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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)

Prof. dr. Stefaan Voet

Sofia Caruso

Anna D'Agostino

Stien Dethier

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Introduction

Directive 2013/11/EU on alternative dispute resolution for consumer disputes (hereafter: Directive) aims to ensure EU consumers access to high-quality ADR to resolve their disputes arising from the sale of goods or services. The measure belongs to a set of legislative and non-legislative tools aiming to (re)enforce substantive consumer rights, thus improving consumers' trust in the internal market. By regulating consumer ADR procedures, the EU aims to improve consumers' access to justice through a simple, efficient, fast and low-cost dispute resolution method, which is deemed more suitable to deal with low-value claims than in-court proceedings.¹ The Directive covers both domestic and cross-border consumer-to-business disputes throughout the EU.

The Directive adopts a minimum harmonisation approach, establishing minimum requirements for ADR entities to be certified by national authorities of the Member States. Such entities must be accessible to consumers, also vulnerable ones, and respect the principles of expertise, independence, impartiality, transparency, effectiveness, fairness, liberty and legality. National competent authorities must verify these requirements at the certification stage and monitor them on an ongoing basis. Additionally, Member States may demand more stringent requirements to protect consumers' interest better.

However, Member States must establish all the other aspects concerning the nature of such ADR entities and the type of procedures they offer. Across the EU, ADR entities may be public or private bodies closely connected to traders and trade associations, and they may have sectoral or general competence. The procedures vary from consumer arbitration to mediation or ombudsman schemes, which may deliver binding or non-binding outcomes. In most countries, ADR proceedings are voluntary, at least for consumers, although many adopt sector-specific provisions that make business participation mandatory.

The European approach to consumer rights enforcement allocates consumer disputes to a network of extrajudicial entities, both public and private. Some authors doubt this system will compensate for the inefficiencies of justice in the courts in dealing with the increase in consumer disputes.² Eidenmüller and Engel believe this to be a 'detrimental development' of consumer rights protection, side-lining State courts and privileging efficiency over judicial scrutiny and the observance of due process standards.³ In the eyes of the authors, it is outright contradictory to leave the enforcement of consumer rights, aimed to correct market failures, to private bodies acting according to the same market logic. Such ADR entities operate outside of the procedural safeguards of the court system, and they do not necessarily have elevated legal competencies, features that may ultimately frustrate the enforcement of the sophisticated EU consumer law apparatus. Silberzahn proves to be more moderate and, although she does not believe

¹ Caroline Cauffman, 'Critical Remarks on the ADR Directive' in Caroline Cauffman and Jan M Smits (eds), *The Citizen in European Private Law: Norm-setting, Enforcement and Choice* (Intersentia 2016).

² Alessia Fachechi, 'Alternative Dispute Resolution Regulation: A Work of Modern Art' (2019) 5 *Italian Law Journal* 293, 302.

³ Horst Eidenmüller and Martin Engel, 'Against false settlement: Designing efficient consumer rights enforcement systems in Europe' (2014) 29 *Ohio State Journal on Dispute Resolution* 261, 261-262.

privatisation always leads to better service, she suggests evaluating the ADR model upon consumer satisfaction to determine whether privatisation is a suitable strategy.⁴

The development of consumer ADR has been profoundly affected by national legal cultures, leading to very diverse results.⁵ Consequently, while adopting a minimum harmonisation approach enabled the measure to encompass such a variegated picture, it also raised some criticism about the potential of the Directive to secure a fully coherent and consistent approach to consumer ADR across the EU.⁶ For these reasons, it is especially relevant to consider the peculiarities of Member States and how they implemented the Directive in their legal system.

This academic report will especially focus on Belgium, France, Germany, Italy and the Netherlands.

⁴ Cathrin Silberzahn, *Die ADR-Richtlinie als neuer Weg der verbraucherrechtlichen Konfliktmittlung* (Universität Würzburg, 2016), 127.

⁵ Naomi Creutzfeldt and Christopher Hodges, 'Consumer Dispute Resolution (CDR) in Europe' (2014) 2 *Nederlands-Vlaams tijdschrift voor mediation en conflictmanagement* 29.

⁶ Sébastien de Brouwer, 'Financial dispute resolution in Europe and the European network FIN-NET' (2020) *DBF-BFR* 16.

1. Scope

a. Temporal scope

Article 25

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 9 July 2015. They shall forthwith communicate to the Commission the text of those provisions.

The Directive was published on 21 May 2013, and it has been applied since 8 July 2013. The Member States had to bring into force the laws, regulations and administrative provisions necessary to implement it by 9 July 2015, but most of them missed the deadline. The Commission initiated 16 infringement procedures, all of which were closed upon notification of complete implementation of the Directive.⁷

b. Geographical scope

Article 2

Scope

1. This Directive shall apply to procedures for the out-of-court resolution of domestic and cross-border disputes concerning contractual obligations stemming from sales contracts or service contracts between a trader established in the Union and a consumer resident in the Union through the intervention of an ADR entity which proposes or imposes a solution or brings the parties together with the aim of facilitating an amicable solution.

Article 4

Definitions

1. For the purposes of this Directive:

- (a) ‘consumer’ means any natural person who is acting for purposes which are outside his trade, business, craft or profession;*
- (b) ‘trader’ means any natural persons, or any legal person irrespective of whether privately or publicly owned, who is acting, including through any person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession;*
- (c) ‘sales contract’ means any contract under which the trader transfers or undertakes to transfer the ownership of goods to the consumer and the consumer pays or undertakes to pay the price thereof, including any contract having as its object both goods and services;*

⁷ European Commission, ‘Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes (ADR Report)’ COM (2019) 425 final.

- (d) *'service contract'* means any contract other than a sales contract under which the trader supplies or undertakes to supply a service to the consumer and the consumer pays or undertakes to pay the price thereof;
- (e) *'domestic dispute'* means a contractual dispute arising from a sales or service contract where, at the time the consumer orders the goods or services, the consumer is resident in the same Member State as that in which the trader is established;
- (f) *'cross-border dispute'* means a contractual dispute arising from a sales or service contract where, at the time the consumer orders the goods or services, the consumer is resident in a Member State other than the Member State in which the trader is established;
- (g) *'ADR procedure'* means a procedure, as referred to in Article 2, which complies with the requirements set out in this Directive and is carried out by an ADR entity;
- (h) *'ADR entity'* means any entity, however named or referred to, which is established on a durable basis and offers the resolution of a dispute through an ADR procedure and that is listed in accordance with Article 20(2);
- (i) *'competent authority'* means any public authority designated by a Member State for the purposes of this Directive and established at national, regional or local level.

2. A trader is established:

- if the trader is a natural person, where he has his place of business,
- if the trader is a company or other legal person or association of natural or legal persons, where it has its statutory seat, central administration or place of business, including a branch, agency or any other establishment.

3. An ADR entity is established:

- if it is operated by a natural person, at the place where it carries out ADR activities,
- if the entity is operated by a legal person or association of natural or legal persons, at the place where that legal person or association of natural or legal persons carries out ADR activities or has its statutory seat,
- if it is operated by an authority or other public body, at the place where that authority or other public body has its seat.

Article 5

Access to ADR entities and ADR procedures

2. Member States shall ensure that ADR entities:

- (e) *accept both domestic and cross-border disputes, including disputes covered by Regulation (EU) No 524/2013.*

The Directive applies to all out-of-court procedures concerning contractual disputes initiated by a consumer against a trader. The consumer needs to be a resident in the EU and. The trader needs to have its statutory seat, central administration or place of business in the EU.

National ADR entities must cover the disputes addressing traders established in their respective territories, thus they must accept both domestic and cross-border disputes.

c. Material scope

c.1. Sales and services contracts

Recital 13

This Directive should not apply to non-economic services of general interest. Non-economic services are services which are not performed for economic consideration. As a result, non-economic services of general interest performed by the State or on behalf of the State, without remuneration, should not be covered by this Directive irrespective of the legal form through which those services are provided.

Recital 14

This Directive should not apply to health care services as defined in point (a) of Article 3 of Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare (6).

Recital 16

This Directive should apply to disputes between consumers and traders concerning contractual obligations stemming from sales or services contracts, both online and offline, in all economic sectors, other than the exempted sectors. This should include disputes arising from the sale or provision of digital content for remuneration. This Directive should apply to complaints submitted by consumers against traders. It should not apply to complaints submitted by traders against consumers or to disputes between traders. However, it should not prevent Member States from adopting or maintaining in force provisions on procedures for the out-of-court resolution of such disputes.

Article 2

Scope

2. This Directive shall not apply to:

(a) procedures before dispute resolution entities where the natural persons in charge of dispute resolution are employed or remunerated exclusively by the individual trader, unless Member States decide to allow such procedures as ADR procedures under this Directive and the requirements set out in Chapter II, including the specific requirements of independence and transparency set out in Article 6(3), are met;

(b) procedures before consumer complaint-handling systems operated by the trader;

(c) non-economic services of general interest;

(d) disputes between traders;

(e) direct negotiation between the consumer and the trader;

(f) attempts made by a judge to settle a dispute in the course of a judicial proceeding concerning that dispute;

(g) procedures initiated by a trader against a consumer;

(h) health services provided by health professionals to patients to assess, maintain or restore their state of health, including the prescription, dispensation and provision of medicinal products and medical devices;

(i) public providers of further or higher education.

The Directive applies to ADR procedures concerning contractual obligations arising from sales or services contracts. However, article 2 of the Directive lists a number of contracts for which its provisions do not apply, namely contracts for the sale of

property, tenancy agreements and those concerning services generally provided by the State or on its behalf, such as non-economic services of general interest, health services and public further or higher education.

BEUC, the European consumer organisation, recommended broadening the scope of the Directive to unfair commercial practices (UCPs) arising in the extracontractual sphere.⁸ This would be in line with article 11(a) of the Directive 2005/29/EU on unfair commercial practices,⁹ which provides that ‘consumers harmed by unfair commercial practices shall have access to proportionate and effective remedies’. Indeed, it can be argued that consumer ADR may constitute an accessible and effective remedy against UCPs.¹⁰

Non-contractual disputes may also arise from damage due to an error or negligence¹¹ or from the violation of pre-contractual obligations.¹² According to Loos and De Coninck, an amendment expanding the scope of the Directive to the subjects thereof would be desirable to consistently protect consumers who are part of these disputes by covering them with all of the quality standards set by the Directive.¹³ If not, the ADR entities in charge of their cases could present insufficient guarantees of impartiality and expertise, which could ultimately be detrimental to the enforcement of consumer rights in the internal market.¹⁴

⁸ BEUC, ‘BEUC Preliminary List of Issues to Consider When Revising the Regulatory Framework for Consumer ADR/ODR in Europe’ (Position paper) (February 2022) <<https://www.beuc.eu/publications/beuc-preliminary-list-issues-consider-when-revising-regulatory-framework-consumer/html>>, 3.

⁹ Introduced with the Directive 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules [2019] OJ L 328/7 (Omnibus Directive).

¹⁰ BEUC, ‘BEUC Preliminary List of Issues to Consider When Revising the Regulatory Framework for Consumer ADR/ODR in Europe’ (Position paper) (February 2022) <<https://www.beuc.eu/publications/beuc-preliminary-list-issues-consider-when-revising-regulatory-framework-consumer/html>>, 3.

¹¹ Hans De Coninck, ‘Europese voorstellen voor een alternatieve en een online geschillenregeling’ (2012) 94 DCCR 184.

¹² Sabine Bernheim-Desvaux, ‘La Transposition de La Directive 2013/11/UE Du 21 Mai 2013 Relative Au Règlement Extrajudiciaire Des Litiges de Consommation (RELC) Par l’ordonnance N° 2015-1033 Du 20 Août 2015’ (2015) *Contrats Concurrence Consommation* 5, 7 and Pablo Cortés, ‘The New Landscape of Consumer Redress’ in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016).

¹³ Hans De Coninck, ‘Europese voorstellen voor een alternatieve en een online geschillenregeling’ (2012) 94 DCCR 184 and Marco BM Loos, ‘Enforcing Consumer Rights through ADR at the Detriment of Consumer Law’ (2016) 1 *European Review of Private Law* 61, 69.

¹⁴ Marco BM Loos, ‘Enforcing Consumer Rights through ADR at the Detriment of Consumer Law’ (2016) 1 *European Review of Private Law* 61, 69.

Country-specific remarks

In **France**,¹⁵ the amicable settlement of consumer disputes only applies to those concerning the ‘performance’ of the contract.¹⁶ Such a phrasing leads to doubt whether disputes related to the formation of the contract or the failure to comply with pre-contractual duties, such as consumer information obligations, are excluded.¹⁷ Also, the notion of ‘non-economic services of general interest’ covering all services which are not performed for remuneration (recital 13) would exclude from the scope of the Directive the activity of several French mediators,¹⁸ while others would lie in a grey zone as it is not clear whether their activity is considered remunerative or not.¹⁹

In **Germany**,²⁰ the implementing legislation applies to all disputes arising from consumer contracts, thus including those concerning immovable property.²¹ Certified ADR entities can also deal with other kinds of civil disputes – except for labour ones – as long as their main field of activity is consumer contracts.²²

c.2. Nature of the ADR scheme

Recital 17

Member States should be permitted to maintain or introduce national provisions with regard to procedures not covered by this Directive, such as internal complaint handling procedures operated by the trader. Such internal complaint handling procedures can constitute an effective means for resolving consumer disputes at an early stage.

Recital 20

ADR entities are highly diverse across the Union but also within the Member States. This Directive should cover any entity that is established on a durable basis, offers the resolution of a dispute between a consumer and a trader through an ADR procedure and is listed in accordance with this Directive. This Directive may also cover, if Member States so decide, dispute resolution entities which impose solutions which are binding on the parties. However, an out-of-court procedure which

¹⁵ *Ordonnance no 2015-1033 du 21 août 2015 relative au règlement extrajudiciaire des litiges de consommation* (JO 21 août), implementing the Directive in French law; *Décret n° 2015-1382 du 30 octobre 2015 relatif à la médiation des litiges de la consommation* (JO 31 octobre), creating a new section of the Consumer Code (*Titre V Livre I du Code de la consommation – Médiation des litiges de la consommation*).

¹⁶ Article L. 151-1 *Code de la consommation*.

¹⁷ Sabine Bernheim-Desvaux, ‘La Transposition de La Directive 2013/11/UE Du 21 Mai 2013 Relative Au Règlement Extrajudiciaire Des Litiges de Consommation (RELC) Par l’ordonnance N° 2015-1033 Du 20 Août 2015’ (2015) *Contrats Concurrence Consommation* 7.

¹⁸ Such as the national Employment Agency Mediator (*Médiateur National Pôle Emploi*), and the Mediator of the Ministries of Finance and Economy (*Médiateur des ministères économiques et financiers*). See Emmanuel Guinchard, ‘The Implementation of the Consumer ADR Directive in France’ in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 160.

¹⁹ For instance, the Mediator of the Tenant of Paris-Habitat OPH, which provides housing at less than market costs.

²⁰ *Bundesgesetzblatt Jahrgang 2016 Teil I Nr. 9, ausgegeben am 25.02.2016, Seite 254 Gesetz zur Umsetzung der Richtlinie über alternative Streitbeilegung in Verbraucherangelegenheiten und zur Durchführung der Verordnung über Online-Streitbeilegung in Verbraucherangelegenheiten* (VBSG).

²¹ Rosa Miquel, ‘The implementation of the consumer ADR directive in Germany’ in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 180.

²² *ibid.*

is created on an ad hoc basis for a single dispute between a consumer and a trader should not be considered as an ADR procedure.

Recital 21

Also ADR procedures are highly diverse across the Union and within Member States. They can take the form of procedures where the ADR entity brings the parties together with the aim of facilitating an amicable solution, or procedures where the ADR entity proposes a solution or procedures where the ADR entity imposes a solution. They can also take the form of a combination of two or more such procedures. This Directive should be without prejudice to the form which ADR procedures take in the Member States.

Recital 22

Procedures before dispute resolution entities where the natural persons in charge of dispute resolution are employed or receive any form of remuneration exclusively from the trader are likely to be exposed to a conflict of interest. Therefore, those procedures should, in principle, be excluded from the scope of this Directive, unless a Member State decides that such procedures can be recognised as ADR procedures under this Directive and provided that those entities are in complete conformity with the specific requirements on independence and impartiality laid down in this Directive. ADR entities offering dispute resolution through such procedures should be subject to regular evaluation of their compliance with the quality requirements set out in this Directive, including the specific additional requirements ensuring their independence.

Recital 23

This Directive should not apply to procedures before consumer-complaint handling systems operated by the trader, nor to direct negotiations between the parties. Furthermore, it should not apply to attempts made by a judge to settle a dispute in the course of a judicial proceeding concerning that dispute.

Article 2

Scope

4. This Directive acknowledges the competence of Member States to determine whether ADR entities established on their territories are to have the power to impose a solution.

The Directive covers ADR procedures such as mediation, conciliation, arbitration, ombudsman procedures, and complaint boards, irrespectively of their given name. On the other hand, direct negotiation between the consumer and the trader is excluded, as well as internal complaint handling procedures operated by the trader. It is left up to national legislators to decide whether to extend the harmonised requirements as set out in the Directive to ADR entities where the natural persons in charge are employed or remunerated exclusively by the trader. Judicial settlements also fall outside of the scope of the Directive.

At the time of the transposition in national law, most Member States recognised all types of out-of-court procedures as possible ADR procedures under the Directive. At the same time, they did not make use of the option provided for in article 2(2)(a) to include ‘entities where the natural persons in charge of dispute resolution are employed or remunerated exclusively by the individual trade.’²³

²³ Commission, ‘Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes (ADR Report)’ COM (2019) 425 final, 5-6.

The Directive is only applicable to disputes resolved through the intervention of a certified ADR entity complying with the requirements set by articles 6-10 (see *infra* 3). As a consequence, ADR entities that do not comply with the definition of the Directive fall outside of the scope of the Directive, and Member States are not obliged to ensure they meet such minimum quality standards, unless legislators have expanded the scope of the transposed Directive to cover non-certified bodies. Several authors express their concerns that these entities will still be able to operate in the ADR market in the form of unfair competition against certified entities,²⁴ unless there is an effective way for consumers to assess the differences between the two (see *infra* 3.c).

The Directive may apply to both binding and consensual proceedings. It is left up to the Member States to determine whether the ADR entities established in their territories have the power to propose or impose a solution.

Country-specific remarks

In **France**, consumer arbitration falls out of the scope of the provisions. The French model heavily relies on in-house mediators, although public Ombudsmen play an important role in the key sectors of energy and finance.

In **Germany**, the ADR system is of recent introduction and is still patchy.²⁵ The Directive applies only to ADR schemes that do not impose a binding solution on the parties nor prevent the consumer's right to access the court, thus excluding arbitration schemes from the scope of application of the transposed legislation. Such a choice attracted criticism, as the dispositions protecting consumers do not apply to arbitration procedures that see their participation.²⁶ Consequently, the number of cases handled via consumer arbitration is feared to face an increase in a country where there is no tradition of consumer ADR.²⁷

Similarly, the **Italian** legislator opted for a hybrid solution,²⁸ deciding not to certify ADR entities with adjudicative powers on consumers but allowing those imposing a solution on the trader. Hence ADR entities can offer hybrid proceedings, which have different effects on each party.²⁹

The Italian Consumer Code also covers so-called 'joint negotiations', namely those procedures handled by company conciliators, provided that they comply with criteria

²⁴ For instance, by offering lower fees to the traders. See Marco BM Loos, 'Enforcing Consumer Rights through ADR at the Detriment of Consumer Law' (2016) 1 *European Review of Private Law* 61, 72.

²⁵ Naomi Creutzfeldt and Christopher Hodges, 'Consumer Dispute Resolution (CDR) in Europe' (2014) 2 *Nederlands-Vlaams tijdschrift voor mediation en conflictmanagement* 29.

²⁶ Rosa Miquel, 'The implementation of the consumer ADR directive in Germany' in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 180.

²⁷ *ibid.*

²⁸ *D.lgs. 6 agosto 2015, n. 130, Attuazione della direttiva 2013/11/UE sulla risoluzione alternativa delle controversie dei consumatori, che modifica il regolamento (CE) n. 2006/2004 e la direttiva 2009/22/CE (direttiva sull'ADR per i consumatori) (GU n.191 del 19-08-2015).*

²⁹ Carlo Pilia and Paolo Vargiu, 'The Implementation of the Consumer ADR Directive in Italy' in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 222.

of independence and transparency.³⁰ Additionally, Italy introduced peer-to-peer dispute resolution methods. They have been elaborated by consumer associations and traders or trade associations, and provide for schemes that businesses agree *ex ante* to resort to in the event of a dispute.³¹

In Italy, the integration of public and private enforcement of consumer rights is still developing and sometimes redundant. D'Alessandro and Marchese express their concern that the complex interplay between multiple actors and enforcement techniques may fail adequate consumer protection.³²

The **Netherlands** can count on a longstanding tradition of encouraging settlements rather than using adversarial dispute resolution processes.³³ However, the traditional Dutch approach relied mostly on the self-regulation of ADR entities, especially in mediation,³⁴ hence the Dutch legislator decided not to apply the Directive criteria to in-house ADR.³⁵

c.3. Collective ADR

Recital 27

This Directive should be without prejudice to Member States maintaining or introducing ADR procedures dealing jointly with identical or similar disputes between a trader and several consumers. Comprehensive impact assessments should be carried out on collective out-of-court settlements before such settlements are proposed at Union level. The existence of an effective system for collective claims and easy recourse to ADR should be complementary and they should not be mutually exclusive procedures.

The Directive does not deal with collective redress, nor has it been amended after the entry into force of the Directive (UE) 2020/1828 on representative actions for the protection of the collective interests of consumers (RAD). At the moment, the only explicit link between the two is article 2 of the RAD, which states that qualified entities must have a legitimate interest in protecting consumer interests as provided for in (several provisions among which) the Directive. However, it would be important to

³⁰ Gina Gioia, 'L'uniforme regolamentazione della risoluzione alternativa delle controversie con i consumatori' (2018) 1 *Revista Ítalo-española de Derecho procesal* 3, 19.

³¹ *ibid.* and European Parliament, 'Resolution of 25 October 2011 on alternative dispute resolution in civil, commercial and family matters' INI (2011) 2117.

³² Chiara Antonia D'Alessandro and Claudia Marchese, *Ius dicere in a globalized world: a comparative overview*, vol 2 (Roma Tre-Press 2018) 688.

³³ Naomi Creutzfeldt and Christopher Hodges, 'Consumer Dispute Resolution (CDR) in Europe' (2014) 2 *Nederlands-Vlaams tijdschrift voor mediation en conflictmanagement* 29.

³⁴ Albertha Harma Santing-Wubs, 'Twee Europese voorstellen voor de alternatieve beslechting van consumentengeschillen: een ADR-richtlijn en een ODR-verordening' (2012) 4 *Tijdschrift voor civiele rechtspleging* 109 and Eline Verhage, 'The Implementation of the Consumer ADR Directive in the Netherlands' in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016).

³⁵ *Wet van 16 april 2015 tot implementatie van de Richtlijn 2013/11/EU van het Europees Parlement en de Raad van 21 mei 2013 betreffende alternatieve beslechting van consumentengeschillen en tot wijziging van Verordening (EG) nr. 2006/2004 en Richtlijn 2009/22/EG en uitvoering van de Verordening (EU) nr. 524/2013 van het Europees Parlement en de Raad van 21 mei 2013 betreffende onlinebeslechting van consumentengeschillen en tot wijziging van Verordening (EG) nr. 2006/2004 en Richtlijn 2009/22/EG (Implementatiewet buitengerechtelijke geschillenbeslechting consumenten).*

better coordinate the two pieces of law in order to determine what body is in the best position to decide over a number of similar cases and to avoid possible competing decisions.

c.4. *Ratione personae*

Recital 18

The definition of ‘consumer’ should cover natural persons who are acting outside their trade, business, craft or profession. However, if the contract is concluded for purposes partly within and partly outside the person’s trade (dual purpose contracts) and the trade purpose is so limited as not to be predominant in the overall context of the supply, that person should also be considered as a consumer.

The Directive applies to ADR schemes initiated by a consumer against a trader. However, such a restrictive notion of the personal scope of the Directive may ultimately be detrimental to consumers themselves.

According to Schulte-Nölke, the very notion of ‘consumer’ is an artificial label attributed to the parties to the process, ultimately resulting in protection gaps affecting those who do not formally qualify as consumers but should be equally entitled to consumer protection. That is the case in sectors such as telecommunication, data protection and payment services, where the same *ratio* adopted to justify consumer protection applies to users of such services. In Schulte-Nölke’s opinion, the further development of EU consumer law is likely to be more inclusive. In the future, the quality guarantees offered by the Directive may cover ADR mechanisms in general, irrespectively of the qualification of its beneficiaries.³⁶

In order to effectively protect consumers with all the guarantees offered by the Directive, Loos is favourable to extending its scope to business-to-consumer disputes. Whenever a Member State opens ADR procedures to traders’ claims against consumers, that Member State is not required to ensure that the harmonised quality requirements of the Directive also apply to such procedures, despite the obvious need to protect consumers from the partiality of the ADR entity and lack of expertise of the persons adjudicating the case also under these circumstances.³⁷

Taking a step further, business mediation could be included in the scope of the Directive,³⁸ as ADR schemes could efficiently respond not only to consumers’ needs, but also to SMEs’³⁹. However, Hodges remarks that SMEs have failed to comply with the obligations set by implementing legislations, primarily because of a lack of awareness of ADR’s beneficial effects on their businesses and the costs of the

³⁶ Hans Schulte-Nölke, ‘The Brave New World of EU Consumer Law—Without Consumers, or Even Without Law?’ (2015) 4 *Journal of European Consumer and Market Law* 135, 138.

³⁷ Marco BM Loos, ‘Enforcing Consumer Rights through ADR at the Detriment of Consumer Law’ (2016) 1 *European Review of Private Law* 61, 69.

³⁸ Sabine Bernheim-Desvaux, ‘Règlement extrajudiciaire et règlement en ligne des litiges de consommation’ (2014) 95 *L’observateur de Bruxelles* 16 and Hans De Coninck, ‘Europese voorstellen voor een alternatieve en een online geschillenregeling’ (2012) 94 *DCCR* 184.

³⁹ Christopher Hodges, ‘Developments and Issues in Consumer ADR and Consumer Ombudsmen in Europe’ (The Foundation for Law, Justice and Society 2019) 8.

procedure, which fall entirely on the trader.⁴⁰ The costs of appointing a mediator and the mediation procedure itself are perceived as excessive, especially by those small professionals who do not generate many disputes in their ordinary activity.⁴¹ These conditions result in a lack of business coverage,⁴² constituting a *vulnus* to consumer protection as SMEs count for up to 99% of EU businesses.⁴³ Ensuring full business coverage is especially difficult in those Member States that did not make ADR compulsory⁴⁴ or where there is no residual ADR entity,⁴⁵ and ultimately struggle to attract SMEs to join any ADR scheme.

In order to solve this issue, one option could be to radically exclude SMEs from the scope of the Directive. Nevertheless, this solution is not yet allowed under the Directive, which does not indicate any criteria to exempt small or even micro-businesses from joining ADR schemes.⁴⁶ However, it is undeniable that some differences exist among SMEs, which could justify differences in policies.

Country-specific remarks

France struggles to ensure that ADR entities are in place in all economic sectors.⁴⁷ Despite their legal obligations, not all professions have established an ADR scheme. Especially in sectors such as the automotive and construction industries and in regulated professions (notaries, lawyers and architects in particular), consumers are deprived of the possibility to resort to ADR entities offering guarantees of independence and impartiality.⁴⁸ Others, such as bakers, butchers, and greengrocers, have not appointed consumer mediators because they regard it as such an excessive burden compared to the amount of disputes that may arise from their activities.⁴⁹ It has been observed that these traders would have indeed little need to resort to ADR mechanisms. However, under the label of SMEs, other categories of small professionals are more likely to generate more disputes, such as plumbers.⁵⁰

In order to ensure compliance with the transposed Directive and, eventually, extend its scope to disputes initiated by SMEs, it is necessary to set up incentives for them to do

⁴⁰ *ibid.*, 4.

⁴¹ ADR assembly 2021, Breakout session 1C.

⁴² Christopher Hodges, 'Developments and Issues in Consumer ADR and Consumer Ombudsmen in Europe' (The Foundation for Law, Justice and Society 2019) 4.

⁴³ According to the Annual report on European SMEs 2020-2021, SMEs constitute 99.8% of EU enterprises in the non-financial business sector, which includes almost all economic sectors (European Commission, 'Annual report on European SMEs 2020-2021'(2021) 8-9).

⁴⁴ Christopher Hodges, 'Developments and Issues in Consumer ADR and Consumer Ombudsmen in Europe' (The Foundation for Law, Justice and Society 2019) 5.

⁴⁵ *ibid.*, 4.

⁴⁶ ADR assembly 2021, Breakout session 1C.

⁴⁷ Alexandre Biard and Christopher Hodges, 'Médiation de La Consommation: Un Bilan, Des Défis, Des Pistes de Réflexion Pour l'avenir' (2019) 2 Contrats Concurrence Consommation 1, 3.

⁴⁸ CECMC – DGCCRF, 'Rapport d'activité 2019-2021' (2021) 3.

⁴⁹ ADR assembly 2021, Breakout session 1C.

⁵⁰ *ibid.*

so. For example, the successful Water Mediation scheme requires traders to pay only a small fee, proportionate to the number of clients and cases investigated (see *infra* e.1).⁵¹

The French legislator is also evaluating the possibility of establishing a residual entity dedicated to SMEs.⁵²

In **Italy**, some ADR entities have been created specifically for SMEs, and consumer associations and Chambers of commerce also act as ADR entities for low-value claims.⁵³

Germany is one of the few Member States allowing traders' complaints against consumers. However, access to ADR is oftentimes difficult for them, as most ADR entities do not provide such a service.⁵⁴

⁵¹ Emmanuel Guinchard, 'The Implementation of the Consumer ADR Directive in France' in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 161.

⁵² ADR assembly 2021, Breakout session 1C.

⁵³ *ibid.*

⁵⁴ Peter Rott, 'Consumer ADR in Germany' (2018) 7 *Journal of European Consumer & Market law* 121, 125.

2. Access

Recital 4

Ensuring access to simple, efficient, fast and low-cost ways of resolving domestic and cross-border disputes which arise from sales or service contracts should benefit consumers and therefore boost their confidence in the market. That access should apply to online as well as to offline transactions, and is particularly important when consumers shop across borders.

Recital 24

Member States should ensure that disputes covered by this Directive can be submitted to an ADR entity which complies with the requirements set out in this Directive and is listed in accordance with it. Member States should have the possibility of fulfilling this obligation by building on existing properly functioning ADR entities and adjusting their scope of application, if needed, or by providing for the creation of new ADR entities. This Directive should not preclude the functioning of existing dispute resolution entities operating within the framework of national consumer protection authorities of Member States where State officials are in charge of dispute resolution. State officials should be regarded as representatives of both consumers' and traders' interests. This Directive should not oblige Member States to create a specific ADR entity in each retail sector. When necessary, in order to ensure full sectoral and geographical coverage by and access to ADR, Member States should have the possibility to provide for the creation of a residual ADR entity that deals with disputes for the resolution of which no specific ADR entity is competent. Residual ADR entities are intended to be a safeguard for consumers and traders by ensuring that there are no gaps in access to an ADR entity.

Article 5

Access to ADR entities and ADR procedures

1. Member States shall facilitate access by consumers to ADR procedures and shall ensure that disputes covered by this Directive and which involve a trader established on their respective territories can be submitted to an ADR entity which complies with the requirements set out in this Directive.

The Directive aims at providing EU consumers with access to high-quality ADR procedures across the EU and in virtually all retail sectors, regardless of whether the dispute is domestic or cross-border and whether the purchase took place online or offline. As a result of its implementation, the Directive obliged Member States to introduce ADR for every national, cross-border or online dispute, thus bringing consumer ADR to geographical areas and trade sectors where it did not exist before. However, the formal availability of ADR schemes does not always correspond to effective access to such remedies.

a. Access for consumers

Article 5

Access to ADR entities and ADR procedures

1. Member States shall facilitate access by consumers to ADR procedures and shall ensure that disputes covered by this Directive and which involve a trader established on their respective territories can be submitted to an ADR entity which complies with the requirements set out in this Directive.

2. Member States shall ensure that ADR entities:

- (a) *maintain an up-to-date website which provides the parties with easy access to information concerning the ADR procedure, and which enables consumers to submit a complaint and the requisite supporting documents online;*

provide the parties, at their request, with the information referred to in point (a) on a durable medium;

where applicable, enable the consumer to submit a complaint offline;

Article 8

Effectiveness

Member States shall ensure that ADR procedures are effective and fulfil the following requirements:

- (b) *the ADR procedure is available and easily accessible online and offline to both parties irrespective of where they are;*
- (c) *the parties have access to the procedure without being obliged to retain a lawyer or a legal advisor, but the procedure shall not deprive the parties of their right to independent advice or to be represented or assisted by a third party at any stage of the procedure;*
- (e) *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. In the case of highly complex disputes, the ADR entity in charge may, at its own discretion, extend the 90 calendar days' time period. The parties shall be informed of any extension of that period and of the expected length of time that will be needed for the conclusion of the dispute.*

The Directive has been criticised for its cumbersome procedural apparatus, which ultimately decides the parties not to use the procedure.⁵⁵ Therefore, the doctrine suggests two complementary paths to simplify the procedure and make its outcome more appealing to the participants.

As Brennan and others effectively said, ADR justice proceedings should take 'consumers easily from problem to solution'⁵⁶, thus drawing attention to consumer redress design in the first place. Complaint submission must be simple, either online or offline, and make use of accessible standard forms.⁵⁷ Consumers should be able to access most ADR entities online,⁵⁸ and websites should provide them with all relevant information and allow them to file their complaints and supporting documents. Moreover, the goal of each ADR entity should be clearly determined, and consumers should be correctly signposted to the one that is competent for their case,⁵⁹ maybe through a single platform redirecting them to the appropriate entity⁶⁰ (see *infra* a.2). As recommended by the French CECMC (*Commission d'Évaluation et de Contrôle de la*

⁵⁵ Sabine Bernheim-Desvaux, 'Règlement extrajudiciaire et règlement en ligne des litiges de consommation' (2014) 95 L'observateur de Bruxelles 16.

⁵⁶ Carol Brennan and others, 'Designing Consumer Redress: Making Redress Accessible for Consumer-Citizens' (The Foundation for Law, Justice and Society 2015) 6.

⁵⁷ Andrea Fejos and Chris Willet, 'Consumer Access to Justice: The Role of the Directive and the Member States' (2016) 1 European Review of Private Law 33, 41.

⁵⁸ Naomi Creutzfeldt, 'Implementation of the Consumer ADR Directive' (2016) 4 Journal of European Consumer and Market Law 169, 172.

⁵⁹ Carol Brennan and others, 'Designing Consumer Redress: Making Redress Accessible for Consumer-Citizens' (The Foundation for Law, Justice and Society 2015) 6.

⁶⁰ Eline Verhage, 'The Implementation of the Consumer ADR Directive in the Netherlands' in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 248 and CECMC – DGCCRF, 'Rapport d'activité 2019-2021' (2021) 47 <www.economie.gouv.fr/mediation-conso>.

Médiation de la Consommation), such support could evolve into an automatic referral to the competent ADR entity after a certain time no answer is given to the consumer complaint, thus avoiding the burden of filing double complaints about the same facts.⁶¹

Secondly, the peculiarities of consumer redress must be considered to promote consumer participation in ADR schemes.⁶² It has been noted that consumers are ‘one-shot litigants’⁶³ and would benefit from measures directed at counter-weighting the costs of uncertainty they bear.⁶⁴ Luzak and De Coninck suggest introducing prior advice to consumers on the possible outcome of their case.⁶⁵ At the moment, ADR entities often do not provide prior legal advice on the merits of the cases they receive,⁶⁶ while being aware of their chances of winning would allow consumers to evaluate their position better.⁶⁷ Another option could be to make online databases available to the public, thus allowing consumers to look up cases similar to their own. Especially in Member States where more than one ADR entity could be competent to handle the matter, consumers might wish to check how such entities have previously decided and thus know what outcome to expect. Time certainty is another factor that should help overcome consumers’ rational apathy. This is one of the reasons why the 90 days-time limit provided by the Directive is positively regarded as making the ADR procedure more appealing than judicial rulings⁶⁸ (see *infra* 3.g).

Country-specific remarks

In **Belgium**, up to 39.6 % of the complaints received by the national portal for consumer claims (SMC) are dismissed, mainly because they are incomplete.⁶⁹ Even when the SMC offers its support to overcome the issue, many consumers prefer to drop their case, allegedly because they already reached an agreement with the trader and they did not inform the SMC or because they found the administrative burden to be excessive.⁷⁰

Belgian consumers expressed different preferences concerning the means of communication related to the ADR procedure. Some were favourable to a completely automated procedure, although most preferred a more empathetic and personal contact,

⁶¹ CECMC – DGCCRF, ‘Rapport d’activité 2019-2021’ (2021) 47.

⁶² Andrea Fejos and Chris Willet, ‘Consumer Access to Justice: The Role of the Directive and the Member States’ (2016) 1 *European Review of Private Law* 33, 40.

⁶³ As opposite to businesses who are ‘repetitive litigants’. The expression comes from Marc Galanter, ‘Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change’ (1974) 9 *Law & Society Review* 95.

⁶⁴ Joasia Luzak, ‘The Directive: Designed to Fail? A Hole-Ridden Stairway to Consumer Justice’ (2016) 1 *European Review of Private Law* 81, 87.

⁶⁵ *ibid.* and Hans De Coninck, ‘Europese voorstellen voor een alternatieve en een online geschillenregeling’ (2012) 94 *DCCR* 184.

⁶⁶ Hans De Coninck, ‘Europese voorstellen voor een alternatieve en een online geschillenregeling’ (2012) 94 *DCCR* 184.

⁶⁷ Joasia Luzak, ‘The Directive: Designed to Fail? A Hole-Ridden Stairway to Consumer Justice’ (2016) 1 *European Review of Private Law* 81, 87.

⁶⁸ *ibid.*, 86.

⁶⁹ Alexandre Biard and Stefaan Voet, ‘Expériences et attitudes de consommateurs avec le Service de Médiation pour le Consommateur/ Consumentenombudsdienst : enquête sur les dossiers incomplets’ (2020) 126 *DCCR* 15.

⁷⁰ SMC, ‘Rapport annuel 2017’ (2017) 20
[≤https://mediationconsommateur.be/fr/telechargements/rapport-annuel-2017≥](https://mediationconsommateur.be/fr/telechargements/rapport-annuel-2017).

with no pre-written or automatic answers.⁷¹ However, such preferences clash with the limited human and financial resources available to the residual entity, which in April 2019 counted no more than eleven people, six of them dealing with consumers' dossiers.⁷²

In **Italy** the digitalisation of the proceeding is perceived as a potential obstacle to consumer access due to the low level of digital competencies in the country. Therefore, implementing legislation requires ADR entities to also offer the possibility to handle offline disputes.⁷³ Even successful ADR entities such as Corecom in telecommunications would benefit from enabling distance communications and incorporating ODR technology into their procedure.⁷⁴ Nevertheless, the piecemeal approach to technology is predominant, and only some ADR entities – or even some regional offices of the same entity – offer online access to the process.⁷⁵

According to article 8(b) of the Directive, parties cannot be required to have legal representation, although they may choose to be assisted by a lawyer. However, Italian law demands the assistance of a lawyer when joining mandatory mediation.⁷⁶ According to Fachechi, the formal contradiction between the two provisions could be justified in the light of the complexity of the subject in the financial, banking and insurance sectors.⁷⁷ In these cases, the parties could do without a legal advisor only in conciliatory schemes aiming at helping them to reach an agreement, while pre-trial mandatory mediation is more complex, for example when it involves the taking of evidence, and should take place with the support of a lawyer. While dropping the requirement of legal representation would make access to the procedure more flexible, on the other hand retaining such an obligation would improve the level of consumer protection, which is also one of the goals of the Directive.⁷⁸ Troisi pushes such criticisms even further, assuming that the formal complexity of the ADR procedure would discourage the average consumer from independently resorting to an ADR entity with no legal assistance.⁷⁹

All **German** ADR entities have up-to-date websites with detailed explanations, sometimes in the form of videos. They make available to consumers interactive forms

⁷¹ Alexandre Biard and Stefaan Voet, 'Expériences et attitudes de consommateurs avec le Service de Médiation pour le Consommateur/ Consumentenombudsdienst : enquête sur les dossiers incomplets' (2020) 126 DCCR 15.

