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Recommendations from academic research regarding future needs of the EU framework of the consumer Alternative Dispute Resolution (ADR) (JUST/2020/CONS/FW/CO03/0196)

Executive Summary

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1. Scope (Article 2)

Scholars across multiple jurisdictions advocate in favour of extending the scope of application of the Directive in order to consistently protect European consumers irrespective of the dispute concerned. The Directive should also cover unfair commercial practices and other non-contractual disputes, as well as B2C proceedings, extending its quality standards to all disputes arising from consumer contracts.

Conversely, the positions on the inclusion of SMEs within the definition of 'trader' are more nuanced. On the one hand, it is believed that businesses – especially small and micro ones – would benefit from more accessible ADR procedures. On the other hand, it has been observed that some SMEs do not give origin to many disputes,[1] and appointing an ADR entity may be excessively burdensome to them. Therefore, some authors suggest that the latter should be excluded from the scope of the Directive according to criteria yet to be defined.

The implementing legislation of most Member States covers all out-of-court procedures, except those ADR entities where the natural persons in charge of dispute resolution are employed or remunerated exclusively by the trader, although with significant differences among the Member States.[2] However, as the Directive only applies to certified ADR entities, there is the risk that non-certified ADR entities operating in the market may disregard the quality standards as set by the Directive, with negative repercussions on consumer perception of ADR in general.

In conclusion, it is a general concern that the minimum harmonisation approach of the Directive may not secure a coherent and consistent approach to consumer ADR across the Union.

[1] For instance bakeries, greengrocers' and butchers' shops.

[2] France and Germany exclude arbitration from the scope of their implementing legislations, while France covers in-house mediators under the legislation thereof.

2. Access (Article 5)

Consumer ADR is often the only realistic and viable option for consumers to seek redress. Scholars indicate two main profiles to simplify consumer access to ADR: improving the redress design and reducing the number of active ADR entities.[3]
Firstly, the submission of claims should be simple, both online and offline, especially where consumers are unfamiliar with digital tools, and all the relative information should be provided in plain language. Particularly in cross-border cases, the whole procedure should be delivered in the consumer's language, whereas ADR entities can now restrict the language in which they process disputes, which generally is the trader's. On top of that, to correctly identify the ADR entity competent for the case, the scope of such entities should be clearly defined, their grounds for refusal limited by law, and consumers should be able to initiate the procedure through a single access point acting as the front office of all ADR entities.[4]
As for the second profile, the doctrine is generally critical of competitive models where many entities operate in the same sectors since that leads to consumer confusion and complicates monitoring activities. On the contrary, they recommend the introduction of horizontal or sectoral residual entities, which ensure full business-coverage,[5] sided by a few highly specialised and authoritative ADR entities.
Scholars also highlight the importance of counterweighting the cost of uncertainty on consumers by providing them with more tools for self-assessing their case, such as delivering prior advice on the merits. Some authors endorse a proactive role of ADR entities, which should provide step-by-step guidance to consumers, even when they do not qualify as vulnerable ones.
The position of vulnerable consumers has not been adequately addressed, although national legislation may compensate for such void, and more critical voices point out that the Directive adopts unrealistic consumer standards, as the voluntary nature of the ADR proceeding, together with the limited information available, make ADR accessible only to knowledgeable individuals.

3. Requirements (to ADR entities and ADR procedures)

The Directive aimed at granting consumers access to high-quality ADR across the Union and within all business sectors. For this purpose, the Directive introduced horizontal quality requirements to ADR entities and ADR procedures and provided for a certification process of ADR entities and oversight of ADR procedures by the competent national authorities. Scholars contend, however, that the Directive has not fully achieved its purpose, since the quality of consumer ADR is uneven across the Union and consumers are granted varying degrees of protection when they settle their C2B disputes out-of-court. Therefore, scholars advocate for higher harmonised quality requirements, as well as a stronger certification process and more accurate monitoring by competent authorities. They argue that this is necessary to increase consumer protection but also to induce consumers' trust in ADR entities and ADR procedures.

