dispute Resolution Platform (the "EU ODR Platform").[5] Its functioning built on and complemented the regulatory framework established by the 2013 Directive. The platform aimed at dealing with disputes arising from online purchases of products or services and intended to facilitate the coordination between consumers, traders, and consumer ADR entities certified across the EU.

1.3. 2023: a new EU legislative proposal to modernise the ADR framework

The Commission took stock of the experience with consumer ADR in 2019 and 2023.[6] These evaluation reports highlighted that the development of consumer ADR has been uneven in the EU. In some countries or sectors, consumer ADR is well-established while in many others, it is still dragging its feet. Overall, the Commission observed that the new ADR framework is still underused due to a lack of awareness, difficulties to navigate remarkably diverse ADR landscapes and a general reluctance of traders to participate.

In parallel, contexts and environments in which consumer ADR has been evolving have changed a lot since the adoption of the Directive ten years ago. As we also explained in our 2022 Position paper[7], regulatory contexts have evolved. Rules on ADR (or on out-of-court dispute mechanisms more generally) are now increasingly included into new or upcoming pieces of European legislation.[8] At national level as well, civil justice systems have been relying increasingly on ADR to reduce courts' workload and to facilitate individuals' access to redress.[9] In parallel, new technological developments have had an impact on the way ADR entities have been operating and recent crise (such as the cost-of-living crisis or the COVID-19 pandemic) have led to significant increases in the number of complaints that consumers have submitted to ADR entities in some sectors.

Considering the limitations of the current framework and the need to adapt to new market realities, the European Commission issued a **new legislative proposal** on 17 October 2023 aimed at modernising the existing regulatory framework.[10] Specifically, this consumer ADR legislative package comprised, among other things,[11] a proposal for a Directive making

[5] https://ec.europa.eu/consumers/odr/main/?event=main.home2.show
[6] In parallel, other studies have showed a limited use of ADR. According to the Consumer Condition Survey 2021, 5% of EU consumers on average brought their complaints to an ADR entity in 2020, and only 8% of them would approach an ADR body in the future in the event of experiencing problems.
[7] www.beuc.eu/position-papers/alternative-dispute-resolution-consumers-time-move-gear
[8] For recently adopted EU instruments, see (e.g.) the DSA; for EU instruments currently under discussion see: the proposal for a EU Regulation on payment services in the internal market (COM/2023/367 final).
[9] In some Member States, a mandatory out-of-court dispute resolution step is required before going to court for small value claims (e.g., France for civil claims below 5.000€).
[10] https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/resolve-your-consumer-complaint/alternative-dispute-resolution-consumers_en
[11] The Commission also published several preparatory documents, impact assessment and the results of a behavioural study (https://op.europa.eu/en/publication-detail/-/publication/e93a7d75-6c97-11ee-9220-01aa75ed71a1/language-en).

targeted amendments to Directive 2013/11/EU,[12] a proposal for a Regulation repealing the Regulation establishing the EU ODR Platform[13] and a recommendation addressed to online marketplaces and EU trade associations having a dispute resolution mechanism.[14]

Importantly, the legislative proposal **does not change the minimum harmonisation approach** that has prevailed so far. The main objectives of the proposal, as presented by the Commission, are: (1) to make the framework fit for digital markets by covering a wider range of EU consumer rights; (2) to enhance the use of ADR in cross-border through more customised assistance to consumers and traders; and (3) to simplify ADR procedures and reducing reporting obligations.

2. Assessment of the proposal and propositions to move forward

2.1. The proposal briefly: missed opportunity and possible paradigm shift

The revision of the 2013 Directive is a **welcome initiative** considering the experience collected so far and the limits of the existing framework. However, the changes announced are also likely to remain **insufficient since they do not address the fundamental problems that have hindered the use and development of ADR in the EU so far.**

Furthermore, the new initiative significantly widens the scope of consumer ADR to make it available to deal with almost any type of consumer disputes, including unfair market practices. Whereas it is essential to ensure consumers' access to redress, the proposed changes might also trigger significant changes in the role and functioning of consumer ADR entities in several Member States.

2.2. Quality of consumer ADR

2.2.1. Why it matters to consumers

Ensuring that the functioning and work of consumer ADR entities is of good quality is key to enhancing consumers' and traders' trust in, and their subsequent use of, ADR procedures. The 2013 Directive set out several quality requirements applying to consumer ADR entities. The objective was among others to promote their transparency and accountability, their sufficient expertise, and their independence (in particular to prevent situations of conflicts of interests which may arise when the ADR entity is funded or co-funded by traders or professional organisations). Importantly, these quality requirements were deliberately left broad and vague in the 2013 Directive as they had to accommodate all kinds of consumer ADR entities and procedures operating across the EU in a wide range of sectors. Member States were given some leeway to adapt the regulatory framework to their national needs. This led to significant differences in the quality of ADR entities between but also within the Member States.[15] Although the quality criteria of the 2013 Directive led to some improvements, they have been often insufficient to ensure a high quality of services and a levelled playing field across Europe.

[12] Proposal for a Directive amending Directive 2013/11/EU on alternative dispute resolution for consumer disputes, 17 October 2023.
[13] Proposal for a Regulation repealing Regulation (EU) No 524/2013 and amending Regulations (EU) 2017/2394 and (EU) 2018/1724 with regards to the discontinuation of the European ODR Platform, 17 October 2023.
[14] Recommendation on quality requirements for dispute resolution procedures offered by online marketplaces and Union trade associations.
[15] www.beuc.eu/position-papers/alternative-dispute-resolution-consumers-time-move-gear (June 2022).

In parallel, consumer ADR went through important technological developments in the past ten years, with notably the emergence of new platform providers proposing a new range of online dispute resolution services. Furthermore, an ever-growing number of ADR entities willing to decrease their operational costs have been relying on digital tools and other automated means to process and/or solve consumer complaints.

2.2.2. What the new initiative proposes

According to new article 5(2)(a), consumers should be given the possibility to submit their complaints and the supporting documents online in a traceable manner, but they may also submit these documents in a non-digital format upon request. In addition, a new article 5(2)(b) focuses on the necessity for vulnerable consumers to have access to ADR entities through an "easily accessible and inclusive tool". A new article 5(2)(c) grants consumers the right to request that the outcome of an ADR procedure be reviewed by a natural person whenever the procedure was carried by automated means. Finally, an amendment to article 7(2) makes the publication of activity reports by ADR entities compulsory on a biannual basis instead of every year, as it was the rule until now.

2.2.3. What the issues are

The decision to improve the accessibility to ADR entities for vulnerable consumers is a **welcome initiative** considering the growing number of ADR entities which have dematerialised their services, mostly to reduce their costs. It should be possible for consumers without digital skills to easily contact and reach out to an ADR entity whenever they experience a problem.