⁷² SMC, Rapport annuel 2018 (2018) 15 <<https://mediationconsommateur.be/fr/node/343>> and Alexandre Biard and Stefaan Voet, 'Expériences et attitudes de consommateurs avec le Service de Médiation pour le Consommateur/ Consumentenombudsdienst : enquête sur les dossiers incomplets' (2020) 126 DCCR 15.

⁷³ Paolo Porreca, 'Commento all'art. 141 cod. cons.' in Vincenzo Cuffaro (ed), *Codice del consumo e norme collegate* (Giuffrè 2016) 1002.

⁷⁴ Pablo Cortés, 'The Impact of EU Law in the ADR Landscape in Italy, Spain and the UK: Time for Change or Missed Opportunity?' (2015) 16 ERA Forum 125, 7.

⁷⁵ *ibid.*

⁷⁶ *Articolo 5 comma 1 bis d.l. n. 28/2010.*

⁷⁷ Alessia Fachechi, 'Alternative Dispute Resolution Regulation: A Work of Modern Art' (2019) 5 Italian Law Journal 293, 307. See also CJEU 14 June 2017, Case C-75/16, *Livio Menini and Maria Antonia Rampanelli v. Banco Popolare Società Cooperativa*, ECLI:EU:C:2017:457 ('national legislation may not require a consumer taking part in an ADR procedure to be assisted by a lawyer').

⁷⁸ Alessia Fachechi, 'Alternative Dispute Resolution Regulation: A Work of Modern Art' (2019) 5 Italian Law Journal 293, 307.

⁷⁹ Claudia Troisi, 'L'attuazione della direttiva 2013/11/UE in Italia alla luce della sentenza C-75/16' [2018] *Comparazione e diritto civile* 1, 35.

for filing their complaints and uploading documents, and most entities also offer additional assistance by telephone.⁸⁰

Nevertheless, consumers may find the ADR landscape challenging to navigate. Miquel denounces that, despite the prohibition of using the name *Verbraucherschlichtungsstelle* for non-certified bodies,⁸¹ some ADR entities still carry misleading names, calling themselves arbitral boards (*Schiedsstellen*) even though they do not issue arbitral awards.⁸²

Also in the **Netherlands** there are concerns that only highly educated consumers would be able to face the complexities of the procedure, mainly due to difficulties in accessing the technical language and the lack of professional guidance.⁸³

a.1. Vulnerable consumers

Recital 18

The definition of ‘consumer’ should cover natural persons who are acting outside their trade, business, craft or profession. However, if the contract is concluded for purposes partly within and partly outside the person’s trade (dual purpose contracts) and the trade purpose is so limited as not to be predominant in the overall context of the supply, that person should also be considered as a consumer.

Article 4

Definitions

1. For the purposes of this Directive:

(a) ‘consumer’ means any natural person who is acting for purposes which are outside his trade, business, craft or profession;

When speaking of consumers, the Directive implicitly adopts the ‘average consumer’ standard as elaborated by the CJEU in its free movements case law. Pursuant to the court definition, the average consumer is ‘reasonably well-informed and reasonably observant and circumspect’, but Théocaridi claims that EU law considers consumers more informed than they actually are.⁸⁴ The voluntary nature of the ADR proceeding, combined with the limited information available on ADR schemes, makes consumer ADR a procedure accessible only to those individuals who know how to search for

⁸⁰ Peter Rott, ‘Consumer ADR in Germany’ (2018) 7 Journal of European Consumer & Market law 121, 122.

⁸¹ Assisted by a fine of up to 50,000 euros. See Peter Rott, ‘Consumer ADR in Germany’ (2018) 7 Journal of European Consumer & Market law 121, 122.

⁸² This is the case of the arbitral boards for motor vehicle-related disputes. Its decisions are considered ‘arbitral reports’ (*Schiedsgutachten*) and are binding on the car dealer but not on the buyer who can always bring the claim to the courts. See Rosa Miquel, ‘The implementation of the consumer ADR directive in Germany’ in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 170.

⁸³ Charlotte Pavillon ‘Als consument je recht halen bij een geschillencommissie: goed(koop), maar kan beter’ (2020) 2 AA 199.

⁸⁴ Eva Théocaridi, ‘Effectiveness of the Directive: Standard of Average Consumer and Exceptions’ (2016) 1 European Review of Private Law 103, 109.

relevant information and would act in the right way upon such knowledge.⁸⁵ Such an approach leaves out consumers that may be vulnerable because of their age, education, physical disability, mental health issues or little financial means, notwithstanding that many are the circumstances and life-changing events that could make a person more vulnerable at a given time.⁸⁶

In order to overcome the difficulties that vulnerable consumers face, Théocaridi proposes to adopt a differentiated approach to ADR, providing for specific rules applying to certain groups of consumers. Member States could further elaborate on the provision of article 13(2) of the Directive on ‘clear, comprehensive and easily accessible information’ by adopting special rules and exceptions that consider the point of view of such vulnerable consumer groups.⁸⁷

ADR entities could make themselves more approachable by allowing omnichannel communication via website, phone, text messages or Whatsapp messages,⁸⁸ provided that the chosen channel is compatible with the type of ADR scheme. For instance, a mediation setting requires the presence of both parties at the table, while an adjudicatory scheme allows the mere exchange of written communication between the parties and the ADR entity.⁸⁹

Brennan and others suggest a more radical change of perspective, charging ADR entities with a more proactive role instead of limiting their support to consumers to the moments when a problem arises. ADR entities should help consumers, providing them with complete information on their rights and options, and enabling them to self-assess their case. They bring the example of *Resolver*, a UK-based platform that actively guides consumers in looking for redress, ultimately signposting them to the correct ADR entity if their issue has not been solved. The authors believe that improving independent assessment generates fairer results for both consumers and traders, as well as more effective and cheaper solutions.⁹⁰

Instead, the EU ODR platform is explicitly designed to be accessible to all users, respecting the Web Accessibility guidelines to address the needs of people with disabilities. Also, navigation on the website is intuitive, consumers are guided step-by-step in the procedure and are allowed to save their progresses. Finally, the program runs smoothly on multiple browsers and is compatible with many devices, from smartphones to desktop computers.⁹¹

⁸⁵ Carol Brennan and others, ‘Designing Consumer Redress: Making Redress Accessible for Consumer-Citizens’ (The Foundation for Law, Justice and Society 2015) 11.

⁸⁶ *ibid.*, 6 and Eva Théocaridi, ‘Effectiveness of the Directive: Standard of Average Consumer and Exceptions’ (2016) 1 *European Review of Private Law* 103, 114.

⁸⁷ Following the example of the UCPs Directive. Eva Théocaridi, ‘Effectiveness of the Directive: Standard of Average Consumer and Exceptions’ (2016) 1 *European Review of Private Law* 103, 114.

⁸⁸ ADR assembly 2021, Breakout session 1C.

⁸⁹ *ibid.*

⁹⁰ Carol Brennan and others, ‘Designing Consumer Redress: Making Redress Accessible for Consumer-Citizens’ (The Foundation for Law, Justice and Society 2015) 11.

⁹¹ Pablo Cortés, *The Law of Consumer Redress in an Evolving Digital Market: Upgrading from Alternative to Online Dispute Resolution* (Cambridge University Press 2017) 120.

Country-specific remarks

In **France**, up to 10% of the population faces difficulties accessing the internet or formally writing.⁹² While it is positive that consumer complaints can be filed both online and via mail, the formality of the system can still be an obstacle for many consumers.⁹³

In the **Netherlands**, ADR entities aim to personalise consumer access, guiding them in the procedure even when they do not necessarily belong to a vulnerable category. Dutch ADR representatives illustrated some of the ongoing projects at the ADR Assembly 2021: they will redesign their websites in order to meet the Web Accessibility standards for people with disabilities, increase the use of plain language instead of formal language, and convey information about the ADR techniques via animated instructional videos. Additionally, the ADR entities are considering collaborations with various social partners, such as foundations assisting illiterate people or people with disabilities.⁹⁴

In **Nordic countries**, the Swedish residual entity (*Allmänna reklamationsnämnden*)⁹⁵ is actively replacing specific technical terms with everyday language in order to make information more accessible to laypeople.⁹⁶

a.2. Fragmentation of ADR entities

Member States may adopt different models in the distribution of ADR entities: a competitive model, where several ADR entities operate in a given sector; an oligopoly, with only a few entities each dealing with certain kinds of disputes; or a monopoly of a single sectoral entity.⁹⁷

In competitive models, the national authorities have to verify whether there is real competition among the ADR entities or rather they deal with different kinds of disputes, and whether only a few entities attract the vast majority of claims.⁹⁸

When certified and non-certified ADR schemes multiply, consumers may struggle to understand which entity is the most appropriate for their case. This is especially true when the scope of the ADR entities is limited to specific aspects of a dispute in a given retail sector, as consumers are ultimately forced to turn to two ADR entities to have

⁹² ADR assembly 2021, Breakout session 1C.

⁹³ Sophie Gjidara-Decaix, 'La Médiation de La Consommation: Le Point de Vue d'une Universitaire' (2019) Tome 61 Archives de philosophie du droit 213, 224.

⁹⁴ ADR assembly 2021, Breakout session 1D.

⁹⁵ *Allmänna reklamationsnämnden* <<https://www.arn.se/>>.

⁹⁶ Christof Berlin and Felix Braun, 'Impulse für Verbraucher-ADR aus der Praxis' (2015) 5 Zeitschrift für Konfliktmanagement 149, 152.

⁹⁷ Alexandre Biard, 'Impact of Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK' (2019) 42 Journal of Consumer Policy 109, 132.

⁹⁸ *ibid.*

their claims addressed in full.⁹⁹ In some Member States, private entrepreneurs entered the ADR market, further contributing to its fragmentation.¹⁰⁰

The diversity of the ADR schemes concerns how they operate, the trader's mandatory participation, and whether their outcome is binding on the latter or not. All of these factors contribute to consumer confusion and lack of trust in ADR procedures in general, which may also negatively affect the existing good quality ADR entities.¹⁰¹

The simplification of the ADR landscape and a clearer redress design are crucial to improving consumers' access to justice, otherwise, as Creutzfeldt effectively sums up, 'European consumers are very likely to be overwhelmed with confusing information and lack of signposting, and therefore may remain dissatisfied and unable to exploit the full potential of ADR.'¹⁰²

A practical example of redress design applied to ADR schemes is introducing a single access point at the national level redirecting consumers to the most appropriate ADR entity. Cortés suggests that technology could support this process by creating a national ODR platform, interoperable with the EU ODR platform, which would ensure full ADR coverage across all economic sectors while signposting complaints to specialised ADR entities.¹⁰³ However, while it is relatively easier to establish a single entry point in smaller Member States, things are more complicated when dealing with larger Member States.¹⁰⁴ Notwithstanding that, a scattered ADR landscape may hide behind a single entry point (for example in Belgium).

Biard observes that competition among mediators negatively affects the ADR service quality, taking the UK Gambling Commission as an example.¹⁰⁵ Conversely, monopoly models make identifying the competent ADR entity easier,¹⁰⁶ thus reducing consumer confusion. Not only consumers but also competent national authorities benefit from having only one entity to relate with, as it facilitates their monitoring activities and the exchange of information with the regulators. On top of that, sectoral entities can better develop their knowledge of their market segment, recurrent professional (mal)practices

⁹⁹ Commission, 'Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes (ADR Report)' COM (2019) 425 final, 11.

¹⁰⁰ Alexandre Biard, 'Impact of Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK' (2019) 42 *Journal of Consumer Policy* 109, 113.

¹⁰¹ Christopher Hodges, 'Developments and Issues in Consumer ADR and Consumer Ombudsmen in Europe' (The Foundation for Law, Justice and Society 2019) 4.

¹⁰² Naomi Creutzfeldt, 'Implementation of the Consumer ADR Directive' (2016) 4 *Journal of European Consumer and Market Law* 169, 175.

¹⁰³ Carol Brennan and others, 'Designing Consumer Redress: Making Redress Accessible for Consumer-Citizens' (The Foundation for Law, Justice and Society 2015) 10.

¹⁰⁴ Eline Verhage, 'The Implementation of the Consumer ADR Directive in the Netherlands' in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 127-128.

¹⁰⁵ Alexandre Biard, 'Impact of Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK' (2019) 42 *Journal of Consumer Policy* 109, 135.

¹⁰⁶ Alexandre Biard and Christopher Hodges, 'Médiation de La Consommation: Un Bilan, Des Défis, Des Pistes de Réflexion Pour l'avenir' (2019) 2 *Contrats Concurrence Consommation* 1, 7.

and problems generally faced by consumers, offering better quality service. Finally, they are in a position of more substantial authority to influence market behaviour.¹⁰⁷

On the other hand, having multiple ADR schemes operating in the market may foster virtuous competition, thus improving the overall quality of the services offered. Secondly, competent authorities can intervene more effectively on ADR providers if they do not have to rely on a single monopoly entity. Notwithstanding that, in countries where ADR is voluntary, it is necessary to provide traders with some choice for the ADR entity to resort to depending on their cultural fit, IT systems, costs, and consumer feedback.¹⁰⁸

However, in order to improve consumer access to ADR, mere signposting may be insufficient, and some Member States should scale down the number of ADR entities (for example in France). Biard raises the question of whether, in such cases, competent authorities should be given the discretionary power to refuse certification when this appears necessary for structuring and simplifying the ADR markets. For instance, grounds for refusal could be maintaining consumers' visibility in a given sector or facilitating monitoring by competent national authorities.¹⁰⁹ Nonetheless, such a solution might not be decisive as certification is not compulsory for ADR entities to operate. Entities with legal requirements may decide not to apply for certification and enjoy more regulatory freedom instead,¹¹⁰ shaping a two-tier ADR landscape that would only complicate the picture.

Country-specific remarks

Belgium created a single national portal (*Service de Médiation pour le Consommateur/Consumentenombudsdienst*)¹¹¹ that refers cases to other competent and sectoral ADR entities.¹¹² A single access point is positive for Belgian consumers,¹¹³ but the SMC is only the 'common front office'¹¹⁴ of ADR entities, which can still receive complaints directly from consumers.¹¹⁵ There are still huge variations across ADR

¹⁰⁷ Alexandre Biard, 'Impact of Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK' (2019) 42 *Journal of Consumer Policy* 109, 132.

¹⁰⁸ Biard bring as an example the UK Civil Aviation ADR sector, where two players dominate the market. Alexandre Biard, 'Impact of Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK' (2019) 42 *Journal of Consumer Policy* 109, 126.

¹⁰⁹ *ibid.*, 132.

¹¹⁰ Rosa Miquel, 'The implementation of the consumer ADR directive in Germany' in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 173.

¹¹¹ *Service de Médiation pour le Consommateur / Consumentenombudsdienst* <<https://consumerombudsman.be/en>>.

¹¹² Christopher Hodges, 'Developments and Issues in Consumer ADR and Consumer Ombudsmen in Europe' (The Foundation for Law, Justice and Society 2019) 4.

¹¹³ Alexandre Biard and Christopher Hodges, 'Médiation de La Consommation: Un Bilan, Des Défis, Des Pistes de Réflexion Pour l'avenir' (2019) 2 *Contrats Concurrence Consommation* 1, 8.

¹¹⁴ Stefaan Voet, 'De toekomst van CDR in België' in Stefaan Voet (ed), *CDR in België. Buitengerechtelijke beslechting en oplossing van geschillen* (die Keure 2018) 231 and Nathalie Jouant, 'Le règlement extrajudiciaire des litiges de consommation en Belgique: évolutions' (2017) 3 *DCCR* 115.

¹¹⁵ Nathalie Jouant, 'Le règlement extrajudiciaire des litiges de consommation en Belgique: évolutions' (2017) 3 *DCCR* 115.

entities and their procedures,¹¹⁶ which could be better centralised and rationalised.¹¹⁷ However, one of the positive effects of the single portal has also been observed on the ADR providers' side, as it encourages collaboration among the most relevant mediators.¹¹⁸

France presents a highly competitive and fragmented ADR landscape, with 91 certified schemes.¹¹⁹ The original plan was to organise consumer ADR around key sectoral and public schemes, establishing the principle 'one dispute, one mediation'.¹²⁰ However, such a model never came into place, meeting the strenuous resistance of business representatives defending the role and place of in-house mediators.¹²¹ As a consequence, three main types of consumer ADR coexist in France: in-house consumer *médiateurs*, operating at the top tier of a company's consumer satisfaction services; sectoral *médiateurs*, usually set up by a federation of companies; and *médiateurs* established by the law, such as the Financial Ombudsman. All three are designed to fulfil different purposes of which consumers are not always aware.¹²²

According to Biard, the French case depicts the adverse effects of competition among ADR entities, which the introduction of the Directive failed to tackle. Indeed, only a few of the many existing ADR schemes receive a significant number of complaints, while most of them cannot develop the necessary expertise in dealing with consumer disputes.¹²³ Moreover, such a proliferation of ADR entities impairs consumers' visibility and generates confusion.¹²⁴ Therefore, the *Assemblée Nationale* has discussed multiple proposals to prioritise public sectoral mediators over private ones. These proposals suggested introducing a hierarchy between ADR providers, ensuring the prominence of sectoral and public ombudsmen, or requesting the trader to favour the sectoral ADR scheme.¹²⁵ However, the opposition of in-house mediators prevented any change in this direction and, as Gjidara-Decaix critically observes, nowadays, the priority to public mediators is only relevant since they can agree on the repartition of disputes with private entities active in the same domain.¹²⁶

¹¹⁶ Stefaan Voet, 'De toekomst van CDR in België' in Stefaan Voet (ed), *CDR in België. Buitengerechtelijke beslechting en oplossing van geschillen* (die Keure 2018) 231.

¹¹⁷ Nathalie Jouant, 'Le règlement extrajudiciaire des litiges de consommation en Belgique: évolutions' (2017) 3 DCCR 115.

¹¹⁸ Alexandre Biard and Christopher Hodges, 'Médiation de La Consommation: Un Bilan, Des Défis, Des Pistes de Réflexion Pour l'avenir' (2019) 2 Contrats Concurrence Consommation 1, 8.

¹¹⁹ CECMC – DGCCRF, 'Rapport d'activité 2019-2021' (2021) 24.

¹²⁰ Sabine Bernheim-Desvaux, 'La Transposition de La Directive 2013/11/UE Du 21 Mai 2013 Relative Au Règlement Extrajudiciaire Des Litiges de Consommation (RELC) Par l'ordonnance N° 2015-1033 Du 20 Août 2015' (2015) Contrats Concurrence Consommation 5, 9.

¹²¹ Alexandre Biard, 'Impact of Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK' (2019) 42 Journal of Consumer Policy 109.

¹²² Sabine Bernheim-Desvaux, 'La Transposition de La Directive 2013/11/UE Du 21 Mai 2013 Relative Au Règlement Extrajudiciaire Des Litiges de Consommation (RELC) Par l'ordonnance N° 2015-1033 Du 20 Août 2015' (2015) Contrats Concurrence Consommation 5, 9.

¹²³ ADR assembly 2021, Breakout session 1C.

¹²⁴ UFC Que Choisir, 'Généralisation de la médiation de la consommation. L'heure doit être à la bonne information' (2016) <www.quechoisir.org/action-ufc-que-choisir-generalisation-de-la-mediation-dela-consommation-l-heure-doit-etre-a-la-bonne-information-n13131/>.

¹²⁵ Sabine Bernheim-Desvaux, 'La Transposition de La Directive 2013/11/UE Du 21 Mai 2013 Relative Au Règlement Extrajudiciaire Des Litiges de Consommation (RELC) Par l'ordonnance N° 2015-1033 Du 20 Août 2015' (2015) Contrats Concurrence Consommation 5, 9.

¹²⁶ Sophie Gjidara-Decaix, 'La Médiation de La Consommation: Le Point de Vue d'une Universitaire' (2019) Tome 61 Archives de philosophie du droit 213, 221 and Alexandre Biard, 'Impact of Directive

Some reforms took place in the energy sector. The public Energy Ombudsman (*Médiateur de l'Énergie*) can receive complaints from consumers dissatisfied with how their claims have been handled by in-house mediators, but not *vice versa*.¹²⁷ The Ombudsman described its cooperation with in-house mediators as 'complementary partners' rather than competitors, and signed two agreements to organise their work further. Such a dynamic had positive consequences for consumers. In 53% of cases submitted to the Ombudsman as second-readings, the two entities shared the same analysis about the dispute. Yet, in 68% of cases, the amounts recommended by the public Ombudsman were up to four times higher than those suggested by the private mediator. Consequently, even when companies do not fully follow the Ombudsman's recommendations, most consumers obtain more than with the proposed solutions.¹²⁸

The general picture is further complicated because different rules apply in the various economic sectors. In contrast to the energy sector, financial and banking ADR is still difficult to access for consumers. The AMF Ombudsman (*Médiateur de l'Autorité des Marchés Financiers*) has a monopoly in the investment sector but is not competent in banking, insurance and life insurance, taxation and bank transactions, where it shares its competencies with in-house mediators.¹²⁹ More than 25 mediators and private entities operate in the banking sector alone, sometimes active at a local level.¹³⁰ As the AMF Ombudsman highlighted in its 2017 annual report, such a scattered picture resulted in a lack of comprehension among users of the scope of the AMF Ombudsman, and half of the submitted requests had to be redirected to the appropriate entities.¹³¹

Biard and Hodges collected the complaints and suggestions of the AMF Ombudsman, which since 2014 has advocated for the creation of a 'one-stop-shop' covering the investment, banking and insurance sectors,¹³² as is already the case in other European countries. Nevertheless, even the provision of a second referral to the AMF Ombudsman – along the lines of the Energy Ombudsman discipline – has been removed from the draft ordinance implementing the Directive,¹³³ deepening the sectoral differences existing in French law. Biard and Hodges are among those advocating for more uniform rules before the two public mediators by introducing the second-reading

2013/11/EU on Consumer ADR Quality: Evidence from France and the UK' (2019) 42 Journal of Consumer Policy 109.

¹²⁷ Alexandre Biard, 'Impact of Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK' (2019) 42 Journal of Consumer Policy 109, 120.

¹²⁸ Médiateur de l'énergie, 'Rapport annuel' (2016) 14 <www.energie-mediateur.fr/wpcontent/uploads/2017/06/ra2016_mne_uk_lgt.pdf>.

¹²⁹ Alexandre Biard, 'Impact of Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK' (2019) 42 Journal of Consumer Policy 109, 121.

¹³⁰ Such a situation originates from *Loi n° 2001-1168 du 11 décembre 2001 portant mesures urgentes de réformes à caractère économique et financier* (MURCEF), a law obliging credit institutions to appoint a mediator to deal with client disputes. See Alexandre Biard, 'Impact of Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK' (2019) 42 Journal of Consumer Policy 109, 121.

¹³¹ Médiateur AMF, 'Rapport annuel. Médiateur de l'autorité des marchés financiers' (2017), <www.amf-france.org/Publications/Rapports-annuels/Rapports-annuels-du-mediateur/Dernier-public>, 8.

¹³² Alexandre Biard and Christopher Hodges, 'Médiation de La Consommation: Un Bilan, Des Défis, Des Pistes de Réflexion Pour l'avenir' (2019) 2 Contrats Concurrence Consommation 1, 6.

¹³³ Alexandre Biard, 'Impact of Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK' (2019) 42 Journal of Consumer Policy 109, 121.

mechanism before the AMF Ombudsman.¹³⁴ Also the CECMC, the national authority responsible for the certification of ADR entities, strongly recommends focusing on public or at least sectoral mediators to simplify consumer ADR and make it more accessible.¹³⁵

In **Germany**, some crucial sectors are still not covered by ADR schemes. For instance, the *Schlichtungsstelle Energie* is competent for disputes related to electricity and gas but not for district heating. Hence, German consumers are still deprived of access to ADR in that sector.

Italy counts several sectoral ADR entities. A complex enforcement system combining private and public entities that are still not perfectly integrated exists. This leads to overlapping competencies and redundant mechanisms. Fragmentation results from public and private schemes applying simultaneously, with the risk of designing an expensive and confusing ADR landscape.

There are differences across business areas. The most relevant ADR entity is in the telecommunication sector, and it operates locally through the Regional Committee for Communications (*Corecom*). *Corecom* receives about 100,000 complaints a year from telecom users. Although business participation before *Corecom* is voluntary, most of them join the proceeding, and parties reach an agreement in over 70% of the cases. As a peculiarity, consumer associations are allowed to attend these meditations on behalf of complainants.¹³⁶

On the opposite side of the spectrum, there are sectors with no dedicated ADR entities, despite the high number of consumer complaints arising – for instance – from car rental or air transport services.

Also the **Netherlands** created many sector-specific ADR entities. Nijgh reports high satisfaction among businesses for such a model, as sectoral expertise fosters business compliance.¹³⁷ However, while implementing the Directive and ODR Regulation, the question has been raised whether to rationalise the ADR landscape under a single umbrella body or consumer ADR entity.¹³⁸ At the moment, the Dutch system consists of three notified consumer ADR entities (SGC, Kifid, and SKGZ), and Verhage deems it to be already quite coherent. She suggests preserving the independence of the three entities while providing for a single point of access to consumer ADR. That could enhance the visibility and coherence of the ADR landscape, and it would be much easier

¹³⁴ Alexandre Biard and Christopher Hodges, 'Médiation de La Consommation: Un Bilan, Des Défis, Des Pistes de Réflexion Pour l'avenir' (2019) 2 *Contrats Concurrence Consommation* 1, 9 and CECMC – DGCCRF, 'Rapport d'activité 2019-2021' (2021) 49.

¹³⁵ CECMC – DGCCRF, 'Rapport d'activité 2019-2021' (2021) 49.

¹³⁶ Pablo Cortés, 'The Impact of EU Law in the ADR Landscape in Italy, Spain and the UK: Time for Change or Missed Opportunity?' (2015) 16 *ERA Forum* 125, 7.

¹³⁷ Koos Nijgh, 'Versterking alternatieve geschilbeslechting in consumentenzaken door richtlijn ADR en verordening ODR' (2014) 18 *Nederlands-Vlaams tijdschrift voor mediation en conflictmanagement* 5.

¹³⁸ Naomi Creutzfeldt, 'Alternative Dispute Resolution for Consumers' in Michael Stürner, Fernando Gascón Inchausti and Remo Caponi (eds), *The Role of Consumer ADR in the Administration of Justice: New Trends in Access to Justice under EU Directive 2013/ 11* (Sellier European Law Publishers 2015) 10.

to implement, for instance, by launching a single website that navigates consumers through ADR schemes.¹³⁹

Nordic countries adopt a slightly different approach. For instance, in Sweden, there is one main public entity, the National Board for Consumers Disputes (ARN, *Allmänna reklamationsnämnden*) that works as a tribunal. Next to the ARN six private entities approved by the Agency for judicial services operate, each in a specific domain: consumer complaints against estate agents, disputes between lawyers and their clients, funeral agencies services, the insurance sector and one specific for insurance companies for victims of personal injury arising from road accidents.¹⁴⁰

a.3. Residual entities and availability of ADR entities

Recital 24

[...] This Directive should not oblige Member States to create a specific ADR entity in each retail sector. When necessary, in order to ensure full sectoral and geographical coverage by and access to ADR, Member States should have the possibility to provide for the creation of a residual ADR entity that deals with disputes for the resolution of which no specific ADR entity is competent. Residual ADR entities are intended to be a safeguard for consumers and traders by ensuring that there are no gaps in access to an ADR entity.

Article 5

Access to ADR entities and ADR procedures

3. Member States may fulfil their obligation under paragraph 1 by ensuring the existence of a residual ADR entity which is competent to deal with disputes as referred to in that paragraph for the resolution of which no existing ADR entity is competent. Member States may also fulfil that obligation by relying on ADR entities established in another Member State or regional, transnational or pan-European dispute resolution entities, where traders from different Member States are covered by the same ADR entity, without prejudice to their responsibility to ensure full coverage and access to ADR entities.

The Directive correctly avoids imposing on the Member States the obligation to create sectoral ADR entities, which Bernheim-Desvaux describes as outright utopic, considering the high costs linked to the funding of all of these entities.¹⁴¹ Therefore, the majority of Member States introduced one or more residual ADR entities that are competent for consumer disputes falling outside of the scope of other ADR entities and, in some cases, enjoy shared competence with the latter.¹⁴² However, there are still

¹³⁹ Eline Verhage, 'The Implementation of the Consumer ADR Directive in the Netherlands' in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 247-248.

¹⁴⁰ CECMC – DGCCRF, 'Rapport d'activité 2019-2021' (2021) 53.

¹⁴¹ Sabine Bernheim-Desvaux, 'Règlement extrajudiciaire et règlement en ligne des litiges de consommation' (2014) 95 L'observateur de Bruxelles 16.

¹⁴² Commission, 'Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes (ADR Report)' COM (2019) 425 final, 7.

Member States where specific economic sectors are left with no ADR scheme available, which also constitutes an obstacle to the ECC-Net operativeness.¹⁴³

Country-specific remarks

France has no residual entity, as the country opted for accrediting a high number of sector-specific ADR entities. In July 2021, the CECMC counted 91 active ADR entities, of which only 3 are public ombudsmen.¹⁴⁴

Although – because of the efforts of the CECMC – almost all of the 130 identified economic sectors are covered by at least one ADR entity, the competent authority is arguing in favour of creating one residual entity. The CECMC observes that there might still be loopholes in the ADR landscape, due to the fact that many SMEs have not yet appointed a mediator or to the cancellation of a sectoral entity from the list of the accredited ADR entities. A residual entity would ensure consumer access to ADR and continuity in consumer protection.¹⁴⁵

In **Germany**, there is no strong ADR tradition. Established ADR schemes already existed in the banking and insurance sector, energy sector and passengers' rights area, due to the developments of EU law introducing consumer ADR in these fields. After implementing the Directive, the German landscape is still quite diverse and counts 22 sector-specific ADR entities and residual entities dealing with all disputes not covered otherwise. Rott reports the heated debate between the federal State and the *Länder* as to who should organise and fund such residual entities.¹⁴⁶ In principle, such responsibility lies with the *Länder* that had to create the so-called Universal Conciliation Boards (*Universalschlichtungsstellen*) to fill the gaps left by regional and sector-specific ADR schemes. Their scope should encompass all consumer disputes within their respective States with a value between 10 euros and 5,000 euros when no other entity has jurisdiction.¹⁴⁷ However, the legislator also established the General Consumer Conciliation Body (*Allgemeine Verbraucherschlichtungsstelle des Zentrums für Schlichtung e.V.*), a residual ADR entity operating all over Germany, which allowed regional states to delay the implementation of the Conciliation Boards. Initially labelled as a 'scientific project', the General Consumer Conciliation Body ceased its activity in 2019, but was promptly substituted by the Universal Conciliation Body (*Universalschlichtungsstelle des Bundes*)¹⁴⁸ run by the same centre.¹⁴⁹ Indeed the

¹⁴³ ADR assembly 2021, Breakout session 1A.

¹⁴⁴ Next to the 3 public ombudsmen (Energy Ombudsman, Financial Ombudsman, Games Ombudsman), there are 40 in-house mediators, 24 mediators associated with a federation or an association, 22 associations or societies of mediators, and 2 mediation commissions (data from the CECMC – DGCCRF, 'Rapport d'activité 2019-2021' (2021) 24).

¹⁴⁵ CECMC – DGCCRF, 'Rapport d'activité 2019-2021' (2021) 25 and 47.

¹⁴⁶ Peter Rott, 'Consumer ADR in Germany' (2018) 7 *Journal of European Consumer & Market Law* 121, 121.

¹⁴⁷ Joanna Page and Laurel Bonnyman, 'ADR and ODR—Achieving Better Dispute Resolution for Consumers in the EU' (2016) 17 *ERA Forum* 145, 159.

¹⁴⁸ *Universalschlichtungsstelle des Bundes* <<https://www.verbraucher-schlichter.de/english/english-version>>.

¹⁴⁹ The Centre for Arbitration (*Zentrum für Schlichtung e.V.*) in Kehl won the EU tender procedure, thus remaining responsible for running the residual ADR entity. See Bea Brunen, 'Aufgepasst: Die "Allgemeine Verbraucherschlichtungsstelle" Wird Zur "Universalschlichtungsstelle" *it-recht kanzlei*

German legislator realised that the creation of sixteen other Conciliation Boards would have made things more complicated for consumers and established the residual entity active at the federal level.

In **Italy**, sectoral ADR schemes and residual ADR entities coexist, as the Italian reform did not provide for the establishment of a new single residual ADR entity. Instead, such a role was allocated to the Chambers of Commerce, already offering mediation services for civil and commercial disputes, including consumer disputes.¹⁵⁰

However, despite the Chambers of Commerce already operating *de facto* with general competence for consumer matters, their mediation and arbitration services are not the most relevant in the consumer sector.¹⁵¹ In practice, they deal mainly with a few high-value consumer complaints, but do not process low-value disputes.¹⁵² The Chambers do not even enjoy consumer trust, as they turned to consumer issues only recently and are still perceived as ‘traders bodies’.¹⁵³ Therefore, according to Cortés, the Chambers of Commerce cannot be expected to improve the Italian consumer redress landscape. He adds that a better solution would be promoting the development of sector-specific consumer ADR entities and joint conciliation procedures.¹⁵⁴

In the **Netherlands**, consumer ADR already covered various consumer disputes. However, it did not provide full coverage for all consumer disputes, as consumer ADR is not mandatory in every trading sector. At the moment of implementing the Directive, one of the goals of the Dutch legislator was to establish a residual consumer ADR entity to fill the gaps left by the triad of SGC, Kifid, and SKGZ entities. Therefore, a residual Consumer Complaint Commission (*Geschillencommissie Algemeen*) was incorporated into the SGC scheme. Although it is supposed to serve as the closing point of the system, Verhage seems sceptical as to the opportunity of making the adherence to the Consumer Complaint Commission voluntary while aiming at full access to consumer ADR.¹⁵⁵

However, the Dutch system proved to be appealing to traders so far. According to Nijgh, this is due to the expertise of sectoral entities, which is crucial to guarantee high levels of business compliance. Therefore, he says that having many sector-specific

(19 December 2019) <https://www-it-recht-kanzlei-de.translate.google.com/allgemeine-verbraucherschlichtungsstelle-universalschlichtungsstelle.html?_x_tr_sl=auto&_x_tr_tl=en&_x_tr_hl=en-US&_x_tr_pto=wapp>.

¹⁵⁰ Carlo Pilia, Pablo Cortés and Paolo Vargiu, ‘The Implementation of the Consumer ADR Directive in Italy’ in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 222.

¹⁵¹ Pablo Cortés, ‘The Impact of EU Law in the ADR Landscape in Italy, Spain and the UK: Time for Change or Missed Opportunity?’ (2015) 16 ERA Forum 125, 134.

¹⁵² Carlo Pilia, Pablo Cortés and Paolo Vargiu, ‘The Implementation of the Consumer ADR Directive in Italy’ in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 222.

¹⁵³ Nicola Scannicchio, *Accesso alla giustizia e attuazione dei diritti: la mediazione delle controversie di consumo nella direttiva europea 2013-11* (Giappichelli 2015) 75.

¹⁵⁴ Pablo Cortés, ‘The Impact of EU Law in the ADR Landscape in Italy, Spain and the UK: Time for Change or Missed Opportunity?’ (2015) 16 ERA Forum 125, 134.

¹⁵⁵ Eline Verhage, ‘The Implementation of the Consumer ADR Directive in the Netherlands’ in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 241-242 and 248.

ADR entities is better than creating one residual ADR entity, especially in markets where many transactions occur and the number of potential disputes raises.¹⁵⁶

Among the **Nordic countries**, Sweden provides a limited number of sectoral entities and one residual entity. The ARN receives all complaints not dealt with by private ADR entities, either because they fall out of their scope or because the dispute does not concern a member of the private entity.¹⁵⁷

b. Grounds for refusal

Recital 25

This Directive should not prevent Member States from maintaining or introducing legislation on procedures for out-of-court resolution of consumer contractual disputes which is in compliance with the requirements set out in this Directive. Furthermore, in order to ensure that ADR entities can operate effectively, those entities should have the possibility of maintaining or introducing, in accordance with the laws of the Member State in which they are established, procedural rules that allow them to refuse to deal with disputes in specific circumstances, for example where a dispute is too complex and would therefore be better resolved in court. However, procedural rules allowing ADR entities to refuse to deal with a dispute should not impair significantly consumers' access to ADR procedures, including in the case of cross-border disputes. Thus, when providing for a monetary threshold, Member States should always take into account that the real value of a dispute may vary among Member States and, consequently, setting a disproportionately high threshold in one Member State could impair access to ADR procedures for consumers from other Member States. Member States should not be required to ensure that the consumer can submit his complaint to another ADR entity, where an ADR entity to which the complaint was first submitted has refused to deal with it because of its procedural rules. In such cases Member States should be deemed to have fulfilled their obligation to ensure full coverage of ADR entities.

Article 5

Access to ADR entities and ADR procedures

4. Member States may, at their discretion, permit ADR entities to maintain and introduce procedural rules that allow them to refuse to deal with a given dispute on the grounds that:

- (a) the consumer did not attempt to contact the trader concerned in order to discuss his complaint and seek, as a first step, to resolve the matter directly with the trader;*
- (b) the dispute is frivolous or vexatious;*
- (c) the dispute is being or has previously been considered by another ADR entity or by a court;*
- (d) the value of the claim falls below or above a pre-specified monetary threshold;*
- (e) time limit, which shall not be set at less than one year from the date upon which the consumer submitted the complaint to the trader;*
- (f) dealing with such a type of dispute would otherwise seriously impair the effective operation of the ADR entity.*

Where, in accordance with its procedural rules, an ADR entity is unable to consider a dispute that has been submitted to it, that ADR entity shall provide both parties with a reasoned explanation of the grounds for not considering the dispute within three weeks of receiving the complaint file.

¹⁵⁶ Koos Nijgh, 'Versterking alternatieve geschilbeslechting in consumentenzaken door richtlijn ADR en verordening ODR' (2014) 18 Nederlands-Vlaams tijdschrift voor mediation en conflictmanagement 5.

¹⁵⁷ CECMC – DGCCRF, 'Rapport d'activité 2019-2021' (2021) 53.

Such procedural rules shall not significantly impair consumers' access to ADR procedures, including in the case of cross-border disputes.

ADR entities can refuse to process a complaint in the circumstances listed in article 5 of the Directive. These six grounds are exhaustive, save for two exceptions: ADR entities can refuse complaints falling outside of their scope, and they may decide to discontinue a complaint due to the behaviour of the parties, for example, once they have settled the dispute or when parties have missed deadlines, fabricated evidence, or been abusive.¹⁵⁸

However, in several Member States, many consumer complaints are dismissed simply because consumers did not try to find a solution directly with the trader (for example in France).

As for unmeritorious claims, whether the designed ADR procedure is adequate to filter out frivolous suits should be investigated. As Weber notices, the low cost of the procedure attracts consumer claims, and the risk is that frivolous or vexatious suits would hamper the quality of consumer ADR in general. Nonetheless, there is no definition of 'frivolous' or 'vexatious' claims in the Directive, which would have been desirable to specify admissibility requirements. It is feared that the open formula of article 5(4) of the Directive could allow ADR entities to filter the incoming claims too strictly and reduce access to justice arbitrarily, should the Member States not intervene on the point.¹⁵⁹

Another critical aspect concerns the provision under letter f of article 5(4) that, combined with the 90 days-time limit and the fact that legal representation is not required, designs ADR entities that will probably seek to attract easy cases rather than more complex ones. In Weber's opinion, such behaviour is expected to negatively impact residual ADR entities, which will have to deal with all of the cases that specialised yet restrictive sectoral bodies refuse.¹⁶⁰

Finally, ADR entities are free to limit their own scope to cases concerning only certain aspects of the disputes or where only members of some organisations are involved. As a consequence, the ADR landscape is further fragmented, and consumers may struggle to correctly identify the competent entity they should turn to. Moreover, this situation is frustrating for residual ADR entities that cannot rely on specialised ADR entities to cover the entire sector where they operate.¹⁶¹

¹⁵⁸ Pablo Cortés, 'The New Landscape of Consumer Redress' in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 23.

¹⁵⁹ Franziska Weber, 'Is ADR the Superior Mechanism for Consumer Contractual Disputes?—An Assessment of the Incentivizing Effects of the Directive' (2015) 38 *Journal of Consumer Policy* 265, 283.

¹⁶⁰ *ibid.*, 280.

¹⁶¹ ADR assembly 2021, Breakout session 1A.