[3] A high number of complaints is dismissed at the early stage of the procedure because they are incomplete or directed to the wrong entity.
[4] As in Belgium.
[5] In practise, there are significant differences in access to ADR across the Member States and the different economic sectors.

a. Expertise, independence and impartiality (Article 6)

As regards ADR entities, it is argued that increasing the expertise, independence, and impartiality of the natural persons in charge of ADR procedures is of utmost importance.
First, scholars suggest flexible yet more solid expertise of the latter. It is stressed that, even if the dispute is solved out-of-court, mandatory consumer law must not be disregarded. Besides, the expertise should be tailored to the type of dispute and the type of ADR scheme the entity offers, hence in many cases the 'general understanding of the law' may not suffice. Especially in cross-border disputes and when ADR procedures end with binding outcomes, a deeper knowledge of consumer law is desirable. This can increase the accuracy of the findings and enhance speedier outcomes. It is also suggested to reinforce training requirements along the lines of what the Directive recommended, also by entrusting the competent authorities with the supervision of the training programs. In addition, the importance of communication and conflict management skills is recognised, as these elements are both decisive for the acceptance of the outcome.
Second, scholars unanimously advocate for more impartial and independent ADR entities. They find that consumers and traders perceive ADR entities as biased against them. Consumers' concerns mainly regard non-public ADR entities and ADR entities funded by traders. Conversely, traders perceive ADR entities as 'consumer agencies'. To enhance the integrity of the persons in charge of ADR procedures, hence parties' trust in ADR, additional guarantees should be introduced. Scholars particularly emphasise the following elements: strict eligibility requirements, sufficient duration of the mandate, an equal representation of traders and consumers within the board of ADR entities, and a stronger supervisory role of competent authorities when ADR entities are organised or funded by traders or trade associations.

b. Transparency (Article 7)

Transparency also plays a paramount role in enhancing parties' confidence in ADR procedures. The more information the parties have at their disposal, the less the uncertainty of the outcome will be a deterrent to resorting to an ADR procedure. Scholars find, however, that ADR entities are not fully transparent, and do not always comply with the transparency requirements as established by the Directive. ADR entities have different policies on the publication of their activities' reports and on the display of information such as the average length of the procedure, the trending issues consumers face, and the recommendations on how to avoid disputes in the future. Scholars suggest, *inter alia*, the following best practices: the publication of the previous decisions and the rate of acceptance of proposed solutions, the consistency of decision making and the alignment of ADR outcomes with judgments, the intelligibility of the outcomes, and explanation of their legal effects. It is also crucial that ADR entities communicate updates and feedback on the status of the complaints, so consumers can evaluate whether to drop the case, seek redress via other means, or consult their lawyer. Scholars also advocate for better communication between ADR entities and competent authorities. ADR entities should also communicate relevant information to competent authorities, for example when traders systematically refuse to collaborate in ADR procedures and should put in place 'black lists' for the 'naming and shaming' of the latter.

c. Effectiveness (Article 8)

It is argued that the effectiveness of ADR procedures depends on their accessibility (e.g., fees at a minimum) and on their expediency. As regards fees, scholars find that these are mainly borne by traders and their extent generally fluctuates depending on the dispute, the business sector concerned and the service offered by the ADR entity. It is contended that the funding structure of ADR procedures hinders the traders' willingness to cooperate: in countries where business participation is not mandatory, they complain of having to bear the costs of the ADR procedure, whereas when smaller fees are charged on traders they register higher participation rates and are more collaborative. Therefore, it is suggested to keep the costs at a minimum, for both consumers and traders.