However, the proposal leaves the other quality requirements laid down in the 2013 Directive untouched, which is a **missed opportunity** to improve the current framework. As we highlighted in our 2022 position paper, the lack of independence and impartiality of several consumer ADR entities has been a source of concern in several Member States:

- Our member the Latvian Association for Consumer Protection (Patērētāju Interešu Aizstāvības Asociācija - LPIAA) has stressed that the requirements laid down in the 2013 Directive have been too low and have failed to ensure a sufficient level of independence for many ADR entities in Latvia. This is because Latvia has been relying mostly on "historical" ADR entities and several of them still do not fully comply with the quality requirements of the Directive.
- In France, our member UFC-Que Choisir and the *Comité Consultatif du Secteur Financier* have stressed several issues concerning the independence of ADR bodies in the banking sector.[16]
- Concerns have also been raised regarding the independence of the so-called in-house ADR entities**,** which are ADR entities employed or remunerated by individual traders (such as ADR entities embedded into big banks, as they exist in France).[17]
- In some Member States[18], consumer ADR entities do not comply with their transparency obligations and do not publish their activity reports.

Overall, the lack of perceived independence has had an impact on the level of trust among consumers and traders. In the United Kingdom, Which? has highlighted that a "consistent complaint from both businesses and consumers is that ADR bodies are in some way biased".[19] Yet the proposal does not take steps to enhance the transparency of ADR entities.

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[16] www.economie.gouv.fr/mediation-bancaire-assurantielle-propositions-amelioration-ccsf, 2 July 2021 .
[17] Art.2(2) of Directive 2013/11/EU gives to the Member States the possibility to have ADR entities where the natural persons in charge of the dispute resolution are employed or remunerated by the individual traders, provided that they complied with additional requirements ensuring their independence.
[18] www.beuc.eu/position-papers/alternative-dispute-resolution-consumers-time-move-gear (June 2022
[19] Which?, Are Alternative Dispute Resolution schemes working for consumers?, 2021, p. 7 www.which.co.uk/policy/consumers/7428/adrschemes.

Quite conversely, it proposes to reduce some transparency obligations and the amended article 7(2) proposes that ADR entities will from now on publish biannual reports about their activities (instead of yearly reports under the current rule).

Finally, we are concerned about the possibility for consumers to have their case fully handled by ADR entities' automated means, and this even though they may request a review of the outcome of the ADR procedure by a natural person. This new measure should be analysed in the context of article 22 GDPR (General Data Protection Regulation), which states that "the data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her". Article 22 GDPR is relevant when it comes to decisions by ADR entities as they may indeed produce legal effects on consumers. Under article 22 GDPR, consumers have the right not to be subject to automated decision-making. As also foreseen by article 22(2) GDPR, this rule may not apply in certain circumstances, and notably under the condition that consumers give their explicit consent.

2.2.4. Our propositions to move forward

The new initiative should be an opportunity to strengthen the quality requirements laid down in the 2013 Directive, and to strengthen the independence (and perceived independence) of ADR entities as well as their expertise. For example, in Denmark, consumer representatives take part in almost all complaints boards, and this has contributed to strengthening consumers' confidence in ADR.

We support better accessibility and increased protection for vulnerable consumers:

- We support article 5(2)(a) and (b) ensuring accessibility to ADR entities, including for consumers with no or limited digital skills.
- We propose to amend article 5(2)(c) also in light of article 22 GDPR: although ADR entities may use automated means to facilitate the processing of consumer complaints, ADR procedures and their outcomes should by default always be reviewed and placed under the responsibility of a natural person. Consumers should give their explicit consent whenever the ADR entities intend to use automated means to resolve their cases.

We support stronger requirements ensuring the independence, impartiality, and transparency of ADR entities:

- We propose to strengthen the quality requirements relating to the independence, impartiality, and transparency of ADR entities by:
  - Adding to article 6(3) a new (e) prohibiting to in-house ADR entities the possibility to use the software, database and other tools or information used or in the possession of the trader in which the ADR entity is embedded.
  - Strengthening and encouraging the participation of consumer organisations in the governance of ADR entities. In particular, an equal participation of consumer and traders' representatives at the board of ADR entities must be made mandatory.
  - Re-establishing article 7(2) in its previous version under the 2013 Directive to ensure that ADR entities publish yearly activity reports.

We support consumer ADR with stronger expertise and knowledge:

- We propose to amend article 6(1) to strengthen the expertise and knowledge requirements of the ADR entity's staff, in particular in the area of consumer law and other relevant sectorial legislation. Specifically, the staff of consumer ADR entities should be required to undergo annual training to ensure that their knowledge is continuously updated.

2.3. Material scope of consumer ADR

2.3.1. Why it matters to consumers

ADR can be an effective tool for consumers to obtain quick redress, in particular for low-value complaints where they have no incentives to vindicate their rights in court. However, the overall consistency and coherence of the consumer enforcement system should also be preserved to avoid confusing consumers and traders and jeopardising the actions of the different stakeholders involved (such as consumer protection authorities or consumer organisations).

2.3.2. What the new initiative proposes

The proposal makes significant changes concerning the material scope of consumer ADR, which under the 2013 Directive has been limited to contractual obligations stemming from sales or services contracts. The amended article 2 proposes a significant extension of the material scope of ADR to cover disputes related to:

- Contractual obligations stemming from sales contracts, including for the supply of digital content, or service contracts,
- Consumer rights applicable to non- or pre-contractual situations concerning:
    - Unfair commercial practices,
    - Compulsory precontractual information,
    - Geo-blocking practices,
    - Access to services and delivers,
    - Remedies in case of non-conformity of products or digital content,
    - Right to switch providers,
    - Passenger and traveller rights.

Furthermore, Member States would also be entitled to further extend the list above to add additional areas. Concretely, as regards unfair market practices, this would mean that consumer ADR entities could from now on deal with misleading greenwashing practices and that with the proposed rules, consumers will have the possibility to signal unfair market practices to ADR entities and ADR entities will have the possibility to approach traders to agree on remedies.

2.3.3. What the issues are

On the one hand, the overall objective of the proposal is laudable as it intends to facilitate a quick access to redress for consumers. This is important considering that consumers should always have an accessible pathway to exercise the rights that they have. On the other hand, as shown above, ADR is one of the existing enforcement pathways and consumer ADR entities are one of the stakeholders active in this area, together with consumer authorities or consumer organisations. To avoid confusion for consumers and traders and to preserve the coherence of the entire system, ADR should be carefully linked with the other pathways and the roles of other stakeholders and where relevant support public enforcement.

In addition, one must also consider the fact that national ADR architectures and ADR systems diverge significantly across the EU. For instance, the number of ADR entities operating in the Member States, the level of traders' and consumers' awareness and their use of ADR procedures, as well as the procedural rules and governance of ADR entities vary a lot across Member States.