Country-specific remarks

The **Belgian** national competent authority complains that most ADR entities are linked to professional organisations,¹⁶² which is a notable exception to the principle of full coverage by ADR entities because, if the trader is not part of the trade organisation financing the ADR entity, the consumer cannot bring his or her claim before that entity.¹⁶³

In **France**, more than 50% of the complaints are dismissed as non-admissible, primarily because consumers fail to preliminarily attempt to resolve their dispute directly with the trader.¹⁶⁴ Biard and Hodges blame this phenomenon on the low quality of the referrals.¹⁶⁵ Many consumers are unaware that they have to make a written attempt to solve their issue directly with the trader and bring proof of it, as most of them do not even read the mediation charters before referring the matters to a mediator.¹⁶⁶

On the other hand, French law does not require consumer claims to be of a minimum monetary value, therefore, consumers can initiate a dispute even though it has little or no economic value.¹⁶⁷

German ADR entities are given the option of dismissing claims based on mandatory grounds for refusal or additional ones they provide for in their own procedural rules. The first mandatory ground for refusal is the lack of jurisdiction of the ADR entity. Secondly, the ADR entity can refuse to hear a case if the complaint has not been discussed with the respondent beforehand. Thirdly, the complaint can be refused if it appears to have no chances of success or is frivolous, for instance, if the dispute had already been settled or a previous solicitude of legal aid had been rejected on these grounds. Additionally, ADR entities can introduce four grounds of refusal: when there has already been an ADR procedure before the same entity or the dispute is pending before another entity; when the dispute has been decided or is pending before a court, unless the court decides to suspend the proceeding; when the value of the claim is inferior or superior to the amount established in the procedural rules of the entity; when dealing with the case would considerably affect the function of the ADR entity, for instance, because it would require incurring a disproportionate burden or because the

¹⁶² *ibid.*

¹⁶³ Grégory Renier, 'Le nouvel encadrement de l'Union européenne pour le règlement extrajudiciaire des litiges de consommation. Examen de la directive 2013/11/UE en matière d'ADR' (2014) 1 *Revue européenne de droit de la consommation / European Journal of Consumer Law* 135.

¹⁶⁴ Peaks of over 70% of dismissed claims have been touched in 2017, more specifically the 75% of the cases received by La Poste group's Ombudsman and the 72% for the Energy Ombudsman. See Bernheim-Desvaux, 'La Commission d'évaluation et de Contrôle de La Médiation de La Consommation (CECMC) Publie Son Rapport d'activité 2019-2021' (2021) 12 *Contrats Concurrence Consommation* 1, 1 and Alexandre Biard and Christopher Hodges, 'Médiation de La Consommation: Un Bilan, Des Défis, Des Pistes de Réflexion Pour l'avenir' (2019) 2 *Contrats Concurrence Consommation* 1, 3.

¹⁶⁵ Alexandre Biard and Christopher Hodges, 'Médiation de La Consommation: Un Bilan, Des Défis, Des Pistes de Réflexion Pour l'avenir' (2019) 2 *Contrats Concurrence Consommation* 1, 3.

¹⁶⁶ In 2017, the RATP group Mediator conducted a survey on inadmissible complaints: 65% of the consumers who responded were unaware that a complaint had to be submitted beforehand, 77% of them had not read the RATP Mediation Charter before referring the matter to the mediator. See Alexandre Biard and Christopher Hodges, 'Médiation de La Consommation: Un Bilan, Des Défis, Des Pistes de Réflexion Pour l'avenir' (2019) 2 *Contrats Concurrence Consommation* 1, 3.

¹⁶⁷ Sabine Bernheim-Desvaux, 'La Transposition de La Directive 2013/11/UE Du 21 Mai 2013 Relative Au Règlement Extrajudiciaire Des Litiges de Consommation (RELC) Par l'ordonnance N° 2015-1033 Du 20 Août 2015' (2015) *Contrats Concurrence Consommation* 5, 7.

dispute concerns an unsolved fundamental legal question.¹⁶⁸ Greger criticises the fact that a pending court proceeding could impede starting an ADR procedure, while civil judges themselves can propose seeking extrajudicial solutions. Also, he disapproves that facing an unsolved fundamental legal question is included among the grounds for refusal within the meaning of letter f of article 5(4) of the Directive, namely under the label of a severe impairment of the effective operation of the ADR entity.¹⁶⁹

In **Italy**, the Consumer Code allows ADR entities to refuse to deal with a given case when ‘the dispute is futile or reckless’,¹⁷⁰ but the evaluation is left to the ADR entity itself.¹⁷¹ Such a provision might have been introduced to prevent abusive litigation before the ADR entities as, without any formal barrier to groundless claims nor specific sanctions against reckless litigations,¹⁷² there would be the risk that a high number of claims may slow down the entire ADR apparatus.

c. Cross-border ADR

Recital 15

The development within the Union of properly functioning ADR is necessary to strengthen consumers’ confidence in the internal market, including in the area of online commerce, and to fulfil the potential for and opportunities of cross-border and online trade. [...]

Recital 26

This Directive should allow traders established in a Member State to be covered by an ADR entity which is established in another Member State. In order to improve the coverage of and consumer access to ADR across the Union, Member States should have the possibility of deciding to rely on ADR entities established in another Member State or regional, transnational or pan-European ADR entities, where traders from different Member States are covered by the same ADR entity. Recourse to ADR entities established in another Member State or to transnational or pan-European ADR entities should, however, be without prejudice to Member States’ responsibility to ensure full coverage by and access to ADR entities.

Recital 38

This Directive should establish quality requirements of ADR entities, which should ensure the same level of protection and rights for consumers in both domestic and cross-border disputes. [...]

Recital 52

Member States should ensure that ADR entities cooperate on the resolution of cross-border disputes.

Article 5

Access to ADR entities and ADR procedures

2. Member States shall ensure that ADR entities:

¹⁶⁸ Rosa Miquel, ‘The implementation of the consumer ADR directive in Germany’ in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 182.

¹⁶⁹ Reinhard Greger, ‘Alternative Streitschlichtung: Die Umsetzung der ADR-Richtlinie in Deutschland’ (2015) *Verbraucher und Recht* 216, 218.

¹⁷⁰ *Articolo 141 bis comma 2 Codice del consumo*.

¹⁷¹ Giovanna Saccaro, ‘L’introduzione della Direttiva 2013/11/UE e la riforma del codice dei consumatori’ (2015) *Rivista elettronica del Centro di Documentazione Europea dell’Università Kore di Enna*, 3.

¹⁷² Differently from in-court proceedings, which are covered by *articolo 96 Codice di procedura civile*.

(e) accept both domestic and cross-border disputes, including disputes covered by Regulation (EU) No 524/2013; and

Article 7

Transparency

2. Member States shall ensure that ADR entities make publicly available on their websites, on a durable medium upon request, and by any other means they consider appropriate, annual activity reports. Those reports shall include the following information relating to both domestic and cross-border disputes:

(h) cooperation of ADR entities within networks of ADR entities which facilitate the resolution of cross-border disputes, if applicable.

Article 14

Assistance for consumers

1. Member States shall ensure that, with regard to disputes arising from cross-border sales or service contracts, consumers can obtain assistance to access the ADR entity operating in another Member State which is competent to deal with their cross-border dispute.

2. Member States shall confer responsibility for the task referred to in paragraph 1 on their centres of the European Consumer Centre Network, on consumer organisations or on any other body.

Article 16

Cooperation and exchanges of experience between ADR entities

1. Member States shall ensure that ADR entities cooperate in the resolution of cross-border disputes and conduct regular exchanges of best practices as regards the settlement of both cross-border and domestic disputes.

The Directive addresses explicitly cross-border ADR as a crucial factor in encouraging purchases across the internal market. However, the specific problems affecting consumer ADR are only aggravated in cross-border cases.

First of all, consumers might ignore that there is an entity in the trader's country that can deal with their case or even that ADR entities in their own countries are competent also for disputes with a trader established abroad.

Having efficient and reliable domestic entities dealing with cross-border cases would be a step in the right direction. However, in many Member States, there are no or only a few ADR entities whose territorial jurisdiction encompasses such cases.¹⁷³ Although article 5(2)(e) of the Directive requires the Member States to ensure that ADR entities accept both domestic and cross-border disputes, the same Directive does not require ADR entities to accept claims against companies located in other Member States.¹⁷⁴ In practice, consumers who wish to settle a cross-border contractual dispute have to approach an ADR entity located abroad, even after the implementation of the Directive.¹⁷⁵ Under these circumstances, the different procedural rules and criteria applied across the Member States may refrain consumers from taking action, and such

¹⁷³ Giesela Rühl, 'Alternative and Online Dispute Resolution for Cross-Border Consumer Contracts' (2015) 38 *Journal of Consumer Policy* 431, 445-448.

¹⁷⁴ Jochen Hayungs, 'ADR-Richtlinie und ODR-Verordnung' (2013) 16 *Zeitschrift für Konfliktmanagement* 86, 88 and Sara Tramarin, *La Protection Judiciaire et Extrajudiciaire Du Consommateur Dans Le Droit de l'Union Européenne* (Université de Strasbourg; Università degli studi di Bologna 2017), 197.

¹⁷⁵ Giesela Rühl, 'Alternative and Online Dispute Resolution for Cross-Border Consumer Contracts' (2015) 38 *Journal of Consumer Policy* 431, 445-448.

a lack of trust in cross-border redress mechanisms may ultimately decide consumers not to buy products and services from foreign traders.

In the absence of any provision explicitly granting consumers the right to start a proceeding against a foreign trader with an ADR entity located in their country of residence,¹⁷⁶ the practical difficulties they face are often mitigated by the national consumer organisations, which assist them in the search for competent dispute resolution bodies through the ECC-Net.¹⁷⁷

A specific issue of cross-border disputes is the language barrier. Even though certified ADR entities must accept domestic and cross-border disputes – including those referred by the EU ODR platform – the Directive does not require them to offer their services in other European languages.¹⁷⁸ Therefore, entities can restrict the language in which they process disputes, which generally is the trader's language. As Cortés points out, traders are often the ones who pay and thus choose the ADR entity, which is likely to be established in the same Member States.¹⁷⁹ As a consequence, most consumers initiating cross-border disputes have to process their complaints in a foreign language.

A possible solution could be to add sector-specific conditions for ADR entities to provide translation services, along the lines of those introduced by the Energy Regulator in the UK.¹⁸⁰ Also, language support may be offered as part of the assistance provided under article 14 of the Directive, which requires Member States to assist consumers in accessing ADR schemes operating in a different country, either directly or through the ECC-Net.

Unlike the Directive, the ODR Regulation addresses the language problem and provides an online platform equipped with an automated translation tool supported by human assistance for the translation of outcomes or settlements (see *infra* 8.b.2).

d. Costs

Recital 41

ADR procedures should preferably be free of charge for the consumer. In the event that costs are applied, the ADR procedure should be accessible, attractive and inexpensive for consumers. To that end, costs should not exceed a nominal fee.

Article 7

Transparency

¹⁷⁶ Sara Tramarin, *La Protection Judiciaire et Extrajudiciaire Du Consommateur Dans Le Droit de l'Union Européenne* (Université de Strasbourg; Università degli studi di Bologna 2017), 197.

¹⁷⁷ Giesela Rühl, 'Alternative and Online Dispute Resolution for Cross-Border Consumer Contracts' (2015) 38 *Journal of Consumer Policy* 431, 445-448.

¹⁷⁸ Pablo Cortés, 'The New Landscape of Consumer Redress' in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 22.

¹⁷⁹ *ibid.*

¹⁸⁰ The Office of Gas and Electricity Markets requires ADR schemes to prove they are able to provide a wide range of translation services for consumers who do not speak English or that they have adopted 'processes that allow for additional help in accessing the scheme to be given to consumers that need it' (Alexandre Biard, 'Impact of Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK' (2019) 42 *Journal of Consumer Policy* 109, 130).

1. Member States shall ensure that ADR entities make publicly available on their websites, on a durable medium upon request, and by any other means they consider appropriate, clear and easily understandable information on:

(l) the costs, if any, to be borne by the parties, including any rules on awarding costs at the end of the procedure;

Article 8

Effectiveness

Member States shall ensure that ADR procedures are effective and fulfil the following requirements:

(c) the ADR procedure is free of charge or available at a nominal fee for consumers;

While traditional ADR is generally seen as an alternative to the court system, consumer ADR is often the only realistic option available for consumers to find redress in a cost-effective and proportionate manner.¹⁸¹ Therefore, it is of the utmost importance that ADR procedures are accessible and inexpensive to consumers, either free of charge or not exceeding a nominal fee, pursuant to a principle of cost-effectiveness.¹⁸² However, the procedure is not necessarily free of charge for the traders, which may be requested to bear the cost according to the provisions of each Member State.

Moreover, the Directive does not mention additional costs that could arise from an ADR procedure, ranging from lawyer and expert fees to stamp costs, and who should bear the responsibility for these costs. Luzak points out the failure of the Directive in harmonising these aspects and ensuring that consumer access costs to ADR remain low, as Member States may decide whether to introduce provisions explicitly dealing with these profiles in their national laws or leave the matter to the ADR entities.¹⁸³

Country-specific remarks

In **France**, consumer ADR is free of charge for the consumer, a choice consistent with the fact that even claims of no economic value can be brought to ADR, while the trader pays for the procedure.¹⁸⁴ In exchange, the legislator leaves the latter the choice of the mediation scheme to join.¹⁸⁵

However, Gjidara-Decaix observes that consumers may still bear extra costs such as lawyer fees, should they opt for legal assistance, expert fees, which can be jointly

¹⁸¹ To the extent that some authors refer to it specifically as CADR or CDR. See Pablo Cortés, 'The Impact of EU Law in the ADR Landscape in Italy, Spain and the UK: Time for Change or Missed Opportunity?' (2015) 16 ERA Forum 125, 127.

¹⁸² Andrea Fejos and Chris Willet, 'Consumer Access to Justice: The Role of the Directive and the Member States' (2016) 1 European Review of Private Law 33, 41.

¹⁸³ Joasia Luzak, 'The Directive: Designed to Fail? A Hole-Ridden Stairway to Consumer Justice' (2016) 1 European Review of Private Law 81, 87.

¹⁸⁴ Sabine Bernheim-Desvaux, 'La Transposition de La Directive 2013/11/UE Du 21 Mai 2013 Relative Au Règlement Extrajudiciaire Des Litiges de Consommation (RELC) Par l'ordonnance N° 2015-1033 Du 20 Août 2015' (2015) Contrats Concurrence Consommation 5, 7.

¹⁸⁵ Sophie Gjidara-Decaix, 'La Médiation de La Consommation: Le Point de Vue d'une Universitaire' (2019) Tome 61 Archives de philosophie du droit 213, 216.

requested by the parties, as well as the costs of stamps and the reproductions of documents.¹⁸⁶

In **Germany**, ADR entities cover their expenses through fees charged to the traders, which grants them more independence from the members of the association organising the ADR.¹⁸⁷ Such fees must be ‘appropriate’, and ADR entities have implemented this concept in different ways. Some charge an amount proportional to the value of the case, which corresponds to the German approach to court fees and lawyers’ fees, applying significant discounts if the trader accepts the complaint immediately.¹⁸⁸

The *Schlichtungsstelle Energie* charges up to 450 euros for a complete procedure that ends with a recommendation. The price decreases for simpler cases or disputes confirming the trader's position. Also, a discount is applied when the trader collaborates with the ADR entity or agrees to settle immediately. On the other hand, complex cases may be charged 100 euros extra. Rott observes that ADR can be pretty expensive for the trader, which constitutes an incentive for the trader to agree with the consumer before a complaint is filed, at least in the fields where ADR is mandatory, such as the energy sector. Conversely, when ADR is not mandatory – as is the case in most market sectors – the fees are just an incentive not to participate.¹⁸⁹

In **Italy**, some independent authorities offer low-cost ADR schemes in specific business sectors.¹⁹⁰ For instance, the Italian Central Bank (*Banca d'Italia*) provides an arbitration procedure open to banks, other financial institutions, and their clients (*Arbitrato Bancario Finanziario*, ABF) at the mere cost of 20 euros. Such an option allows consumers to access a wide range of high-quality services at a merely symbolic cost. However, in sectors where mediation is mandatory, consumers have to be assisted by a lawyer,¹⁹¹ hence frustrating the exemption from mediation costs by charging the claimants with the price of technical assistance.¹⁹²

In the **Netherlands**, the overhead costs of the SGC scheme are funded by the State, as well as those arising from the residual Consumer Complaint Commission incorporated in the same entity.¹⁹³

As an example from the **Nordic countries**, the Swedish residual entity is accessible free of charge for both consumers and traders. The ARN justifies such a choice because traders cannot file complaints themselves.¹⁹⁴

¹⁸⁶ *ibid.*, 219.

¹⁸⁷ Peter Rott, ‘Consumer ADR in Germany’ (2018) 7 *Journal of European Consumer & Market law* 121, 124.

¹⁸⁸ For instance, the *Allgemeine Verbraucherschlichtungsstelle* charged between 50 euros, for complaint worth under 100 euros, and 600 euros, when the value of the complaint was above 5,000 euros (Peter Rott, ‘Consumer ADR in Germany’ (2018) 7 *Journal of European Consumer & Market law* 121, 124).

¹⁸⁹ Peter Rott, ‘Consumer ADR in Germany’ (2018) 7 *Journal of European Consumer & Market law* 121, 124.

¹⁹⁰ Although they attracted criticisms for their alleged lack of independence (see *infra* 3.e.2).

¹⁹¹ Even if just to attend the first so called ‘exploratory’ meeting.

¹⁹² Maria Pia Gasperini, ‘Il sistema delle ADR in Italia, tra contesto europeo e policies interne in materia di giustizia civile’ (2017) 6 *Annali della Facoltà Giuridica dell’Università di Camerino* 135, 155.

¹⁹³ Eline Verhage, ‘The Implementation of the Consumer ADR Directive in the Netherlands’ (2016) in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 242.

¹⁹⁴ CECMC – DGCCRF, ‘Rapport d’activité 2019-2021’ (2021) 53.

e. Mandatory and non-mandatory ADR schemes

Recital 49

This Directive should not require the participation of traders in ADR procedures to be mandatory or the outcome of such procedures to be binding on traders, when a consumer has lodged a complaint against them. However, in order to ensure that consumers have access to redress and that they are not obliged to forego their claims, traders should be encouraged as far as possible to participate in ADR procedures. Therefore, this Directive should be without prejudice to any national rules making the participation of traders in such procedures mandatory or subject to incentives or sanctions or making their outcome binding on traders, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system as provided for in Article 47 of the Charter of Fundamental Rights of the European Union.

Article 1

Subject matter

[...] This Directive is without prejudice to national legislation making participation in such procedures mandatory, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system.

Article 9

Fairness

2. In ADR procedures which aim at resolving the dispute by proposing a solution, Member States shall ensure that:

(a) The parties have the possibility of withdrawing from the procedure at any stage if they are dissatisfied with the performance or the operation of the procedure. They shall be informed of that right before the procedure commences. Where national rules provide for mandatory participation by the trader in ADR procedures, this point shall apply only to the consumer.

While the Directive establishes a system of voluntary ADR, Member States are free to make participation in ADR procedures mandatory at the national level, provided that the national legislation does not prevent the parties from exercising their right of access to the judicial system.

In most Member States, ADR is not compulsory for consumers; generally, it is not also for traders. However, some sector-specific provisions may apply in Member States where ADR is usually voluntary.

The fact that ADR is voluntary for consumers is coherent with the premises of the Directive, oriented at consumer protection to improve their confidence in the internal market. On the other hand, Hodges, Fejos and Willet are among those who believe that participation in ADR processes should be mandatory for businesses. They assert that the power imbalance between businesses and consumers would put the latter in a weaker bargaining position from which they would not be able to compel traders to participate in the ADR proceeding and ultimately would be deprived of access to justice.¹⁹⁵ Making ADR compulsory contributes to levelling the field,¹⁹⁶ which the authors deem to be the reason why business participation is mandatory in sectors like

¹⁹⁵ Andrea Fejos and Chris Willet, 'Consumer Access to Justice: The Role of the Directive and the Member States' (2016) 1 *European Review of Private Law* 33, 42.

¹⁹⁶ Christopher Hodges, 'Consumer Alternative Dispute Resolution' in Burkhard Hess and Stephanie Law (eds), *Implementing EU consumer rights by national procedural law* (CH Beck 2019) 178.

energy, telecommunications, and financial services, where the disproportion in the two parties' positions is particularly striking.¹⁹⁷

Several Member States require consumers to at least attempt to solve their issues directly with the traders before resorting to ADR. According to Fejos and Willet, only mandatory ADR would make sense in these cases, as traders have already considered and ignored or dismissed the consumer's claim.¹⁹⁸

However, national practice plays a significant role in whether or not traders observe the outcome of the ADR proceeding, irrespectively of the binding or not binding nature of such decision or recommendation.¹⁹⁹

Where consumer ADR is not mandatory, a reward system addressing the reasons for business reluctance to participate should be put in place, as the voluntary adhesion of traders is a crucial element to making consumer redress through ADR effective.

First of all, traders may refuse to join the ADR scheme because they would have to bear the costs for it, either in person or through their trade association, as only a few Member States grant access to consumer ADR free of charge for both parties. When the trader is a member of a trade association, such costs may be included in the membership fee, thus, the participation in an ADR scheme would not lead to substantive additional costs for the trader.²⁰⁰ When this is not the case, the costs of the proceeding and for establishing the entity itself fall entirely on the trader. The trader could reasonably refuse to participate, leaving the consumer with the alternative of either going to court or abandoning the claim.²⁰¹ Therefore, stakeholders should promote the inclusion of ADR schemes in the membership fees of trade associations, especially those whose members are SMEs. The costs issue may otherwise be tackled indirectly through tax deductions, as Vigoriti suggests.²⁰² On the other hand, the German experience illustrates that lowering or raising the fee according to parties' behaviour and whether the procedure is expeditious or not is likely to favour early settlements when ADR is compulsory, since the alternative for the trader who decides not to join a voluntary procedure comes at zero costs (see *supra* 2.4 Germany).

Therefore, it is essential to stress the reputational value for a business to join ADR schemes as an effective conciliatory way to process consumer complaints while preserving the relationship with the clients and fostering public confidence.²⁰³ Hodges

¹⁹⁷ Andrea Fejos and Chris Willet, 'Consumer Access to Justice: The Role of the Directive and the Member States' (2016) 1 *European Review of Private Law* 33, 42 and Marco BM Loos, 'Enforcing Consumer Rights through ADR at the Detriment of Consumer Law' (2016) 1 *European Review of Private Law* 61, 70.

¹⁹⁸ Andrea Fejos and Chris Willet, 'Consumer Access to Justice: The Role of the Directive and the Member States' (2016) 1 *European Review of Private Law* 33, 42.

¹⁹⁹ Christopher Hodges, 'Consumer Alternative Dispute Resolution' in Burkhard Hess and Stephanie Law (eds), *Implementing EU consumer rights by national procedural law* (CH Beck 2019) 185.

²⁰⁰ Marco BM Loos, 'Enforcing Consumer Rights through ADR at the Detriment of Consumer Law' (2016) 1 *European Review of Private Law* 61, 70.

²⁰¹ *ibid.*

²⁰² Vincenzo Vigoriti, 'Superabili ambiguità. Le proposte europee in tema di ADR e di ODR' (2012) 5 *Nuova giurisprudenza civile commentata* 319, 323.

²⁰³ Gina Gioia, 'L'uniforme regolamentazione della risoluzione alternativa delle controversie con i consumatori' (2018) 1 *Revista Ítalo-española de Derecho procesal* 3, 4.

says that adherence to ADR outcomes is high where traders consider belonging to a consumer ADR scheme as a matter of business reputation.²⁰⁴

Other incentives should lie in the quick resolution of the dispute within the 90 days limits, which Vigoriti suggests could be backed up by the immediate execution of the agreement.²⁰⁵

Country-specific remarks

In **Belgium**, the ADR procedure is generally voluntary for both parties. However, business participation may be compulsory under the Code of conduct of many trade associations or sale or service contracts, and the adhesion to an ADR entity may be required to exercise certain professions.²⁰⁶

In **France**, the previous ‘attempt’ with the client service of the trader is a precondition to access consumer ADR, but no definition is provided in national law.²⁰⁷ The matter is demanded to a specific clause in consumer contracts that must describe how to draw up such prior written complaint and explain how the competent department will examine it. The clause does not have to be drafted in a deceiving way to give consumers the impression that they can only refer the matter to the ombudsman after the internal procedure has been completed.²⁰⁸ Indeed the consumer can refer the matter to ADR when the trader fails to reply within two months or if he or she is not satisfied with the reply, and within a maximum of one year from the date of the complaint.²⁰⁹ However, the consumer must provide written proof of this preliminary step, which is the most prominent reason why French ADR entities dismiss a high percentage of claims. Sometimes this two-step mechanism is made even more complicated by the poor layout of the complaint forms on the trader’s website, making it difficult for the consumer to see the complete claim form or print it, thus depriving him or her of the possibility to keep proof of it.²¹⁰

When consumers effectively address the competent ADR entity, traders often refuse to join on the basis that their professional insurance does not cover it.²¹¹

Overall, the compliance rate with ADR decisions is rather low in France.²¹² SMEs are particularly reluctant to participate in ADR proceedings, but Guinchard highlights that establishing sectoral entities, instead of expecting traders to appoint their own mediator,

²⁰⁴ Christopher Hodges, ‘Consumer Alternative Dispute Resolution’ in Burkhard Hess and Stephanie Law (eds), *Implementing EU consumer rights by national procedural law* (CH Beck 2019) 185.

²⁰⁵ Vincenzo Vigoriti, ‘Superabili ambiguità. Le proposte europee in tema di ADR e di ODR’ (2012) 5 *Nuova giurisprudenza civile commentata* 319, 323.

²⁰⁶ Grégory Renier, ‘Le règlement extrajudiciaire des litiges de consommation. Analyse de la transposition de la directive « ADR » 2013/11/UE en droit belge’ (2015) 107 *DCCR* 3, 28.

²⁰⁷ Sabine Bernheim-Desvaux, ‘La Transposition de La Directive 2013/11/UE Du 21 Mai 2013 Relative Au Règlement Extrajudiciaire Des Litiges de Consommation (RELC) Par l’ordonnance N° 2015-1033 Du 20 Août 2015’ (2015) *Contrats Concurrence Consommation* 5, 8.

²⁰⁸ Sophie Gjidara-Decaix, ‘La Médiation de La Consommation: Le Point de Vue d’une Universitaire’ (2019) *Tome 61 Archives de philosophie du droit* 213, 219.

²⁰⁹ *ibid.*

²¹⁰ ADR assembly 2021, Breakout session 1C.

²¹¹ Alexandre Biard and Christopher Hodges, ‘Médiation de La Consommation: Un Bilan, Des Défis, Des Pistes de Réflexion Pour l’avenir’ (2019) 2 *Contrats Concurrence Consommation* 1, 5.

²¹² *ibid.*

and providing businesses with the right incentive are adequate solutions to the problem. He does so by bringing the example of Water Mediation (*Médiation de l'eau*), an ADR entity accessible to all consumers whose supplier is a member or upon parties' agreement. Water Mediation is a cost-efficient solution for its members, who pay an annual subscription proportional to the number of their clients plus an additional fee per case investigated.²¹³

Finally, the CECMC calls out another practice negatively affecting business participation in France, namely that some mediators make mediation conditional on the initial payment of a fee. If the trader refuses, the whole mediation process is halted. Therefore, the French authority aims to forbid such a practice, which ultimately frustrates consumers' expectations and rights.²¹⁴

In **Germany**, legal professionals and some academics are sceptical about the alleged added value of ADR proceedings, since they deem the court system to be efficient enough to handle this kind of disputes.²¹⁵ In order to promote such mechanisms, ADR is generally encouraged before going to court. Eleven regional States require disputes in specific sectors to be submitted to ADR procedures as a prerequisite for court proceedings, namely in disputes involving lawyers, civil aviation providers and energy providers,²¹⁶ but many traders do not comply with this rule.²¹⁷

According to Creutzfeldt, German consumers should be further educated on what ADR can offer to understand and gain trust in the procedure.²¹⁸

In **Italy**, attempting mediation is a precondition for initiating a court proceeding in the banking, financial and insurance sectors. Since provisions on mandatory mediation prevail on general consumer ADR law, consumer ADR is mandatory for clients of banks, financial intermediaries and insurance agencies, while it is voluntary for consumers who bring claims in other sale and service contracts.

The mandatory nature of the Italian consumer ADR has been challenged before the CJEU, which ultimately stated that the voluntary nature of ADR procedure is compatible with any form of compulsory mediation, as long as the parties are not prevented from exercising their right of access to the judicial system.²¹⁹

The Italian Constitutional Court proposed a similar interpretative solution, although on a different basis. The judges excluded any contrast between the compulsory nature of mediation and the fundamental right of defence under article 24 of the Italian

²¹³ Emmanuel Guinchard, 'The Implementation of the Consumer ADR Directive in France' in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 161.

²¹⁴ CECMC – DGCCRF, 'Rapport d'activité 2019-2021' (2021) 47.

²¹⁵ Naomi Creutzfeldt, 'Implementation of the Consumer ADR Directive' (2016) 4 *Journal of European Consumer and Market Law* 169, 173-174.

²¹⁶ Christopher Hodges, 'Consumer Alternative Dispute Resolution' in Burkhard Hess and Stephanie Law (eds), *Implementing EU consumer rights by national procedural law* (CH Beck 2019) 176-178.

²¹⁷ Naomi Creutzfeldt, 'Implementation of the Consumer ADR Directive' (2016) 4 *Journal of European Consumer and Market Law* 169, 173-174.

²¹⁸ *ibid.*

²¹⁹ Alessia Fachechi, 'Alternative Dispute Resolution Regulation: A Work of Modern Art' (2019) 5 *Italian Law Journal* 293, 299 and Anna van Duin and others, 'Effective Justice in Consumer Protection: Re-jus Casebook' (University of Trento, 2018) 168 <<https://www.rejus.eu/content/materials>>. See CJEU 14 June 2017, Case C-75/16, *Livio Menini and Maria Antonia Rampanelli v. Banco Popolare Società Cooperativa*, ECLI:EU:C:2017:457.

Constitution. Following the Constitutional Court case law, the legal action does not necessarily have to be immediate. Instead, it could be postponed to safeguard ‘general’ or ‘social’ interests, avoid abuses of rights or pursue superior objectives of justice, as long as such delays would not make it impossible or extremely difficult to exercise the person’s right.²²⁰

Both courts acknowledged that access to justice could be subject to conditions like a mandatory preliminary attempt to mediate. However, the legitimacy of such a restriction (even though temporary) to court proceedings has to be justified on a case-by-case basis, considering the functioning of the specific proceeding, the purpose of the regulation, the nature of the dispute and the interests to protect.²²¹

In **Nordic countries**, traders generally comply with the ADR outcome, and such a high adherence rate is sometimes supported by ‘name and shame’ publicity.²²²

In Sweden, the residual can analyse consumer claims even though the trader has refused the procedure as their participation is not a requirement.²²³

f. Coordination between court proceedings and ADR

As Cortés clearly illustrates, the connection between court proceedings and extrajudicial schemes also determines access to justice.²²⁴ Judicial and ADR schemes generally are not mutually exclusive, save for arbitration. Instead, they complement each other, a collaboration that, according to the author, could progressively shift the small claims workload to ADR entities and entrust courts with a supervisory function. However, the Directive and the ODR Regulation do not encourage such cooperation. Only the Small Claims Regulation says that ‘whenever appropriate, the court or tribunal shall seek to reach a settlement between the parties’.²²⁵

Cortés indicate several ways to improve the connections between in-court and out-of-court proceedings.

Firstly, the parties must be adequately informed and able to assess the best method to handle their dispute. As consumers and traders may be unaware of the benefits of ADR, such an option should be offered at the time of submitting the claim and during the court proceeding.²²⁶ The unjustified refusal to attempt ADR or the rejection of a

²²⁰ Alessia Fachechi, ‘Alternative Dispute Resolution Regulation: A Work of Modern Art’ (2019) 5 Italian Law Journal 293, 299.

²²¹ *ibid.*

²²² Christopher Hodges, ‘Consumer Alternative Dispute Resolution’ in Burkhard Hess and Stephanie Law (eds), *Implementing EU consumer rights by national procedural law* (CH Beck 2019) 185.

²²³ CECMC – DGCCRF, ‘Rapport d’activité 2019-2021’ (2021) 53.

²²⁴ Pablo Cortés, ‘The New Landscape of Consumer Redress’ in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 57.

²²⁵ Article 12(3) of Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure [2007] OJ L199/1.

²²⁶ In Belgium, civil procedure rules grant courts more power to persuade the litigant parties to mediate, either in court or via external accredited mediators. See Pablo Cortés, ‘The New Landscape of Consumer Redress’ in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 58 and Christopher Hodges, ‘Developments and Issues in Consumer ADR and Consumer Ombudsmen in Europe’ (The Foundation for Law, Justice and Society 2019) 4.

proposed settlement could be sanctioned with higher court fees when the solution proposed is equal to or higher than the judicial award.

Member States should ensure the possibility of staying the court proceeding and interrupting the limitation period for the whole duration of the ADR attempt, which some countries still do not.²²⁷ The case should automatically return to the competent judge if a settlement cannot be reached.²²⁸

Another set of provisions should recognise the courts' supervisory role over the outcomes of ADR schemes. For instance, several authors advocate for introducing a preliminary reference to the court by the ADR entity to obtain clarification on the interpretation of law, which would improve the legality of ADR schemes (see *infra* 3.j).²²⁹

Finally, legislators should facilitate the enforcement of ADR outcomes, especially when consumer interests have to be protected from a trader undergoing financial difficulties or who disagrees with the ADR decision. Cortés suggests accelerating compliance proceedings by providing for an automatic referral to the court or other enforcement authority and assisting the enforcement procedure with a formal request by the public authority and sanctions such as the inscription in 'name and shame' registries (see *infra* 4.c).²³⁰

The implementation of alternative dispute resolution necessarily presupposes a cultural revolution of all parties involved, based on a 'polyhedral' system of law enforcement where State courts stand next to a set of different paths aiming at the extrajudicial settlement of disputes.²³¹ According to Marinaro, alternative dispute resolution systems are not merely needed to cope with the growing demand for justice, but a cultural necessity that must be addressed to sustain a more complex justice system.²³²

²²⁷ Christopher Hodges, 'Consumer Alternative Dispute Resolution' in Burkhard Hess and Stephanie Law (eds), *Implementing EU consumer rights by national procedural law* (CH Beck 2019) 185.

²²⁸ Pablo Cortés, 'The New Landscape of Consumer Redress' in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 58.

²²⁹ *ibid.*

²³⁰ *ibid.*

²³¹ Marco Marianello, 'L'evoluzione delle procedure ADR nel diritto privato italiano' in Guido Alpa and others (eds), *Soluciones alternativas a los conflictos de consumo: perfiles hispano-italianos* (Comares 2016), 453.

²³² Marco Marinaro, 'Spunti di riflessione per l'armonizzazione e la razionalizzazione dei sistemi di ADR per le liti dei consumatori' (2016) *Judicium* <<https://www.judicium.it/wp-content/uploads/2016/10/M.-Marinaro-1.pdf>>.

3. Quality requirements

The regulatory architecture of the Directive is undeniably built upon the quality requirements established for ADR entities and ADR procedures. This building block and its corollary (i.e., the oversight of the requirements by Competent Authorities), clearly represent the heart of the Directive, and thus also the topical field of research and discussion in the literature. Whilst scholars and experts may have polarised views, they altogether agree that the overall impact of the Directive and the level of protection granted to consumers largely depends on these requirements.

a. The rationale for quality requirements

It is common ground that consumer ADR should be an alternative to court proceedings, not an alternative to justice. Outsourcing the protection of consumers (the so-called weaker contracting parties) from the natural venue of *iurisdictio* requires that the out-of-court dispute resolution procedures ensure equivalent guarantees, or rather that they do not imply any *deminutio* in the satisfaction of consumer rights.²³³ Angelone argues that it is not possible to ensure the safeguards of the European values of ‘fair trial’ outside the courtrooms unless quality requirements are set for dispute resolution entities and procedures. He asserts that the need for quality requirements is even intensified when ADR is not an ‘alternative’ for consumers, but rather the only chance they have to access justice. This happens quite often. Consumers generally hold low-value claims, and their ‘rational apathy’ discourages them to seek redress in courts, where litigation costs override the benefits of (any) compensation. Even more dramatically, some Member States are known for a substantial backlog of cases pending before the courts that generally prevent consumers from exercising their rights within a reasonable time.²³⁴ These concerns explain the ‘institutionalisation’ of consumer ADR in the EU: the *ratio legis* was to embed consumer ADR in the European civil justice system.²³⁵ This required setting requirements for ADR procedures and ADR entities that would mimic the principle constituting the right to a fair trial, as laid down in article 6 (1) of the European Convention on Human Rights.²³⁶

In scholarly literature, the debate is heated on whether the Directive has effectively managed to achieve this objective through the provisions on quality requirements. Cauffman believes that the Directive falls short in offering the normal guarantees necessary for the proper administration of justice.²³⁷ Similarly, Eidenmüller argues that out-of-court dispute resolution mechanisms can only offer ‘rough justice’. Conversely, many authors confidently look at the requirements as a sufficient (but above all

²³³ Marco Angelone, ‘La “degiurisdizionalizzazione” della tutela del consumatore’ (2016) 3 *Rassegna di diritto civile* 723, 723.

²³⁴ Recital 15 ADR Directive.

²³⁵ Carol Brennan and others, ‘Designing Consumer Redress: Making Redress Accessible for Consumer-Citizens’ (The Foundation for Law, Justice and Society 2015) 10.

²³⁶ Alexandre Biard, ‘Impact of Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK’ (2019) 42 *Journal of Consumer Policy* 109, 110.

²³⁷ Caroline Cauffman, ‘Critical remarks on the ADR Directive’ in Caroline Cauffman and Jan M Smits (eds), *The Citizen in European Private Law: Norm-setting, Enforcement and Choice* (Intersentia 2016).

necessary) starting point. Hodges conveys that ADR entities established to protect consumers often pay even more attention to consumer protection than courts.²³⁸ Likewise, Peters is convinced that the traditional court system is unable to administer justice ‘of scale’, while ADR provides consumers with the architecture and tools to handle the increasing number of online disputes.²³⁹

b. The minimum harmonisation approach in the drafting of quality requirements

Recital 5

Alternative dispute resolution (ADR) offers a simple, fast and low-cost out-of-court solution to disputes between consumers and traders. However, ADR is not yet sufficiently and consistently developed across the Union. It is regrettable that, despite Commission Recommendations 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes (3) and 2001/310/EC of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (4), ADR has not been correctly established and is not running satisfactorily in all geographical areas or business sectors in the Union.

Recital 37

The applicability of certain quality principles to ADR procedures strengthens both consumers’ and traders’ confidence in such procedures. Such quality principles were first developed at Union level in Recommendations 98/257/EC and 2001/310/EC. By making some of the principles established in those Commission Recommendations binding, this Directive establishes a set of quality requirements which apply to all ADR procedures carried out by an ADR entity which has been notified to the Commission.

In the late ‘90s, the European Commission had already tried to level the playing field of existing out-of-court mechanisms with Recommendation no. 98/257 of 30 March 1998,²⁴⁰ and Recommendation 2001/310 of 4 April 2001.²⁴¹ These recommendations contained non-binding principles applicable to the bodies for out-of-court settlement of consumer disputes and principles for out-of-court bodies involved in the consensual resolution on consumer disputes. As soft-law instruments, they did not have a great impact in the Member States.²⁴² After a decade, the horizontal regulatory framework set out by the Directive enhanced the previous initiatives by giving the recommended principles a binding nature.²⁴³ Gasparini and Scannicchio describe this process as the

²³⁸ Christopher Hodges, ‘Consumer Alternative Dispute Resolution’ in Burkhard Hess and Stephanie Law (eds), *Implementing EU consumer rights by national procedural law* (CH Beck 2019) 181.

²³⁹ Shamaise Peters, ‘The Evolution of Alternative Dispute Resolution and Online Dispute Resolution in the European Union’ (2021) 12 CES Derecho 3, 4.

²⁴⁰ Commission Recommendation 98/257/EC of 30 March 1998 on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes [1998] OJ L115.

²⁴¹ Commission Recommendation 2001/310/EC of 4 April 2001 on the Principles for the Out-of-Court Bodies Involved in the Consensual Resolution of Consumer Disputes [2001] OJ L109/56.

²⁴² Recital 6 ADR Directive.

²⁴³ Guillermo Palao Moreno, ‘Cross-Border Consumer Redress after the ADR Directive and the ODR Regulation’ in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 394.