Regarding the expediency of ADR procedures, scholars find that this is far from being achieved, even in the Nordic countries. While the Directive requires ADR entities to make available their decision within 90 days, counting from when they have received the complete complaint, the Directive does not define when a complaint should be considered 'complete'. Additionally, the Directive allows this period to be extended at the discretion of the ADR entity in face of 'complex' disputes. Scholars advocate for more clarity in the definitions of 'complete complaints' and 'complex disputes'. They also encourage the Commission to introduce further requirements that could intensify the predictability of the duration of the ADR procedures, and stronger monitoring carried out by the competent national authorities of the compliance with the 90 days requirement.

d. Fairness (Article 9)

Scholars' views on the fairness of ADR procedures are polarised. Many advocate that fair ADR outcomes depend on the role of the adversarial principle within ADR procedures. They emphasise the parties' need to be heard and their willingness to proactively participate through the exchange of documents. Conversely, other scholars argue that the participation and information of the parties in ADR procedures should be enhanced only insofar as it is not detrimental to the expediency of the procedure. Therefore, a compromise should be sought: ADR procedures should allow for the participation of the parties where necessary to rebalance information asymmetries since this is found crucial in the finding of a fair amicable solution. The Directive already intends fair outcomes as those which best satisfy the parties, and not necessarily as law-oriented outcomes. It is contended, however, that this 'fairness' sometimes allows the natural persons in charge of the ADR procedure to enjoy too much creativity. This 'freedom' left to ADR entities undermines the parties' need for predictability, hence the parties' perception of the fairness of the procedure. It is find, however, that this perception is triggered by factors that are specific to the culture in the relevant Member State. In some Member States parties tend to value more formal procedures,[6] while in other Member States parties are not necessarily more satisfied by law-oriented procedures.[7]

[6] e.g., Germany.

[7] e.g., Italy and the UK are examples of jurisdictions where equity-oriented procedures are appreciated.

e. Liberty (Article 10)

As regards liberty, the trader's mandatory participation in ADR proceedings and the binding nature of its outcomes are closely intertwined.
Business participation rates are generally low across all sectors and Member States. However, residual ADR entities seem to experience the worst participation rates. Scholars agree on the need to take measures to encourage business participation, but the debate is ongoing as to whether to prefer 'carrots' or 'sticks'. Mandatory participation has worked effectively for ADR entities in Italy, the Netherlands and Greece, especially in those sectors where the consumer-trader imbalance is more explicit.[8] On the other hand, convincing traders of the added value of ADR would be preferable, but has proven difficult in practice. Further incentives could include making the first ADR procedure free for the trader, adopting name and shame techniques against traders who refuse to join ADR schemes, or introducing court sanctions.[9]
Business compliance is fairly high (around 90%); however, this data might be influenced by the low level of business participation. In order to increase business compliance, decisions could be made binding on traders and, under specific circumstances such as low-value claims or the provision of consent, also on consumers. Softer measures include offering guarantees from trade associations,[10] and name and shame techniques.

f. Legality (Article 11)

The legality requirement ensures that consumers receive the protection granted to them under national and EU secondary law regardless of the law applicable to their case.
The most controversial aspect of the legality requirement is that it does not apply to non-binding outcomes, although, as ADR is often the only viable option to obtain redress, the factual difference between binding and non-binding decisions is small. Such a distinction is deemed detrimental to consumer protection and to the levelling of the playing field across the EU.
Furthermore, the Directive does not clarify how to guarantee compliance of the decisions issued with the legality requirement. Some authors suggest that competent authorities should examine sample decisions delivered by ADR entities, while others want to introduce forms of judicial review.
The picture is further complicated with regard to cross-border cases because the Directive and the Rome I Regulation provisions are not aligned, and ADR entities often lack knowledge about mandatory consumer laws of Member States other than their own.

[8] e.g., telecommunications, energy.
[9] The court could impose higher court fees on traders who do not collaborate for settling the dispute at an earlier stage, or request them to attempt pre-litigation mediation.
[10] This is the case in the Netherlands.