More specifically:

- *Number of ADR entities:* some countries have a limited number of ADR entities in place. For example, Austria (or Belgium to some extent) has one ADR entity per regulated sector (e.g., energy, financial services, etc.) plus one residual ADR entity acting as a safety net where the other ADR entities are not competent. Conversely, other Member States have dozens of ADR entities. For instance, France counts approximately 94 ADR entities, which makes the French ADR landscape fragmented and difficult to navigate for consumers and traders. Similarly, the UK counts approximately 50 approved ADR schemes in the non-regulated sectors.
- *Structure of ADR entities*: the governance structure of ADR is also very diverse across Europe. Some countries have ADR systems composed equally of consumers and traders' representatives. Others have set up consumer ADR entities that have close links with sectorial regulators. Others have so-called "in-house ADR entities" which are "historic" ADR entities embedded into (and closely linked to) companies and banks.
- *Scope of ADR entities*: some ADR entities cover economic sectors in their entirety (e.g., financial ombudsmen in charge of all issues related to financial services, insurance, and banking) but in other sectors this coverage is fragmented, and several ADR entities operate in parallel or share the coverage of economic sectors. For example, in Spain or in France, consumers experiencing problems relating to financial services or insurance may have to address their complaints to different entities depending on the nature of their problems. In Belgium, the residual ADR entity (*Service de médiation pour le conformateur/Consumentenombudsdienst*) highlighted in its 2020 annual report that several ADR entities still propose partial sectorial coverage.[20]
- *Funding and financing:* the financing of ADR entities is also very different across countries. Some are paid by traders or traders' organisations, others receive public funding, while for others this is a combination of the two.
- *Overall effectiveness of ADR for consumers*: Finally, some ADR entities - like those operating for instance in the Nordic countries (Denmark, Sweden etc.) are most of the time performing well, are well-established and well-known by traders and consumers. Conversely, in other countries, ADR is still emerging and remains rarely used by consumers and traders.

For this reason and considering the different level of experience and role of ADR entities in the EU Member States, **a one-size-fits-all approach about the material scope of ADR** may be difficult to establish for all EU Member States, and a more granular approach considering the specificities existing at national level appears more appropriate.

This being said, on a broader level, several concerns may still be raised with regards to the proposed extension of consumer ADR to unfair commercial practices:

- **First, in such circumstances, consumer ADR might depart from dispute resolution to play a *de facto* market monitoring role potentially** undermining the coherence of the consumer protection system and paving the way towards a growing privatisation in the enforcement of consumer rights. So far, ADR has been thought to find solutions to private contractual disputes involving a consumer and a trader (e.g., issues concerning a purchase delivery). With the proposed changes, ADR would no longer only be about dealing with private matters since ADR entities will be able to handle unfair market practices, which also have a collective dimension and, as such, are also of relevance for all consumers. Such a market monitoring role is usually entrusted to consumer protection authorities, which also have the necessary enforcement powers.[21] The explanatory memorandum accompanying the proposal for

[20]https://mediationconsommateur.be/sites/default/files/content/download/files/cod-jaarverslag_2020-fr-def-lr_4.pd

[21] Powers of consumer protection authorities (CPC Authorities) are listed in EU Regulation 2017/2394 (CPC Regulation).

example provides that "the possibility of obtaining redress against greenwashing through ADR would reinforce the efforts of public consumer protection authorities and contribute to achieving the goals of the European Green Deal strategy".[22] Yet nothing is said about **the link to be established between this new role that would be given to consumer ADR entities and the one performed by the other relevant actors, in particular consumer authorities.** This could lead to overlaps between them, potentially jeopardising the work of authorities and creating a considerable risk of confusion for consumers who might expect from ADR entities the same results as the ones they would expect from authorities. Yet ADR entities have no enforcement powers to stop and sanction misleading practices.

- **Second, this evolution might go against the *modus operandi* and the core principles underlying consumer ADR in many Member States.**
    - ***Expertise, resources, and capacity of ADR entities***: the primary role of consumer ADR has been to find amicable solutions whenever a contract between a consumer and a trader has not been fulfilled. The contractual agreement is the core document upon which the ADR entity can mediate and try to find a solution to the dispute acceptable for the concerned parties. Consider now a situation where the consumer reaches out to an ADR entity to report an unfair commercial practice. In this situation, there is no longer a contract upon which the discussions can be organised. Conversely, the ADR entity will have to carry out potentially extensive and lengthy investigation on its own motion to assess whether the practices is indeed unfair. Considering that many ADR entities lack resources and expertise, it is likely that many of them will not have the capacity to conduct such in-depth analysis. Furthermore, since experience already shows that ADR entities in many countries already face difficulties to comply with the time limit set down by the 2013 Directive to solve cases,[23] it is likely that resolving additional – and probably more complex – cases will increase their workload and lead to additional delays.
    - ***Impartiality***: ADR is built on the premise that the ADR entity must solve cases between consumers and traders in an impartial manner.[24] Giving ADR entities the possibility to investigate unfair market practices could jeopardise this impartiality, or at least their perceived impartiality, in particular from the perspective of traders who as a consequence may be discouraged to participate in ADR procedures.
    - ***Confidentiality***: confidentiality of the ADR process is one of the key principles of consumer ADR.[25] It is often used by ADR entities to convince traders to start and take part in ADR procedures. However, confidentiality of ADR is no longer acceptable when it comes to unfair market practices, which are not private disputes but deal with issues affecting the functioning of markets as a whole with a relevance for all consumers. Such information should be brought to the attention of consumer protection authorities and not treated in a confidential manner.
    - ***Fairness*** : ADR entities sometimes decide to depart from the law to ground their decisions on fairness (i.e., what the ADR entity thinks is the right solution in a given situation). However, the use of fairness may not be acceptable when it comes to unfair market practices. Furthermore, depending on the legal

[22] Explanatory Memorandum accompanying the Proposal for a Directive amending Directive 2013/11/EU on alternative dispute resolution for consumer disputes, 17 October 2023.
[23] Article 8 of Directive 2013/11/EU (i.e. maximum 90 days. This period can be extended for more complex cases).
[24] Article of Directive 2013/11/EU.
[25] Recital 29 of Directive 2013/11/EU provides that "confidentiality and privacy should be respected at all times during the ADR procedure. Member States should be encouraged to protect the confidentiality of ADR procedures in any subsequent civil or commercial judicial proceedings or arbitration."

qualifications in the Member States, some unfair market practices may constitute criminal offences under national laws, making irrelevant the use of fairness by the ADR entities. Unfair commercial practices should not be subject to compromises or mediated outcomes as they touch upon public order and the fundamentals of consumer protection.

- **Third, this extension could trigger some confusion among consumers and traders**. In countries like for instance France with more than 80 ADR entities, consumers may have too many contact points to flag unfair practices. This could dilute market supervision instead of strengthening it.

2.3.4. Our propositions to move forward

The new proposal should promote the use of ADR while maintaining a coherent system for the enforcement of consumer protection rights. This could be done by limiting the extension of the scope of consumer ADR and by ensuring swift cooperation between the different actors involved in the enforcement of consumer rights. As ADR systems are different and operate in different ways across Europe, consideration should also be given to the respective role played by ADR domestically.

- *A reasonable extension of the material scope of consumer ADR under conditions*

The scope of consumer ADR should be extended to cover specific consumers' statutory rights for which access to redress has been lacking in practice, such as the right to switch providers (new article 2(1)(b)(vi), the right not to be subject to geo-blocking practices (new article 2(1)(b)(iii), and also include compulsory precontractual information (Art. 2 (1)(b)(ii), since the inclusion of the latter has been a source of uncertainty both for consumers and ADR entities in the past and led to delays in the resolution of complaints.