“canonisation” of the quality requirements on consumer ADR.²⁴⁴ The provision for quality requirements has had a great impact on Member States that previously had no consumer ADR culture, since they were finally bound to complement their consumer dispute resolution landscape with ADR, and to do it seriously. The same provisions also have had a great impact on Member States with pre-existing consumer ADR, since matching the Directive’s quality requirements was a trigger to review the effectiveness of the previous ADR schemes and to upgrade them.²⁴⁵

Recital 15

The development within the Union of properly functioning ADR (...) should build on existing ADR procedures in the Member States and respect their legal traditions. Both existing and newly established properly functioning dispute resolution entities that comply with the quality requirements set out in this Directive should be considered as ‘ADR entities’ within the meaning of this Directive.

Recital 38

This Directive should establish quality requirements of ADR entities, which should ensure the same level of protection and rights for consumers in both domestic and cross-border disputes.

Article 2

Scope

3. This Directive establishes harmonised quality requirements for ADR entities and ADR procedures in order to ensure that, after its implementation, consumers have access to high-quality, transparent, effective and fair out-of-court redress mechanisms no matter where they reside in the Union. Member States may maintain or introduce rules that go beyond those laid down by this Directive, in order to ensure a higher level of consumer protection.

Ultimately, the aim of the Directive was to ensure the availability of high-quality ADR entities and procedures for all European consumers, regardless of their residence, and to grant them the same level of protection. To make it work, the Directive pursued a minimum harmonisation approach. Biard asserts that this approach reflects the aim of inclusiveness: no one-size-fits-all was prescribed to avoid cancelling the pre-existing national consumer ADR schemes.²⁴⁶ Doing otherwise would have resulted in a narrowing of consumer protection, rather than an expansion. Quality requirements have been selected, and their content described, on the basis that they could be applied to any ADR entity operating in any sector and Member States. Additionally, the quality requirements were not deemed to be an insuperable rod. Quite the opposite: the Directive left leeway to Member States to set higher-quality standards.

²⁴⁴ Maria Pia Gasperini, ‘Il sistema delle ADR in Italia, tra contesto europeo e policies interne in materia di giustizia civile’ (2017) 6 *Annali della Facoltà Giuridica dell’Università di Camerino* 135, 149 and Nicola Scannicchio, *Accesso alla giustizia e attuazione dei diritti: la mediazione delle controversie di consumo nella direttiva europea 2013-11* (Giappichelli 2015) 3.

²⁴⁵ Commission, ‘Explanatory Memorandum to COM(2019)425 - Application of Directive 2013/11/EU on alternative dispute resolution for consumer disputes and Regulation 524/2013 on online dispute resolution for consumer dispute’.

²⁴⁶ Alexandre Biard, ‘Monitoring Consumer ADR Quality in the EU: A Critical Perspective’ (2018) 2 *European Review of Private Law* 171, 182.

Recital 24

[...] This Directive should not preclude the functioning of existing dispute resolution entities operating within the framework of national consumer protection authorities of Member States where State officials are in charge of dispute resolution. State officials should be regarded as representatives of both consumers' and traders' interests. This Directive should not oblige Member States to create a specific ADR entity in each retail sector. When necessary, in order to ensure full sectoral and geographical coverage by and access to ADR, Member States should have the possibility to provide for the creation of a residual ADR entity that deals with disputes for the resolution of which no specific ADR entity is competent. Residual ADR entities are intended to be a safeguard for consumers and traders by ensuring that there are no gaps in access to an ADR entity.

Recital 38

This Directive should not prevent Member States from adopting or maintaining rules that go beyond what is provided for in this Directive.

In **France**, the transposition of the Directive improved the guarantees offered by consumer mediators, especially those embedded within a business. Creutzfeldt highlights that it encouraged the creation of the *Commission d'évaluation et de contrôle de la médiation de la consommation* (CECMC).²⁴⁷

The Competent Authorities designed by the Member States to monitor the compliance of the ADR entities' with quality requirements, have levelled up the quality of the latter via guidelines. This was clear in the **United Kingdom**, especially in the aviation and gambling sector. Biard stresses, however, that this process is normally very slow since reviewing criteria takes a long time.²⁴⁸

Some Member States have not set national procedural rules for their ADR entities but left to the same ADR entities the task to draft their own procedures, once fulfilling the Directive's general requirements. Luzak questions whether this can be confusing for consumers, since their assessment of the compliance of the ADR entities with the ADR framework is made burdensome within the same Member States.²⁴⁹ Some authors point out that the Directive has not encouraged much progress by national legislators, who were rather calmed down by the minimum standards set out at the EU level and took no further effort. Biard asserts that the flexibility of the requirements is not *per se* a bad thing: the requirements can be easily adapted to the diversity of providers which can ensure high-quality services to consumers.²⁵⁰ At the same time, he inquires whether they result in practice in a too low common denominator to adequately enhance ADR quality and meet consumer expectations. In his work, he finds that the flexibility of broad standards has resulted in a loss in precision borne at costs and risks of ambiguities on contents and meanings.²⁵¹ Scannicchio, on the other hand, argues that when

²⁴⁷ Naomi Creutzfeldt, 'Implementation of the Consumer ADR Directive' (2016) 4 Journal of European Consumer and Market Law 169, 172.

²⁴⁸ Alexandre Biard, 'Impact of Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK' (2019) 42 Journal of Consumer Policy 109, 112-130.

²⁴⁹ Joasia Luzak, 'The ADR Directive: Designed to Fail? A Hole-Ridden Stairway to Consumer Justice' (2016) 1 European Review of Private Law 81, 96.

²⁵⁰ Alexandre Biard, 'Impact of Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK' (2019) 42 Journal of Consumer Policy 109, 118-130.

²⁵¹ Alexandre Biard, 'Monitoring Consumer ADR Quality in the EU: A Critical Perspective' (2018) 2 European Review of Private Law 171, 11.

requirements are not flexible, they result in strong and hidden restrictions to the application of the Directive.²⁵²

In **Italy**, the Consumer Code defines the ADR entities by placing particular emphasis on the requirement of the durable basis of their establishment. It strictly follows recital 20 of the Directive, and impedes the creation of more spontaneous ADR entities.²⁵³ Requirements intended as restrictions, have been welcomed by other scholars. Santing-Wubs claims that the Directive's demand for structural ADR entities is a guarantee for a better protection of consumer rights.²⁵⁴

c. The certification process of the ADR entities

Article 20

Role of the competent authorities and of the Commission

1. Each competent authority shall assess, in particular on the basis of the information it has received in accordance with Article 19(1), whether the dispute resolution entities notified to it qualify as ADR entities falling within the scope of this Directive and comply with the quality requirements set out in Chapter II and in national provisions implementing it, including national provisions going beyond the requirements of this Directive, in conformity with Union law.

The flexibility of the quality requirements as listed in the Directive is considered to be counterbalanced by the certification process. If they wish to be certified as ADR entities, the ADR providers have to go through a careful scrutiny operated by Competent Authorities. In theory, it allows for effective control over performance and quality of schemes. Biard stresses, however, that it has not been a choice for homogeneity. The certification process largely depends on the goodwill of Competent Authorities. He claims that there is for the time being no in-depth assessment by default, but rather mere “ticking the box” when reviewing the information provided.²⁵⁵

Additionally, the certification process is not mandatory or necessary for ADR providers. Cortés highlights that certified ADR entities hold a competitive advantage over non-certified ADR providers, since the former are subject to higher standards and are perceived as more qualified.²⁵⁶ Biard agrees that the certification represents a sign of quality, a trust-mark incentivising consumers and traders to refer complaints to approved ADR entities, but it is not enough *per se*.²⁵⁷ However, he points out another advantage of certification: visibility. Traders can only inform consumers about certified

²⁵² Nicola Scannicchio, ‘The Fake Implementation of a Fake Consumers’ ADR Directive: A Case Study on Rights’ Enforcement by Regulatory Powers in Italy’ (2019) 5 Italian Law Journal 323.

²⁵³ Claudia Troisi, ‘L’attuazione della direttiva 2013/11/UE in Italia alla luce della sentenza C-75/16’ [2018] *Comparazione e diritto civile* 1.

²⁵⁴ Albertha Harma Santing-Wubs, ‘Twee Europese voorstellen voor de alternatieve beslechting van consumentengeschillen: een ADR-richtlijn en een ODR-verordening’ (2012) 4 *Tijdschrift voor civiele rechtspleging* 109.

²⁵⁵ Alexandre Biard, ‘Impact of Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK’ (2019) 42 *Journal of Consumer Policy* 109, 130.

²⁵⁶ Pablo Cortés, ‘The New Landscape of Consumer Redress’ in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 22.

²⁵⁷ Alexandre Biard, ‘Impact of Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK’ (2019) 42 *Journal of Consumer Policy* 109, 111-112.

ADR entities in the event a dispute arises and only certified ADR entities can be listed on the EU ODR platform.

In **Germany**, if the certification is successful, the ADR entities are listed in compliance with article 20 (2) of the Directive but will also be defined as “*Verbraucherschlichtungsstelle*” (consumer ADR entities). Entities that do not comply with the requirements established by the VSBG²⁵⁸ or are excluded from its scope of application, will not receive any sanctions but nor will they benefit from the positive effects of being listed in the public record.²⁵⁹ Korte highlights that sometimes ADR providers comply with the requirements but nevertheless choose not to apply for certification in order to maintain more regulatory freedom.²⁶⁰

In **France**, the certification of ADR entities has impacted the overall functioning of these ADR entities. Prior to the Directive, there were already different types of mediators: public mediators, sectoral mediators, mediators from business organisations, in-house mediators, association of mediators. The Directive allowed the maintenance of such bodies, but it introduced extra warranties.²⁶¹ The CECMC, the French Competent Authority, has set high standards, in particular with regards to the independence of ADR schemes. Several applications were rejected because the applicants failed to meet the requirements. The CECMC also carefully analyses how ADR entities meet the quality criteria *in concreto*. It scrutinises applicants’ business plans and verifies the economic viability of their activities, their charters, the contents and nature of agreements signed with traders, their level of legal and technical expertise, and the absence of conflicts of interest.²⁶² Several schemes have improved their transparency, internal capacity, and the quality of the information provided to consumers (e.g., AMF Ombudsman, *Médiateur AMF* 2016).²⁶³ Other schemes have amended their dispute resolution schemes (e.g., *Médiateur Nationale de l’Énergie*).²⁶⁴ Several schemes also have increased their staff to facilitate the resolution of disputes

²⁵⁸ Gesetz vom 19 Februar 2016 zur Umsetzung der Richtlinie über alternative Streitbeilegung in Verbraucherangelegenheiten und zur Durchführung der Verordnung über Online-Streitbeilegung in Verbraucherangelegenheiten (VSBG) (Bundesgesetzblatt Teil 1, 9, 25 Februar 2016, 00254-00274). The VSBG is the German act implementing the Directive.

²⁵⁹ Rosa Miquel, ‘The implementation of the consumer ADR directive in Germany’ in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 173.

²⁶⁰ It must be noted however that bearing the denomination ‘consumer ADR entity’ without permission can lead to sanctions of up to a 50,000 euros fine. Stefan Korte, ‘Die behördliche Anerkennung privater Schlichtungsstellen’ (2015) 18 Deutsches Verwaltungsblatt 1157.

²⁶¹ Alexandre Biard and Christopher Hodges, ‘Médiation de La Consommation: Un Bilan, Des Défis, Des Pistes de Réflexion Pour l’Avenir’ (2019) 2 Contrats Concurrence Consommation 1, 2.

²⁶² Alexandre Biard, ‘Impact of Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK’ (2019) 42 Journal of Consumer Policy 109, 118 and Sophie Gjidara-Decaix, ‘La Médiation de La Consommation: Le Point de Vue d’une Universitaire’ (2019) Tome 61 Archives de philosophie du droit 213, 228.

²⁶³ The Financial Markets Authority Ombudsman (AMF Ombudsman), which was the first entity to be certified in 2016, has revised the online materials available to consumers, and added information and tools for users, which in particular now include an online referral form to contact the Ombudsman more easily.

²⁶⁴ *Médiateur Nationale de l’Énergie* has put an end to its ‘second-chance’ rule, which allowed complaints that had not been at least superficially processed by the trader to be sent back to the trader for additional examination. This rule was used to preserve the Ombudsman’s resources and to maintain greater scrutiny for more complex cases. As the Ombudsman’s managing director explained, the Ombudsman has ‘complied with the Commission’s requirement to process all referral procedures in depth.’

within 90 days, as requested by the Directive (e.g., *Médiateur de l'assurance*, *Médiateur des télécommunications électroniques*).²⁶⁵ In-house mediators have also reviewed their procedures (e.g., *Médiateur du Groupe La Poste*).²⁶⁶ Like other mediators, in-house mediators have to be appointed by a collegial body composed of an equal number of consumer association representatives and traders' representatives. The in-house mediator must also have an autonomous budget and no hierarchical or functional link with the trader. At the end of the mandate, the in-house mediators are prohibited from working for the trader who employed them or for the federation to which these traders are affiliated for at least three years. This seems like a rear brake for the authors commenting on this feature. Bernheim-Desvaux and Guinchard wonder what the future holds for business mediation when the mandate expires.²⁶⁷

Differences in behaviour and in degrees of scrutiny between Competent Authorities mean that certified ADR providers with uneven quality can coexist across the EU.²⁶⁸ Biard and Hodges have questioned the adequacy and effectiveness of the checks carried out by the CECMC to ensure that the mediators listed actually comply with the quality criteria laid down in the regulations. Given the large number of consumer mediators and the limited resources of the CECMC, the question of the authors appears legitimate. They have remarked that the new certification process is more complex than expected due to the complex landscape and the wide diversity of existing schemes.²⁶⁹ In France, consumers have approached the French Authority DGCCRF (*Direction Générale de la Concurrence, de la Consommation et de la Répression des fraudes*) to complain about the alleged lack of independence of certain entities or about the delays in complaint-handling processes. In some circumstances, the CECMC and DGCCRF contacted the ADR entities and requested additional clarification about practices.²⁷⁰ Scholars have also emphasised that the different accreditation process of ADR entities across the EU is likely to create a risk of regulatory ADR shopping. Biard reports that traders signpost their consumers to cheaper ADR entities that are certified in the Member States where lower procedural standards apply.²⁷¹ Traders are described as repeat-players who can analyse the ADR entities' reports and choose the one that is most favourable to them (e.g., how often they uphold consumers' complaints). They may check which ADR entity offers a "race to the bottom" as to quality requirements. Cortés believes that it should be allowed to consumers, and not traders, to choose the ADR entity, though it

²⁶⁵ The average processing time of complaints by the telecom Ombudsman (*Médiateur des communications électroniques*) has decreased from 135 days in 2016 to 80 days in 2017.

²⁶⁶ *Médiateur du Groupe La Poste* has amended its Charter and revised its website, which now includes a mechanism allowing users to upload documents online so as to facilitate the treatment of their claims.

²⁶⁷ Sabine Bernheim-Desvaux, 'La Transposition de La Directive 2013/11/UE Du 21 Mai 2013 Relative Au Règlement Extrajudiciaire Des Litiges de Consommation (RELC) Par l'ordonnance N° 2015-1033 Du 20 Août 2015' (2015) *Contrats Concurrence Consommation* 5, 9 and Emmanuel Guinchard, 'The Implementation of the Consumer ADR Directive in France' in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 162.

²⁶⁸ Alexandre Biard, 'Impact of Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK' (2019) 42 *Journal of Consumer Policy* 109, 113.

²⁶⁹ Alexandre Biard and Christopher Hodges, 'Médiation de La Consommation: Un Bilan, Des Défis, Des Pistes de Réflexion Pour l'avenir' (2019) 2 *Contrats Concurrence Consommation* 1, 3.

²⁷⁰ Alexandre Biard, 'Impact of Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK' (2019) 42 *Journal of Consumer Policy* 109, 118-119, 126.

²⁷¹ *ibid.*, 113.

is acknowledged that the fee structure of the ADR entities may make this option difficult to implement in practice.²⁷²

Biard and Cortés believe that the existence of a single pan-European authority could ensure a more uniform accreditation process. Cortés argues that the European Commission is invested with this power, and should operate on the advice of a working group that should include the ECC-net and the national ODR contact points.²⁷³

d. The monitoring of the requirements carried out by the Competent Authority

The Directive promotes high-quality consumer ADR through the approval process and regular monitoring, both carried out by the Competent Authorities. It is not sufficient for the dispute resolution entities to comply with the requirements once: after they have been certified as such, ADR entities must continuously comply with the binding requirements. This in order to respond to the criticisms expressed about the way ADR entities operate, in particular concerns regarding schemes' lack of independence, limited accountability and possible effects on due process.²⁷⁴ Experience shows that there sometimes is a lack of consistency between the certification and the monitoring practices, because of the too superficial oversight carried out by the Competent Authorities. Scholars question the ability and capacity of Competent Authorities to perform subsequent control checks when many ADR entities have been certified.²⁷⁵ In **France**, Bernheim-Desvaux is sceptical of the requirements' assessment carried out by CECMC and DGCCRF since they have to monitor, with limited resources and human capacities, more than 80 schemes.²⁷⁶ Luzak contends that the Directive could have mandated the designation of an Authority entity deputed at evaluating the compliance of ADR entities with the requirements and provide them with an external endorsement (trustmark).²⁷⁷ Similarly, Biard is convinced that a coordinating Authority should be designated and it should have the power to make binding recommendations to ensure and facilitate coordination when needed.²⁷⁸ It is pointed out that, especially in vertical models, not one single Competent Authority has the data to distil ADR best practices and there is only a minimal incentive for Competent Authorities to compile such information or enforce higher standards. Biard and Hodges agree that Competent Authorities should impose extra requirements depending on the peculiarities of sectors

²⁷² Pablo Cortés, 'The New Landscape of Consumer Redress' in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 36.

²⁷³ *ibid.*

²⁷⁴ Alexandre Biard, 'Impact of Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK' (2019) 42 *Journal of Consumer Policy* 109, 109.

²⁷⁵ Alexandre Biard and Christopher Hodges, 'Médiation de La Consommation: Un Bilan, Des Défis, Des Pistes de Réflexion Pour l'avenir' (2019) 2 *Contrats Concurrence Consommation* 1, 3.

²⁷⁶ Sabine Bernheim-Desvaux, 'Le marché français de la médiation de la consommation' (2017) *Revue internationale de droit économique*, 4, 35–44. See also Alexandre Biard and Christopher Hodges, 'Médiation de La Consommation: Un Bilan, Des Défis, Des Pistes de Réflexion Pour l'avenir' (2019) 2 *Contrats Concurrence Consommation* 1, 3.

²⁷⁷ Joasia Luzak, 'The ADR Directive: Designed to Fail? A Hole-Ridden Stairway to Consumer Justice' (2016) 1 *European Review of Private Law* 81.

²⁷⁸ Alexandre Biard, 'Impact of Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK' (2019) 42 *Journal of Consumer Policy* 109, 126.

and consumers concerned. They find that this could help rationalise the number of ADR entities.²⁷⁹

e. Expertise, independence and impartiality

Article 6

Expertise, independence and impartiality

1. Member States shall ensure that the natural persons in charge of ADR possess the necessary expertise and are independent and impartial. This shall be guaranteed by ensuring that such persons:

- (a) possess the necessary knowledge and skills in the field of alternative or judicial resolution of consumer disputes, as well as a general understanding of law;*
- (b) are appointed for a term of office of sufficient duration to ensure the independence of their actions, and are not liable to be relieved from their duties without just cause;*
- (c) are not subject to any instructions from either party or their representatives;*
- (d) are remunerated in a way that is not linked to the outcome of the procedure;*
- (e) without undue delay disclose to the ADR entity any circumstances that may, or may be seen to, affect their independence and impartiality or give rise to a conflict of interest with either party to the dispute they are asked to resolve. The obligation to disclose such circumstances shall be a continuing obligation throughout the ADR procedure. It shall not apply where the ADR entity comprises only one natural person.*

2. Member States shall ensure that ADR entities have in place procedures to ensure that in the case of circumstances referred to in point (e) of paragraph 1:

- (a) the natural person concerned is replaced by another natural person that shall be entrusted with conducting the ADR procedure; or failing that*
- (b) the natural person concerned refrains from conducting the ADR procedure and, where possible, the ADR entity proposes to the parties to submit the dispute to another ADR entity which is competent to deal with the dispute; or failing that*
- (c) the circumstances are disclosed to the parties and the natural person concerned is allowed to continue to conduct the ADR procedure only if the parties have not objected after they have been informed of the circumstances and their right to object.*

Where the ADR entity comprises only one natural person, only points (b) and (c) of the first subparagraph of this paragraph shall apply.

3. Where Member States decide to allow procedures referred to in point (a) of Article 2(2) as ADR procedures under this Directive, they shall ensure that, in addition to the general requirements set out in paragraphs 1 and 5, those procedures comply with the following specific requirements:

- (a) the natural persons in charge of dispute resolution are nominated by, or form part of, a collegial body composed of an equal number of representatives of consumer organisations and of representatives of the trader and are appointed as result of a transparent procedure;*
- (b) the natural persons in charge of dispute resolution are granted a period of office of a minimum of three years to ensure the independence of their actions;*
- (c) the natural persons in charge of dispute resolution commit not to work for the trader or a professional organisation or business association of which the trader is a member for a period of three years after their position in the dispute resolution entity has ended;*

²⁷⁹ Alexandre Biard and Christopher Hodges, 'Médiation de La Consommation: Un Bilan, Des Défis, Des Pistes de Réflexion Pour l'avenir' (2019) 2 Contrats Concurrence Consommation 1, 8.

(d) the dispute resolution entity does not have any hierarchical or functional link with the trader and is clearly separated from the trader's operational entities and has a sufficient budget at its disposal, which is separate from the trader's general budget, to fulfil its tasks.

4. Where the natural persons in charge of ADR are employed or remunerated exclusively by a professional organisation or a business association of which the trader is a member, Member States shall ensure that, in addition to the general requirements set out in paragraphs 1 and 5, they have a separate and dedicated budget at their disposal which is sufficient to fulfil their tasks.

This paragraph shall not apply where the natural persons concerned form part of a collegial body composed of an equal number of representatives of the professional organisation or business association by which they are employed or remunerated and of consumer organisations.

5. Member States shall ensure that ADR entities where the natural persons in charge of dispute resolution form part of a collegial body provide for an equal number of representatives of consumers' interests and of representatives of traders' interests in that body.

6. For the purposes of point (a) of paragraph 1, Member States shall encourage ADR entities to provide training for natural persons in charge of ADR. If such training is provided, competent authorities shall monitor the training schemes established by ADR entities, on the basis of information communicated to them in accordance with point (g) of Article 19(3).

The quality requirements established in the Directive can ideally be divided into two categories: one pertaining to the ADR entities, and the other dealing with the ADR procedures. The first includes *inter alia*: expertise, independence and impartiality (*rectius*, third party status). Fejos and Willet assert that these quality requirements were put in place not only to increase consumer protection, but also to induce consumers' trust in ADR schemes. The high-quality of ADR has to be perceived by consumers.²⁸⁰ If they know they can count on expert, independent and impartial ADR entities, they will fear the event of a contractual dispute arising less, and they will be more confident to have a national/cross-border/online/offline exchange with a trader. Scholars and experts have identified some practices that are generally regarded by consumers as an overall guarantee of independence, impartiality and expertise. Renier mentions the practice of publishing previous decisions of ADR entities and the rate of acceptance of proposed solutions by traders.²⁸¹ Luzak agrees on the importance of making consistent decision making available to consumers, since consumers can use this to assess whether they are treated equally to other consumers.²⁸² Jacquemin and Lachapelle believe that the confidence that consumers will place on the ADR entity will depend on the guarantees provided regarding the confidentiality of the information exchanged within this framework, in particular when personal data are processed.²⁸³ Théocaridi argues that it is regrettable that the Directive entrusts consumers with the task of regularly verifying the list of ADR entities.²⁸⁴ Setting high-quality requirements as to the profile of the entity in charge of settling the conflict is also fundamental to tackle traders' reluctance to collaborate in ADR procedures. There are some issues that are crucial in

²⁸⁰ Andrea Fejos and Chris Willet, 'Consumer Access to Justice: The Role of the ADR Directive and the Member States' (2016) 1 European Review of Private Law 33.

²⁸¹ Grégory Renier, 'Le règlement extrajudiciaire des litiges de consommation. Analyse de la transposition de la directive « ADR » 2013/11/UE en droit belge' (2015) 107 DCCR 3.

²⁸² Joasia Luzak, 'The ADR Directive: Designed to Fail? A Hole-Ridden Stairway to Consumer Justice' (2016) 1 European Review of Private Law 81, 99.

²⁸³ Hervé Jacquemin and Amélie Lachapelle, 'Renforcer la confiance des consommateurs par le règlement extrajudiciaire des litiges' (2014) 209 Journal de droit européen 186

²⁸⁴ Eva Théocaridi, 'Effectiveness of the ADR Directive: Standard of Average Consumer and Exceptions' (2016) 1 European Review of Private Law 103, 108.

the eyes of traders. Biard indicates, among others, the quality of the adjudicators: judicial experience, legal expertise, familiarity with national and EU law, the ability to deal with complex operations, and the capacity to evaluate arguments and evidence. He also found it crucial for traders that the ADR entity is proven not to have familiarity with the business activity and has not done similar activity for a direct competitor, in order to avoid conflicts of interest.²⁸⁵

e.1. Expertise

Recital 36

It is essential for the success of ADR, in particular in order to ensure the necessary trust in ADR procedures, that the natural persons in charge of ADR possess the necessary expertise, including a general understanding of law. In particular, those persons should have sufficient general knowledge of legal matters in order to understand the legal implications of the dispute, without being obliged to be a qualified legal professional.

Article 6

Expertise, independence and impartiality

1. Member States shall ensure that the natural persons in charge of ADR possess the necessary expertise and are independent and impartial. This shall be guaranteed by ensuring that such persons:

(a) possess the necessary knowledge and skills in the field of alternative or judicial resolution of consumer disputes, as well as a general understanding of law;

The Directive does not require the person in charge of settling the consumer dispute to be a jurist. In the implementation phase, most of the Member States have chosen not to require higher standards of expertise, albeit following a heated debate (e.g., in Germany). However, this has raised many doubts about the effective application of the mandatory consumer law within the ADR procedure. In fact, one wonders if it is possible to reasonably imagine that a non-jurist knows consumers' rights and can therefore guarantee its observance.²⁸⁶ For this reason, Cauffman argues that although the Directive purports to offer guarantees relating to the expertise of the members of the ADR entities, the value of these guarantees is questionable.²⁸⁷ Appiano makes a comparison with the Mediation Directive and concludes that the latter's normative dictation is much more precise on the point of the expertise required to mediators. This precision is based on the compliance with the codes of conduct by mediators and their vocational training.²⁸⁸ The latter consists of an initial course of study, to which all mediators must undergo if they intend to work as such entities, as well as periodical refresher courses. Weber believes that overall legal guidance for ADR decisions should be desirable since it increases the accuracy of the findings in ADR procedures and

²⁸⁵ Alexandre Biard, 'Impact of Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK' (2019) 42 *Journal of Consumer Policy* 109, 131.

²⁸⁶ Silvana Dalla Bontà, 'Una giustizia "co-esistenziale" online nello spazio giuridico europeo? Spunti critici sul pacchetto ADR-ODR per i consumatori' (2021) 1 *Giustizia consensuale* 191, 222.

²⁸⁷ Caroline Cauffman, 'Critical Remarks on the ADR Directive' in Caroline Cauffman and Jan M Smits (eds), *The Citizen in European Private Law: Norm-setting, Enforcement and Choice* (Intersentia 2016).

²⁸⁸ Ermenegildo M Appiano, 'ADR e ODR per le liti consumeristiche nel diritto UE' (2013) 2 *Contratto e impresa / Europa* 965, 971.

compensates, to some extent, for loss-detailed procedural rules. It is also fundamental to ensure the alignment of the outcome of courts with out-of-court decisions.²⁸⁹

In **France**, consumer mediators must have skills in mediation, negotiation, communication and conflict management. They also have to greatly master consumer law. Some authors believe that the former is not so important, as the subject is very technical. Regular training in their specific and technical field of intervention for mediators is mandated.²⁹⁰ According to the CECMC, consumer mediators should also have a good knowledge of the sector in which they operate. Gjidara-Decaix considers this requirement as very risky as mediators and traders could be very close.²⁹¹

In **Germany**, the dispute mediator must be a fully qualified lawyer or a certified mediator.²⁹² He must have the legal knowledge (especially of consumer law) and the skills required for the resolution of disputes in the area of competence of the consumer conciliation body.²⁹³ Most dispute mediators are recruited from the judiciary and are former judges at higher courts, which is meant to increase the reputation of the ADR scheme.²⁹⁴ For example, Günter Hirsch, former judge at the Court of Justice and former president of the *Bundesgerichtshof*, the highest civil law court in Germany, was appointed Insurance Ombudsman in 2008. In 2011, Renate Jaeger, former judge at the European Court of Human Rights, was appointed as the first mediator for disputes between lawyers and their clients; her successor Monika Nöhre is the former president of the *Kammergericht* (Higher Regional Court) Berlin. Edgar Isermann, head of the *söp* (*Schlichtungsstelle für den öffentlichen Personenverkehr*), was president of the Higher Regional Court of Braunschweig.²⁹⁵ Weber argues that the knowledge of arbitrators nonetheless differs from one judge to another; the Directive also makes explicit that the outcome of courts and ADR procedures' may differ.²⁹⁶ This does not always mean that consumer protection is guaranteed less for the outcome of an out-of-court procedure. For example, in the **Netherlands**, the *Geschillencommissie* and (for financial services) Kifid consumer ADR systems apply standard terms and conditions that are never lower than the level of protection afforded by the law and are usually higher, since they are negotiated every few years between trade and consumer representatives under the auspices of the State Council. This system produces a wide understanding on the

²⁸⁹ Franziska Weber, 'Is ADR the Superior Mechanism for Consumer Contractual Disputes?—An Assessment of the Incentivizing Effects of the ADR Directive' (2015) 38 *Journal of Consumer Policy* 265, 276.

²⁹⁰ ADR assembly 2021, Breakout session 1C.

²⁹¹ Sophie Gjidara-Decaix, 'La Médiation de La Consommation: Le Point de Vue d'une Universitaire' (2019) Tome 61 *Archives de philosophie du droit* 213, 225-226.

²⁹² Peter Rott, 'Consumer ADR in Germany' (2018) 7 *Journal of European Consumer & Market Law* 121, 121.

²⁹³ Joanna Page and Laurel Bonnyman, 'ADR and ODR—Achieving Better Dispute Resolution for Consumers in the EU' (2016) 17 *ERA Forum* 145, 159.

²⁹⁴ Christopher Hodges, 'Consumer Alternative Dispute Resolution' in Burkhard Hess and Stephanie Law (eds), *Implementing EU consumer rights by national procedural law* (CH Beck 2019) 182.

²⁹⁵ Peter Rott, 'Consumer ADR in Germany' (2018) 7 *Journal of European Consumer & Market Law* 121, 123.

²⁹⁶ Franziska Weber, 'Is ADR the Superior Mechanism for Consumer Contractual Disputes?—An Assessment of the Incentivizing Effects of the Directive' (2015) 38 *Journal of Consumer Policy* 265, 285.

relevant standards (and law) by traders and CDR decision-makers, and it also drives higher trading standards.²⁹⁷

In **Italy**, an implementation of the expertise requirement such the German one was not seconded. Hence, the expertise of ADR entities raises some concerns. Vaccà wonders how the so-called freelance mediators can be considered experts. She conveys that these kinds of mediators, acting as a “one-man band” are left free to conduct any ADR procedure without their competences being verifiable in any way.²⁹⁸

In **Finland**, the Consumer Dispute Resolution Boards have very knowledgeable members, who know the law (national and European) and apply it ex officio. They are experts in consumer law. Their expertise is similar or even exceeds that of District Courts.²⁹⁹

Also in the **Netherlands**, both the Ombudsman and all of the members of the Tribunal of the Consumer Complaint Commission must have a degree in Law. Verhage reports that Kifid takes consumer dispute resolution to the next level by demanding that both the Financial Ombudsman and the President of its Financial Complaint Commission must be judges. The reasoning behind the different approaches in the Dutch consumer dispute resolution landscape towards training requirements of the persons in charge of consumer ADR might depend on the supposed complexity of the cases handled by the relevant ADR entity. Nevertheless, in the author’s opinion, the possibility of a more consistent approach towards training requirements for persons in charge of consumer ADR should be considered in the Netherlands, as in all Europe.³⁰⁰

e.2. Expertise tailored on the type of consumer dispute and on the type of ADR scheme

Scholars convey that consumer contractual disputes require varying degrees of expertise, hence the expertise of ADR entities should be tailored to the type of dispute concerned.³⁰¹ Théocaridi claims that the vast majority of C2B disputes involve simple facts or mis-application of clear law by traders, without complex or unclear questions of law arising, so they are often swiftly resolved by ADR entities. Hodges argues, however, that some ADR schemes are often poor at identifying unfair contract terms. He believes that the task of identifying such illegality and applying the law correctly can be undertaken only with the involvement of trained lawyers and judges. The same author however criticises that empirical evidence on this point is missing and the

²⁹⁷ Eva Théocaridi, ‘Effectiveness of the ADR Directive: Standard of Average Consumer and Exceptions’ (2016) 1 *European Review of Private Law* 103, 107.

²⁹⁸ Cesare Vaccà, ‘L’attuazione della direttiva sulle ADR nelle liti di consumo’ (2015) *Consumatori, Diritti e Mercato* <<http://www.consumatoridirittimercato.it/diritti-e-giustizia/lattuazione-della-direttiva-sulle-adr-nelle-liti-di-consumo/>>.

²⁹⁹ Christopher Hodges, ‘Consumer Alternative Dispute Resolution’ in Burkhard Hess and Stephanie Law (eds), *Implementing EU consumer rights by national procedural law* (CH Beck 2019) 181.

³⁰⁰ Eline Verhage, ‘The Implementation of the Consumer ADR Directive in the Netherlands’ in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016).

³⁰¹ Ermenegildo M Appiano, ‘ADR e ODR per le liti consumeristiche nel diritto UE’ (2013) 2 *Contratto e impresa / Europa* 965, 971.

academic debate being polarised has been inconclusive.³⁰² On the other hand, Théocaridi emphasises that ADR procedures may sometimes require the resolution of complex legal issues, especially when the dispute implies a conflict of laws and the ADR entities have to apply a foreign law in conformity with the provisions of International Private law.³⁰³ Renier agrees that the level of education and experience required should be levelled according to the type of dispute, since some types require more knowledge than others.³⁰⁴ Ultimately, ADR entities are supposed to deal with simple cases, according to the Directive design, but Weber argues that there is no preclusion of complex cases either. Sometimes, it depends on how principal cases are filtered to the courts.³⁰⁵ Dalla Bontà stresses that even if the person in charge of the ADR procedure is a jurist, it does not necessarily mean that the person will ensure compliance with mandatory consumer law. She points out that in cross-border disputes this is even truer since the applicable law must be identified pursuant to article 6 of the Rome I Regulation on the law applicable to contractual obligations (article 11, par. 1, letter b), ADR Directive). The author legitimately doubts that the person in charge of the procedure, even if a jurist, is always able to promptly identify the *lex causae*. Dalla Bontà and Loos also question whether jurists can effectively guarantee compliance with mandatory consumer law in cross-border ADR procedures, as it stems from the jumble of Directives regarding consumer protection.³⁰⁶ These Directives are of complex application and also difficult to unravel because they are intertwined with the internal law of Member States. Wagner finds it surprising that the European legislator, aware of the complexity of European consumer law, has decided to entrust its implementation to the ADR entities, as designed by the Directive.³⁰⁷

Scholars also convey a distinction might arise in practice between, on the one hand, general ADR entities or individual mediators or arbitrators and, on the other hand, expert sectoral ADR or ombudsman schemes (appointed because of their relevant knowledge of sectoral legislations and rules).³⁰⁸ If the qualified entity makes binding decisions, Jouant argues that it is questionable whether a legal background should not be required. Indeed, the principle of legality implies that the entity should be able to ensure that the imperative rights of the consumer are respected.³⁰⁹ In this context, Loos highlights that article 11, paragraph 1 of the Directive requires the Member State to ensure that the consumer shall not be deprived of the protection of the applicable mandatory law. This implies that in any ADR procedure under the Directive that leads to a binding decision, one or more jurists must be involved as “a general understanding

³⁰² Christopher Hodges, ‘Consumer Alternative Dispute Resolution’ in Burkhard Hess and Stephanie Law (eds), *Implementing EU consumer rights by national procedural law* (CH Beck 2019) 180.

³⁰³ Eva Théocaridi, ‘Effectiveness of the ADR Directive: Standard of Average Consumer and Exceptions’ (2016) 1 *European Review of Private Law* 103, 107.

³⁰⁴ Grégory Renier, ‘Le règlement extrajudiciaire des litiges de consommation. Analyse de la transposition de la directive « ADR » 2013/11/UE en droit belge’ (2015) 107 *DCCR* 3.

³⁰⁵ Franziska Weber, ‘Is ADR the Superior Mechanism for Consumer Contractual Disputes?—An Assessment of the Incentivizing Effects of the ADR Directive’ (2015) 38 *Journal of Consumer Policy* 265, 181.

³⁰⁶ Marco BM Loos, ‘Enforcing Consumer Rights through ADR at the Detriment of Consumer Law’ (2016) 1 *European Review of Private Law* 61, 75.

³⁰⁷ Gerhard Wagner, ‘Private Law Enforcement through ADR: Wonder Drug or Snake Oil?’ (2014) 51 *Common Market Law Review* 165, 178.

³⁰⁸ Nathalie Besombes and others, ‘Médiation et Entreprise: Nouvelles Obligations et Perspectives’ (2016) 39 *Entreprise et Affaires* 21, 23.

³⁰⁹ Nathalie Jouant, ‘Le règlement extrajudiciaire des litiges de consommation en Belgique: évolutions’ (2017) 3 *DCCR* 115.

of law” does not suffice to guarantee that mandatory law is not disregarded.³¹⁰ Knigge agrees that binding decisions should preferably be taken by ADR entities that are composed of legal scholars or practitioners.³¹¹ She gives the example of the **Netherlands**, where the Compliant Boards always comprises one member of the judiciary. Arbiters may take either active or passive roles, with regard to fact-finding and may also differently treat parties’ emotional appeals. For example, an active arbiter would inquire about missing information, forcing consumers to answer additional questions and gather more evidence. A passive arbiter would be more likely to favour repeat players, which are usually professional parties.³¹² Gjidara-Decaix argues that the current professionalisation of consumer mediation could justify reinforcing the training requirements along the lines of what the 2013 Directive recommended, by inviting Member States to encourage ADR entities to provide training for natural persons in charge, and by entrusting the competent authorities, where such training is provided, with the supervision of the training programmes put in place.³¹³ Nicole Nespoulous agrees that the Directive should become more precise on the training of mediators, for example introducing a minimum number of hours.³¹⁴ In the absence of a provision in the Directive, Cadier proposes that mediators should nonetheless train themselves and strong associations keen on training mediators should make sure that professionalism is consistent.

e.3. Expertise as good communication

The requirement of expertise is linked to the fairness and legality requirements of the ADR procedure. In terms of fairness, the parties involved in the procedure must receive communication of the reasons on which the outcome of the procedure is based (article 9, paragraph 1, letter c)). In terms of legality, it is established that where the ADR procedure ends with an imposed solution, this must not deprive the consumer of the protection guaranteed by the mandatory rules provided for his protection in the State of his habitual residence (article 11). Hence, expertise means that the ADR entities must also provide good communication and information. Berlin and Braun argue that a mediator must communicate in a way that parties, especially consumers, can understand the conciliation proposal. The inherent legal analysis should not only be legally correct, but also comprehensible for legal laypersons.³¹⁵ They believe it is crucial to keep the parties motivated in difficult situations, so that they are open to amicable dispute resolution. In many Member States, the aspect of communication as part of ADR entities’ expertise has been particularly considered. Biard and Hodges report that in **France**, some ADR entities do not use the “old” arbitrage model, but rather a more

³¹⁰ Marco BM Loos, ‘Enforcing Consumer Rights through ADR at the Detriment of Consumer Law’ (2016) 1 *European Review of Private Law* 61, 72.

³¹¹ Marte Knigge and Charlotte Pavillon, ‘The Legality Requirement of the ADR Directive: Just Another Paper Tiger?’ (2016) 5 *Journal of European Consumer and Market Law* 155, 163.