4. Information (Articles 13 - 15)

Raising awareness about consumer ADR is a major concern of the European legislator. Here traders play a crucial role, and the Directive correctly requires them to signpost consumers to the ADR entity they are affiliated with, although there is no analogous obligation to communicate the peculiarities and benefits of ADR. Scholars agree that pre-contractual information is less effective than that provided once problems arise or when internal complaint handling systems fail to solve them, thus the provision introducing information duties once the C2B relationship deteriorates is the most significant of the Directive. On the other hand, authors are concerned that laying such information duties also on traders unwilling to join ADR proceedings could harm consumer trust.
The quality of the information is essential, as well as its visibility, and information should preferably be tailored to consumers' features, especially vulnerable consumers'.
Consumer assistance is still dissatisfactory in cross-border disputes, where the ECC Network impact appears marginal, and the language barrier is still the main obstacle to effective consumer ADR.

5. Cooperation (Articles 16 - 17)

The Directive encourages cooperation between ADR entities through national and cross-border networks. A single access point encourages such exchange in the Member States where it is in place, but these exchanges may also arise spontaneously. Sector-specific networks promote the professionalisation and specialisation of ADR entities, as well as the exchange of best practices.
Secondly, ADR entities should cooperate with public enforcement authorities as they are in the best position to collect data about market (mis)behaviours, particularly sectoral ombudsmen, which are indicated as the most appropriate scheme to collect large volumes of data in a given economic sector. These authorities could build on such knowledge to deliver collective redress, and again ombudsmen could lead collective ADR.
Scholars encourage a more proactive role of ADR entities, which should also provide consumers with recommendations and guidelines in order to prevent the problems detected.
Thirdly, cooperation should go both ways, and public enforcement authorities should promote compliance with ADR outcomes among traders by investigating reasons for non-compliance and providing fast-track enforcement paths.

6. Competent national authorities (Articles 18 - 20)

All Member States[11] appointed existing bodies as their competent authorities, organising them either according to a horizontal or a vertical system. In the latter case, the hierarchy and degree of cooperation and coordination among sectoral competent authorities vary across Member States, thus the vertical model has been criticised as leading to fragmentation. The proposed solutions range from imposing the horizontal approach, with one competent authority acting as the contact point and supervising all ADR entities, to strengthening the hierarchical bonds in vertical systems.

As for their tasks, the Directive gives the competent authorities much leeway. They certify ADR entities, but it is unclear to which extent they should examine the compliance with the criteria as set in the Directive, as such criteria may be quite broad[12]. The same holds for the subsequent monitoring tasks. Most competent authorities base their supervision on the annual activity reports of the ADR entities and the complaints from traders and consumers, whereas it is uncertain to what extent they have to gather information themselves.

7. Link between the ADR Directive and the ODR Regulation (Recital 12)

The EU ODR platform has been created to facilitate access to consumer ADR, therefore its effectiveness largely depends on the implementation of the Directive.

The distinction between the two is increasingly blurred, and scholars suggest different ways for ADR and ODR to improve one another. For instance, the quality standards set in the Directive should be extended to ODR systems in order to make them more fair and trustworthy in the eyes of consumers. Also, the ODR Regulation should impose cooperation duties on ODR entities to build on big data. On the other hand, ADR entities should improve their presence online and incorporate new technologies, which could also be employed to overcome the language barrier in cross-border disputes.

Secondly, all practical obstacles to the proceedings should be removed to better coordinate ADR and ODR, from providing easily accessible links to the EU ODR platform and simple complaint forms to ensure the interoperability of the systems.

Regarding the role ODR platforms should play, scholars are not unanimous. Some believe they should merely provide information and direct consumers, while others highlight the importance of the ‘direct-talk’ function allowing negotiations between the consumer and the trader. Even more, some authors praise the use of automatic negotiation in delivering computer-based solutions to address repetitive small-value claims.

[11] Except for France.

[12] e.g., the nominal fee.