In some specific situations, some consumer ADR entities may be authorised to deal with unfair market practices themselves **under the following conditions**:

- First, they should be well-established ADR entities (e.g., sectorial ombudsmen) covering the relevant economic sector in its entirety, with a high level of independence as well as sufficient resources, funding, and capacity. Some of these ADR entities may also build on their close connections with the relevant market regulators. As we highlighted in our 2022 Position paper,[26] restructuring national ADR landscapes around a limited number of sectorial public entities could importantly strengthen the role of ADR in Europe.
- Second, the ADR entities should address unfair commercial practices only where they have caused a loss (material or immaterial) to the consumer.
- Third, the principle of confidentiality should not apply in such circumstances. In particular, the consumer ADR entity should in parallel inform the consumer protection Authority or relevant market regulators about the unfair practice brought to its attention.
- Fourth, the possibility for the ADR entity to apply fairness instead of the law should not be permissible when dealing with unfair commercial practices.

- *Better linking consumer ADR with the other enforcement pathways*

Article 17 of the 2013 Directive already provides that Member States shall ensure cooperation between ADR entities and national authorities entrusted with the enforcement of EU consumer rules. This provision states that this cooperation must (among other

[26] www.beuc.eu/position-papers/alternative-dispute-resolution-consumers-time-move-gear

things) include a mutual exchange of information on practices about which consumers have repeatedly lodged complaints. However, in practice, these exchanges of information have rarely taken place. Article 17 should be applied more systematically, and consumer ADR entities should report to their national Competent Authorities and/or consumer Authorities whenever consumers inform them about unfair commercial practices.

We support a reasonable extension of the scope of consumer ADR taking also into account national experiences with ADR:

- We propose to amend article 2 extending the material scope of consumer ADR to include:
  - Specific statutory consumer rights for which consumers' access to redress has been lacking in practice, such as the right to switch providers (art. 2(1)(b)vi) and the right not to be subject to geo-blocking practices (art. 2(1)(b)(iii).
  - Compulsory pre-contractual information (art. 2 (1)(b)(ii).

- We propose to amend article 2(1)(b)(i) and enable consumer ADR entities to address unfair commercial practices where the following cumulative conditions are met:
  1. The ADR entity is a well-established ADR entity (e.g., ombudsmen-like entity), covering the relevant economic sector in its entirety, with a high-level of independence as well as having the sufficient resources, funding, and capacity;
  2. The unfair practice has caused the consumer a loss (material or immaterial);
  3. The principle of confidentiality of ADR procedures does not apply. Specifically, the consumer ADR entity should simultaneously inform the relevant consumer protection Authority or relevant market regulator about the unfair practice brought to its attention by consumers; and
  4. The consumer ADR entity does not apply fairness instead of the law when dealing with unfair commercial practices.

We support better links between consumer ADR and the other consumer enforcement pathways:

- Article 17 of the 2013 Directive allowing for an exchange of information between ADR entities and consumer authorities should be applied more systematically. ADR entities should inform the Competent Authority and consumer Authorities/sectorial regulators whenever they are aware of systemic market problems.

- When they are informed about unfair commercial practices, the ADR entity should also inform and where relevant signpost consumers to the entity (consumer organisations, authorities, or others) which may be in the best position to assist them.

2.4. Geographical scope of consumer ADR

2.4.1. Why it matters to consumers

Consumers increasingly buy from non-EU traders. However, the latter do not currently fall within the scope of the 2013 Directive.

2.4.2. What the new initiative proposes

The initiative proposes to widen the geographical scope of consumer ADR. Specifically, amended article 5(1) introduces the possibility for traders established outside the EU to participate (on a voluntary basis) in ADR procedures. Member States will have an obligation to establish ADR entities to deal with such disputes between consumers and non-EU traders.

2.4.3. What the issues are

Third-country traders will remain free to select the ADR entity of their choice in the EU (as is the case for EU traders). As such, the proposal does not say that non-EU traders should sign up to an ADR entity located in the country where the trader sells its products or services. Therefore, the non-EU trader could decide to sign up to an Italian ADR entity to address complaints coming from German consumers. Furthermore, when dealing with non-EU traders, the ADR entities may have to deal with complex issues relating to applicable law, which will require specific expertise from the ADR staff. This also means that for the same professional and the same practice, the outcome for consumers who are domiciled in different countries could diverge due to a lack of harmonisation between those countries.

2.4.4. Our propositions to move forward

Although the objective of broadening the geographical scope of ADR to non-EU traders is positive and can facilitate access to redress for consumers, some additional steps should be taken to make this measure operational and consumer friendly. Non-EU traders should adhere to a consumer ADR entity in the country(ies) where they sell their services or products. There should also be a harmonisation of the ADR procedure to ensure that EU consumers are not treated differently because of their place of domicile.

We support an extension of the geographical scope of ADR to non-EU traders with additional requirements:

- We propose to amend article 5 to clarify that non-EU traders should adhere to a consumer ADR entity in the countr(ies) in which they sell their services or products.
- We propose to amend article 6 to strengthen the expertise of the consumer ADR's natural persons dealing with cross-border complaints, in particular their knowledge in private international law.
- We propose to harmonise ADR procedures for complaints relating to non-EU traders.

2.5. Traders' participation

2.5.1. Why it matters to consumers

The issue of traders' participation in consumer ADR covers two distinct but related issues:

(i) Traders' participation in ADR procedures, and

(ii) Traders' compliance with the outcome of such procedures.

- *Traders' participation in ADR procedures*

The 2013 Directive did not impose any obligation on traders to take part in ADR procedures. The possibility to make traders' participation compulsory was left to the Member States. As a result, the rules differ across Europe. In some countries (or sectors within the same country), traders' participation is mandated by law. For example, Portugal has made traders' participation in ADR mandatory in some specific sectors, and when disputes do not exceed €5,000. France requires all traders (regardless of their size) to adhere to an ADR entity of their choice. In other sectors/countries, traders' participation is made compulsory not by law but because the trader is part of a professional organisation making it mandatory for its members to sign up to an ADR body. In other situations, traders' participation remains voluntary. In 2019, the European Commission noted that "while overall traders' participation in ADR has slowly but steadily increased since 2014, currently only one in three retailers is willing to use ADR. This is clearly insufficient (…)".[27] The European Commission further stressed that "in a number of regions or retail sectors the ADR models currently offered yield only insufficient participation rates for traders".[28]

Mandatory participation in ADR procedures…

➢ *What the Court of Justice of the EU says:*

In its judgement *Menini and al. v Banco Popolare* (C-75/16) of 14 June 2017, the Court of Justice ruled that EU law does not preclude national legislation which provides that, in disputes involving consumers, mandatory mediation should take place before any court proceedings. As the court highlighted, "what is important is not whether the mediation system is mandatory or optional, but the fact that, as expressly laid down in the directive, the parties' right of access to the judicial system is maintained". Accordingly, the Court provides for several conditions reconciling mandatory ADR and effective access to courts.

➢ *What other EU instruments say:*

Art. 26(3) of Directive 2019/944 on common rules for the internal market for electricity: the participation of electricity undertakings in out-of-court dispute settlement mechanisms for household customers shall be mandatory unless the Member State demonstrates to the Commission that other mechanisms are equally effective.