³¹² Joasia Luzak, ‘The ADR Directive: Designed to Fail? A Hole-Ridden Stairway to Consumer Justice’ (2016) 1 *European Review of Private Law* 81, 98.

³¹³ Sophie Gjidara-Decaix, ‘La Médiation de La Consommation: Le Point de Vue d’une Universitaire’ (2019) Tome 61 *Archives de philosophie du droit* 213, 226.

³¹⁴ ADR assembly 2021, Breakout session 1C.

³¹⁵ Christof Berlin and Felix Braun, ‘Impulse für Verbraucher-ADR aus der Praxis’ (2015) 5 *Zeitschrift für Konfliktmanagement* 149, 150.

dynamic mediation model. They provide a more efficient communication, and allow the parties to have an idea of the strength or weakness of their dossiers from the beginning.³¹⁶ Nevertheless, the legislative act implementing the Directive does not require the mediators to duly inform the parties about what happened by the end of the mediation. Biard suggests that mediators should explain the legal effects of accepting the mediator's proposal, the possibility for the parties to ask the judge to approve their agreement, and the procedure for closing a consumer mediation, particularly in the event of silence from the parties. The current silence of the law on certain stages of the mediation process may lead consumer mediators to interpret the texts differently and to adopt heterogeneous mediation practices.³¹⁷ In the **United Kingdom**, a survey by the British Financial Ombudsman Service describes the communicative skills of the dispute mediators as particularly decisive for the acceptance of the outcome. This data also led to change in the recruitment criteria.³¹⁸

e.4. Impartiality and independence

Recital 31

Member States should ensure that ADR entities resolve disputes in a manner that is fair, practical and proportionate to both the consumer and the trader, on the basis of an objective assessment of the circumstances in which the complaint is made and with due regard to the rights of the parties.

The Directive gives punctual instructions on the impartiality and independence required for ADR entities. In the doctrine, there is debate on whether the guarantees established for the natural persons in charge of ADR can be considered enough. As a matter of fact, ADR entities are not always perceived as neutral, both by consumers and traders. Consumers often perceive the entity to be biased, mostly against them, especially when ADR entities rule in favour of the traders.³¹⁹

The perception of both consumers and traders mainly depends on the particular structure of the ADR entity and on the scheme it offers. As shown by Voet, the “personification” of the **Belgian** Ombudsman for Energy has enhanced the consumers’ trust on his/her impartiality.³²⁰ Consumers know his/her face, he/she is often in the media, TV and newspapers. Additionally, ADR entities’ denomination can tackle consumers’ scepticism. This is the case of the Belgian residual entity named “*Service de Médiation pour le Consommateur*”/“*Consumentenombudsdienst*”. The risk of this choice is that it might contribute to the general perception traders have that ADR

³¹⁶ Alexandre Biard and Christopher Hodges, ‘Médiation de La Consommation: Un Bilan, Des Défis, Des Pistes de Réflexion Pour l’avenir’ (2019) 2 *Contrats Concurrence Consommation* 1, 7.

³¹⁷ CECMC – DGCCRF, ‘Rapport d’activité 2019-2021’ (2021) 49.

³¹⁸ Christof Berlin and Felix Braun, ‘Impulse für Verbraucher-ADR aus der Praxis’ (2015) 5 *Zeitschrift für Konfliktmanagement* 149, 150.

³¹⁹ Alexandre Biard, ‘Impact of Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK’ (2019) 42 *Journal of Consumer Policy* 109, 131.

³²⁰ ADR assembly 2021, Breakout session 2.

entities represent consumers' interests and are therefore biased in favour of the consumer.³²¹

In **Italy**, a good example of impartiality – intended as a guarantee for both consumers and traders – is provided by the “*conciliazione paritetica*” (joint conciliation). It is an alternative dispute resolution scheme based on a voluntary agreement (protocol and implementing regulations) between consumer associations and traders. It provides for the involvement of a conciliation commission, with an equal composition (i.e., a representative of the business and one of the consumer associations) in charge not only to decide the dispute, but also to identify a possible solution and submit it to the acceptance of the consumer.³²²

Public ADR entities, in general, enjoy more confidence of both consumers and traders as to their impartiality and independence. In **France**, consumer organisations value public mediators as more independent, and they seem to deliver opinions more favourable to consumers. Moreover, even though not binding, their decisions are overwhelmingly endorsed by courts.³²³ The independence of public mediators is ensured by their designation by an independent public authority. The independence of private mediators is ensured by the minimum duration of their appointment (3 years).³²⁴

It may be different In **Italy**. As a rule, entities can be managed by both public and private bodies as long as there is equilibrium in the representation of the interests of consumers and traders. Nevertheless, the participation of public bodies is further refined by secondary legislation.³²⁵ Pilia, Cortés and Vargiu have considered the requirements set for these ADR entities as too low to ensure full independence.³²⁶ The regulation of public ADR entities (CONSOB, AGCOM, AEEG, CCIA, ABF) contains rules on the composition of bodies and the selection of conciliators and provides for the separation of the governing body (the “Chamber”) from the conciliation body. Scannicchio emphasises that these sector authorities are also governing bodies of the market in question and exercise this governance in the public interest, which is an objective different from the interest of consumers.³²⁷ This opens up the possibility of a conflict of interests, since the organisations responsible for the monitoring will carry out this activity for themselves. Scannicchio highlights the very controversial problem that affects “independent” authorities: the concentration of regulatory and sanctioning powers within a single body. The choice seems peculiar if one considers that in the experience of the ABF, *Arbitro Bancario Finanziario*, the doctrine has requested a more marked separation between the Bank of Italy and the ADR system generated and

³²¹ Alexandre Biard, ‘On the Road to High-Quality Consumer ADR: the Belgian Experience’ in Loic Cadet, Burkhard Hess, Marta Requejo Isidro (eds), *Privatising Dispute Resolution - Trends and Limits* (Nomos 2019).

³²² Mariacristina Bottino, ‘La nuova normativa europea in materia di risoluzione alternativa delle controversie dei consumatori’ (2014) 1 *Contratto e impresa/Europa* 395, 414.

³²³ Emmanuel Guinchard, ‘The Implementation of the Consumer ADR Directive in France’ in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 165.

³²⁴ Sophie Gjidara-Decaix, ‘La Médiation de La Consommation: Le Point de Vue d’une Universitaire’ (2019) Tome 61 *Archives de philosophie du droit* 213, 227.

³²⁵ Carlo Pilia, Pablo Cortés and Paolo Vargiu, ‘The Implementation of the Consumer ADR Directive in Italy’ in Pablo Cortés (ed) *The new regulatory framework for consumer dispute resolution* (Oxford University Press 2016) 223.

³²⁶ *ibid.*

³²⁷ Nicola Scannicchio, *Accesso alla giustizia e attuazione dei diritti: la mediazione delle controversie di consumo nella direttiva europea 2013-11* (Giappichelli 2015) 53

managed by it. Marinaro argues that in order to make the ABF system more authoritative and independent, it has been suggested that the ABF system be made autonomous from the Bank of Italy, reserving to the latter only the regulation and operational support, as well as qualitative monitoring.³²⁸

Recital 22

Procedures before dispute resolution entities where the natural persons in charge of dispute resolution are employed or receive any form of remuneration exclusively from the trader are likely to be exposed to a conflict of interest. Therefore, those procedures should, in principle, be excluded from the scope of this Directive, unless a Member State decides that such procedures can be recognised as ADR procedures under this Directive and provided that those entities are in complete conformity with the specific requirements on independence and impartiality laid down in this Directive. ADR entities offering dispute resolution through such procedures should be subject to regular evaluation of their compliance with the quality requirements set out in this Directive, including the specific additional requirements ensuring their independence.

Recital 33

The natural persons in charge of ADR should only be considered impartial if they cannot be subject to pressure that potentially influences their attitude towards the dispute.[...]

The independence and integrity of the people who work for ADR entities is linked to the following elements: sufficient duration of their mandate; ineligibility to leave without just cause; freedom from having to follow the instructions of one or other party; a remuneration that is not linked to the outcome of the procedure.³²⁹ The legal framework for consumer ADR does not preclude the person in charge of the ADR procedure from exercising or having exercised the same professional activity as the companies involved in the procedure for which he is in charge. Jouant finds it questionable whether ombudsmen belonging to the same profession as the one that is the subject of the complaint do not always give the consumer some semblance of a corporatist settlement of the dispute.³³⁰ Wagner argues that is even more remarkable that the drafters of the Directive saw no contradiction between the affirmation of the principles of neutrality on the one hand and the permission, granted in article 6(4) ADR Directive, to entrust the proceedings to a professional organisation or a business association of which the business is a member on the other. He retains that it is disturbing that article 2(2)(a) ADR Directive authorises the Member States to accept institutional arrangements where the dispute resolution process is entrusted to persons who are the paid employees of the business (i.e., one of the parties to the dispute). It is a necessary implication of articles 6(3) and (4) ADR Directive that the mere fact that the person in charge of ADR procedures is an employee of one of the parties to the dispute or of a business association of which one of the parties is a member, in itself is not enough to object to his participation and to force his replacement by another neutral person. Wagner contends that is a remarkable deviation from basic principles of

³²⁸ Marco Marinaro, 'Spunti di riflessione per l'armonizzazione e la razionalizzazione dei sistemi di ADR per le liti dei consumatori' (2016) *Judicium* <<https://www.judicium.it/wp-content/uploads/2016/10/M.-Marinaro-1.pdf>>.

³²⁹ Ermenegildo M Appiano, 'ADR e ODR per le liti consumeristiche nel diritto UE' (2013) 2 *Contratto e impresa / Europa* 965, 972.

³³⁰ Nathalie Jouant, 'Le règlement extrajudiciaire des litiges de consommation en Belgique: évolutions' (2017) 3 *DCCR* 115.

neutrality that are well-established across a broad range of dispute resolution mechanisms.³³¹ De Coninck agrees that the possible recognition by a Member State of an ADR entity set up by a company or a professional association may represent a problem.³³² Voet considers the funding of an ADR entity by a professional federation not to hinder *per se* the impartiality of the ADR entity, as long as it is in the interests of those professional federations that their members comply with consumer rights.³³³ Luzak doubts that consumers will even consider ADR entities whose arbiters are exclusively employed by a professional organisation of which the trader is a member to be impartial.³³⁴ If the ADR entity has a collegial board, an equal representation of traders and consumers needs to be ensured in line with what is suggested in the design requirements. The Directive does not prescribe the nomination procedure to be made public. One additional criterion (i.e., the budget requirement) applies for the arbitrators linked to the respective trade associations. From a law and economics perspective, a more balanced composition and stronger independence requirements would have been desirable. Regarding in-house arbitration, recital 17 sets out that the Directive is without prejudice to such internal complaint handling mechanisms that “can constitute an effective means for resolving consumer disputes at an early stage”. Weber stresses that recital 22 only speaks of a “regular evaluation” of the compliance of schemes close to traders, but this is not mentioned quite clearly in the articles of the Directive. She argues, however, that Competent Authorities established in each Member State should have a great supervisory role especially in these cases.³³⁵

In **Belgium**, *Ombudsfijn* is considered to be a good example of an ADR entity. However, de Patoul argues that by looking at its organisation and operation, the service nevertheless remains strongly linked to the financial sector, which makes a significant contribution to its funding. In view of Directive 2013/11/EU, he considers a reform on this point desirable, if not essential.³³⁶

In **France**, mediators who are employed or paid by the trader have to be designated according to a transparent procedure, from a collegial board composed of both consumer associations representatives and traders representatives. They cannot have any hierarchical link with the trader nor have worked for the trader or his association for at least three years.³³⁷

In **Germany**, the impartiality is translated by §6 para. 3 VSBG into the requirement not to work in the relevant industry or as a representative of consumer interests, and not to have worked there for three years prior to the appointment as dispute mediator. This serves as a guarantee that neither side can influence the dispute mediator. Luzak argues

³³¹ Gerhard Wagner, ‘Private Law Enforcement through ADR: wonder drug or snake oil?’ (2014) 51 *Common Market Law Review* 165.

³³² Hans De Coninck, ‘De alternatieve geschillenbeslechting in België: verleden, heden en toekomst’ (2013) 100-101 *DCCR* 217.

³³³ Stefaan Voet, ‘CDR-landschap in België’ in Stefaan Voet (ed), *CDR in België. Buitengerechtelijke beslechting en oplossing van geschillen* (die Keure 2018) 7.

³³⁴ Joasia Luzak, ‘The ADR Directive: Designed to Fail? A Hole-Ridden Stairway to Consumer Justice’ (2016) 1 *European Review of Private Law* 81, 99.

³³⁵ Franziska Weber, ‘Is ADR the Superior Mechanism for Consumer Contractual Disputes?—An Assessment of the Incentivizing Effects of the ADR Directive’ (2015) 38 *Journal of Consumer Policy* 265, 285.

³³⁶ Frédéric de Patoul, ‘Quelques réflexions sur une voie extrajudiciaire de règlement des conflits de consommation: Ombudsfijn, l’ombudsman des conflits financiers’ (2013) 100-101 *DCCR* 227.

³³⁷ Sophie Gjidara-Decaix, ‘La Médiation de La Consommation: Le Point de Vue d’une Universitaire’ (2019) Tome 61 *Archives de philosophie du droit* 213, 227.

that the same requirements of impartiality should also regard the technical expert that ADR entities can hire for an external opinion. She highlights, however, that the Directive, nor the German legislative act implementing the Directive, provide guidance on how to hire them, who pays them, etc.³³⁸ Under § 9 VSBG, if the ADR entity is organised or financed by either a trade or a consumer association, determining and changing the competence of the ADR entity, the rules of procedure and the appointment or dismissal of a dispute mediator shall require the involvement of an association that represents the interest of the other side. If a trader participates in a trade association ADR entity, then a consumer association must be involved in determining the jurisdiction and procedural rules of that ADR body and in appointing the persons in charge of the ADR process. The reverse is true for an ADR entity sponsored by a consumer association.³³⁹ In Germany, most private ADR entities are organised and financed by the business side, notable exceptions being the *Schlichtungsstelle Nahverkehr* that is co-organised by the *Verbraucherzentrale Nordrhein-Westfalen* (Consumer Centre of Northrhine-Westphalia) and the transportation sector, and the *Schlichtungsstelle Energie* that was co-founded by the *Verbraucherzentrale Bundesverband e.V.* (the umbrella organisation of the German Consumer Centers). Some ADR entities approach the problem by using an advisory board that is, for example, composed of one third each of members from the business side, from the consumer side and of neutral origin. The advisory board must then either propose the dispute mediator or consent to the proposal, or, in a less stringent version, at least be heard. In the case of the ADR entities in the area of financial services, no advisory bodies exist. Here, specific legislation provides that the *Verbraucherzentrale Bundesverband* has the right to give its opinion. As to the term of office, § 8 para. 1 VSBG requires a minimum term of three years and allows reappointment. Some ADR schemes provide a term of service of four or even five years.³⁴⁰ The Ombudsman is appointed by the Board of Directors of the VÖB for a period of three years. The appointment can be repeated for an unlimited period (it may affect independence). The Federation of German Consumer Organisation (vzbv) is heard and can raise objections to the qualification or impartiality.³⁴¹

f. Transparency

Recital 39

ADR entities should be accessible and transparent. In order to ensure the transparency of ADR entities and of ADR procedures it is necessary that the parties receive the clear and accessible information they need in order to take an informed decision before engaging in an ADR procedure. The provision of such information to traders should not be required where their participation in ADR procedures is mandatory under national law.

³³⁸ Joasia Luzak, 'The ADR Directive: Designed to Fail? A Hole-Ridden Stairway to Consumer Justice' (2016) 1 European Review of Private Law 81, 99.

³³⁹ Joanna Page and Laurel Bonnyman, 'ADR and ODR—Achieving Better Dispute Resolution for Consumers in the EU' (2016) 17 ERA Forum 145, 159.

³⁴⁰ Peter Rott, 'Consumer ADR in Germany' (2018) 7 Journal of European Consumer & Market law 121, 123.

³⁴¹ Stefan Martin Schmitt, 'Branchenschlichtungsverfahren (Ombudsmann der öff. Banken)–(k) eine Alternative: keine Verbesserung durch ADR-Richtlinie RL 2013/11/EU' (2015) Verbraucher und Recht 134, 136.

Article 7

Transparency

1. Member States shall ensure that ADR entities make publicly available on their websites, on a durable medium upon request, and by any other means they consider appropriate, clear and easily understandable information on:

- (a) their contact details, including postal address and e-mail address;
- (b) the fact that ADR entities are listed in accordance with Article 20(2);
- (c) the natural persons in charge of ADR, the method of their appointment and the length of their mandate;
- (d) the expertise, impartiality and independence of the natural persons in charge of ADR, if they are employed or remunerated exclusively by the trader;
- (e) their membership in networks of ADR entities facilitating cross-border dispute resolution, if applicable;
- (f) the types of disputes they are competent to deal with, including any threshold if applicable;
- (g) the procedural rules governing the resolution of a dispute and the grounds on which the ADR entity may refuse to deal with a given dispute in accordance with Article 5(4);
- (h) the languages in which complaints can be submitted to the ADR entity and in which the ADR procedure is conducted;
- (i) the types of rules the ADR entity may use as a basis for the dispute resolution (for example legal provisions, considerations of equity, codes of conduct);
- (j) any preliminary requirements the parties may have to meet before an ADR procedure can be instituted, including the requirement that an attempt be made by the consumer to resolve the matter directly with the trader;
- (k) whether or not the parties can withdraw from the procedure;
- (l) the costs, if any, to be borne by the parties, including any rules on awarding costs at the end of the procedure;
- (m) the average length of the ADR procedure;
- (n) the legal effect of the outcome of the ADR procedure, including the penalties for non-compliance in the case of a decision having binding effect on the parties, if applicable;
- (o) the enforceability of the ADR decision, if relevant.

2. Member States shall ensure that ADR entities make publicly available on their websites, on a durable medium upon request, and by any other means they consider appropriate, annual activity reports. Those reports shall include the following information relating to both domestic and cross border disputes:

- (a) the number of disputes received and the types of complaints to which they related;
- (b) any systematic or significant problems that occur frequently and lead to disputes between consumers and traders; such information may be accompanied by recommendations as to how such problems can be avoided or resolved in future, in order to raise traders' standards and to facilitate the exchange of information and best practices;
- (c) the rate of disputes the ADR entity has refused to deal with and the percentage share of the types of grounds for such refusal as referred to in Article 5(4);
- (d) in the case of procedures referred to in point (a) of Article 2(2), the percentage shares of solutions proposed or imposed in favour of the consumer and in favour of the trader, and of disputes resolved by an amicable solution;
- (e) the percentage share of ADR procedures which were discontinued and, if known, the reasons for their discontinuation;

- (f) the average time taken to resolve disputes;
- (g) the rate of compliance, if known, with the outcomes of the ADR procedures;
- (h) cooperation of ADR entities within networks of ADR entities which facilitate the resolution of cross-border disputes, if applicable.

The discussion on transparency requirement complements what has been emphasised above regarding expertise. It is, however, a requirement that applies to both ADR entities and procedures. The Directive requires the “qualified” entities to make clear and understandable information on a whole list of elements publicly available on their websites, as well as on a durable medium upon request, and by any other means they consider appropriate. ADR entities are expected to publish annual reports containing general information on the number of disputes received, the rate of compliance with the outcome, the average time taken to resolve disputes, as well as any systematic or significant problems that occur frequently and lead to disputes between consumers and traders. This statistical information may indicate to consumers how often, on average, consumers win cases at a given ADR entity. The Directive provides that such information shall be accompanied by recommendations as to how the frequent issues encountered can be avoided or resolved in future, in order to raise traders’ standards and to facilitate the exchange of information and best practices. But Luzak stresses that ADR entities are not bound to disclose information on the type of disputes resolved.³⁴² It seems, therefore, that the Directive does not lift the cost of uncertainty for consumers, who are not enabled to estimate in advance their chances of winning. Such reports could also indicate persistent unfair commercial practices/contract terms, in order to inform traders that similar practices are scrutinised and to motivate a change in conduct. But Luzak is concerned that if consumers do not see their problems mentioned as “significant” ones in the reports, this can create a negative loop (i.e., less and less complaints in the face of specific “hidden” issues). Since only systematic problems are included in the annual reports, only in a few cases consumers will receive information that their problem with a certain trader was not isolated and exceptional.³⁴³ It is true what Biard evidences: ADR entities are also bound to respect confidentiality and privacy all along the ADR procedure.³⁴⁴ As Luzak argues, confidentiality may only provoke distrust in consumers, especially where Member States provide for courts of any instance to publish their judgments. In the end, authors agree that among the endless list of requirements as to transparency, what stands out is exactly what is missing. Cauffman highlights that the Directive does not require the decisions of the ADR entities to be published and, in the absence of the publication of the outcome, the procedure cannot be considered *stricto sensu* transparent.³⁴⁵ Cauffman and Luzak agree that if outcomes are not published, it is difficult to find common patterns among the cases and the predictability of the decision making is hindered.³⁴⁶ Rott believes that

³⁴² Joasia Luzak, ‘The ADR Directive: Designed to Fail? A Hole-Ridden Stairway to Consumer Justice’ (2016) 1 *European Review of Private Law* 81, 89.

³⁴³ *ibid.*

³⁴⁴ Alexandre Biard, ‘Impact of Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK’ (2019) 42 *Journal of Consumer Policy* 109, 131-132.

³⁴⁵ Caroline Cauffman, ‘Critical Remarks on the ADR Directive’ in Caroline Cauffman and Jan M Smits (eds), *The Citizen in European Private Law: Norm-setting, Enforcement and Choice* (Intersentia 2016).

³⁴⁶ Caroline Cauffman, ‘Critical Remarks on the ADR Directive’ in Caroline Cauffman and Jan M Smits (eds), *The Citizen in European Private Law: Norm-setting, Enforcement and Choice* (Intersentia 2016)

ADR entities being a black box in terms of outcomes can be a disincentive for consumers to engage in ADR procedures, as they may suspect that they are unlikely to have their claims fulfilled.³⁴⁷ Santing-Wubs insists that this also makes it difficult for both consumers and traders to have an idea of the approximate length of the proceedings.³⁴⁸ When the outcome is published, as the particular ADR scheme requires, confidentiality nonetheless extends to the contents of the outcome in a way that it is difficult to scrutinise the fairness of the decision. Farah and De Oliveria find this problem within arbitral proceedings, where there is also less oversight by consumer lobbies and public bodies.³⁴⁹

Biard and Voet suggest that more transparency would help consumers be updated on the status of their complaints, so they could evaluate whether to drop the case and seek redress via other means, consult their lawyer, etc.³⁵⁰ Brennan et al. suggest developing a tool which would permit consumers to provide feedback throughout the complaint process.³⁵¹ In this context, platforms and legaltech tools should be investigated. For example, Biard and Voet particularly commend the Ombudsfm scheme. This ADR entity, which implements a best practice in **Belgium** in the financial sector, improved its mechanism by creating a platform to help consumers “tracking” the dispute to react to the problem of (‘lost’) consumers.³⁵²

In **Germany**, the principle of confidentiality is required by §22 VSBG, and is regarded as crucial by ADR entities for their activity. Rott stresses, however, that traders want to keep the outcomes of the ADR procedure secret, to avoid broader consequences.³⁵³ If they cannot count on confidentiality, they may decide not to participate in the ADR procedure in the first place. In the energy sector, the compromise between transparency and confidentiality is found in anonymised outcomes. This practice is also developing beyond this sector, e.g. the Insurance Ombudsman and the *söp* (*Schlichtungsstelle für den öffentlichen Personenverkehr e.V.*).

Biard argues that some political support and changes in legislation might be necessary for enhancing the disclosure of information while respecting confidentiality obligations.³⁵⁴ As Biard and Hodges observe, the exchange of (anonymous) data between consumer mediators, professionals and authorities, if systematised, would

and Joasia Luzak, ‘The ADR Directive: Designed to Fail? A Hole-Ridden Stairway to Consumer Justice’ (2016) 1 *European Review of Private Law* 81, 97, 101.

³⁴⁷ Peter Rott, ‘Consumer ADR in Germany’ (2018) 7 *Journal of European Consumer & Market Law* 121, 124.

³⁴⁸ Betty Santing-Wubs, ‘ADR in the Netherlands and ‘Europe’ (2012) 4 *Nederlands-Vlaams tijdschrift voor mediation en conflictmanagement* 32.

³⁴⁹ Youssef Farah and Leonardo VP De Oliveira, ‘Releasing the Potential for a Value-Based Consumer Arbitration under the Consumer ADR Directive’ (2016) 1 *European Review of Private Law* 117, 134.

³⁵⁰ Alexandre Biard and Stefaan Voet, ‘Expériences et attitudes de consommateurs avec le Service de Médiation pour le Consommateur/ Consumentenombudsdienst : enquête sur les dossiers incomplets’ (2020) 126 *DCCR* 15.

³⁵¹ Carol Brennan and others, ‘Designing Consumer Redress: Making Redress Accessible for Consumer-Citizens’ (The Foundation for Law, Justice and Society 2015) 4.

³⁵² Alexandre Biard and Stefaan Voet, ‘Expériences et attitudes de consommateurs avec le Service de Médiation pour le Consommateur/ Consumentenombudsdienst : enquête sur les dossiers incomplets’ (2020) 126 *DCCR* 15.

³⁵³ Peter Rott, ‘Consumer ADR in Germany’ (2018) 7 *Journal of European Consumer & Market Law* 121, 124.

³⁵⁴ Alexandre Biard, ‘Impact of Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK’ (2019) 42 *Journal of Consumer Policy* 109, 131-132.

improve the functioning of the markets. For serious and repeated exceptional situations, this transparent mechanism could ensure better cooperation between dispute resolution bodies and regulators.³⁵⁵ ADR entities have a lot of data available, and it is pointless if they cannot alert either consumers or authorities when a bad practice is reiterated by traders. Some Member States have introduced the “name and shame” practise, which induces positive competition between traders and informs the market of good and bad players. Jouant observes that this practice also enhances traders’ participation.³⁵⁶ Luzak finds that it urges traders to actively increase their rate of compliance.³⁵⁷ Cortès finds it useful especially in those industries where the majority of traders do not opt-in to a particular ADR scheme.³⁵⁸ This practice is particularly developed in the Nordic countries.

In **Estonia**, the willingness of entrepreneurs to participate in the process and accept the result is communicated to the public.³⁵⁹

In **Finland**, the success rate of the traders’ compliance is 80%/100% and this is considered to be linked not to the regulatory approach but to the culture behind it and the importance of traders’ reputation and cooperation.

Gössl reports that practises similar to the ones above are not convincing in **Germany** according to national law.³⁶⁰

In **Sweden**, the ARN publishes online twice a year in its consumer magazine the names of businesses that systematically refuse to comply with the recommendations.³⁶¹

g. Effectiveness

Article 8

Effectiveness

Member States shall ensure that ADR procedures are effective and fulfil the following requirements:

(a) the ADR procedure is available and easily accessible online and offline to both parties irrespective of where they are;

(b) the parties have access to the procedure without being obliged to retain a lawyer or a legal advisor, but the procedure shall not deprive the parties of their right to independent advice or to be represented or assisted by a third party at any stage of the procedure;

(c) the ADR procedure is free of charge or available at a nominal fee for consumers;

³⁵⁵ Alexandre Biard and Christopher Hodges, ‘Médiation de La Consommation: Un Bilan, Des Défis, Des Pistes de Réflexion Pour l’avenir’ (2019) 2 *Contrats Concurrence Consommation* 1, 9.

³⁵⁶ Nathalie Jouant, ‘Le règlement extrajudiciaire des litiges de consommation en Belgique: évolutions’ (2017) 3 *DCCR* 115.

³⁵⁷ Joasia Luzak, ‘The ADR Directive: Designed to Fail? A Hole-Ridden Stairway to Consumer Justice’ (2016) 1 *European Review of Private Law* 81, 89.

³⁵⁸ Pablo Cortés, *The Law of Consumer Redress in an Evolving Digital Market: Upgrading from Alternative to Online Dispute Resolution* (Cambridge University Press 2017) 261.

³⁵⁹ Susanne Lilian Gössl, ‘Fünf Jahre europäische Alternative und Online-Streitbeilegung’ (2020) 2 *Zeitschrift für Konfliktmanagement* 55, 58.

³⁶⁰ *ibid.*

³⁶¹ Pablo Cortés, *The Law of Consumer Redress in an Evolving Digital Market: Upgrading from Alternative to Online Dispute Resolution* (Cambridge University Press 2017) 261.

(d) the ADR entity which has received a complaint notifies the parties to the dispute as soon as it has received all the documents containing the relevant information relating to the complaint;

(e) 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. In the case of highly complex disputes, the ADR entity in charge may, at its own discretion, extend the 90 calendar days' time period. The parties shall be informed of any extension of that period and of the expected length of time that will be needed for the conclusion of the dispute.

g.1. Free of charge and low-cost ADR procedures for consumers

The Directive has established a framework for consumer ADR that could mirror the key elements of consumer disputes. Since, on average, consumer disputes are of a low-value claim, ADR procedures were designed by the Directive as free-of-charge or low-cost. Fees are seen as a deterrent for consumers submitting a complaint to an ADR entity. For this reason, some Ombudsman associations state that their members cannot require fees from claimants.³⁶²

The fact that the costs of the ADR procedure must not be allocated on consumers does not mean that these costs do not exist; the costs will be borne mainly by the traders. Some ADR entities do not charge any fee before the appointment of the neutral third party. Other entities do not request fees until parties have exchanged information. With regard to mediation, Besombes and others reports that costs vary for traders and fluctuate depending on the type of service offered by mediators (physical presence, email, telephone), their extra requirements (e.g., training of the mediator about the trader's activity).³⁶³ Costs are subject to an increase depending on the type of dispute; transnational mediation normally entails higher costs. Cortés finds that the fee system can encourage early settlement. The real cost of the ADR procedure will also depend on the degree of organisation of the sector concerned and the "maturity" of structure for handling complaints internally.³⁶⁴ Nominal fee ADR procedures push traders to deal with the complaints internally and to consider meritorious settlements. When traders join an ADR entity, traders pay a case fee and an annual fee for the membership, which include the enquiries and a number of cases for which traders do not pay a case fee. These fees provide ADR entities with the necessary revenue stability to fund its staff. The case fees ensure that those traders that generate more complaints are not subsidised by the traders that have fewer complaints. It also pushes traders to deal with the complaints internally and to consider meritorious settlements. Sometimes a fee reduction applies when parties settle disputes early. Cortés argues that this may as well lead to traders settling unmeritorious claims where the costs of settlement are similar or inferior to the cost of the case fee.³⁶⁵

³⁶² *ibid.*, 257.

³⁶³ Nathalie Besombes and others, 'Médiation et Entreprise: Nouvelles Obligations et Perspectives' (2016) 39 *Entreprise et Affaires* 21, 26.

³⁶⁴ Sophie Gjidara-Decaix, 'La Médiation de La Consommation: Le Point de Vue d'une Universitaire' (2019) Tome 61 *Archives de philosophie du droit* 213, 221.

³⁶⁵ Pablo Cortés, *The Law of Consumer Redress in an Evolving Digital Market: Upgrading from Alternative to Online Dispute Resolution* (Cambridge University Press 2017) 257.

The one-sided cost structure on traders leads to the perception that traders are treated unfairly. In **Germany**, traders always pay for the procedure, even if they win the case in the end, while in B2C disputes consumers hardly ever bear the costs of the procedure. This, of course, may impact traders' behaviour, namely their participation in the procedure. In **Austria**, a case model in terms of success rates is the Consumer Arbitration Service (77% participation rate, 75% settlement rate in 2018). The procedure is free of charge for both consumers and traders. Gössl argues that the Austrian model should be followed also in Germany, at least by some ADR entities.³⁶⁶ She stresses that initial steps have already been taken in revising the financing concept of ADR procedure in Germany. Since 2020, cost relief has been possible at the Universal Conciliation Board if the trader acknowledges the claim. She also argues that at the same time the incentive structure vis-à-vis traders should be rethought to raise awareness, especially among SMEs, of the benefits of alternative dispute resolution mechanisms.³⁶⁷

Wagner highlights that, for the trader, the costs of dispute resolution are merely an element of his finances that contribute to the overall cost of doing business. As price is a function of costs, the prices of goods and services offered in the market must reflect the total costs of dispute resolution. Since consumers pay prices, they end up footing the bill anyway. The same author argues that article 8(c) of the Directive does not spare consumers the burden of costs but instead provides an insurance policy: those consumers who end up in a dispute with the traders they have transacted with, are insured against the costs of dispute resolution, at the expenses of all the other consumers not involved in the dispute.³⁶⁸

g.2. Expedient ADR procedures and the feasibility of the limit of 90 days requirement

Recital 40

A properly functioning ADR entity should conclude online and offline dispute resolution proceedings expeditiously within a timeframe of 90 calendar days starting on the date on which the ADR entity has received the complete complaint file including all relevant documentation pertaining to that complaint, and ending on the date on which the outcome of the ADR procedure is made available. The ADR entity which has received a complaint should notify the parties after receiving all the documents necessary to carry out the ADR procedure. In certain exceptional cases of a highly complex nature, including where one of the parties is unable, on justified grounds, to take part in the ADR procedure, ADR entities should be able to extend the timeframe for the purpose of undertaking an examination of the case in question. The parties should be informed of any such extension, and of the expected approximate length of time that will be needed for the conclusion of the dispute.

The Directive has established a framework for consumer ADR that could mirror the key elements of consumer contracts. One of these is the fastness. As consumers conclude contracts speedily, the Directive claims to grant consumers a mechanism to

³⁶⁶ Susanne Lilian Gössl, 'Fünf Jahre europäische Alternative und Online-Streitbeilegung' (2020) 2 Zeitschrift für Konfliktmanagement 55, 59.

³⁶⁷ *ibid.*

³⁶⁸ Gerhard Wagner, 'Private Law Enforcement through ADR: wonder drug or snake oil?' (2014) 51 Common Market Law Review 165.

access justice quite as fast. Conversely to judicial rulings that generally require years to be heard, ADR outcomes can be issued within a short time frame. The Directive gives consumers certainty on the duration of ADR procedures by requiring the entities to make available their decision within 90 days, counting from when they have received the complete complaint. However, there is no definition of what a “complete complaint” is in the Directive. In the Netherlands, SGC, Kifid and SKGZ are free to decide at what stage in their triage system a complaint file is “complete”.³⁶⁹ The discretion to decide the moment from which the ninety-day period should be counted means that the parties will not necessarily have expeditious procedures.

In theory, this predictability would serve to overcome consumers’ rational apathy.³⁷⁰ By looking at the practice, Verhage argues that the time limitation requirement appears as flexible. This results in a perception among consumers and traders that ADR procedures take much longer than 90 days. In the Netherlands, the process from intake of the complaint to receipt of the outcome is found to last more than foreseen in the Directive.³⁷¹ Plus, the Directive allows this period to be extended at the discretion of the ADR entity in face of complex disputes. Hellegers highlights, however, that the Directive does not clear what a “complex dispute” may be.³⁷² The Directive only mentions one example in the Preamble, by providing for the ADR entities to extend the time limit when one of the parties is unable to participate in the ADR procedure for justified reasons. As Biard contends, ADR entities’ compliance with the length of procedure requirement is made difficult because of a lack of human resources; to make available an outcome within the required 90 days, ADR entities would have to hire more staff.³⁷³ Since the length of the procedure is only to a certain extent “certain”, Santing-Wubs argues that ADR entities should better inform parties on this point. Especially if the procedure has been activated consensually, the time to find an amicable solution depends on the willingness of the parties required to actively participate in the procedure.³⁷⁴

h. Fairness

Article 9

1. Member States shall ensure that in ADR procedures:

(a) the parties have the possibility, within a reasonable period of time, of expressing their point of view, of being provided by the ADR entity with the arguments, evidence, documents

³⁶⁹ Eline Verhage, ‘The Implementation of the Consumer ADR Directive in the Netherlands’ in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016)

³⁷⁰ Joasia Luzak, ‘The ADR Directive: Designed to Fail? A Hole-Ridden Stairway to Consumer Justice’ (2016) 1 *European Review of Private Law* 81, 86.

³⁷¹ Eline Verhage, ‘Een blik over de Belgische grens: CDR in Nederland’ in Stefaan Voet (ed), *CDR in België. Buitengerechtelijke beslechting en oplossing van geschillen* (die Keure 2018) 226.

³⁷² Donald PCM Hellegers, ML Hendrikse and JGJ Rinkes, *De juridische aspecten van het Klachteninstituut Financiële Dienstverlening (Kifid) anno 2015* (Uitgeverij Paris 2015).

³⁷³ Alexandre Biard, ‘Impact of Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK’ (2019) 42 *Journal of Consumer Policy* 109, 126.

³⁷⁴ Albertha Harma Santing-Wubs, ‘Twee Europese voorstellen voor de alternatieve beslechting van consumentengeschillen: een ADR-richtlijn en een ODR-verordening’ (2012) 4 *Tijdschrift voor civiele rechtspleging* 109.

and facts put forward by the other party, any statements made and opinions given by experts, and of being able to comment on them;

(b) the parties are 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;

(c) the parties are notified of the outcome of the ADR procedure in writing or on a durable medium, and are given a statement of the grounds on which the outcome is based.

h.1. The adversarial principle in ADR procedures

In the drafting of the requirement of ADR procedures, the Directive aimed to ensure that these procedures are not too far from the values that inspire judicial proceedings. The third party's role is crucial, but parties' views are not to be forgotten. In theory, the adversarial principle is to be respected also within ADR procedures. However, the short time frame demands for a quick handling of the dispute to the detriment of the exchange of documents between the parties and the ADR entities, as it stems from article 8(1)(a).³⁷⁵ Weber argues that this provision is rather vague and clearly not comparable with the typical "antagonism" of court proceedings.³⁷⁶ Also Gjidara-Decaix contends that the adversarial principle has not been considered very conducive to negotiation, hence it has been significantly watered down in the Directive. ADR entities lack investigative powers and have no strict obligation to hear the parties, even if these should always be given the possibility to express their positions.³⁷⁷ De Patoul stresses the existence of an asymmetry of information: while the consumer's complaint is usually forwarded to the trader, the documents provided by the latter are very rarely communicated to the consumer. Most of the time, ADR entities only exchange with consumers a brief summary of traders' positions with the main arguments they have brought up.³⁷⁸ Appiano highlights, however, that when the ADR procedure merely aims to help the parties reach an agreement, a favourable context for a fairer outcome is created when both parties can fully participate in the discussion. He believes that the consensus should first be built on a psychological stage and if parties are not allowed by the ADR entities to make their views known and to respond to the opposing thesis, they will perceive the outcome as unfair.³⁷⁹ Marianello stresses that the socio-anthropological notion of dispute indicates a situation of conflict between divergent interests, which may find a different degree of settlement depending on the complexity and/or the flexible system of control that the parties intend to exercise over it. This contrast does not necessarily have to be settled through the use of legal precepts, but can also be managed through the use of informal settlement procedures, aimed at

³⁷⁵ Grégory Renier, 'Le nouvel encadrement de l'Union européenne pour le règlement extrajudiciaire des litiges de consommation. Examen de la directive 2013/11/UE en matière d'ADR' (2014) 1 *Revue européenne de droit de la consommation / European Journal of Consumer Law* 135.

³⁷⁶ Franziska Weber, 'Is ADR the Superior Mechanism for Consumer Contractual Disputes?—An Assessment of the Incentivizing Effects of the Directive' (2015) 38 *Journal of Consumer Policy* 265, 282.

³⁷⁷ Sophie Gjidara-Decaix, 'La Médiation de La Consommation: Le Point de Vue d'une Universitaire' (2019) Tome 61 *Archives de philosophie du droit* 213, 239.

³⁷⁸ Frédéric de Patoul, 'Quelques réflexions sur une voie extrajudiciaire de règlement des conflits de consommation: Ombudsfin, l'ombudsman des conflits financiers' (2013) 100-101 *DCCR* 227.

³⁷⁹ Ermenegildo M Appiano, 'ADR e ODR per le liti consumeristiche nel diritto UE' (2013) 2 *Contratto e impresa / Europa* 965, 975.

finding shared solutions spontaneously observed by the parties.³⁸⁰ The Directive does not require ADR entities to guarantee public hearings, but Fejos and Willet contend that by means of the provisions of other procedural safeguards, the Directive manages to provide for a reasonable level of procedural justice. Scannicchio adds that other general safeguards should apply directly from national law.

h.2. The outcomes of ADR procedures

The Directive allows for the possibility that the outcome of the ADR procedure to be different from the one that would have been the result of the enforcement of mandatory law by courts. Rühl argues that ADR is not designed to enforce consumer rights but to settle disputes without focusing exclusively on rights. The author finds as a result that consumers run the risk of losing their rights when settling disputes out of court, or at least of getting less than what would gain through a court proceeding.³⁸¹ On the other hand, Schulte-Nölke argues that ADR procedures hardly ever reach a stage where applicable hard law should be applied. He explains that this was clear in the early negotiation of the Directive. In the drafting, the compromise was reached with the principle that consumers should not lose the rights they hold pursuant to mandatory law.

There are other provisions within the Directive in contradiction with the model of quasi-judicial decision-making. The most striking example is provided by article 9(2)(b)(iii) which requires ADR entities to advise the parties, before they accept the proposed solution, that “[the outcome] may be different from an outcome determined by a court applying legal rules”. Wagner argues that it is open debate whether this *caveat* only reflects the fact that ADR entities operate with a ‘lighter touch’ so that the quasi-decisions reached in ADR only approximate – and not fully replicate – the courts’ judgements, or whether it also implies that ADR entities are not even required to approximate the outcome of legal proceedings. In light of a broad guarantee of the ‘fair’ procedure (article 9(1)(a)), the author contends that the first interpretation is the correct one.³⁸² Scannicchio argues that the reference to ‘fairness’ seems to imply, rather than an additional form of protection, a depreciation of the position of the parties, and in particular of the consumer. He finds that it is not a serious problem when the procedure is inspired by the principle of economic interests and claims at stake are small. Conversely, when consumer disputes are more serious one, this “fairness” may exacerbate the mentioned depreciation of consumer protection. The author contends that the Directive does not allow for a distinction to be made between the two hypotheses.³⁸³ The **Italian** transposition of the Directive on this point might be misleading. It translates ‘fairness’ with ‘*equità*’, which generally does not designate a specific characteristic of the procedure, but rather a particular criterion of judgement

³⁸⁰ Marco Marianello, ‘L’evoluzione delle procedure ADR nel diritto privato italiano’ in Guido Alpa and others (eds), *Soluciones alternativas a los conflictos de consumo: perfiles hispano-italianos* (Comares 2016), 445.

³⁸¹ Giesela Rühl, ‘Alternative and Online Dispute Resolution for Cross-Border Consumer Contracts’ (2015) 38 *Journal of Consumer Policy* 431, 13-14.

³⁸² Gerhard Wagner, ‘Private Law Enforcement through ADR: wonder drug or snake oil?’ (2014) 51 *Common Market Law Review* 165.

³⁸³ Nicola Scannicchio, *Accesso alla giustizia e attuazione dei diritti: la mediazione delle controversie di consumo nella direttiva europea 2013-11* (Giappichelli 2015) 63.

sometimes admitted by law: the so-called ‘*ex aequo et bono*’.³⁸⁴ Fairness, so understood, operates on the entire set of professional and human relationships between parties to a dispute. It is the parties who remain the protagonists and decide which hypothesis of an agreement appears to them to be preferable. The conciliator-mediator-arbitrator merely takes note.³⁸⁵

Fejos and Willet believe that this provision grants ADR entities a certain degree of creativity.³⁸⁶ In the end, a fair outcome will not be the one logically stemming from law, but the outcome which best satisfies parties. This conclusion seems to be coupled with the fact that the Directive did not require persons in charge of ADR procedures to be qualified lawyers or judges, and rather considered sufficient a lower degree of legal knowledge.³⁸⁷ The creativity left to ADR entities does not mean that it is not important to provide for consistent outcomes. Creutzfeldt considers it crucial that ADR entities can still ensure outcomes that are to a certain extent predictable.³⁸⁸ Persons in charge of ADR procedure should be streamlined and trained to issue similar outcomes for similar complaints. But, again, the staff should not be necessarily trained on consumer law. Schulte-Nölke highlights that this would not be necessary to make the outcomes of the disputes more predictable. The author believes that the importance of hard law in some consumer disputes is decreasing.³⁸⁹ In fact, as Fejos and Willet point out, within the consumer market, traders’ detrimental practice may still be not tackled by formal law. In those cases, fair outcomes (intended as satisfying outcomes) are a good thing for both consumers and traders.³⁹⁰ Rühl stresses that when court enforcement is *de facto* unavailable, the availability of ADR procedures, regardless of the *stricto sensu* “fairness” of their outcomes is of utmost importance: it still deter traders from considering that their improper conduct may go unsanctioned.³⁹¹ Hodges argues that, in some Member States, ADR entities have been created specifically to handle consumer disputes, hence it is not uncommon that ADR outcomes are more beneficial for consumers compared to court rulings.³⁹² Knigge and Pavillon find that sometimes inaccurate interpretations or applications of semi-mandatory law do not harm consumers (*amplius infra* on Legality), but can even benefit them.³⁹³ Traders must have agreed with the deviation of semi-mandatory law but the authors assume that the voluntary adherence of traders to ADR schemes amounts to such an agreement. They illustrate, however, that in some branches there is no such voluntary adherence, since

³⁸⁴ Gina Gioia, ‘L’uniforme regolamentazione della risoluzione alternativa delle controversie con i consumatori’ (2018) 1 *Revista Ítalo-española de Derecho procesal* 3, 27.

³⁸⁵ *ibid.*

³⁸⁶ Andrea Fejos and Chris Willet, ‘Consumer Access to Justice: The Role of the ADR Directive and the Member States’ (2016) 1 *European Review of Private Law* 33, 44.

³⁸⁷ Hans Schulte-Nölke, ‘The Brave New World of EU Consumer Law—Without Consumers, or Even Without Law?’ (2015) 4 *Journal of European Consumer and Market Law* 135, 137.

³⁸⁸ Naomi Creutzfeldt, ‘Implementation of the Consumer ADR Directive’ (2016) 4 *Journal of European Consumer and Market Law* 169, 174.

³⁸⁹ Hans Schulte-Nölke, ‘The Brave New World of EU Consumer Law—Without Consumers, or Even Without Law?’ (2015) 4 *Journal of European Consumer and Market Law* 135, 137.

³⁹⁰ Andrea Fejos and Chris Willet, ‘Consumer Access to Justice: The Role of the ADR Directive and the Member States’ (2016) 1 *European Review of Private Law* 33, 44.

³⁹¹ Giesela Rühl, ‘Alternative and Online Dispute Resolution for Cross-Border Consumer Contracts’ (2015) 38 *Journal of Consumer Policy* 431, 13-14.

³⁹² Christopher Hodges, ‘Consumer Alternative Dispute Resolution’ in Burkhard Hess and Stephanie Law (eds), *Implementing EU consumer rights by national procedural law* (CH Beck 2019) 181.

³⁹³ Marte Knigge and Charlotte Pavillon, ‘The Legality Requirement of the ADR Directive: Just Another Paper Tiger?’ (2016) 5 *Journal of European Consumer and Market Law* 155, 161.

adhering to a binding scheme may be considered compulsory. In these cases, traders might be able to challenge a decision based on an incorrect reading of the law, thereby impairing the level of protection of the consumers.³⁹⁴ As already stressed, ADR outcomes perceived as fair by traders allow for the development of consumer ADR. Not only do these outcomes spark traders' interest for further collaboration with ADR entities, but also their commitment to engage in better practices.³⁹⁵

Research suggests that consumers' and traders' perceptions of the fairness of an ADR procedure are triggered also by factors that are specific to the culture in the relevant Member State.

In **Belgium**, ADR entities have been created for the purpose of protecting consumers, so they generally duly apply consumer law. For example, when a case has been referred to the *Energy Ombudsman* and the trader proposes a settlement, the ombudsman provides a legal validity assessment and objects to the settlement if it appears to be illegal or unbalanced.³⁹⁶

German consumers tend to value more formal and law-oriented procedures.³⁹⁷

In **Italy**, consumers generally do not regard the fairness depicted by the Directive as a sufficient quality requirement for ADR procedure. This is mainly due to the translation of 'fairness' (in 'equità') within the transposition of the Directive into national law. In the Italian Civil Code, 'equità' evokes the so-called '*ex aequo et bono*' criterion of judgement, hence a decision released from the application of an abstract norm, but elaborated instead in the conscience of the person in charge of the procedure.³⁹⁸

In the **United Kingdom**, consumers and traders value being listened to and being able to prevent others from having the same problem. Furthermore, consumers' expectations vis-à-vis an ADR procedure are different when the ADR entity is a public body from when it is privately incorporated.³⁹⁹

h.3. The withdrawal from the ADR procedure

Recital 45

The right to an effective remedy and the right to a fair trial are fundamental rights laid down in Article 47 of the Charter of Fundamental Rights of the European Union. Therefore, ADR procedures should not be designed to replace court procedures and should not deprive consumers or traders of their rights to seek redress before the courts. This Directive should not prevent parties from exercising their right of access to the judicial system. In cases where a dispute could not be resolved through a given ADR procedure whose outcome is not binding, the parties should subsequently not be prevented from initiating judicial proceedings in relation to that dispute. Member States should

³⁹⁴ *ibid.*

³⁹⁵ Joasia Luzak, 'The ADR Directive: Designed to Fail? A Hole-Ridden Stairway to Consumer Justice' (2016) 1 *European Review of Private Law* 81.

³⁹⁶ Christopher Hodges, 'Consumer Alternative Dispute Resolution' in Burkhard Hess and Stephanie Law (eds), *Implementing EU consumer rights by national procedural law* (CH Beck 2019) 181.

³⁹⁷ Naomi Creutzfeldt, *Trusting the middle-man: Impact and legitimacy of ombudsmen in Europe* (University of Westminster 2016).

³⁹⁸ Gina Gioia, 'L'uniforme regolamentazione della risoluzione alternativa delle controversie con i consumatori' (2018) 1 *Revista Ítalo-española de Derecho procesal* 3, 27.

³⁹⁹ Naomi Creutzfeldt, *Trusting the middle-man: Impact and legitimacy of ombudsmen in Europe* (University of Westminster 2016).

be free to choose the appropriate means to achieve this objective. They should have the possibility to provide, *inter alia*, that limitation or prescription periods do not expire during an ADR procedure.

Article 9

Fairness

2. In ADR procedures which aim at resolving the dispute by proposing a solution, Member States shall ensure that:

(a) The parties have the possibility of withdrawing from the procedure at any stage if they are dissatisfied with the performance or the operation of the procedure. They shall be informed of that right before the procedure commences. Where national rules provide for mandatory participation by the trader in ADR procedures, this point shall apply only to the consumer.

(b) The parties, before agreeing or following a proposed solution, are informed that:

(i) they have the choice as to whether or not to agree to or follow the proposed solution;

(ii) participation in the procedure does not preclude the possibility of seeking redress through court proceedings;

(iii) the proposed solution may be different from an outcome determined by a court applying legal rules.

(c) The parties, before agreeing to or following a proposed solution, are informed of the legal effect of agreeing to or following such a proposed solution.

(d) The parties, before expressing their consent to a proposed solution or amicable agreement, are allowed a reasonable period of time to reflect.

3. Where, in accordance with national law, ADR procedures provide that their outcome becomes binding on the trader once the consumer has accepted the proposed solution, Article 9(2) shall be read as applicable only to the consumer.

In the **Italian** transposition of article 8(2)(a) of the Directive, Troisi stresses that the Italian legislator put excessive emphasis on recital 45 which appears to introduce a '*ius poenitendi*' for the consumer to withdraw from the conciliation agreement. The author considers this choice to be a *favor* for consumers, as well as an incentive for them to use ADR procedures.⁴⁰⁰ Troisi also argues that there is an error in the transposition of article 9 (2)(b)(ii) of the Directive within article 141-*quater*, co. 5, lett. b, sub. 2 of the Italian Consumer Code, since it grants consumers the possibility to go to court for compensation. From a comparative perspective, the **French** and **German** versions do not limit the recourse to the judge for the sole claim of compensation. Considering both this and the general principle of prevalence of the interpretation most favourable to consumers, we should disregard this limitation.⁴⁰¹ As ruled by the CJEU, in the *Menini* case: "it is necessary to take the view that such a limitation restricts the parties' right of access to the judicial system, contrary to the objective of Directive 2013/11, recalled in article 1 thereof. Any withdrawal from an ADR procedure by a consumer must not have unfavourable consequences for that consumer in the context of proceedings before the

⁴⁰⁰ Claudia Troisi, 'L'attuazione della direttiva 2013/11/UE in Italia alla luce della sentenza C-75/16' [2018] *Comparazione e diritto civile* 1, 13.

⁴⁰¹ French Version: '*la participation à la procédure n'exclut pas la possibilité de former un recours par le biais des procédures judiciaires*'; German version: '*dass die Beteiligung an dem Verfahren die Möglichkeit nicht ausschließt, die Durchsetzung ihrer Rechte vor Gericht zu suchen*'. See Claudia Troisi, 'L'attuazione della direttiva 2013/11/UE in Italia alla luce della sentenza C-75/16' [2018] *Comparazione e diritto civile* 1, 27.

courts relating to the dispute which formed, or which ought to have formed, the subject matter of that procedure”.⁴⁰²

Carlone highlights that penalties for the withdrawal from ADR procedures, even when the procedure is mandatory, are contrary to the right of access of the parties to the judicial system, as protected by article 9(2) of the Directive. The parties should not be asked to demonstrate the existence of a justified reason for abandoning the procedure.⁴⁰³

i. Liberty

Recital 43

An agreement between a consumer and a trader to submit complaints to an ADR entity should not be binding on the consumer if it was concluded before the dispute has materialised and if it has the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the dispute. Furthermore, in ADR procedures which aim at resolving the dispute by imposing a solution, the solution imposed should be binding on the parties only if they were informed of its binding nature in advance and specifically accepted this. Specific acceptance by the trader should not be required if national rules provide that such solutions are binding on traders.

Recital 45

The right to an effective remedy and the right to a fair trial are fundamental rights laid down in Article 47 of the Charter of Fundamental Rights of the European Union. Therefore, ADR procedures should not be designed to replace court procedures and should not deprive consumers or traders of their rights to seek redress before the courts. This Directive should not prevent parties from exercising their right of access to the judicial system. In cases where a dispute could not be resolved through a given ADR procedure whose outcome is not binding, the parties should subsequently not be prevented from initiating judicial proceedings in relation to that dispute. Member States should be free to choose the appropriate means to achieve this objective. They should have the possibility to provide, inter alia, that limitation or prescription periods do not expire during an ADR procedure.

Recital 49

This Directive should not require the participation of traders in ADR procedures to be mandatory or the outcome of such procedures to be binding on traders, when a consumer has lodged a complaint against them. However, in order to ensure that consumers have access to redress and that they are not obliged to forgo their claims, traders should be encouraged as far as possible to participate in ADR procedures. Therefore, this Directive should be without prejudice to any national rules making the participation of traders in such procedures mandatory or subject to incentives or sanctions or making their outcome binding on traders, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system as provided for in Article 47 of the Charter of Fundamental Rights of the European Union.

Article 10

Liberty

⁴⁰² CJEU 14 June 2017, Case C-75/16, *Livio Menini and Maria Antonia Rampanelli v. Banco Popolare Società Cooperativa*, ECLI:EU:C:2017:457. Both the Advocate General (para 86) and the Court (para 66) derive this conclusion immediately from article 1 of the Directive. See Nicola Scannicchio, ‘The Fake Implementation of a Fake Consumers’ ADR Directive: A Case Study on Rights’ Enforcement by Regulatory Powers in Italy’ (2019) 5 *Italian Law Journal* 323, 337.

⁴⁰³ Francesca Romana Carlone, ‘Note a margine di Corte di Giustizia UE, Sez. I 16 luglio 2017, C 75/16 in tema di risoluzione alternativa delle controversie di consumo’ (2018) XVI *Rivista di Diritto dell’Economia, dei Trasporti e dell’Ambiente* 227, 234.

1. Member States shall ensure that an agreement between a consumer and a trader to submit complaints to an ADR entity is not binding on the consumer if it was concluded before the dispute has materialised and if it has the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the dispute.

2. Member States shall ensure that in ADR procedures which aim at resolving the dispute by imposing a solution the solution imposed may be binding on the parties only if they were informed of its binding nature in advance and specifically accepted this. Specific acceptance by the trader is not required if national rules provide that solutions are binding on traders.

Article 10 of the Directive covers liberty. The two different paragraphs of this article cover two different aspects of this liberty: while the first paragraph talks about binding participation in ADR, the second paragraph deals with binding outcomes of ADR. However, in general, ADR is still ‘no strings attached’: there is no mandatory participation, nor binding outcomes.⁴⁰⁴ Although these two are closely connected, we will assess both of these aspects separately in the following chapter. It is, however, important to keep their interdependence in mind, as for example the discussion on the compatibility of both mandatory and binding ADR with the right to a fair trial of article 6 ECHR and general rights of judicial protection. Furthermore, this interdependence is also something to think about when reviewing compliance rates, i.e. the proportion of ADR proceedings in which the trader complies with the (non-binding) outcome. While the EU median compliance rate is 90%, it is important to keep in mind that this could be the case because traders simply refuse to even enter into voluntary ADR proceedings.⁴⁰⁵

i.1. Mandatory participation and article 6 ECHR and article 47 of the Charter of Fundamental Rights

There is discussion on whether making both participation in ADR and the outcome of the ADR procedures binding would infringe the right to a fair trial of article 6 ECHR and article 47 of the Charter of Fundamental Rights of the EU.⁴⁰⁶ To this extent, recital 49 of the Directive clarifies that “this Directive should be without prejudice to any national rules making the participation of traders in such procedures mandatory or subject to incentives or sanctions or making their outcome binding on traders, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system as provided for in article 47 of the Charter of Fundamental Rights of the EU”. There is a general consensus in the literature that making ADR mandatory does not infringe the right to a fair trial, as long as the outcome is non-binding or the parties have the choice whether the outcome is binding.⁴⁰⁷

⁴⁰⁴ Albertha Harma Santing-Wubs, ‘Twee Europese voorstellen voor de alternatieve beslechting van consumentengeschillen: een ADR-richtlijn en een ODR-verordening’ (2012) 4 Tijdschrift voor Civiele Rechtspleging 174.

⁴⁰⁵ Andrea Fejos and Chris Willet, ‘Consumer Access to Justice: The Role of the ADR Directive and the Member States’ (2016) 1 European Review of Private Law 33.

⁴⁰⁶ Albertha Harma Santing-Wubs, ‘Twee Europese voorstellen voor de alternatieve beslechting van consumentengeschillen: een ADR-richtlijn en een ODR-verordening’ (2012) 4 Tijdschrift voor Civiele Rechtspleging 174.

⁴⁰⁷ Bram Krijnen, ‘Is een wettelijk verplichte geschillencommissie in strijd met het recht op toegang tot de rechter?’ (2015) 5 Tijdschrift voor Consumentenrecht en handelspraktijken 264.

Fejos and Willet see mandatory ADR with a binding outcome for the traders as the ideal ADR model.⁴⁰⁸ They do, however, acknowledge that it may be debated whether this would be contrary to the traders' fundamental right of a fair trial and the general EU law principle of effective judicial protection. Fejos and Willet contend that the fundamental right to judicial protection is respected as long as the ADR outcomes are subject to judicial scrutiny, even if the court can only scrutinise the decision on limited grounds. Similarly, Santing-Wubs finds that the right of access to the court is not hindered if the parties have voluntarily agreed to participate beforehand and/or the judge can (partly) review the decision afterwards.⁴⁰⁹ According to Fejos and Willet, the key element in nurturing the compatibility of the mandatory and binding ADR and fundamental rights of judicial protection is the efficiency concept. However, there is no clear consensus on this. Other authors find that making both participation in ADR and the outcome of the ADR binding would infringe the right to a fair trial of article 6 ECHR. It is clear that there is no consensus on the extent to which ADR proceedings can be both mandatory and binding.

In *Alassini*,⁴¹⁰ the CJEU was receptive towards national laws that impose prior implementation of a consensual out-of-court settlement procedure, provided a number of conditions are met to guarantee a party has effective access to courts should they fail to settle. The Court ruled on a question concerning Italian legislation imposing an additional step for access to courts and was not concerned with the validity of the agreement to which the parties agreed to consent to ADR.

This is why Fejos and Willet propose that “the European Commission could possibly issue a recommendation, and/or a communication, providing guidance as to whether (and subject to what conditions) it is acceptable for processes to be mandatory for, and outcomes to be binding on, businesses”.

i.2. Mandatory participation in ADR?

The first paragraph of article 10 relates to mandatory participation in ADR procedures. It only explicitly regulates the possibility of mandatory ADR for the **consumers**, and effectively excludes the possibility of making ADR mandatory for consumers, at least if it is made mandatory ‘before the dispute has materialised’. According to Cortés, this respects the right of access to the court: consumers cannot know that a dispute will arise when concluding a contract, or at least would not know the extent and significance of this dispute.⁴¹¹ This is the result of the information asymmetry between the traders and the consumers. Scannicchio contends that the right to withdraw for the consumer does not only have a legal, but also an economic logic: this way, the threat of legal proceedings is still valid for the traders, which will induce them to participate actively

⁴⁰⁸ Andrea Fejos and Chris Willet, ‘Consumer Access to Justice: The Role of the ADR Directive and the Member States’ (2016) 1 *European Review of Private Law* 33.

⁴⁰⁹ Albertha Harma Santing-Wubs, ‘Twee Europese voorstellen voor de alternatieve beslechting van consumentengeschillen: een ADR-richtlijn en een ODR-verordening’ (2012) 4 *Tijdschrift voor Civiele Rechtspleging* 174.

⁴¹⁰ CJEU 18 March 2010, Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08, *Rosalba Alassini and Others v. Telecom Italia SpA and Others*, ECLI:EU:C:2010:146.

⁴¹¹ Pablo Cortés, ‘The New Landscape of Consumer Redress’ in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016).

in the ADR proceedings.⁴¹² In *Menini and Rampanelli*,⁴¹³ the CJEU ruled that article 10(1) does not forbid national legislation that prescribes recourse to a mediation procedure as a condition for the admissibility of legal proceedings, as long as such a requirement does not prevent the parties from exercising their right of access to the judicial system. However, legislation that provides that consumers must be assisted by a lawyer in the ADR proceedings and that consumers can only withdraw from the proceedings as long as the consumer can prove a valid reason to withdraw, contravenes the Directive.⁴¹⁴ In *Alassini*, the Court has clarified that national legislation that prescribes recourse to a mediation procedure as a condition for the admissibility of legal proceedings only is compatible with the Directive as long as these procedures do not generate any costs for the consumers or that they are not excessive.⁴¹⁵

Although the article does not explicitly address mandatory ADR for **traders**, it implies that the Directive itself does not impose any specific limitations on making ADR mandatory for traders.⁴¹⁶ Cauffman criticises the leeway left to the Member States to introduce mandatory participation for traders, as it could potentially undermine the level playing field of the EU.⁴¹⁷ She contends that this could discourage consumers to trade cross-border, and thus might worsen the internal market. There is a lot of discussion on whether ADR should be mandatory for traders. The authors that support mandatory ADR, often point to low participation rates as their main argument. Moreover, some authors recognize the potential of ADR schemes to combat the long delays and backlogs in the courts and thus improve access to justice.⁴¹⁸ The authors that are not in favour of mandatory ADR generally consider the very nature of ADR proceedings. They find that mandatory mediation (or ADR in general) is a *contradictio in terminis* and judicial proceedings should always be an option. Among them, Santing-Wubs contends that “ADR should not be an alternative, but an addition to traditional judicial proceedings”.⁴¹⁹ She contends that it should be possible to require parties to inquire on the different ADR possibilities. Some authors criticise the change in perspective on ADR: Pailli and Poncibò stress that it used to be a method of voluntary conciliation, that now has become a mechanism of law enforcement.⁴²⁰ Fejos and Willet warn that, if outcomes should become binding, traders should not be allowed to

⁴¹² Nicola Scannicchio, Compulsory consumer ADR and the effectiveness of the European Directive 2013/11/EU. European harmonization or Italian colors? In Stefan Leible and Rosa Miquel Sala (eds), *Legal integration in Europe and America* (JWV Jenaer Wissenschaftliche Verlagsgesellschaft 2018).

⁴¹³ CJEU 14 June 2017, Case C-75/16, *Livio Menini and Maria Antonia Rampanelli v. Banco Popolare Società Cooperativa*, ECLI:EU:C:2017:457.

⁴¹⁴ Francesca Romana Carlone, ‘Note a margine di Corte di Giustizia UE, Sez. I 16 luglio 2017, C 75/16 in tema di risoluzione alternativa delle controversie di consumo’ (2018) XVI *Rivista di Diritto dell’Economia, dei Trasporti e dell’Ambiente* 227, 235.

⁴¹⁵ Ermenegildo M Appiano, ‘ADR e ODR per le liti consumeristiche nel diritto UE’ (2013) 2 *Contratto e impresa / Europa* 965, 970.

⁴¹⁶ Claudia Troisi, ‘L’attuazione della direttiva 2013/11/UE in Italia alla luce della sentenza C-75/16’ [2018] *Comparazione e diritto civile* 1, 32.

⁴¹⁷ Caroline Cauffman, ‘Critical remarks on the ADR Directive’ in Caroline Cauffman and Jan M Smits (eds), *The Citizen in European Private Law: Norm-setting, Enforcement and Choice* (Intersentia 2016)

⁴¹⁸ Giacomo Pailli and Cristina Poncibò, ‘The Transformation of Consumer Law Enforcement: An Italian Perspective’ (2017) 8 *Comparative Law Review* 1.

⁴¹⁹ Albertha Harma Santing-Wubs, ‘Twee Europese voorstellen voor de alternatieve beslechting van consumentengeschillen: een ADR-richtlijn en een ODR-verordening’ (2012) 4 *Tijdschrift voor Civiele Rechtspleging* 174.

⁴²⁰ Giacomo Pailli and Cristina Poncibò, ‘The Transformation of Consumer Law Enforcement: An Italian Perspective’ (2017) 8 *Comparative Law Review* 1.

challenge these outcomes on any basis: this would induce them to threaten with a judicial challenge the outcome of the ADR proceedings.⁴²¹ They propose a ‘judicial review’ type of action, in which the decision can only be challenged on very limited grounds.

Residual ADR bodies in general experience the worst trader participation rates, not surprisingly because participation is voluntary for these bodies.⁴²² Hence, Verhage suggests that the voluntary trader participation by default in the ADR Directive should be reconsidered.⁴²³ Effective full coverage of ADR bodies, she contends, depends fully on the willingness of traders to participate in the ADR proceedings.⁴²⁴ Next to the fact that participation is sometimes mandatory, there is also more trader participation with sectoral ADR bodies because the traders know the sectoral body and often have a positive attitude towards it.⁴²⁵

Interestingly, it might also be financially more interesting to join sectoral ADR bodies because the trade association of the sector often pays for the **costs**, whereas traders have to pay for the fees themselves in residual ADR bodies. For example, the Dutch ADR body Kifid is funded by the financial sector itself, as a result of which the costs of the proceedings in general are no problem for the traders. For the residual ADR bodies, there is often a more difficult balance required from the traders: it is voluntary to participate in the ADR proceedings, but if they participate, they have to pay the costs. This creates extra incentives for traders not to participate in the proceedings. In other Member States, e.g., Malta and Sweden, ADR proceedings are financed by the State, to avoid that this would constitute a threshold to participate in ADR.

Experts see several ways to **strengthen trader’s participation**. This is deemed important from the viewpoint of the goal of full coverage of ADR: without trader participation, there is no effective full coverage.⁴²⁶ According to Fejos and Willet, traders’ compliance rates do not depend on the country where traders operate as much as they depend on the design of the ADR scheme: there is a direct link between voluntary compliance and the good reputation of an ADR scheme.⁴²⁷ The Directive leaves it to the Member States to decide whether to use any incentives and sanctions to increase trader participation and provides no guidance as to their selection and combination.⁴²⁸ During the ADR assembly 2021, there was discussion on possible measures to strengthen trader participation and especially whether carrots or sticks should be used. A first important, and also quite effective measure would be making ADR mandatory. A number of Member States have used national legislation to make traders’ participation mandatory in specific sectors, typically in the financial and energy

⁴²¹ Andrea Fejos and Chris Willet, ‘Consumer Access to Justice: The Role of the ADR Directive and the Member States’ (2016) 1 *European Review of Private Law* 33.

⁴²² ADR assembly 2021, Breakout session 1D.

⁴²³ ADR assembly 2021, Breakout session 1D.

⁴²⁴ Eline Verhage, ‘Een blik over de Belgische grens: CDR in Nederland’ in Stefaan Voet (ed), *CDR in België. Buitengerechtelijke beslechting en oplossing van geschillen* (die Keure 2018).

⁴²⁵ Pieter-Jan De Koning, ‘Consumentenombudsdienst’ in Stefaan Voet (ed), *CDR in België. Buitengerechtelijke beslechting en oplossing van geschillen* (die Keure 2018).

⁴²⁶ Grégory Renier, ‘Le nouvel encadrement de l’Union européenne pour le règlement extrajudiciaire des litiges de consommation. Examen de la directive 2013/11/UE en matière d’ADR’ (2014) 1 *Revue européenne de droit de la consommation / European Journal of Consumer Law* 135.

⁴²⁷ Andrea Fejos and Chris Willet, ‘Consumer Access to Justice: The Role of the ADR Directive and the Member States’ (2016) 1 *European Review of Private Law* 33.

⁴²⁸ *ibid.*

sectors.⁴²⁹ Trader participation is also increased if trade associations require their members to adhere to an ADR scheme as a condition for their membership.⁴³⁰ Some experts in the ADR assembly found that it is not a problem of increasing consumers' awareness, but a problem of convincing traders to participate, especially in residual ADR bodies. Many experts found that trader participation is better in sectoral ADR bodies, and thus suggest that it would be easier to **convince traders sector by sector**. Some have emphasised that there is still a need to increase awareness of traders and that it is necessary to go to traders and explain why it is intrinsically important to participate in ADR. Some have suggested that the threshold in terms of costs might be remedied by making the **first procedure** before the residual ADR body **free**, so they can have a first experience with ADR bodies and experience its impartiality. Others have suggested to exempt traders that have adhered to a specific ADR entity from costs, whereas traders that have not adhered to ADR would have to pay for the proceedings.⁴³¹ It might also be interesting to strive to make ADR a **competitive advantage**. Lars Arent from the EEC-net gives the example of the car rental sector: in this sector, all the main players adhere to ADR proceedings. These traders can promote themselves by showing that they are part of an accessible and fast way of conflict resolution. Some authors have suggested a '**name and shame**' practice for the traders: ADR bodies could publish which traders participate in ADR and which traders do not participate in ADR.⁴³² These whitelists and/or blacklists do not only increase transparency (see *supra*), but also induce positive competition between the traders, as the market offers better information on their participation in ADR. Another possibility is imposing a **case fee** on traders that refuse to settle in the first stage of the ADR proceedings.⁴³³ This case fee would incentivise traders to settle early into the ADR proceedings, and impose a sanction if they fail to settle. The court could also play a role in incentivising parties to go for ADR through **court sanctions**: courts could refuse straightforward cases for which ADR schemes are available, make the submission of claims conditional on an attempt to use ADR, and/or impose a cost sanction on the party that fails to attempt ADR. All these incentives and sanctions interact with each other, and their effectiveness depends on the specifics of the case.⁴³⁴ For example, the probability that the case will be taken to court plays a big role: if this is no real threat, the trader will be less incentivised to participate in the ADR proceedings. Moreover, for incentives such as treating ADR as a competitive advantage and the 'name and shame'-technique, effective market information and competition is required. If the consumer has no or little real other options to turn to, these techniques will not have any useful effect. It could also be necessary to take specific measures in sectors with particular problems.

⁴²⁹ Commission, 'Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes (ADR Report)' COM (2019) 425 final.

⁴³⁰ Marco BM Loos, 'Enforcing Consumer Rights through ADR at the Detriment of Consumer Law' (2016) 1 European Review of Private Law 61.

⁴³¹ Alexandre Biard, 'Impact of Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK' (2019) 42 Journal of Consumer Policy 109.

⁴³² Nathalie Jouant, 'Le règlement extrajudiciaire des litiges de consommation en Belgique: évolutions' (2017) 3 DCCR 115.

⁴³³ Andrea Fejos and Chris Willet, 'Consumer Access to Justice: The Role of the ADR Directive and the Member States' (2016) 1 European Review of Private Law 33.

⁴³⁴ *ibid.*

Country-specific remarks

In **Belgium**, there is in general no mandatory participation in ADR. This means that consumers will sometimes not find an out-of-court solution, and thus often no redress at all. However, participation in ADR is sometimes required in a certain sector or to acquire recognition to exercise a certain profession.⁴³⁵

Bulgaria faces overall trader participation problems.⁴³⁶ The country has tried different nudging techniques, such as informing the traders and the free test option, but traders don't see the value of adhering to ADR (yet).

In **Germany**, liberty is a general principle of the ADR system, both for the consumers and traders.⁴³⁷ However, trader participation is mandatory in the energy, telecommunications and air passenger's sectors, unless they are already part of a certified privately incorporated ADR entity.⁴³⁸ In these cases, the trader has to pay for the ADR proceedings, which acts as an incentive to actively participate in the proceedings. It has been considered to extend this obligation to pay the costs regardless of whether the trader effectively participates in the proceedings to all ADR proceedings.⁴³⁹ However, it is questioned whether this is constitutional. Gössl considers mandatory ADR to be a restriction of the right of access to justice, which is normally justifiable by the fact that the parties agree to participate in ADR. It might thus be better to have this system of mandatory contribution to the costs only in specific sectors or low-value claims. Some trader associations, e.g., for private banking, require their members to participate in ADR. The lack of trader participation is partly due to the high fees traders have to pay for the proceedings before the residual ADR body. If the trader decides not to participate in the ADR proceedings, they are 'rewarded' with a settlement proposal based on the facts and the arguments of the consumer. Especially in low-value claims, this proposal might be more interesting than actively participating in ADR. Miquel suggests that, if Germany wants its residual entity to be effective, it should lower the fees.⁴⁴⁰

The **Italian** Consumer Code stipulates that participation can be made mandatory by regulators in their own sectors, but only for the traders.⁴⁴¹ According to De Palo, Italy is a good illustration of the fact that making ADR mandatory will effectively increase

⁴³⁵ Grégory Renier, 'Le règlement extrajudiciaire des litiges de consommation. Analyse de la transposition de la directive « ADR » 2013/11/UE en droit belge' (2015) 107 DCCR 3.

⁴³⁶ ADR assembly 2021, Breakout session 1D.

⁴³⁷ Peter Rott, 'Consumer ADR in Germany' (2018) 7 Journal of European Consumer and Market Law 121.

⁴³⁸ Commission, 'Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes (ADR Report)' COM (2019) 425 final.

⁴³⁹ Susanne Lilian Gössl, 'Stellungnahme zum Entwurf eines Verbraucherstreit-beilegungsgesetzes zur Umsetzung der ADR-Richtlinie (EU-Richtlinie Nr. 2013/11)' (Universität Bonn 2015) 59.

⁴⁴⁰ Rosa Miquel, 'The implementation of the consumer ADR directive in Germany' in Pablo Cortés (ed) *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016).

⁴⁴¹ Carlo Pilia, Pablo Cortés and Paolo Vargiu, 'The Implementation of the Consumer ADR Directive in Italy' in Pablo Cortés (ed) *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016).

trader participation.⁴⁴² Arlene McCarthy, the Rapporteur on the Mediation Directive, calls the Italian mediation model “an example the entire EU should learn from”. Cortes believes that Italy should make participation mandatory in all sectors in which ADR is a better option than the courts, and thus for most - if not all - consumer cases.⁴⁴³ De Palo contends that we shouldn’t linger in idealistic ideas of voluntary mediation: mediation will only really work if it is mandatory.⁴⁴⁴ The idea is to extend the current mandatory mediation system that exists, but to update it in two ways. First, the mandatory element should not only extend to the preliminary information session but also the mediation process itself, or at least if this is recommended by the mediator. Second, it should not require consumers to have legal representation in the mediation process. If the level of settlements is low, the ADR entity should also have an adjudication stage within its proceedings. Moreover, judicial review should be limited to certain specific grounds, especially if the claims are low-value.

In **Greece**, there is a system of mandatory mediation.⁴⁴⁵ According to the expert in the ADR assembly, this has greatly improved trader participation.

In the **Netherlands**, the residual ADR body is grounded in voluntary trader participation. This faces its limits: most traders don’t want to register with the ADR body, despite the different nudging techniques used, such as sending out information letters and emails. It seems that nudging and self-regulatory techniques do not work in case of the residual ADR body, especially for SMEs and freelancers, who make up 75% of traders in the Netherlands.⁴⁴⁶ The Netherlands is a good illustration of the fact that residual ADR bodies face even more problems as regards trader participation than ‘regular’ ADR bodies: the country has a rich ADR tradition with specific ADR bodies in for example the financial sector, but still faces major trader participation problems in the residual ADR body.

i.3. Binding outcome of ADR?

In general, the outcome of the ADR proceedings is not binding for the consumer nor for the trader, unless they specifically accept the binding nature of the outcome. However, national legislation can also stipulate that outcomes are binding on the traders, if accepted by the consumer.⁴⁴⁷ According to Cauffman, the fact that Member States can choose between proposed and imposed solutions or a combination of both for the traders, might lead to an uneven level playing field within the internal market.⁴⁴⁸

⁴⁴² Giuseppe De Palo and Romina Canessa, ‘Sleeping - Comatose - Only Mandatory Consideration of Mediation Can Awake Sleeping Beauty in the European Union’ (2014) 16 *Cardozo Journal of Conflict Resolution* 723.

⁴⁴³ Pablo Cortés, ‘The impact of EU law in the ADR landscape in Italy, Spain and the UK: time for change or missed opportunity?’ (2015) 16 *ERA Forum* 134.

⁴⁴⁴ Giuseppe De Palo and Romina Canessa, ‘Sleeping - Comatose - Only Mandatory Consideration of Mediation Can Awake Sleeping Beauty in the European Union’ (2014) 16 *Cardozo Journal of Conflict Resolution* 723.

⁴⁴⁵ ADR assembly 2021, Breakout session 1A.

⁴⁴⁶ ADR assembly 2021, Breakout session 1D.

⁴⁴⁷ Frédéric de Patoul, ‘Quelques réflexions sur une voie extrajudiciaire de règlement des conflits de consommation: Ombudsfin, l’ombudsman des conflits financiers’ (2013) 100-101 *DCCR* 227.

⁴⁴⁸ Caroline Cauffman, ‘Critical remarks on the ADR Directive’ in Caroline Cauffman and Jan M Smits (eds), *The Citizen in European Private Law: Norm-setting, Enforcement and Choice* (Intersentia 2016).

De Coninck contends that a major problem of the ADR Directive is that traders are not obliged to comply with the outcome when consumers accept the proposed solution.⁴⁴⁹ According to de Patoul, the problem with the default rule of non-binding outcomes is that the credibility and practical effectiveness of the ADR system depend on the goodwill of the traders.⁴⁵⁰ This problem is especially pressing for low-value claims: in these cases, the chance that a consumer will pursue the case before the courts is very low. The median compliance rate across the EU is now 90%. However, it is important to keep in mind the interdependence of participation and compliance: this rate could in practice be much lower because traders simply refuse to even enter into voluntary ADR proceedings.

According to Fejos and Willet, there are a few advantages to **making ADR outcomes binding** on the traders.⁴⁵¹ Empirical research has shown that the median compliance rate will then be 100%, as opposed to the general compliance rate of 90%. Moreover, the prospect of a binding outcome at the end might incentivise traders to cooperate more and reach settlements earlier into the ADR proceedings. Binding outcomes might thus reduce the resources, time and inconvenience spent during the ADR proceedings. This is especially important in cross-border cases, as these have greater costs and also demand more effort from the consumers and traders. Furthermore, binding outcomes make consumer redress a routine, which reinforces the deterrent effect of ADR: this might induce traders more to abstain from behaviour that is detrimental to the consumers.

As article 10.1 of the Directive does not accept a commitment to ADR proceedings before the dispute has arisen, it seems that this also excludes the possibility for the consumer to accept that the outcome will be binding before the dispute has arisen.⁴⁵² This does not apply to the trader: they can accept to be bound by the outcome of the ADR proceedings at the time of the conclusion of the contract. The Directive requires **specific acceptance** for the consumer to be bound by the outcome of the ADR proceedings. However, neither article 10.2 nor recital 43 stipulate what requirements have to be met to acquire specific acceptance. Specific acceptance is a standard set by the EU in multiple legislative instruments, for example also by the Draft Regulation of a Common European Sales Law. It is subject to interpretation by the CJEU. However, the ADR entity cannot make a reference to the CJEU. It is thus unclear what will be qualified as a valid specific acceptance by the consumer. Member States can introduce certain requirements for the specific acceptance.⁴⁵³

There are different possible measures to increase trader compliance, one of which is making the decision binding on the trader by way of national legislation. Providing that outcomes will be binding on the trader is also possible at the EU level. De Patoul argues that the Directive should make ADR decisions binding under a certain threshold of, for

⁴⁴⁹ Hans De Coninck, 'De alternatieve geschillenbeslechting in België: verleden, heden en toekomst' (2013) 100-101 DCCR 217.