[27] Report from the European Commission on the application of Directive 2013/11/EU, COM(2019)425 final, 25 September 2019, p. 10.
[28] *idem*

- *Traders' compliance with the outcomes of ADR procedures*

Likewise, the 2013 Directive left to the Member States the possibility to make the outcomes of ADR procedures binding on traders or not. In practice, traders' compliance rates have been differing a lot across Europe and depending on sectors. In Italy, Altroconsumo has stressed that traders' compliance rate tends to be generally high. Likewise, in Sweden, traders usually comply with the decisions of the General Complaints Board (*Allmänna reklamationsnämnden* - ARN). Conversely, in the UK, Which? has stressed that many traders still fail to comply with the outcomes of ADR procedures in several sectors. In Latvia, most ADR entities issue non-binding recommendations, and the overall compliance rate depends on the behaviour of traders and their willingness to cooperate. This situation tends to create some frustration among consumers who may have the feeling that they have wasted their time by taking part in the ADR procedure, which sometimes lasted several months.

2.5.2. What the new initiative proposes

As in the 2013 Directive, the new initiative does not make traders' participation in ADR mandatory. This option is again left to the Member States. However, it includes a new obligation (new article 5.8) for traders to respond within 20 working days to a request made by an ADR entity as to whether they plan to participate in an ADR process against them or not. The proposal does not indicate the consequence in case the trader does not respond to the ADR entity's request in due course.

2.5.3. What the issues are

- *Traders' participation in ADR procedures*

As shown in the figure below, there may be different configurations possible to envisage traders' participation in ADR procedures. Although it is important to trigger traders' participation in ADR procedures, it is also important to strike the right balance since insisting too much with reluctant traders could also lead to a waste of time and resources for both consumers and ADR entities. The gradual approach presented below foresees different options to increase traders' awareness and participation.

In practice, some ADR entities have already been relying on the granular approach presented above. For instance, although this is not prescribed in the French rules implementing the 2013 Directive, the French telecom ombudsman requests traders to provide explanations wherever they refuse to participate in the ADR procedure. The

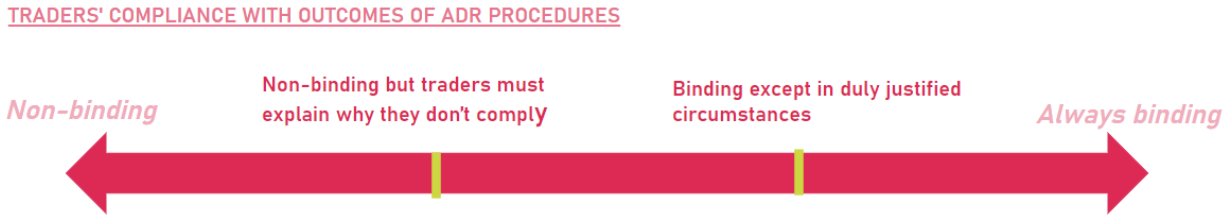
experience gained so far also tends to show that consumer ADR can yield higher results when traders are required to participate in the ADR procedures or must take part in information sessions about ADR. This allows traders (who initially may still be reluctant to start an ADR procedure) to progressively gain experience and help them increase their knowledge. Without this, many traders may continue to ignore consumer ADR as a possibility to address consumer complaints.

Today, ADR continues to remain voluntary in several sectors where consumers would need it the most and which are well-known for **yielding high numbers of consumer complaints.** This is the case for tourism and transport. In those sectors, private claims management companies have also been multiplying and propose to consumers possibilities to vindicate their rights against a fee. Consumers may turn to these costly options when they feel that they have no other possibility to access redress. For these sectors, this makes the need for mandatory traders' participation in ADR - which is free for consumers - even more pressing.

Finally, remarkably, the obligation laid down under new article 5(8) to respond within 20 working days to the request made by the ADR entity does not come with any sanction in case of non-compliance. Consequently, it will be up to the Member States (or potentially to the ADR entities directly) to decide on solutions when the national laws do not address the issue. For instance, some ADR entities may decide to "name and shame" the trader refusing to participate in the ADR procedure and/or failing to provide a reasonable justification. Alternatively, some national laws may impose fines on traders. It is most likely however that many will not foresee any consequences for not complying with the obligation foreseen under new article 5(8), making it ineffective in practice. Furthermore, the period of 20 working days means **a period of four weeks in total**, which is considerable for consumers considering that this will only be the very first step of the whole ADR procedure.

- *Compliance with the outcomes of ADR procedures*

Several configurations can be foreseen to incentivise traders to comply with the outcomes of ADR procedures:



In line with the above, some ADR entities or professional organisations have adopted techniques to incentivise traders to comply with the outcome of ADR procedures. For example, in the UK, some ADR entities (e.g., the Motor Ombudsman) rely on penalty point systems where traders may be expelled in case of repeated non-compliance with the outcome of the ADR procedures. Others use "naming and shaming" techniques. For example, the French financial ombudsman (Médiateur de l'AMF) and the French telecom ombudsman (Médiateur des télécommunications électroniques) have in the past disclosed in their annual reports the names of traders refusing to comply systematically with their recommendations. The Irish Financial Ombudsman may also 'name and shame' companies in its annual reports in situations where a financial service provider has been targeted by three or more complaints that have been upheld, upheld, or partially upheld in the preceding fiscal year. In Finland, the consumer affairs magazine cooperating with Kuluttajaliitto -Konsumentförbundet may list the names of the traders not complying with

the outcome of ADR procedures. Likewise, in Sweden, non-compliant traders may be put on a blacklist in the Swedish Consumer Association (Sveriges Konsumenter)'s magazine Råd & Rön. Before the publication of the list, the magazine contacts the traders and gives them a deadline to comply. Additionally, the risk of ending up on the blacklist increases the compliance rate with ADR outcomes and is key for the good functioning of the ADR system in Sweden. In Latvia, the Consumer Dispute Resolution Commission may put the traders failing to comply with its decisions within 30 days on a publicly available blacklist. Our Latvian member LPIAA then contacts the concerned traders, and where relevant, may communicate the information via different channels (i.e., social media, website, press release).

2.5.4. Our propositions to move forward

We propose to increase traders' participation in ADR procedures:

- We propose to amend article 5 to make traders' participation in ADR procedures mandatory at least in the sectors yielding high numbers of consumer complaints, such as in the area of transport and tourism.

- We propose to amend article 9 to introduce an obligation for traders to justify whenever they refuse to enter into an ADR procedure and to give the relevant Competent Authorities the possibility to review the justifications brought forward, and where possible, to impose sanctions when the reasons set forth by the traders are not justified.

- We propose to amend the new article 5(8) to:
  - Limit the period to ten working days (i.e., two weeks in total) instead of twenty working days (i.e., four weeks).
  - Complement this provision by either including a sanction whenever traders fail to respond to the request of the ADR entity to participate in the ADR procedure within the set period, or alternatively, by providing that the failure to respond within the given period shall be considered as traders' tacit consent to participate in the ADR procedure.

We propose to promote traders' compliance with the outcomes of ADR procedures:

- We propose to amend article 9 to request ADR entities to report traders systematically refusing to comply with the outcomes of ADR procedures to the Competent Authorities.
- We propose to amend article 9 so that the Competent Authorities publicly disclose the names of traders who systematically refuse to comply with the outcomes of ADR procedures.