⁴⁵⁰ Frédéric de Patoul, 'Quelques réflexions sur une voie extrajudiciaire de règlement des conflits de consommation: Ombudsfin, l'ombudsman des conflits financiers' (2013) 100-101 DCCR 227.

⁴⁵¹ Andrea Fejos and Chris Willet, 'Consumer Access to Justice: The Role of the ADR Directive and the Member States' (2016) 1 European Review of Private Law 33.

⁴⁵² Francesco P Luiso, 'La direttiva 2013/11/UE, sulla risoluzione alternativa delle controversie dei consumatori' (2014) 4 Rivista trimestrale di diritto e procedura civile 1299.

⁴⁵³ Norbert Reich, 'A Trojan Horse' in the Access to Justice—Party Autonomy and Consumer Arbitration in conflict in the ADR-Directive 2013/11/EU?' (2014) 10 European Review of Contract Law 273.

example 5000 euros.⁴⁵⁴ Similarly, Renier argues solutions should be binding under a certain threshold because in these cases, there is no real threat that the consumer will pursue court proceedings.⁴⁵⁵ Loos suggests instead that the solution is binding on the trader, if the consumer has accepted the proposed solution.⁴⁵⁶ According to Renier, this is the solution that respects the principles of liberty and legality the most.⁴⁵⁷ A technique used in the Netherlands is the ‘**trade association guarantee**’, in which the trade association provides for a contractual guarantee to adhere to the ADR scheme. When traders refuse to comply with the outcome of the proceedings, the trade association will pay the compensation to the consumer, and then claim reimbursement from the trader. Another option is to designate a specific chamber within the ADR entities able to issue binding outcomes. Then, parties can choose to submit their disputes to this chamber on a voluntary basis, but cannot come back on this decision in a later stage of the proceedings.⁴⁵⁸ The **name and shame**-technique is also a possibility at the level of acceptance of outcomes: blacklists, i.e. lists of traders that do not accept outcomes, and whitelists, i.e. lists of traders that do accept outcomes, could increase transparency and consumer trust and incentivise traders to accept the outcomes. For Ombudsfijn in Belgium, this publishing system increased the acceptance rate from 56% to 80%.⁴⁵⁹

Country-specific remarks

In **Belgium**, the general rule is that ADR entities can only propose solutions, but cannot issue binding outcomes.⁴⁶⁰ The residual ADR body can formulate recommendations vis-à-vis specific traders, but the acceptance rate of these recommendations is only 18%. In principle, the trader has to send a motivated reply to the residual ADR entity if they do not wish to comply with the recommendation. However, 57.7% of traders never replied to the recommendation at all. As there is no sanction provided, this system is very ineffective.⁴⁶¹

The **French** ADR system is a fully conventional mechanism, with no possibility to provide for binding outcomes. According to the French Competent Authority, there are no immediate plans to change this.⁴⁶²

In **Germany**, liberty is the most important aspect of ADR legislation. The only sectors in which outcomes are binding are the banking and insurance sectors. In these sectors,

⁴⁵⁴ Frédéric de Patoul, ‘Quelques réflexions sur une voie extrajudiciaire de règlement des conflits de consommation: Ombudsfijn, l’ombudsman des conflits financiers’ (2013) 100-101 DCCR 227.

⁴⁵⁵ Grégory Renier, ‘Le nouvel encadrement de l’Union européenne pour le règlement extrajudiciaire des litiges de consommation. Examen de la directive 2013/11/UE en matière d’ADR’ (2014) 1 Revue européenne de droit de la consommation / European Journal of Consumer Law 135.

⁴⁵⁶ Marco BM Loos, ‘Enforcing Consumer Rights through ADR at the Detriment of Consumer Law’ (2016) 1 European Review of Private Law 61.

⁴⁵⁷ Grégory Renier, ‘Le règlement extrajudiciaire des litiges de consommation. Analyse de la transposition de la directive « ADR » 2013/11/UE en droit belge’ (2015) 107 DCCR 3.

⁴⁵⁸ François Delnooz and Marc Gouverneur, ‘Le règlement extrajudiciaire des litiges de consommation dans le Code de droit économique’ (2014) 57 Revue du Droit des Technologies de l’Information 5.

⁴⁵⁹ Grégory Renier, ‘Le règlement extrajudiciaire des litiges de consommation. Analyse de la transposition de la directive « ADR » 2013/11/UE en droit belge’ (2015) 107 DCCR 3.

⁴⁶⁰ *ibid.*

⁴⁶¹ Grégory Renier and Nathalie Jouant, ‘Le Service de Médiation pour le Consommateur (SMC) : un an après’ (2016) 112 DCCR 103.

⁴⁶² ADR assembly 2021, Breakout session 1C.

the bank and insurance company are bound by the decision as long as its value does not exceed 10.000 euros.⁴⁶³

The **Italian** ADR system has both binding and non-binding outcomes. In the cases foreseen by the Consumer Code or by financial legislation, outcomes are binding for the traders.⁴⁶⁴ Decisions by the Conciliation Board are binding for traders who signed the protocol of understanding when adhering to the ADR scheme, thus committing to comply with the outcome.

In the **Netherlands**, the general rule is binding advice or arbitration.⁴⁶⁵ Except for some specific cases before Kifid and SKGZ and because participation is mandatory in these cases, outcomes are thus generally binding on the traders. The compliance with the decision of the trader can be enforced in court. Additionally, the Netherlands often has a trade association guarantee, in which the trade association guarantees compliance with the decision by the trader.⁴⁶⁶ Because of this guarantee, consumers do not have to go to court to enforce decisions if the trader does not comply.⁴⁶⁷

j. Legality

Recital 44

In ADR procedures which aim at resolving the dispute by imposing a solution on the consumer, in a situation where there is no conflict of laws, the solution imposed should not result in the consumer being deprived of the protection afforded to him by the provisions that cannot be derogated from by agreement by virtue of the law of the Member State where the consumer and the trader are habitually resident. In a situation involving a conflict of laws, where the law applicable to the sales or service contract is determined in accordance with Article 6(1) and (2) of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (1), the solution imposed by the ADR entity should not result in the consumer being deprived of the protection afforded to him by the provisions that cannot be derogated from by agreement by virtue of the law of the Member State in which the consumer is habitually resident. In a situation involving a conflict of laws, where the law applicable to the sales or service contract is determined in accordance with Article 5(1) to (3) of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations (2), the solution imposed by the ADR entity should not result in the consumer being deprived of the protection afforded to the consumer by the mandatory rules of the law of the Member State in which the consumer is habitually resident.

Article 11

Legality

1. Member States shall ensure that in ADR procedures which aim at resolving the dispute by imposing a solution on the consumer:

⁴⁶³ Peter Rott, 'Consumer ADR in Germany' (2018) 7 Journal of European Consumer and Market Law 121.

⁴⁶⁴ Nicola Scannicchio, *Accesso alla giustizia e attuazione dei diritti: la mediazione delle controversie di consumo nella direttiva europea 2013-11* (Giappichelli 2015) 47.

⁴⁶⁵ Grégory Renier, 'Le nouvel encadrement de l'Union européenne pour le règlement extrajudiciaire des litiges de consommation. Examen de la directive 2013/11/UE en matière d'ADR' (2014) 1 Revue européenne de droit de la consommation / European Journal of Consumer Law 135.

⁴⁶⁶ Christopher Hodges, 'Consumer Alternative Dispute Resolution' in Burkhard Hess and Stephanie Law (eds), *Implementing EU consumer rights by national procedural law* (CH Beck 2019).

⁴⁶⁷ Albertha Harma Santing-Wubs, 'Twee Europese voorstellen voor de alternatieve beslechting van consumentengeschillen: een ADR-richtlijn en een ODR-verordening' (2012) 4 Tijdschrift voor Civiele Rechtspleging 174.

(a) in a situation where there is no conflict of laws, the solution imposed shall not result in the consumer being deprived of the protection afforded to him by the provisions that cannot be derogated from by agreement by virtue of the law of the Member State where the consumer and the trader are habitually resident;

(b) in a situation involving a conflict of laws, where the law applicable to the sales or service contract is determined in accordance with Article 6(1) and (2) of Regulation (EC) No 593/2008, the solution imposed by the ADR entity shall not result in the consumer being deprived of the protection afforded to him by the provisions that cannot be derogated from by agreement by virtue of the law of the Member State in which he is habitually resident;

(c) in a situation involving a conflict of laws, where the law applicable to the sales or service contract is determined in accordance with Article 5(1) to (3) of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations, the solution imposed by the ADR entity shall not result in the consumer being deprived of the protection afforded to him by the mandatory rules of the law of the Member State in which he is habitually resident.

2. For the purposes of this Article, 'habitual residence' shall be determined in accordance with Regulation (EC) No 593/2008.

The legality requirement ensures that consumers can enjoy the protection of the mandatory consumer laws of their habitual residence, regardless of what law applies to their case. This requirement is more a requirement of consumer protection, and less a criterion that will change traders' behaviour.⁴⁶⁸ According to Hodges, ADR is good for the facts but less so for the law. Hence, the legality requirement aims at granting consumers the mandatory level of protection.⁴⁶⁹ Knigge and Pavillon argue that the legality requirement is more a **protection requirement**: it does not necessarily require the ADR entity to apply the mandatory law of the consumer's habitual residence, as long as the solution provided meets the protection that this mandatory law provides.⁴⁷⁰ The Directive thus does not distinguish between the ADR entity applying the law or general equity principles.⁴⁷¹

Loos points out a practical problem of article 11(1): it is unclear whether and how a Member State can **ensure that its requirements are effectively met**.⁴⁷² Consumers subject to the legality requirement will often not know that the proposed solution does not meet the standards of mandatory consumer law. Moreover, even if they would know, it is often still improbable that the consumer will effectively claim his rights before the courts. According to Knigge and Pavillon, the Directive leaves this decision to the ADR entity itself: this is not part of the list of information that has to be notified to the Competent Authority under article 19, nor does the content of their decisions

⁴⁶⁸ Marte Knigge and Charlotte Pavillon, 'The Legality Requirement of the ADR Directive: Just Another Paper Tiger?' (2016) 5 Journal of European Consumer and Market Law 155.

⁴⁶⁹ Christopher Hodges, Iris Benöhr and Naomi Creutzfeldt-Banda, *Consumer ADR in Europe* (Hart Publishing 2012).

⁴⁷⁰ Marte Knigge and Charlotte Pavillon, 'The Legality Requirement of the ADR Directive: Just Another Paper Tiger?' (2016) 5 Journal of European Consumer and Market Law 155 and Charlotte Pavillon, 'Geschillencommissies en dwingend recht. Over de gevolgen van een door de ADR-richtlijn gedwongen huwelijk' (2015) 5 Tijdschrift voor Consumentenrecht en handelspraktijken 239.

⁴⁷¹ Naomi Creutzfeldt, 'Implementation of the Consumer ADR Directive' (2016) 4 Journal of European Consumer and Market Law 169.

⁴⁷² Marco BM Loos, 'Enforcing Consumer Rights through ADR at the Detriment of Consumer Law' (2016) 1 European Review of Private Law 61.

have to be notified.⁴⁷³ They propose an examination of a sample of the ADR entity by the competent authority. Member States could then decide to refuse to (further) recognise an ADR entity that does not apply the legality requirement.⁴⁷⁴ It is unclear whether the Directive also requires a remedy for consumers whose rights under mandatory law are not respected.⁴⁷⁵ It could be possible to provide an appeal for a question of law: a court could then review the legality of the decision and either make a decision themselves or refer the case back to the ADR entity.⁴⁷⁶ The Directive could also generally provide that any court that hears a judicial review of an ADR solution should review whether the legality requirement has been met. Knigge and Pavillon come to the conclusion that an amended Directive should devote more attention to the problem of enforcement of the legality requirement.⁴⁷⁷

The legality requirement assures consumer protection from the Rome I Regulation in **cross-border cases**.⁴⁷⁸ A choice of law should not deprive the consumers of the protection offered to them under their national laws. The harmonised EU consumer protection is also part of this consumer protection principle, even though article 11 of the Directive only mentions “the law of the Member State”.⁴⁷⁹ The *ratio* of these provisions is to increase consumers’ confidence in cross-border trade: the consumer that chooses to trade with a trader from another Member State should receive the same consumer protection he/she would expect when trading with a trader based in the same Member State.⁴⁸⁰ However, cross-border cases also pose an extra challenge for the ADR entity: it has to have knowledge on the mandatory consumer law of another Member State, which is quite unlikely.⁴⁸¹ There is an important gap in the regulation of cross-border consumer disputes by the Directive: there are scenarios under which the person will be a consumer under the Directive but his situation nevertheless does not fall under the stringent conditions of Rome I. According to Tramarin, if the situation does not fall under the scope of article 6 Rome I, the other connecting factors of Rome I will come into play, which could result in a lack of the protection the mandatory consumer laws of the consumer’s habitual residence provide. This is not such a strange result as it may seem: the result is the same protection as a consumer would obtain if he would pursue the cases before the courts.⁴⁸²

⁴⁷³ Marte Knigge and Charlotte Pavillon, ‘The Legality Requirement of the ADR Directive: Just Another Paper Tiger?’ (2016) 5 *Journal of European Consumer and Market Law* 155.

⁴⁷⁴ Youseph Farah and Leonardo De Oliveira, ‘Releasing the Potential for a Value-Based Consumer Arbitration under the Consumer ADR Directive’ (2016) 1 *European Review of Private Law* 117.

⁴⁷⁵ Marte Knigge and Charlotte Pavillon, ‘The Legality Requirement of the ADR Directive: Just Another Paper Tiger?’ (2016) 5 *Journal of European Consumer and Market Law* 155.

⁴⁷⁶ Youseph Farah and Leonardo De Oliveira, ‘Releasing the Potential for a Value-Based Consumer Arbitration under the Consumer ADR Directive’ (2016) 1 *European Review of Private Law* 117.

⁴⁷⁷ Marte Knigge and Charlotte Pavillon, ‘The Legality Requirement of the ADR Directive: Just Another Paper Tiger?’ (2016) 5 *Journal of European Consumer and Market Law* 155.

⁴⁷⁸ Pablo Cortés, ‘The New Landscape of Consumer Redress’ in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016).

⁴⁷⁹ Charlotte Pavillon, ‘Geschillencommissies en dwingend recht. Over de gevolgen van een door de ADR-richtlijn gedwongen huwelijk’ (2015) 5 *Tijdschrift voor Consumentenrecht en handelspraktijken* 239.

⁴⁸⁰ Pablo Cortés, ‘The New Landscape of Consumer Redress’ in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016).

⁴⁸¹ Marco BM Loos, ‘Enforcing Consumer Rights through ADR at the Detriment of Consumer Law’ (2016) 1 *European Review of Private Law* 61.

⁴⁸² Sara Tramarin, ‘La Protection Judiciaire et Extrajudiciaire Du Consommateur Dans Le Droit de l’Union Européenne’ (Université de Strasbourg; Università degli studi di Bologna 2017), 194-195.

Importantly, the legality requirement **only applies to ADR proceedings in which a decision is imposed** on the consumer, not to consensual proceedings.⁴⁸³ The ADR Directive thus explicitly accepts different outcomes according to the specific ADR proceedings.⁴⁸⁴ This exclusion has received a lot of critique from the academic literature.⁴⁸⁵ According to Knigge and Pavillon, the quality of a non-binding decision is as important as the quality of a binding decision.⁴⁸⁶ The result of this limitation is that, in ADR proceedings with non-binding outcomes, the solution may be less beneficial than in court proceedings and even less beneficial than what EU consumer law prescribes.⁴⁸⁷ The idea is that for non-binding outcomes, consumers can still choose not to accept the outcome. However, it is probable that the consumer will not know that the proposed solution does not meet the protection of his mandatory laws. Moreover, it is improbable that the consumer will be able to renegotiate the solution or go to the courts. As Cauffman says, the whole idea of the ADR Directive is to provide alternative means of conflict resolution as court proceedings are too slow, costly and complicated for traditional consumers.⁴⁸⁸ As a result, ADR might be the only practicable option. The difference between binding and non-binding ADR should thus not be overemphasised because of this difference in knowledge and bargaining power.⁴⁸⁹ Applying mandatory law of presumably another Member State than the forum of the ADR entity is also more costly and time-consuming. As a result of this restriction, the EU itself nuances its consumer protection: consumers have certain minimum rights, but might have to accept a solution that does not meet this consumer protection standard.⁴⁹⁰ From a pragmatic point of view, this solution is better than the lack of consumer redress if there is no ADR body that proposes a solution.⁴⁹¹ However, in the long term, this will lead to a distinction between the “law in action” and the “law in the books”, legal uncertainty, especially in cross-border consumer transactions, and an uneven level playing field.⁴⁹² According to Wagner, it is unclear to which extent the ADR entity should still aim at finding the ‘correct’ solution, or whether they should just impose the solution that fits

⁴⁸³ Gerhard Wagner, ‘Private Law Enforcement through ADR: wonder drug or snake oil?’ (2014) 51 *Common Market Law Review* 165.

⁴⁸⁴ Franziska Weber, ‘Is ADR the Superior Mechanism for Consumer Contractual Disputes?—An Assessment of the Incentivizing Effects of the ADR Directive’ (2015) 38 *Journal of Consumer Policy* 265.

⁴⁸⁵ Hans De Coninck, ‘Buitengerechtelijke regeling van consumentengeschillen’ (2014) 105 *DCCR* 23.

⁴⁸⁶ Marte Knigge and Charlotte Pavillon, ‘The Legality Requirement of the ADR Directive: Just Another Paper Tiger?’ (2016) 5 *Journal of European Consumer and Market Law* 155.

⁴⁸⁷ Andrea Fejos and Chris Willet, ‘Consumer Access to Justice: The Role of the ADR Directive and the Member States’ (2016) 1 *European Review of Private Law* 33.

⁴⁸⁸ Caroline Cauffman, ‘Critical remarks on the ADR Directive’ in Caroline Cauffman and Jan M Smits (eds), *The Citizen in European Private Law: Norm-setting, Enforcement and Choice* (Intersentia 2016).

⁴⁸⁹ Marte Knigge and Charlotte Pavillon, ‘The Legality Requirement of the ADR Directive: Just Another Paper Tiger?’ (2016) 5 *Journal of European Consumer and Market Law* 155.

⁴⁹⁰ Caroline Cauffman, ‘Critical remarks on the ADR Directive’ in Caroline Cauffman and Jan M Smits (eds), *The Citizen in European Private Law: Norm-setting, Enforcement and Choice* (Intersentia 2016).

⁴⁹¹ Franziska Weber, ‘Is ADR the Superior Mechanism for Consumer Contractual Disputes?—An Assessment of the Incentivizing Effects of the ADR Directive’ (2015) 38 *Journal of Consumer Policy* 265.

⁴⁹² Caroline Cauffman, ‘Critical remarks on the ADR Directive’ in Caroline Cauffman and Jan M Smits (eds), *The Citizen in European Private Law: Norm-setting, Enforcement and Choice* (Intersentia 2016).

the parties' preferences.⁴⁹³ The legality principle also does not apply to non-accredited ADR schemes.⁴⁹⁴

The ADR Directive does not contain any rules on the possibility and timing of presenting **evidence** to the ADR entities. While it might seem favourable to the consumer to provide for flexible evidence rules, the opposite may as well be true: the traders might benefit from it more through their status as repeat players. Moreover, strict procedural rules could also help reduce the discretion of ADR entities and thus help harmonisation, which would in particular benefit consumers in cross-border cases.⁴⁹⁵

As a result of article 11, ADR entities are obliged to apply mandatory EU consumer law provisions. However, ADR entities **cannot ask for prejudicial rulings** at the CJEU: not for the application of consumer law, nor for interpretation of the Directive.⁴⁹⁶ This will lead ADR entities to develop their own case law. According to Weber, the ban for ADR entities to ask prejudicial rulings is a logical consequence of the organisation of the entities themselves: as they are not necessarily required to apply the law and the adjudicators do not necessarily need legal diplomas, the ADR entities are not the best entities to further develop the law.⁴⁹⁷ For the same reasons, ADR entities should not be able to make precedents: they can look at courts' precedents, but not the other way around. The counter-intuitive result of this restriction is that successful ADR may undermine the overall harmonisation of substantive EU consumer law. According to Loos, this can be remedied in three ways.⁴⁹⁸ ADR entities could be allowed to ask for prejudicial rulings at the CJEU. However, this would require a change of the Treaty. Furthermore, a prejudicial ruling-system could be set up under national law, with the possibility to ask questions to a national court. Moreover, the lack of harmonisation could also be solved by judicial review. However, a broad possibility of judicial review would contravene the whole concept of ADR.

Through the ban on the possibility to ask for prejudicial rulings for the ADR body and the lack of legality requirement in ADR proceedings that do not have a binding outcome, there is a strong tension between the harmonisation of substantive consumer law and the stimulation of ADR. The Directive focuses on increasing the feasibility of ADR for consumers.⁴⁹⁹ However, they will also lead to fragmentation of consumer law across the Member States.

⁴⁹³ Gerhard Wagner, 'Private Law Enforcement through ADR: wonder drug or snake oil?' (2014) 51 *Common Market Law Review* 165.

⁴⁹⁴ Marte Knigge and Charlotte Pavillon, 'The Legality Requirement of the ADR Directive: Just Another Paper Tiger?' (2016) 5 *Journal of European Consumer and Market Law* 155.

⁴⁹⁵ Joasia Luzak, 'The ADR Directive: Designed to Fail? A Hole-Ridden Stairway to Consumer Justice' (2016) 1 *European Review of Private Law* 81.

⁴⁹⁶ Elise Poillot, 'Droit de la consommation' (2014) 205 *Journal de droit européen* 20.

⁴⁹⁷ Franziska Weber, 'Is ADR the Superior Mechanism for Consumer Contractual Disputes?—An Assessment of the Incentivizing Effects of the ADR Directive' (2015) 38 *Journal of Consumer Policy* 265.

⁴⁹⁸ Marco BM Loos, 'Enforcing Consumer Rights through ADR at the Detriment of Consumer Law' (2016) 1 *European Review of Private Law* 61.

⁴⁹⁹ Marte Knigge and Charlotte Pavillon, 'The Legality Requirement of the ADR Directive: Just Another Paper Tiger?' (2016) 5 *Journal of European Consumer and Market Law* 155.

Country-specific remarks

In **Germany**, there is discussion on the legality requirement and its implications, especially because of its implementation into the German legal order.⁵⁰⁰ Pursuant to § 19 para. 1 VSBG, '(t)he conciliation proposal should be based on applicable law and, in particular, should observe the compulsory consumer protection laws'.⁵⁰¹ Some insist on the mandatory nature of consumer laws and that this should in any case be applied to the ADR proceedings. Others emphasise the conciliatory nature of ADR and see it as more of a balancing exercise, in which the law is only one of the considerations. There is, however, a danger of creating a 'black box of ADR'.

The **Dutch** Act implementing the Directive is the only Act that addressed the consequences for the consumer should there be a breach of mandatory law: consumers can challenge decisions in breach of mandatory law.⁵⁰² This is important, as mandatory consumer law applies to the majority of cases.⁵⁰³ It does not, however, address the consequences for the ADR entity, nor how the requirements are to be enforced.⁵⁰⁴ An empirical study conducted by Pavillon shows that of the 266 cases studied, 58 cases were doubtful on whether the consumer was offered the protection it has under mandatory law.⁵⁰⁵

⁵⁰⁰ Peter Rott, 'Consumer ADR in Germany' (2018) 7 *Journal of European Consumer and Market Law* 121.

⁵⁰¹ Joanna Page and Laurel Bonnyman, 'ADR and ODR—Achieving Better Dispute Resolution for Consumers in the EU' (2016) 17 *ERA Forum* 145.

⁵⁰² Marte Knigge and Charlotte Pavillon, 'The Legality Requirement of the ADR Directive: Just Another Paper Tiger?' (2016) 5 *Journal of European Consumer and Market Law* 155.

⁵⁰³ Charlotte Pavillon, 'Geschillencommissies en dwingend recht. Over de gevolgen van een door de ADR-richtlijn gedwongen huwelijk' (2015) 5 *Tijdschrift voor Consumentenrecht en handelspraktijken* 239.

⁵⁰⁴ Marte Knigge and Charlotte Pavillon, 'The Legality Requirement of the ADR Directive: Just Another Paper Tiger?' (2016) 5 *Journal of European Consumer and Market Law* 155.

⁵⁰⁵ Charlotte Pavillon, 'Geschillencommissies en dwingend recht. Over de gevolgen van een door de ADR-richtlijn gedwongen huwelijk' (2015) 5 *Tijdschrift voor Consumentenrecht en handelspraktijken* 239.

4. Information

a. Consumer information by traders

Recital 39

ADR entities should be accessible and transparent. In order to ensure the transparency of ADR entities and of ADR procedures it is necessary that the parties receive the clear and accessible information they need in order to take an informed decision before engaging in an ADR procedure. The provision of such information to traders should not be required where their participation in ADR procedures is mandatory under national law.

Recital 47

When a dispute arises it is necessary that consumers are able to identify quickly which ADR entities are competent to deal with their complaint and to know whether or not the trader concerned will participate in proceedings submitted to an ADR entity. Traders who commit to use ADR entities to resolve disputes with consumers should inform consumers of the address and website of the ADR entity or entities by which they are covered. That information should be provided in a clear, comprehensible and easily accessible way on the trader's website, where one exists, and if applicable in the general terms and conditions of sales or service contracts between the trader and the consumer. Traders should have the possibility of including on their websites, and in the terms and conditions of the relevant contracts, any additional information on their internal complaint handling procedures or on any other ways of directly contacting them with a view to settling disputes with consumers without referring them to an ADR entity. Where a dispute cannot be settled directly, the trader should provide the consumer, on paper or another durable medium, with the information on relevant ADR entities and specify if he will make use of them.

Recital 48

The obligation on traders to inform consumers about the ADR entities by which those traders are covered should be without prejudice to provisions on consumer information on out-of-court redress procedures contained in other Union legal acts, which should apply in addition to the relevant information obligation provided for in this Directive.

Article 3

Relationship with other Union legal acts

3. Article 13 of this Directive shall be without prejudice to provisions on consumer information on out-of-court redress procedures contained in other Union legal acts which shall apply in addition to that Article.

Article 13

Consumer information by traders

1. Member States shall ensure that traders established on their territories inform consumers about the ADR entity or ADR entities by which those traders are covered, when those traders commit to or are obliged to use those entities to resolve disputes with consumers. That information shall include the website address of the relevant ADR entity or ADR entities.

2. The information referred to in paragraph 1 shall be provided in a clear, comprehensible and easily accessible way on the traders' website, where one exists, and, if applicable, in the general terms and conditions of sales or service contracts between the trader and a consumer.

3. Member States shall ensure that, in cases where a dispute between a consumer and a trader established in their territory could not be settled further to a complaint submitted directly by the consumer to the trader, the trader provides the consumer with the information referred to in paragraph 1, specifying whether he will make use of the relevant ADR entities to settle the dispute. That information shall be provided on paper or on another durable medium.

The Directive imposes information duties on traders under two circumstances.

Firstly, when traders are affiliated to a consumer ADR entity, either because they have opted in voluntarily or because the sectoral law or the code of conduct of their industry or trade association requires it.⁵⁰⁶ The legislator's main concern is that, once traders have joined ADR entities, consumers are aware of such a circumstance. Catalán Chamorro declares that without the cooperation of traders, it is almost impossible for consumers to know of the existence of consumer ADR and to identify the appropriate ADR entity among the many operating at the international level.⁵⁰⁷ Therefore, the Directive correctly requires traders to signpost consumers to the ADR entity to which they are affiliated and that such information should be clear, comprehensible and easily accessible.

Secondly, when consumer complaints have not been resolved through traders' internal handling systems, the latter should inform consumers of the ADR entities they are affiliated with, and whether they intend to join the ADR proceeding or not. Since most consumers do not read thoroughly the terms and conditions when entering into a contract, it is useful to provide a reminder of the ADR option once a complaint cannot be resolved directly with the trader, so important that Cortés defined it as 'the most relevant legal change affecting all businesses' established in the EU.⁵⁰⁸ Businesses active in the telecommunication field typically receiving a high number of complaints have indeed criticised the provision, as well as Member States where ADR entities are entirely funded with public money, such as Spain. Scholars agree that pre-contractual information is ineffective in consumer matters, while information obligations linked to the moment a dispute arise are more likely to encourage consumers to invest time and effort to understand whether ADR could be useful.⁵⁰⁹ On top of that, it is believed that obliging traders to perform their information duties even when they do not wish to join an ADR proceeding could nudge them to reconsider the use of ADR.⁵¹⁰ On the other hand, traders' refusal to participate may negatively affect consumers' perception of the ADR system. According to Luzak, consumers may also look suspiciously at ADR entities elected by the traders, doubting their impartiality and competence.⁵¹¹

Despite pre-contractual information being considered not very effective, the CJEU stressed its importance by reading article 13 of the Directive in light of article 6(1)(t) of Directive 2011/83. Replying to a request of preliminary ruling on the interpretation of article 13 of the Directive,⁵¹² the CJEU stated that its *ratio* is to inform consumers

⁵⁰⁶ Pablo Cortés, 'The New Landscape of Consumer Redress' in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 27.

⁵⁰⁷ María José Catalán Chamorro, 'El Derecho a La Información de Las ADR de Consumo Tras El Caso C-380/19' (2021) 13 Cuadernos de Derecho Transnacional 811, 821. See also Albertha Harma Santing-Wubs, 'Twee Europese voorstellen voor de alternatieve beslechting van consumentengeschillen: een ADR-richtlijn en een ODR-verordening' (2012) 4 Tijdschrift voor civiele rechtspleging 109.

⁵⁰⁸ Pablo Cortés, 'The New Landscape of Consumer Redress' in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 27.

⁵⁰⁹ Marco BM Loos, 'Enforcing Consumer Rights through ADR at the Detriment of Consumer Law' (2016) 1 European Review of Private Law 61 and Giesela Rühl, 'Alternative and Online Dispute Resolution for Cross-Border Consumer Contracts' (2015) 38 Journal of Consumer Policy 431, 450.

⁵¹⁰ Pablo Cortés, 'The New Landscape of Consumer Redress' in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 27.

⁵¹¹ Joasia Luzak, 'The ADR Directive: Designed to Fail? A Hole-Ridden Stairway to Consumer Justice' (2016) 1 European Review of Private Law 81, 94.

⁵¹² CJEU 25 June 2020, Case C-380/19, *Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V. v. Deutsche Apotheker- und Ärztebank*

before the conclusion of a contract about both ‘the contractual terms and the consequences of that conclusion’ (para 33), with special regard to the exercise of their rights (para 33). For consumers to be able to benefit from that information, they must be informed ‘in good time before the contract is concluded and not simply at the stage of concluding the contract, given that the information provided before the contract is concluded is of fundamental importance for a consumer’ (para 34). Including information on ADR in the general clauses of contract serves multiple purposes, one of which is discouraging consumers from entering into any agreement with traders who do not wish to join ADR schemes.⁵¹³

Luzak and Théocaridi stress that the information concerning the ADR proceeding should be provided separately from other pieces of information, especially considering that general terms and conditions are often inaccessible to the average consumer.⁵¹⁴ Luzak pushes traders’ obligations further, wondering why the Directive does not require them to inform consumers about the benefits of ADR proceedings and to clarify the difference between ADR and internal complaint handling procedures. However, the Directive does not even foresee any sanction for the breach of the information duties under article 13: such a crucial aspect is entirely left to national law.⁵¹⁵

Country-specific remarks

In **France**, traders are obliged to provide information about consumer ADR both before and after the conclusion of the contract, through their websites, the general terms of contract, and any other suitable means⁵¹⁶. The same information must be repeated whenever the internal complaint handling system fails to solve the dispute, directing the consumer to the chosen mediator. Such provisions are assisted by monetary sanctions for those who fail to provide the relevant information. However, the high number of potential mediators is likely to confuse consumers. For instance, whenever a public mediator is active in the relevant business sector, the trader who opted for in-house mediation has to indicate the contact details of both. Also, when the trader operates in multiple economic sectors, he or she must propose either one mediator

eG, ECLI:EU:C:2020:498. The federal union of consumer organisations (*Bundesverband der Verbraucherzentralen und Verbraucherverbände– Verbraucherzentrale Bundesverband eV*) complained that the DAÄB cooperative bank did not indicate in its website any information concerning consumer ADR, although contracts were not stipulated via the website thereof and ADR was mentioned in the general terms at the moment of signing the contract. The consumer organization assumed this lack of information violated consumer protection, as consumers could not be aware in advance of all the possible developments of their relationship with the trader, namely in case of a dispute. The *Oberlandesgericht Düsseldorf* requested a preliminary ruling.

⁵¹³ Francesco Monceri, ‘Tutela del consumatore e obbligo di indicare i mezzi di risoluzione alternativa delle controversie (ADR) nelle condizioni generali del contratto’ (2020) 3 *Diritto Pubblico Comparato ed Europeo Online* 4409, 4413.

⁵¹⁴ Joasia Luzak, ‘The ADR Directive: Designed to Fail? A Hole-Ridden Stairway to Consumer Justice’ (2016) 1 *European Review of Private Law* 81, 95 and Eva Théocaridi, ‘Effectiveness of the ADR Directive: Standard of Average Consumer and Exceptions’ (2016) 1 *European Review of Private Law* 103, 107.

⁵¹⁵ Joasia Luzak, ‘The ADR Directive: Designed to Fail? A Hole-Ridden Stairway to Consumer Justice’ (2016) 1 *European Review of Private Law* 81, 94.

⁵¹⁶ Article L. 616-1 al.1 and article L. 211-3 *Code de la Consommation*.

competent for all the disputes across the different sectors or each competent sectoral mediator.⁵¹⁷

Although not formally obliged, French consumer association actively contribute to informing consumers about ADR.⁵¹⁸

In **Germany**, article 13 of the Directive has been implemented quite literally, requiring that the appropriate information appear on the traders' websites and is included in the general terms and conditions of the contract, with the main difference that traders with less than ten employees are exempted from such information duty.⁵¹⁹ Under the VSBG, traders have to inform consumers whether they are obliged to join an ADR proceeding, as the result of either a legal obligation or a commitment as a member of a trade association, and to disclose what is their attitude towards consumer ADR. Such information is meant to prevent consumers from accepting disadvantageous settlements, and a breach of information duties qualifies as an unfair commercial practice.⁵²⁰ Miquel comments that ADR is no more feared as a trap for consumers since §309 n. 14 BGB (*Bürgerliches Gesetzbuch*) declared the nullity of a general condition requiring an attempt to use ADR before a consumer can initiate court proceedings.⁵²¹

Nevertheless, Gössl complains that such demanding information obligations do not fully achieve their goal, as in practice the relevant information is hidden in the contract, and it can be found only by those who already know what they are looking for. The Legal Affairs Committee's proposal to provide this information in a prominent place in the contract has not been adopted in the reform of the VSBG.⁵²²

Another peculiar feature of the German approach to information duties is the collaboration between public and private bodies to ensure traders' compliance. The *abmahnung* procedure empowers private individuals with a monitoring role on traders' compliance with specific consumers law, included information duties in consumer ADR. Under the *abmahnung*, the lawyer dealing with the case can send a letter or an email providing the proof of the breach, a contract indicating the compensation to be paid in case of further breaches and the invoice of the lawyer's fee, which constitute incentives to pay and avoid legal action. Cortés reports that such a system is successfully adopted versus traders established in Germany and Austria, but this is possible thanks to an accessible and efficient judicial system.⁵²³

⁵¹⁷ Sophie Gjidara-Decaix, 'La Médiation de La Consommation: Le Point de Vue d'une Universitaire' (2019) Tome 61 Archives de philosophie du droit 213, 224.

⁵¹⁸ *ibid.*, 225.

⁵¹⁹ Rosa Miquel, 'The implementation of the consumer ADR directive in Germany' in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 183 and Peter Rott, 'Consumer ADR in Germany' (2018) 7 Journal of European Consumer & Market law 121, 122.

⁵²⁰ Peter Rott, 'Consumer ADR in Germany' (2018) 7 Journal of European Consumer & Market law 121, 122.

⁵²¹ Rosa Miquel, 'The implementation of the consumer ADR directive in Germany' in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 183.

⁵²² Susanne Lilian Gössl, 'Fünf Jahre europäische Alternative und Online-Streitbeilegung' (2020) 2 Zeitschrift für Konfliktmanagement 55, 57.

⁵²³ Pablo Cortés, *The Law of Consumer Redress in an Evolving Digital Market: Upgrading from Alternative to Online Dispute Resolution* (Cambridge University Press 2017) 38-41.

b. Assistance for consumers in cross-border disputes

Article 14

Assistance for consumers

- 1. Member States shall ensure that, with regard to disputes arising from cross-border sales or service contracts, consumers can obtain assistance to access the ADR entity operating in another Member State which is competent to deal with their cross-border dispute.*
- 2. Member States shall confer responsibility for the task referred to in paragraph 1 on their centres of the European Consumer Centre Network, on consumer organisations or on any other body.*

In cross-border disputes, consumer ADR proceedings generally take place before an ADR entity located in the trader's country,⁵²⁴ but the provision of article 14 of the Directive appears to be largely unattended. Language barriers and the requirement for in-person attendance are the main reasons for ADR irrelevance in cross-border cases.⁵²⁵ In fact, ADR entities may choose to restrict the languages in which consumers may submit their claims, as well as the language of the procedure. Secondly, even when consumers are allowed to participate online, traders may be present in person, which may constitute a practical advantage.⁵²⁶

The European Consumer Center Network and the Financial Services Complaints Network are meant to facilitate consumer access to ADR respectively by directing consumers to the appropriate ADR body and dealing with complaints in the area of financial services,⁵²⁷ but they have failed to address these issues so far. In most cases, the ECC-Net obtained traders to pay the damages without actually undertaking an ADR procedure in another Member State.⁵²⁸

Country-specific remarks

The ECC operating in **Italy** seems unable to carry out the functions of assistance to consumers in cross-border cases. Scannicchio reports that the Center, run by two private consumer associations and having its main seat in Rome, merely provides general information about consumer law in Italian. The office does not provide any specific online procedure to ease access to non-Italian consumers, and the online help is rather generic. On the contrary, the Bolzano branch of the ECC is specialised in cross-border disputes, although its jurisdiction is limited to the Austrian border region, and it offers better service in assisting consumers, especially dealing with German market.⁵²⁹

⁵²⁴ As consumers voluntarily join the proceeding, their case falls out of the scope of articles 17-19 of Brussels I Regulation (recast), which are meant to protect passive consumers.

⁵²⁵ ADR assembly 2021, Breakout session 1A.

⁵²⁶ Marco BM Loos, 'Enforcing Consumer Rights through ADR at the Detriment of Consumer Law' (2016) 1 *European Review of Private Law* 61, 75.

⁵²⁷ Franziska Weber, 'Is ADR the Superior Mechanism for Consumer Contractual Disputes?—An Assessment of the Incentivizing Effects of the Directive' (2015) 38 *Journal of Consumer Policy* 265, 279.

⁵²⁸ ADR assembly 2021, Breakout session 1A.

⁵²⁹ Nicola Scannicchio, *Accesso alla giustizia e attuazione dei diritti: la mediazione delle controversie di consumo nella direttiva europea 2013-11* (Giappichelli 2015) 70.

c. General information

Article 15

General information

- 1. Member States shall ensure that ADR entities, the centres of the European Consumer Centre Network and, where appropriate, the bodies designated in accordance with Article 14(2) make publicly available on their websites, by providing a link to the Commission's website, and whenever possible on a durable medium at their premises, the list of ADR entities referred to in Article 20(4).*
- 2. Member States shall encourage relevant consumer organisations and business associations to make publicly available on their websites, and by any other means they consider appropriate, the list of ADR entities referred to in Article 20(4).*
- 3. The Commission and Member States shall ensure appropriate dissemination of information on how consumers can access ADR procedures for resolving disputes covered by this Directive.*
- 4. The Commission and the Member States shall take accompanying measures to encourage consumer organisations and professional organisations, at Union and at national level, to raise awareness of ADR entities and their procedures and to promote ADR take-up by traders and consumers. Those bodies shall also be encouraged to provide consumers with information about competent ADR entities when they receive complaints from consumers.*

Raising awareness about consumer ADR is a major concern of the European legislator, which entrusts ADR entities, consumer organisations, the ECC-Net as well as the Member States with information duties.