2.6. Supervision of consumer ADR

2.6.1. Why it matters to consumers

The consumer ADR Directive left to the Member States the possibility to decide on their oversight models for ADR entities.[29] Some Member States have established one Competent Authority in charge of supervising ADR bodies across all sectors. For example, France has one Competent Authority (known as the *Commission d'Evaluation et de Contrôle de la Médiation de la Consommation* - CECMC) whose role is to certify and monitor all consumer ADR entities operating in France. The secretariat of the CECMC is run by the French consumer Authority (*Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes* - DGCCRF). Other countries have established several Competent Authorities. This is, for example, the case in the UK, Italy, or Spain where a network of Competent Authorities oversees ADR entities depending on the sector where the ADR entities operate. To conduct their supervision over the activities of ADR entities, Competent Authorities often relies on the documentation and information issued by the ADR entities (annual reports and other documentation).

The oversight of ADR entities has raised two main concerns:

(i) The first one regards **the way the oversight is structured at national level**. It is noteworthy that gaps in the supervision of ADR entities are likely to occur when this task is assigned to several Competent Authorities acting in parallel and applying different standards. For example, the UK counts eight Competent Authorities supervising ADR bodies, but all have taken quite different approaches to this role.

(ii) The second issue regards **Competent Authorities' effective control over the ADR entities** (during the certification process and after, during the ongoing monitoring of their activities). In some countries or sectors, ADR entities are closely monitored and their ongoing compliance with the quality requirements are regularly assessed. For example, Sveriges Konsumenter highlights that certified ADR entities in Sweden may see their certification revoked by the Board of Appeal when they do no longer comply with their obligations. In France, the CECMC has de-registered some ADR entities failing to comply with the quality requirements laid down in the legislation. Yet in other countries, this supervision is still missing. The lack of Competent Authorities' resources may often explain this situation. In the UK, Which? has noted that "the CTSI, which is the competent Authority for ADR bodies in non-regulated sectors has significantly few resources and powers to oversee a much larger number of schemes".[30]

2.6.2. What the new initiative proposes

The proposal does not change the structure and powers of national Competent Authorities. New article 19(3) proposes to remove some reporting requirements currently imposed on consumer ADR entities. In particular, ADR entities will no longer have to communicate to Competent Authorities' information about the training provided to their staff nor an assessment of the effectiveness of the ADR procedure offered by the entity and of possible ways of improving their performance.

[29] Art. 18 and seq. of Directive 2013/11/EU.
[30] Which? Are Alternative Dispute Resolution schemes working for consumers? (Policy Report 2021), p. 6, www.which.co.uk/policy/consumers/7428/adrschemes.

2.6.3. What the issues are

Reporting obligations are fundamental and allow competent authorities to supervise the work of ADR entities. In most cases, the effective monitoring of ADR entities' activities relies on the documentation that the ADR entities produce. Instead of being regarded as an administrative burden, they should trigger an active and ongoing dialogue between the Competent Authority and the ADR entity with the intent to improve the services proposed to consumers and traders.

2.6.4. Our propositions to move forward

To improve the supervision of consumer ADR entities:

We propose to strengthen the supervision of ADR entities and the role of Competent Authorities

- We propose to amend article 19 to maintain all the reporting requirements applying to ADR entities as foreseen under the 2013 Directive. This documentation is an important source of information for Competent Authorities allowing them to perform their supervisory duties.
- We propose to complement article 18 to specify that:
  - (1) Member States should ensure that Competent Authorities have the necessary resources and capacity to perform their tasks and duties.
  - (2) The natural persons working for Competent Authorities should be impartial and independent from the ADR entities that they supervise.
- We propose to complement article 20(2) to request Competent Authorities to conduct regular checks into the functioning and activities of the certified ADR entities.
- We propose to amend article 20(6) to require Competent Authorities to make publicly available their annual reports summarising their activities and recommendations to ADR entities.

2.7. Recommendation for online marketplaces and union trade associations

2.7.1. Why it matters to consumers

Several online marketplaces have set up internal complaint-handling mechanisms. However, these services are post-sales customer services and may not offer the same quality of services as the ones proposed by independent ADR entities.

In parallel, EU Regulation 2022/206 (the Digital Services Act – DSA) has established rules concerning notice-and-action mechanisms, statements of reasons, internal complaint-handling mechanisms (article 20) and requires online marketplaces to also sign up to independent out-of-court dispute resolution entities complying with several quality requirements (article 21).

2.7.2. What the recommendation says

The Recommendation provides that online marketplaces or Union trade associations providing dispute resolution services should apply the same quality criteria as those set

out in the 2013 Directive. This intends to ensure (*inter alia*), the expertise, independence, impartiality of the natural persons in charge of the dispute resolution procedures, as well as the effectiveness and fairness of their procedures.

2.7.3. What the issues are

The dispute resolution services provided by online marketplaces are post-sales customers services. Their nature and functioning are different from those provided by independent consumer ADR. Although the objective of improving the quality of services they offer to consumers is positive, it must also be clear for consumers that **such services are not and cannot be considered as equal or equivalent to consumer ADR.** the recommendation 10 provides that "online marketplaces and Union trade associations inform consumers and traders, prior to the start of the dispute resolution procedure, about key elements and procedural rules applied, such as languages used, documentation needed, average duration, possible costs. They should also clearly state the grounds on which they may refuse to deal with a given dispute". However, nothing is said about the availability of consumer ADR and the link between the traders' internal complaint handling mechanism and consumer ADR. In practice, it is likely that many consumers will be confused by the role played by such internal complaint-handling mechanisms and their articulation with consumer ADR. Furthermore, the Recommendation contributes to maintaining this confusion. For instance, its recommendation 3(b) states that, when using the marketplaces and union trade association's complaint-handling procedures, the parties should be informed that they are not obliged to retain a lawyer or a legal advisor, but they may seek independent advice or be represented or assisted by a third party at any stage of the procedure.

The Recommendation is also silent about the mandatory participation of online marketplaces in consumer ADR procedures. This tends to contrast with the rules laid down in article 21 of the DSA stating that recipients of services provided by online platforms "shall be entitled" to select any ADR entity of their choice, that parties "shall engage in good faith" with the selected ADR providers, and that the provider of the online platforms may refuse to engage with such out-of-court procedures on limited grounds. Although consumer complaints submitted under the 2013 Directive may be of a different nature than those submitted to out-of-court dispute resolution bodies under the DSA, the out-of-court technique remains the same each time. Therefore, there is no valid reason to justify why online marketplaces should not also be required to participate in good faith in consumer ADR procedures.

2.7.4. Our propositions to move forward

Consumers should be clearly informed about the nature of the services proposed by online marketplaces, which are mostly post-sale customer services. Consumers should also be informed expressly that they have the right to submit their complaint to an ADR service provider which will independently review their complaints. The online marketplaces should be requested to adhere to the ADR entity in line with the requirements set out in the DSA.

We propose to stress the distinction between online marketplaces' complaint-handling mechanisms and consumer ADR to ensure that consumers are not misled between the two:

- We propose to amend recommendation 10 to clarify that online marketplaces and union trade associations should clearly inform consumers that their complaints-handling procedures are not equivalent to independent ADR and that consumers retain the possibility to refer their complaints to an independent ADR entity.

- We propose to amend recommendation 8 to ensure compliance with article 22 GDPR (see our proposition above on p.10 on this point).

The Recommendation should follow the rules on out-of-court dispute resolution for online marketplaces set down in the Digital Services Act.

- In particular, we propose to make the participation of online marketplaces in consumer ADR procedures mandatory.

2.8. Information and assistance to consumers

2.8.1. Why it matters to consumers

Studies have shown that in many European countries, consumers are still insufficiently informed about the services proposed by consumer ADR entities. This results in low take-up rates in many Member States. Some ADR entities have been active in the field to reach out to consumers, particularly those living in more disadvantaged neighbourhoods.[31] This is key as research conducted in several countries tends to show that well-educated, middle-aged, and middle-class consumers remain the ones who are the most likely to be well-informed about ADR. As Which? has noted, "the age, income, and educational profile of people using ADR suggest that more should be done to reach younger, low-income groups with lower educational qualifications".[32]

2.8.2. What the new initiative proposes

The initiative proposes some measures to facilitate consumers' assistance and information. The new article 14 proposes to establish "ADR contact points" at national level. These contact points will be established by the Member States who may confer this responsibility to their European Consumer Centres (ECC), and where not possible, to consumer organisations or any other body dealing with consumer protection. The role of contact points will be to assist consumers and traders in cross-border (and potentially domestic) ADR processes by, for example, providing machine translation, signposting consumers to

[31] For example, in October 2023, the main Belgian ombudsmen organised an "Ombudstour" across Belgium to present their services and what they have to offer directly to consumers on the ground (https://www.ombudsman.be/fr/node). Similar events also took place in other countries in the past (e.g. "Ombudsvan" in the UK.

the competent ADR entity, explaining the procedures, or assisting with the submission of complaints etc.

2.8.3. What the issues are

- *Information to consumers*

The European Commission conducted a behavioural study to accompany the publication of the new proposal.[33] It intended to explore the impact of disclosure of ADR information to consumers by traders and ADR entities. Interestingly, one of its conclusions was that "ADR information on traders' website should be salient and separated from other information" and that "ADR information should not be confined to traders' terms and conditions". Yet these recommendations are not fully reflected in the proposal which does not amend art.13(2) on traders' information obligations.[34]

- *Assistance to consumers*

Many of the tasks conferred to the new "ADR contact points" will be tasks previously assigned to the so-called "ODR contact points" under the 2013 Directive, many of which were hosted by ECCs (European Consumer Centre). Conversely to the previous article 14 (2) of the 2013 Directive (which stated that Member States could confer this responsibility on their ECCs, on consumer organisations, or on any other body), the new article 14(2) restricts the choice of the Member States, as they must confer this responsibility to their ECCs, "or if not possible", to consumer organisations or any other body dealing with consumer protection.

2.8.4. Our propositions to move forward

The information and assistance of consumers during ADR procedures should be strengthened to incentivise consumers to use ADR procedures. Specifically:

[33] https://op.europa.eu/en/publication-detail/-/publication/e93a7d75-6c97-11ee-9220-01aa75ed71a1/language-en (October 2023).

[34] Recommendations made at national level (like for instance in Germany) are in line with this proposition In Germany, the Conference of German Consumer Protection Ministers unanimously decided that there should be a separate "Consumer Dispute Resolution" tab on the websites and that Art.13 (2) should be amended accordingly (https://www.verbraucherschutzministerkonferenz.de/documents/ergebnisprotokoll-19-vsmk_oeffentlich_18-07-2023_1689678836.pdf, page 28).

We propose to improve consumer information:

- We propose to amend article 13(2) to request traders to clearly inform consumers about the ADR entity covering their activity. This information should be provided in a salient way and be clearly separated from other information available on traders' websites.

We propose to enhance assistance to consumers:

- We propose to amend article 14(2) to re-adopt the wording previously used under article 14(2) of the 2013 Directive enabling Member States to decide whether they want to confer the responsibility of the ADR contact points to ECCs, consumer organisations or to any other relevant body.
- We propose to clarify that consumer organisations may help consumers during ADR procedures.

2.9. Bundling consumer complaints

2.9.1. Why it matters to consumers

In some circumstances, several consumers may contact an ADR entity about the same or similar problems coming from the same trader. The multiplication of complaints may lead to significant delays in the processing of individual cases and can be detrimental for the resources of ADR entities. For cost-effective reasons and to ensure consistency between the treatment of the consumer complaints, it may be relevant to bundle them. In practice, some ADR entities have already been bundling consumer cases to save resources.

2.9.2. What the new initiative proposes

New article 5(2)(d) introduces a possibility for ADR entities to bundle similar cases concerning the same trader. The concerned consumers must have the possibility to object to such bundling.

2.9.3. What the issues are

Although relevant for cost-efficiency reasons, the bundling of consumer complaints raises several concerns:

- First, the fact that an ADR entity receives many similar consumer complaints against the same trader may be the sign of a wider systemic problem and, where relevant, this should also be brought to the attention of the consumer protection Authority or relevant market regulator. Yet the confidentiality of ADR procedures may render this information to authority difficult, if not impossible in practice.
- Second, when bundling consumers cases, ADR entities will *de facto* be structuring mass claims. Yet many ADR entities are not equipped nor have the necessary resources nor expertise to do so. Only a specific type of ADR entities, namely sectorial ADR entities (e.g., ombudsmen) may have the sufficient expertise and resources to do such bundling (and in practice, these sectorial ombudsmen have been the ones so far bundling consumer complaints, e.g. this has notably been the case for ombudsmen in the energy or in the financial sectors).

- Third, the bundling of claims may, in some circumstances at least, undermine a fast resolution of consumer complaints, which is yet one of the core attributes of consumer ADR.
- Fourth, the bundling of cases by ADR entities raises the question of its link and articulation with the rules on representative actions laid down in Directive 2020/1828 (the Representative Actions Directive – RAD) and the role of qualified entities eligible to bring representative actions (in some Member States, consumer ombudsmen may be entitled to bring representative actions).[35] Furthermore, Directive 2020/1828 also provides that the Commission must draw up a report – if appropriate, accompanied by a legislative proposal – to assess whether cross-border representative actions could be best addressed at Union level by establishing a European ombudsman for representative actions for injunctive measures and redress measures.
- Fifth, in some circumstances, alternative techniques others than the bundling of individual claims might be more effective, less costly, and less time-consuming. For instance, ADR entities could also use "model cases" technique where one case is resolved and then serves as a blueprint for all related or similar cases. In some cases, this may be a fastest solution than bundling complaints. These alternative techniques are yet not considered in the proposal.

2.9.4. Our propositions to move forward

Although the bundling of consumers cases may be justified for cost reasons, it should be limited to specific circumstances and take place under some conditions.

We propose to introduce the possibility for ADR entities to bundle consumer complaints under the following conditions:

- We propose to amend article 5(2)(d) giving ADR entities the possibility to bundle cases under the following cumulative conditions:

1. The ADR entity has the sufficient knowledge, capacity, and expertise to deal with the case;
2. Concerned consumers are informed and expressly agree with the bundling;
3. The ADR entity is obliged to inform the concerned consumer about the – where applicable - possibility to contact a consumer organisation or another entity eligible to bring representative actions pursuant to Directive 2020/1828, in particular where there is a representative action planned or already ongoing against the same trader with regard to the same issue; and
4. Where relevant, the ADR entity simultaneously informs the consumer protection Authority and/or relevant market regulator.

[35] This has been the case for instance in Belgium where the residual ADR entity (*Service de mediation pour le consommateur*) can start collective redress actions pursuant to the Belgian legislation preceding the national transposition of the Representative Actions Directive. At the time of concluding this position paper (December 2023), Belgium had not yet transposed the Representative Actions Directive.

2.10. New EU digital platform expected to replace the EU ODR Platform

2.10.1. Why it matters to consumers

Regulation 524/2013 (the ODR Regulation) set up an online platform hosted by the European Commission (the EU "ODR platform"). It covers consumer disputes arising out from the online purchases of products or services. The ODR platform has been available to the public since 15 February 2016. In July 2017, the platform was also made accessible for disputes involving consumers and traders from EEA (European Economic Area) states. The ODR platform intended to serve as a single point of entry for consumers and traders. More specifically, the EU ODR Platform has been working as a referral system to all the ADR bodies certified across Europe. Yet, notwithstanding its name, the ODR platform does not intend to "resolve" complaints but rather serves as a match-making platform putting consumers and traders in relation with an ADR entity. More than five years after its launch and despite the technical changes brought to the platform,[36] the ODR platform has been underused on average across Europe.

2.10.2. What the initiative says

The Commission proposes to discontinue the ODR platform. Instead, new article 20(8) says that the Commission must develop and maintain a digital interactive tool that provides general information on consumer redress and links to the webpages of the notified ADR entities. This tool is also expected to facilitate the signposting of consumers to ensure that when they are looking for information on how to solve their dispute, they can rapidly get an answer on the best ADR entity to contact for their case.

2.10.3. What the issues are

The goal and functionality of the new tool are not specified, and the proposal remains unclear about the new tool. In parallel, it is noteworthy that some Member States have recently been developing their own digital tools to inform consumers at national level. This is notably the case of Belgium, which has announced the launch a new online platform called "ConsumerConnect".[37] This raises the question of: (1) the link between the tool developed at the EU level and the ones already existing in the Member States and; (2) the objective that the new tool intends to pursue. Instead of a multiplication of tools serving similar purposes, the different tools should be complementary.

[36] in July 2019, the European Commission reviewed the ODR platform and introduced a new functionality called "direct talk" allowing consumers and traders to settle their dispute bilaterally directly on the ODR platform.
[37] https://news.belgium.be/fr/creation-de-la-plateforme-numerique-pour-les-consommateurs-consumerconnect

2.10.4. Our propositions to move forward

We propose to further reflect on the purpose and design of the new digital tool announced by the European Commission and expected to replace the ODR platform as well as to include consumer organisations and other relevant stakeholders during that process:

- We propose that the Commission further clarifies:
  - The purpose of the tool,
  - Information about its roll-out and design,
  - Its different functionalities,
  - Its articulation with possible tools pre-existing (or being developed), in particular in the Member States.

- We advise the Commission to engage with consumer organisations, ECCs and other relevant stakeholders at the very early stages of the development of the new tool to build on their experience.

2.11. Other issues not addressed in the legislative proposal

The Consumer ADR Directive provided for several rules to facilitate consumers' accessibility to ADR entities. It allowed Member States to make ADR procedures free of charge or to impose a nominal fee, for example. France and Spain made consumer ADR compulsorily free of charge for consumers (this is also the case in Czech Republic, Lithuania, and Finland). In Slovakia, fees for consumers are limited to €5. In Denmark, fees by the Danish residual entity may amount to DKK 100 (approximately €13) and between DKK 150 to DKK 500 (approx. €20-€67) in other areas.

The Directive also provided that the outcomes of ADR procedures should be issued within a period of 90 days from the date on which the ADR entity has received a complete complaint file, except in complex cases.

In practice however, several hurdles continue to limit consumers' effective access to ADR.

A first one regards the costs of ADR procedures. **Fees may deter consumers from bringing their complaints to ADR entities**, especially when the amount of the complaint at stake is already low, or when the complaint is brought by financially vulnerable consumers. In the UK, the CMA (Competition and Markets Authority) highlighted that "reducing barriers to participation in ADR schemes, for example ensuring they are zero or below cost and that accessibility and advice are prioritised, may be helpful in improving participation for vulnerable consumers".[38]

[38] CMA, Reforming Competition and Consumer Policy, Driving growth and delivering competitive markets that work for consumers, (4 October 2021): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1022615/Reforming_Competition_and_Consumer_Policy_publication_4.10.21.pdf , p. 67

Another accessibility issue regards the length of the ADR procedure. In some countries/sectors, consumers still must wait for a long time (if not an exceedingly long time) before the outcome of the ADR procedure. For example, the Finnish Consumer Disputes Board dealt with approximately 5,400-6,100 complaints in the period 2018-2019. In 2018, the time it needed to reach an outcome was 13.2 months on average and sometimes up to two years. Such a long waiting time may discourage many consumers (especially when the value of their complaint is already low) and may deter them from using ADR again. Art.8(e) of the Consumer Directive provides that "the outcome of the ADR procedure is made available within a period of 90 calendar days from the date on which the ADR entity has received the complete complaint file". However, the problem is that the Consumer ADR Directive does not clearly define what a "complete complaint" is under Art. 8 of Directive 2013/13/EU. ADR entities are thus free to decide when they consider a complaint to be "complete". When ADR entities describe their activities, they usually use various methodologies when it comes to indicating the "average length" to solve complaints. Hence the information conveyed may be misleading and may give to consumers an erroneous idea of the time needed to solve a dispute. For example, figures from AviationADR in the UK suggest that the ADR entity takes an average of 76 days to complete a case. However, information provided in a review conducted on behalf of the CAA show that in 2019 it took the ADR entity an average of 50 days from a complaint being made to the full file being received. Therefore, from the point of view of the consumer the average time cases took was more like 126 days, rather than the initially announced 76 days.[39]

We propose to further simplify and clarify the ADR process:

- By clarifying what a "complete complaint" means according to article 8(e) of the 2013 Directive and clarify that the time given to an ADR entity to solve a complaint start the moment consumers have sent their complaint to the ADR entities.
- By requiring Competent Authorities to check that ADR entities respect the legal timeframe set down in the Directive for delivering the outcomes of the ADR procedures.

[39] Which?, *Are Alternative Dispute Resolution Schemes working for consumers?,* Policy Report April 2021, www.which.co.uk/policy/consumers/7428/adrschemes.

Also on the topic:

BEUC, Consumers should always have access to alternative dispute resolution in energy, but do they?, April 2023

BEUC, Alternative Dispute Resolution for consumers: Time to move up a gear, June 2022

BEUC, Strengthening the coordinated enforcement of consumer protection rules , December 2022.

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