However, Biard and Rühl clarify that increasing the available information may have counter-productive effects, namely charging consumers with an 'information overload'. The authors highlight that transparency is a matter of the amount of information communicated and how such information is delivered.⁵³⁰ Scholars suggest that consumer information should be tailored to consumers' features, especially vulnerable ones, and to the characteristics of the sector.⁵³¹ For instance, some ADR entities and consumer associations have already started communicating in a ludic manner through videos and tutorials that proved to be more consumer-friendly. It would be easier for consumers to access the relevant information if there was a single internet portal dedicated to the purpose, an entry point through which consumers can find the ADR entity competent for their case, connect with a consumer community and receive professional advice.

⁵³⁰ Alexandre Biard, 'Impact of Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK' (2019) 42 *Journal of Consumer Policy* 109, 132 and Giesela Rühl, 'Alternative and Online Dispute Resolution for Cross-Border Consumer Contracts' (2015) 38 *Journal of Consumer Policy* 431, 449.

⁵³¹ Alexandre Biard and Christopher Hodges, 'Médiation de La Consommation: Un Bilan, Des Défis, Des Pistes de Réflexion Pour l'avenir' (2019) 2 *Contrats Concurrence Consommation* 1, 9.

Country-specific remarks

In **Belgium**, the residual ADR entity plays a crucial role in informing consumers about their rights and duties, with special regard to consumer ADR.⁵³² The majority of Belgian consumers find information on the Consumer Ombudsman Service website, which is easy to find and comprehend.⁵³³

However, it is the digital platform *Belmed* that provides information about ODR and gives an overview of all the active ADR entities.⁵³⁴ The lack of interaction between the Consumer Ombudsman Service and *Belmed* makes the system inefficient and confusing for consumers.⁵³⁵

French Ombudsmen have developed innovative methods to deliver information to consumers. The Energy Ombudsman makes use of tutorials, short videos and a newsletter, and the AMF Ombudsman keeps a blog intended, among other things, to explain the cases submitted to mediation while preserving parties' privacy in a manner that makes 'the mission of mediation more concrete and lively'.⁵³⁶

⁵³² Pieter-Jan De Koning, 'Consumentenombudsdiens' in Stefaan Voet (ed), *CDR in België. Buitengerechtelijke beslechting en oplossing van geschillen* (die Keure 2018) 83-84 and Joanna Page and Laurel Bonnyman, 'ADR and ODR—Achieving Better Dispute Resolution for Consumers in the EU' (2016) 17 ERA Forum 145, 158.

⁵³³ Alexandre Biard and Stefaan Voet, 'Expériences et attitudes de consommateurs avec le Service de Médiation pour le Consommateur/ Consumentenombudsdiens : enquête sur les dossiers incomplets' (2020) 126 DCCR 15.

⁵³⁴ Stefaan Voet, 'De toekomst van CDR in België' in Stefaan Voet (ed), *CDR in België. Buitengerechtelijke beslechting en oplossing van geschillen* (die Keure 2018) 230.

⁵³⁵ Stefaan Voet, 'Nieuw Belgisch kader inzake ADR en consumentengeschillen' (2015) 1 Nederlands-Vlaams tijdschrift voor mediation en conflictmanagement 33.

⁵³⁶ Alexandre Biard and Christopher Hodges, 'Médiation de La Consommation: Un Bilan, Des Défis, Des Pistes de Réflexion Pour l'avenir' (2019) 2 Contrats Concurrence Consommation 1, 5 and AMF Blog Médiateur <https://www.amf-france.org/fr/listing_format/format-du-contenu/blog-mediateur>.

5. Cooperation

a. Cooperation between ADR entities

Recital 53

Networks of ADR entities, such as the financial dispute resolution network 'FIN-NET' in the area of financial services, should be strengthened within the Union. Member States should encourage ADR entities to become part of such networks.

Article 7

Transparency

2. Member States shall ensure that ADR entities make publicly available on their websites, on a durable medium upon request, and by any other means they consider appropriate, annual activity reports. Those reports shall include the following information relating to both domestic and cross-border disputes:

(h) cooperation of ADR entities within networks of ADR entities which facilitate the resolution of cross-border disputes, if applicable.

Article 16

Cooperation and exchanges of experience between ADR entities

1. Member States shall ensure that ADR entities cooperate in the resolution of cross-border disputes and conduct regular exchanges of best practices as regards the settlement of both cross-border and domestic disputes.

2. The Commission shall support and facilitate the networking of national ADR entities and the exchange and dissemination of their best practices and experiences.

3. Where a network of ADR entities facilitating the resolution of cross-border disputes exists in a sector-specific area within the Union, Member States shall encourage ADR entities that deal with disputes in that area to become a member of that network.

4. The Commission shall publish a list containing the names and contact details of the networks referred to in paragraph 3. The Commission shall, when necessary, update this list.

The Directive encourages ADR entities to join national associations and participate in cross-border networks, especially those operating in specific economic sectors such as FIN-NET (Financial dispute resolution network) in financial services and NEON in the energy sector.⁵³⁷ Those networks facilitate the resolution of cross-border disputes and the exchange of best practices and information.⁵³⁸

According to Hodges, the re-organisation of ADR entities is a necessary preliminary step to making ADR mandatory in some or all economic sectors. Member States should first create national networks of ADR entities, ideally operating on the same model and grouped based on their expertise, for instance, financial services, communications, energy, or transport. Such an organisation is likely to reduce consumer confusion, as it

⁵³⁷ Pablo Cortés, 'The New Landscape of Consumer Redress' in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 29.

⁵³⁸ Grégory Renier, 'Le nouvel encadrement de l'Union européenne pour le règlement extrajudiciaire des litiges de consommation. Examen de la directive 2013/11/UE en matière d'ADR' (2014) 1 *Revue européenne de droit de la consommation / European Journal of Consumer Law* 135.

would be easier to identify the bodies to bring their claims.⁵³⁹ He stresses the importance of having specialised ADR entities and assumes that creating sectoral networks would facilitate the development of such expertise.⁵⁴⁰

Country-specific remarks

In **Belgium**, the Consumer Ombudsman Service (*Service de Médiation pour le Consommateur/Consumentenombudsdienst*) acts as the common ‘front office’ of all ADR entities. Biard and Hodges report that the main Belgian mediators share the same premise thanks to such a mechanism and are progressively aligning their procedures. Therefore, despite the initial idea of creating a single mediation service being rejected, the cooperation between ADR entities is expected to increase in the coming years.⁵⁴¹

In **France**, a group of consumer mediators created the *Club des Médiateurs du Service Public*. Founded in 2002, the Club is meant to be a space for sharing values and best practices, with the ultimate goal to improve the response to consumer complaints and promote the professionalisation of French mediators.⁵⁴²

b. Cooperation between ADR entities and national consumer regulators

Recital 54

Close cooperation between ADR entities and national authorities should strengthen the effective application of Union legal acts on consumer protection. The Commission and the Member States should facilitate cooperation between the ADR entities, in order to encourage the exchange of best practice and technical expertise and to discuss any problems arising from the operation of ADR procedures. Such cooperation should be supported, inter alia, through the Union’s forthcoming Consumer Programme.

Article 17

Cooperation between ADR entities and national authorities enforcing Union legal acts on consumer protection

1. Member States shall ensure cooperation between ADR entities and national authorities entrusted with the enforcement of Union legal acts on consumer protection.

2. This cooperation shall in particular include mutual exchange of information on practices in specific business sectors about which consumers have repeatedly lodged complaints. It shall also include the provision of technical assessment and information by such national authorities to ADR entities where such assessment or information is necessary for the handling of individual disputes and is already available.

3. Member States shall ensure that cooperation and mutual information exchanges referred to in paragraphs 1 and 2 comply with the rules on the protection of personal data laid down in Directive 95/46/EC.

⁵³⁹ Christopher Hodges, ‘Consumer Alternative Dispute Resolution’ in Burkhard Hess and Stephanie Law (eds), *Implementing EU consumer rights by national procedural law* (CH Beck 2019) 192.

⁵⁴⁰ Christopher Hodges, ‘Developments and Issues in Consumer ADR and Consumer Ombudsmen in Europe’ (The Foundation for Law, Justice and Society 2019) 6.

⁵⁴¹ Alexandre Biard and Christopher Hodges, ‘Médiation de La Consommation: Un Bilan, Des Défis, Des Pistes de Réflexion Pour l’avenir’ (2019) 2 *Contrats Concurrence Consommation* 1, 8.

⁵⁴² Club des Médiateurs du Service Public <<https://clubdesmediateurs.fr/>>.

4. This Article shall be without prejudice to provisions on professional and commercial secrecy which apply to the national authorities enforcing Union legal acts on consumer protection. ADR entities shall be subject to rules of professional secrecy or other equivalent duties of confidentiality laid down in the legislation of the Member States where they are established.

The Directive marks a significant change in the attitude of public authorities towards consumer ADR. What used to be a spontaneous phenomenon exorbitant from the judicial sphere and merely tolerated now has to be guaranteed to litigants and regulated.⁵⁴³ Consumer ADR becomes part of the judicial system in the broader sense, and as such its activity has to be coordinated with that of the public authorities responsible for right enforcement.

The Directive requires ADR entities to cooperate with enforcement bodies by providing them with feedback on recurring problems in the sector where they operate, and ADR entities can request information from enforcement bodies when they consider that such additional information is necessary to resolve individual disputes, for instance in matters of interpretation.⁵⁴⁴ In some countries, ADR entities are directly linked to public institutions, to the extent that some ADR entities are at the same time market surveillance authorities, however, the two do not need to coincide as long as adequate coordination is in place.⁵⁴⁵

ADR entities, the general contact point and competent authorities should adopt what De Coninck describes as an ‘integrated approach’ going beyond resolving the individual consumer complaint and paying attention to frequently occurring issues, emerging structural and group problems. Since the Directive adopts a minimum harmonisation approach, national competent authorities – which are often the regulators – could provide additional guidelines or requirements to the ADR entities they supervise.⁵⁴⁶ ADR entities should inform and warn consumers through recommendations, codes of conduct and guidelines, while actively trying to prevent such problems in the future.⁵⁴⁷ Also, Renier recommends that ADR entities include in their reports not only the problems they solved, but also those falling outside of their scope.⁵⁴⁸ Cortés suggests that expert opinions from enforcement bodies, such as those concerning law interpretation, should be made public and shared with other ADR entities that could face similar doubts.⁵⁴⁹ Public enforcement authorities should care that traders comply with ADR outcomes and do so within a reasonable time, for

⁵⁴³ Fernando Gascón Inchausti, ‘Specific problems of cross-border consumer ADR: what solutions?’ (2014) 4 *Zeitschrift für das Privatrecht der Europäischen Union* 197, 198.

⁵⁴⁴ Pablo Cortés, *The Law of Consumer Redress in an Evolving Digital Market: Upgrading from Alternative to Online Dispute Resolution* (Cambridge University Press 2017) 38-41.

⁵⁴⁵ Fernando Gascón Inchausti, ‘Specific problems of cross-border consumer ADR: what solutions?’ (2014) 4 *Zeitschrift für das Privatrecht der Europäischen Union* 197, 198 and Christopher Hodges, ‘Consumer Alternative Dispute Resolution’ in Burkhard Hess and Stephanie Law (eds), *Implementing EU consumer rights by national procedural law* (CH Beck 2019) 194.

⁵⁴⁶ Pablo Cortés, ‘The New Landscape of Consumer Redress’ in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016).

⁵⁴⁷ Hans De Coninck, ‘Buitengerechtelijke regeling van consumentengeschillen’ (2014) 105 *DCCR* 23.

⁵⁴⁸ Grégory Renier, ‘Le nouvel encadrement de l’Union européenne pour le règlement extrajudiciaire des litiges de consommation. Examen de la directive 2013/11/UE en matière d’ADR’ (2014) 1 *Revue européenne de droit de la consommation / European Journal of Consumer Law* 135.

⁵⁴⁹ Pablo Cortés, *The Law of Consumer Redress in an Evolving Digital Market: Upgrading from Alternative to Online Dispute Resolution* (Cambridge University Press 2017) 38-41.

instance, by inquiring about the reasons for the delay or providing a ‘fast track’ for the enforcement of ADR awards in court.⁵⁵⁰

The cooperation and information exchange duties can be assisted by penalties, which must be proportionate and aim at encouraging compliance. Cortés stresses the ‘proactive role’ that competent authorities are expected to play in ensuring cooperation with ADR entities.⁵⁵¹

According to Hodges, efficient cooperation between ADR entities and public authorities presupposes a review of the market functions performed by each body to deliver them more effectively and efficiently. While courts or arbitration only deliver dispute resolution, ADR also assists consumers and collects data on market trends.⁵⁵² Therefore, the author derives that consumer ombudsmen offer some advantages compared to courts and arbitration, as they are better positioned to collect data and cooperate with regulatory authorities.⁵⁵³ Also, Creutzfeldt praises the unique qualities of consumers ombudsmen, which she defines as ‘professional middle-men’ whose role is multifaceted. They are interpreters, helping consumers clarify their position, advocates to take over consumers’ problems, and hold the instruments to influence, protect and enforce consumers’ rights. However, although well-established in some Member States, their relevance varies across Member States and sectors.⁵⁵⁴

Country-specific remarks

The **Belgian** legislator has not transposed article 17 of the Directive into its implementing legislation, which does not pay special attention to cooperation between ADR entities and national regulators.⁵⁵⁵ Nevertheless, the Federal Public Service carries out regular meetings with the residual ADR entity and the other entities.⁵⁵⁶ ADR entities are crucial for collecting data, but their products are not limited to statistics: the yearly report can also contain recommendations concerning systematic or frequent issues and how to address or avoid them.⁵⁵⁷ A positive feedback loop between ADR entities and regulators allows for communicating these structural problems to the regulators, which may determine the intervention of national authorities or the start of a collective proceeding.⁵⁵⁸ Additionally, De Coninck suggested introducing

⁵⁵⁰ Joasia Luzak, ‘The ADR Directive: Designed to Fail? A Hole-Ridden Stairway to Consumer Justice’ (2016) 1 *European Review of Private Law* 81, 89.

⁵⁵¹ Pablo Cortés, ‘The New Landscape of Consumer Redress’ in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016).

⁵⁵² Christopher Hodges, ‘Developments and Issues in Consumer ADR and Consumer Ombudsmen in Europe’ (The Foundation for Law, Justice and Society 2019) 7.

⁵⁵³ Naomi Creutzfeldt, *Trusting the middle-man: Impact and legitimacy of ombudsmen in Europe* (University of Westminster 2016).

⁵⁵⁴ Christopher Hodges, ‘Consumer Alternative Dispute Resolution’ in Burkhard Hess and Stephanie Law (eds), *Implementing EU consumer rights by national procedural law* (CH Beck 2019) 194.

⁵⁵⁵ Stefaan Voet, ‘Buitengerechtelijke regeling consumentengeschillen’ (2014) 308 *NJW* 674.

⁵⁵⁶ Economische Inspectie FOD Economie, ‘Federale Overheidsdienst Economie’ in Stefaan Voet (ed), *CDR in België. Buitengerechtelijke beslechting en oplossing van geschillen* (die Keure 2018) 191.

⁵⁵⁷ Stefaan Voet, ‘Nieuw Belgisch kader inzake ADR en consumentengeschillen’ (2015) 1 *Nederlands-Vlaams tijdschrift voor mediation en conflictmanagement* 33.

⁵⁵⁸ Stefaan Voet, ‘De toekomst van CDR in België’ in Stefaan Voet (ed), *CDR in België. Buitengerechtelijke beslechting en oplossing van geschillen* (die Keure 2018) 235.

‘performance indicators’ rating how ADR entities operate and measuring consumers’ satisfaction.⁵⁵⁹

In **Italy**, sectoral ADR entities linked to public bodies or regulators have succeeded significantly better than the others in engaging in useful communication with the regulator, as such a structure grants real-time access to consumer complaints in a given sector. Moreover, trader participation is generally mandatory before these public ADR entities, and sometimes it is also for consumers, who have attempted mediation before going to court.

c. Collective redress

Recital 27

This Directive should be without prejudice to Member States maintaining or introducing ADR procedures dealing jointly with identical or similar disputes between a trader and several consumers. Comprehensive impact assessments should be carried out on collective out-of-court settlements before such settlements are proposed at Union level. The existence of an effective system for collective claims and easy recourse to ADR should be complementary and they should not be mutually exclusive procedures.

A holistic approach to cooperation between competent national and European authorities and ADR entities cannot overlook collective claims.⁵⁶⁰

An individual consumer complaint may result from an individual experience, but, in the context of mass production and consumption, the experience of one consumer may be the same for many others. The primary function of ADR schemes is to deliver individual redress, but even effective individual redress is insufficient to provide adequate consumer protection. Bringing evidence from the UK, Graham reports that not everybody raises a claim, and most consumers do not go beyond complaining to the trader: the cases heard before ADR entities are just a fraction of the total and are not necessarily representative of all the problems consumers face.⁵⁶¹ Moreover, if competing ADR entities operate in the same sector, there is the risk of obtaining competing decisions, especially considering that ADR outcomes are generally not public⁵⁶² and, even when they are binding, they do not deploy their effect further than the parties to the case, differently from in-court collective proceeding.⁵⁶³

Voet describes consumer ADR and class action as ‘two-track’ policies that should be developed to effectively address collective damages.⁵⁶⁴ Gioia is more cautious towards

⁵⁵⁹ Hans De Coninck, ‘Buitengerechtelijke regeling van consumentengeschillen’ (2014) 105 DCCR 23.

⁵⁶⁰ *ibid.*

⁵⁶¹ Cosmo Graham, ‘Consumer ADR and Collective Redress’ in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 429.

⁵⁶² For this reason, some countries introduced limits to the confidentiality rule when mediators detect repetitive and severe misconducts. See Alexandre Biard and Christopher Hodges, ‘Médiation de La Consommation: Un Bilan, Des Défis, Des Pistes de Réflexion Pour l’avenir’ (2019) 2 Contrats Concurrence Consommation 1, 8.

⁵⁶³ Cosmo Graham, ‘Consumer ADR and Collective Redress’ in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 429.

⁵⁶⁴ Stefaan Voet, ‘Beslechting van consumentengeschillen in het Belgisch Wetboek van economisch recht’ (2015) 12 SEW 628.

collective ADR, which she remembers being ‘a surrogate of justice’. She suggests that a compromise solution could result from the considerate use of class actions that facilitate consumer access to justice and ultimately provide judicial awards and ADR proceedings, which could base their decisions on the courts’ previous interpretations.⁵⁶⁵ On the other hand, Renier warns about the risks of collective ADR procedures, which require significant investments in terms of money and time and may be ignored by non-compliant traders.⁵⁶⁶

According to Biard and Hodges, some ADR proceedings are better placed than others when it comes to collective redress. Sectoral consumer ombudsmen have access to aggregated data from traders and individual complaints or information requests, providing them with a global view of market trends, and they collaborate closely with the regulators, which they can involve for an efficient solution to mass disputes. Additionally, sectoral ombudsmen are easy for consumers to identify, and they hold a position of authority in the market, making their opinions more persuasive.⁵⁶⁷ Therefore, the authors believe the ombudsman model better serves the regulation function of consumer ADR, which also includes identifying traders’ misbehaviours and nudging them towards better compliance.⁵⁶⁸ This is already the case in the UK, where ombudsmen play a *quasi-regulatory* role complementary to public regulators’.⁵⁶⁹

Country-specific remarks

In **Belgium**, the legislator did not consent to collective proceedings before residual ADR entities, which Voet describes as a missed opportunity.⁵⁷⁰ Indeed whenever mediation fails, consumers are left alone initiating a court proceeding⁵⁷¹ while, when a structural problem emerges, it would be better to allow collective proceedings.⁵⁷²

On the other hand, the Code of Economic Law allows the Consumer Ombudsman Service to represent a group of consumers (only) in the negotiation phase of collective

⁵⁶⁵ Gina Gioia, ‘L’uniforme regolamentazione della risoluzione alternativa delle controversie con i consumatori’ (2018) 1 *Revista Ítalo-española de Derecho procesal* 3, 44.

⁵⁶⁶ Grégory Renier, ‘Le nouvel encadrement de l’Union européenne pour le règlement extrajudiciaire des litiges de consommation. Examen de la directive 2013/11/UE en matière d’ADR’ (2014) 1 *Revue européenne de droit de la consommation / European Journal of Consumer Law* 135.

⁵⁶⁷ Christopher Hodges, ‘Consumer Alternative Dispute Resolution’ in Burkhard Hess and Stephanie Law (eds), *Implementing EU consumer rights by national procedural law* (CH Beck 2019) 182-183 and Alexandre Biard and Christopher Hodges, ‘Médiation de La Consommation: Un Bilan, Des Défis, Des Pistes de Réflexion Pour l’avenir’ (2019) 2 *Contrats Concurrence Consommation* 1, 8.

⁵⁶⁸ Alexandre Biard and Christopher Hodges, ‘Médiation de La Consommation: Un Bilan, Des Défis, Des Pistes de Réflexion Pour l’avenir’ (2019) 2 *Contrats Concurrence Consommation* 1, 7.

⁵⁶⁹ Christopher Hodges, ‘Consumer Alternative Dispute Resolution’ in Burkhard Hess and Stephanie Law (eds), *Implementing EU consumer rights by national procedural law* (CH Beck 2019) 182-183 and Alexandre Biard and Christopher Hodges, ‘Médiation de La Consommation: Un Bilan, Des Défis, Des Pistes de Réflexion Pour l’avenir’ (2019) 2 *Contrats Concurrence Consommation* 1, 8.

⁵⁷⁰ Stefaan Voet, ‘Buitengerechtelijke regeling consumentengeschillen’ (2014) 308 *NJW* 674.

⁵⁷¹ Anne Moriau, ‘Test-Aankoop’ in Stefaan Voet (ed), *CDR in België. Buitengerechtelijke beslechting en oplossing van geschillen* (die Keure 2018) 204.

⁵⁷² Frédéric de Patoul, ‘Quelques réflexions sur une voie extrajudiciaire de règlement des conflits de consommation: Ombudsfijn, l’ombudsman des conflits financiers’ (2013) 100-101 *DCCR* 227.

actions, thus recognising the ADR entity legal standing under the RAD Directive.⁵⁷³ However, the Consumer Ombudsman Service acted as a qualified entity in a representative action only once, filing an action against eight energy providers for hidden termination fees in energy contracts. After a favourable interlocutory judgment issued by the Brussels Commercial Court, the Brussels Court of Appeal challenged the assumption that Consumer Ombudsman Service was a suitable group representative and its request to negotiate with the suppliers in order to achieve a collective settlement was not granted.⁵⁷⁴

⁵⁷³ However, Renier indicates the potential difficulty to reconcile the role of consumer representative in collective actions with that of impartial ADR entity. See Grégory Renier, 'Le règlement extrajudiciaire des litiges de consommation. Analyse de la transposition de la directive « ADR » 2013/11/UE en droit belge' (2015) 107 DCCR 3.

⁵⁷⁴ See Hakim Boularbah and Maria-Clara Van den Bossche, 'Country Report Belgium' (2021) 1 Mass Claims 2, 140.

6. Competent national authorities

a. Designation of competent authorities

Recital 55

In order to ensure that ADR entities function properly and effectively, they should be closely monitored. For that purpose, each Member States should designate a competent authority or competent authorities which should perform that function. The Commission and competent authorities under this Directive should publish and update a list of ADR entities that comply with this Directive. Member States should ensure that ADR entities, the European Consumer Centre Network, and, where appropriate, the bodies designated in accordance with this Directive publish that list on their website by providing a link to the Commission's website, and whenever possible on a durable medium at their premises. Furthermore, Member States should also encourage relevant consumer organisations and business associations to publish the list. Member States should also ensure the appropriate dissemination of information on what consumers should do if they have a dispute with a trader. In addition, competent authorities should publish regular reports on the development and functioning of ADR entities in their Member States. ADR entities should notify to competent authorities specific information on which those reports should be based. Member States should encourage ADR entities to provide such information using Commission Recommendation 2010/304/EU of 12 May 2010 on the use of a harmonised methodology for classifying and reporting consumer complaints and enquiries.

Article 18

Designation of competent authorities

1. Each Member State shall designate a competent authority which shall carry out the functions set out in Articles 19 and 20. Each Member State may designate more than one competent authority. If a Member State does so, it shall determine which of the competent authorities designated is the single point of contact for the Commission. Each Member State shall communicate the competent authority or, where appropriate, the competent authorities, including the single point of contact it has designated, to the Commission.

2. The Commission shall establish a list of the competent authorities including, where appropriate, the single point of contact communicated to it in accordance with paragraph 1, and publish that list in the Official Journal of the European Union.

The Directive left the Member States a lot of discretion in the appointment of a Competent Authority. Member States could choose between designing **one or multiple Competent Authorities**, and this by either appointing an existing authority or designating a new one. As a result, the approaches to the creation of a Competent Authority have differed significantly across the Member States: some have operated a single authority (e.g., Belgium, France), while others have decided to appoint multiple authorities across different sectors (e.g. Italy, UK).⁵⁷⁵ These both systems have been characterised respectively as a horizontal or centralised system and a vertical or decentralised system.⁵⁷⁶ In the horizontal system, one Competent Authority certifies and supervises all ADR entities whereas in the vertical system, different sectors have their own Competent Authority that certifies and supervises the ADR entity. Regardless

⁵⁷⁵ Sébastien de Brouwer, 'Financial dispute resolution in Europe and the European network FIN-NET' (2020) DBF-BFR 16.

⁵⁷⁶ Alexandre Biard, 'Impact of Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK' (2019) 42 Journal of Consumer Policy 109.

of the choice of Member States as to the number of Competent Authorities, one of the Competent Authorities has to be designated as a single contact point for the Commission and will often also take up the role of coordinating Authority. To avoid gaps in the monitoring, Member States with a vertical system have often appointed a residual Authority. This vertical approach is often the result of pre-existing sectoral regulatory authorities that could then continue their supervising work under the ADR Directive. This solution has allowed Member States to retain the expertise of these monitoring bodies and reduce red tape. Sometimes, this vertical system has resulted from the aim of the Member State to appoint different ministries to carry out the tasks of the Competent Authority.⁵⁷⁷ However, this does not help the goal of simplification of the ADR sector. Quite the opposite: it might increase coordination costs and the absence of hierarchy between the different Competent Authorities might lead to chaos. Another issue is varying degrees of cooperation between the Competent Authorities in different Member States.⁵⁷⁸ In Italy, for example, the different Competent Authorities exchange best practices and regularly hold meetings to optimise coordination. In other Member States, the Competent Authorities act rather independently of one another. As a result of these two approaches, there are today more than 45 Competent Authorities across all Member States.⁵⁷⁹ Member States have also decided to appoint different Ministries or even sectoral authorities as Competent Authority.⁵⁸⁰

Biard sets forward a few **suggestions to revise the current monitoring architecture**. He contends that the creation of an EU Competent Authority could effectively increase coordination and simplification of the certification process for ADR entities. He does, however, recognize that it might not be possible to try this one-size-fits-all solution for all ADR entities across the EU.⁵⁸¹ Nevertheless, limiting the fragmentation should be done at the national level: horizontal systems seem better suited to promote consistency. In vertical monitoring systems, Member States should appoint one ‘umbrella’ authority that can ensure overall coherence of the national monitoring system and ensure communication with the Commission. These umbrella authorities should then also be able to impose certain regulations or binding opinions on the other monitoring authorities. Moreover, national Competent Authorities could also work to create networks across the EU-level, such as for example FIN-NET. Through this network, competent authorities could then share relevant experiences or best practices.⁵⁸²

National authorities could at their turn also **help improve the ADR framework** in their Member State. They already guard the entry through the certification process, and can thus employ certain policies on the certification of ADR entities. For example, they

⁵⁷⁷ Alexandre Biard, ‘Monitoring Consumer ADR Quality in the EU: A Critical Perspective’ (2018) 2 *European Review of Private Law* 171.

⁵⁷⁸ Commission, ‘Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes (ADR Report)’ COM (2019) 425 final.

⁵⁷⁹ Alexandre Biard, ‘Monitoring Consumer ADR Quality in the EU: A Critical Perspective’ (2018) 2 *European Review of Private Law* 171.

⁵⁸⁰ Sébastien de Brouwer, ‘Financial dispute resolution in Europe and the European network FIN-NET’ (2020) *DBF-BFR* 16.

⁵⁸¹ Alexandre Biard, ‘Monitoring Consumer ADR Quality in the EU: A Critical Perspective’ (2018) 2 *European Review of Private Law* 171.

⁵⁸² Alexandre Biard, ‘Impact of Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK’ (2019) 42 *Journal of Consumer Policy* 109.

could decide to limit the number of approved ADR entities to keep the ADR process straightforward in their Member States. Moreover, they could focus on only approving high quality or low-cost ADR entities. To this extent, Competent Authorities should be able to refuse certification of ADR entities to build the best infrastructure of ADR bodies, even if they meet all formal requirements.⁵⁸³

Country-specific remarks

In the **Netherlands**, three different ministries have taken up the role of Competent Authority: the *Ministerie van Veiligheid en Justitie* (the Ministry of Security and Justice, also acting as single contact point), the *Ministerie van Financiën* (Ministry of Finance), and the *Ministerie van Volksgezondheid, Welzijn en Sport* (Ministry of Public Health, Welfare and Sport). The Dutch legislator also has left room for the possibility of more Competent Authorities.

France is the only Member State that has created a new entity, the *Commission d'évaluation et de contrôle de la médiation de la consommation* (CECMC), specifically to become its Competent Authority.⁵⁸⁴ The Commission consists of representatives of both consumer and professional associations, a member of the *Conseil d'État* and a member of the *Cour de Cassation*.⁵⁸⁵ Its role is to monitor the ADR bodies, identify good practices and formulate recommendations for the ADR bodies.⁵⁸⁶

In **Italy**, the law recognises six Competent Authorities and allows for more authorities to be added to this list. The Ministry of Economic Development acts as the single contact point for the European Commission and as the 'residual' Competent Authority: it can certify ADR entities in sectors in which there is no specific Competent Authority available (yet).

b. Information to be notified to competent authorities by dispute resolution entities

Article 19

Information to be notified to competent authorities by dispute resolution entities

1. Member States shall ensure that dispute resolution entities established on their territories, which intend to qualify as ADR entities under this Directive and be listed in accordance with Article 20(2), notify to the competent authority the following:

(a) their name, contact details and website address;

⁵⁸³ Alexandre Biard, 'Monitoring Consumer ADR Quality in the EU: A Critical Perspective' (2018) 2 European Review of Private Law 171.

⁵⁸⁴ *ibid.*

⁵⁸⁵ Naomi Creutzfeldt, 'Implementation of the Consumer ADR Directive' (2016) 4 Journal of European Consumer and Market Law 169.

⁵⁸⁶ Alexandre Biard and Christopher Hodges, 'Médiation de La Consommation: Un Bilan, Des Défis, Des Pistes de Réflexion Pour l'avenir' (2019) 2 Contrats Concurrence Consommation 1.

(b) information on their structure and funding, including information on the natural persons in charge of dispute resolution, their remuneration, term of office and by whom they are employed;

(c) their procedural rules;

(d) their fees, if applicable;

(e) the average length of the dispute resolution procedures;

(f) the language or languages in which complaints can be submitted and the dispute resolution procedure conducted;

(g) a statement on the types of disputes covered by the dispute resolution procedure;

(h) the grounds on which the dispute resolution entity may refuse to deal with a given dispute in accordance with Article 5(4);

(i) a reasoned statement on whether the entity qualifies as an ADR entity falling within the scope of this Directive and complies with the quality requirements set out in Chapter II.

In the event of changes to the information referred to in points (a) to (h), ADR entities shall without undue delay notify those changes to the competent authority.

2. Where Member States decide to allow procedures as referred to in point (a) of Article 2(2), they shall ensure that ADR entities applying such procedures notify to the competent authority, in addition to the information and statements referred to in paragraph 1, the information necessary to assess their compliance with the specific additional requirements of independence and transparency set out in Article 6(3).

3. Member States shall ensure that ADR entities communicate to the competent authorities every two years information on:

(a) the number of disputes received and the types of complaints to which they related;

(b) the percentage share of ADR procedures which were discontinued before an outcome was reached;

(c) the average time taken to resolve the disputes received;

(d) the rate of compliance, if known, with the outcomes of the ADR procedures;

(e) any systematic or significant problems that occur frequently and lead to disputes between consumers and traders. The information communicated in this regard may be accompanied by recommendations as to how such problems can be avoided or resolved in future;

(f) where applicable, an assessment of the effectiveness of their cooperation within networks of ADR entities facilitating the resolution of cross-border disputes;

(g) where applicable, the training provided to natural persons in charge of ADR in accordance with Article 6(6);

(h) an assessment of the effectiveness of the ADR procedure offered by the entity and of possible ways of improving its performance.

This provision has not led to specific literature.

c. Role of the competent authorities and of the Commission

Article 20

Role of the competent authorities and of the Commission

1. Each competent authority shall assess, in particular on the basis of the information it has received in accordance with Article 19(1), whether the dispute resolution entities notified to it qualify as ADR entities falling within the scope of this Directive and comply with the quality requirements set out in Chapter II and in national provisions implementing it, including national provisions going beyond the requirements of this Directive, in conformity with Union law.

2. Each competent authority shall, on the basis of the assessment referred to in paragraph 1, list all the ADR entities that have been notified to it and fulfil the conditions set out in paragraph 1. That list shall include the following:

(a) the name, the contact details and the website addresses of the ADR entities referred to in the first subparagraph;

(b) their fees, if applicable;

(c) the language or languages in which complaints can be submitted and the ADR procedure conducted;

(d) the types of disputes covered by the ADR procedure;

(e) the sectors and categories of disputes covered by each ADR entity;

(f) the need for the physical presence of the parties or of their representatives, if applicable, including a statement by the ADR entity on whether the ADR procedure is or can be conducted as an oral or a written procedure;

(g) the binding or non-binding nature of the outcome of the procedure; and

(h) the grounds on which the ADR entity may refuse to deal with a given dispute in accordance with Article 5(4).

Each competent authority shall notify the list referred to in the first subparagraph of this paragraph to the Commission. If any changes are notified to the competent authority in accordance with the second subparagraph of Article 19(1), that list shall be updated without undue delay and the relevant information notified to the Commission.

If a dispute resolution entity listed as ADR entity under this Directive no longer complies with the requirements referred to in paragraph 1, the competent authority concerned shall contact that dispute resolution entity, stating the requirements the dispute resolution entity fails to comply with and requesting it to ensure compliance immediately. If the dispute resolution entity after a period of three months still does not fulfil the requirements referred to in paragraph 1, the competent authority shall remove the dispute resolution entity from the list referred to in the first subparagraph of this paragraph. That list shall be updated without undue delay and the relevant information notified to the Commission.

3. If a Member State has designated more than one competent authority, the list and its updates referred to in paragraph 2 shall be notified to the Commission by the single point of contact referred to in Article 18(1). That list and those updates shall relate to all ADR entities established in that Member State.

4. The Commission shall establish a list of the ADR entities notified to it in accordance with paragraph 2 and update that list whenever changes are notified to the Commission. The Commission shall make publicly available that list and its updates on its website and on a durable medium. The Commission shall transmit that list and its updates to the competent authorities. Where a Member State has designated a single point of contact in accordance with Article 18(1), the Commission shall transmit that list and its updates to the single point of contact.

5. Each competent authority shall make publicly available the consolidated list of ADR entities referred to in paragraph 4 on its website by providing a link to the relevant Commission website. In

addition, each competent authority shall make publicly available that consolidated list on a durable medium.

6. By 9 July 2018, and every four years thereafter, each competent authority shall publish and send to the Commission a report on the development and functioning of ADR entities. That report shall in particular:

(a) identify best practices of ADR entities;

(b) point out the shortcomings, supported by statistics, that hinder the functioning of ADR entities for both domestic and cross-border disputes, where appropriate;

(c) make recommendations on how to improve the effective and efficient functioning of ADR entities, where appropriate.

7. If a Member State has designated more than one competent authority in accordance with Article 18(1), the report referred to in paragraph 6 of this Article shall be published by the single point of contact referred to in Article 18(1). That report shall relate to all ADR entities established in that Member State.

Competent Authorities have different tasks in relation to the different ADR entities operating in their Member State.

First, they have to **certify** ADR entities through an assessment of the information provided in accordance with article 19 of the Directive. The ADR entities should be able to provide accessible, low-cost and quick dispute resolution mechanisms.⁵⁸⁷ The criteria, however, leave discretion to the national Competent Authorities to issue their certification decisions. Moreover, the extent to which Competent Authorities have to examine whether the criteria are fulfilled is unclear.⁵⁸⁸ As briefly described *supra*, some Competent Authority limit their monitoring to a tick the box-system based on the information that the prospective ADR entity provides. Other Authorities might request additional information or conduct in-person hearings, as they see it as their role to guide prospective ADR entities through the certification process. As the latter might be perceived as untransparent, in France, the CECMC has made its most important certification decisions publicly available on its website.⁵⁸⁹ Moreover, it has published a ‘model convention’ that is the basis of its agreement with every ADR entity, so that ADR providers wishing to be certified as ADR entities, can see the respective obligations and requirements.⁵⁹⁰ This has made the process more transparent and given prospective ADR bodies better insights into the criteria. Other Competent Authorities from Member States with less ADR experience might be more passive towards the certification process. The Directive requires the ADR providers applying for certification to notify the Competent Authority the fees they would apply to their service. In Belgium, the Competent Authority has some difficulties in assessing this

⁵⁸⁷ Commission, ‘Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes (ADR Report)’ COM (2019) 425 final.

⁵⁸⁸ Alexandre Biard, ‘Monitoring Consumer ADR Quality in the EU: A Critical Perspective’ (2018) 2 European Review of Private Law 171.

⁵⁸⁹ Sabine Bernheim-Desvaux, ‘La Commission d’évaluation et de Contrôle de La Médiation de La Consommation (CECMC) Publie Son Rapport d’activité 2019-2021’ (2021) 12 Contrats Concurrence Consommation 1.

⁵⁹⁰ Alexandre Biard and Christopher Hodges, ‘Médiation de La Consommation: Un Bilan, Des Défis, Des Pistes de Réflexion Pour l’avenir’ (2019) 2 Contrats Concurrence Consommation 1.

fee.⁵⁹¹ Most of the time, the prospective ADR entities find a way to justify the amount of their fees, and explain on which grounds they are reasonable. Thus, it is difficult for the Authorities to ask ADR entities to reduce these fees, as they contend that these are the fees necessary to cover certain technical stages in the proceedings. The Competent Authority has a pragmatic view on this situation: it prefers to have available ADR entities, even if with quite high fees, instead of no available ADR entities at all. The requirement, however, is tricky, and it seems impossible to create a general threshold (that could work independently of the sector concerned, the service offered, etc.).

Second, the Competent Authority has **monitoring** duties. The Directive, however, is not very clear about which information needs to be used to carry out this monitoring exercise: do the ADR bodies have to provide all information through self-assessment or do the Competent Authorities have to gather information themselves? Of course, the workload of the Competent Authority as regards monitoring also strongly depends on the number of ADR entities certified. Unavoidably, Competent Authorities of Member States with a multitude of ADR bodies will not be able to carry out an in-depth analysis of each ADR body every year, but according to Biard, it is unclear from the Directive which level of monitoring is expected from the Competent Authority.⁵⁹² It seems that monitoring is mainly carried out on the basis of the annual activity reports of the ADR entities and complaints from traders or consumers.⁵⁹³ For example in France, the CECMC collects consumer complaint reports to evaluate ADR entities' behaviour.⁵⁹⁴ In some Member States, Competent Authorities also carry out auditing exercises themselves on a regular basis. In Belgium, for example, the national authority carries out a thorough review of two ADR bodies and does a high-level review of all the other ADR entities.⁵⁹⁵ Through this monitoring exercise, Competent Authorities can also decide to **remove ADR entities** from the list after a warning that they no longer meet the requirements and a time period that allows them to remedy their shortcomings.⁵⁹⁶ Biard contends that this leeway for the Competent Authorities, combined with their great number, will eventually lead to a patchy and disorganised monitoring system.⁵⁹⁷

Third, the Competent Authority should **inform** the Commission and the general public of the available ADR entities by keeping the list of certified ADR entities up to date.

Fourth, the Competent Authorities contribute to policy-making by providing a **report** 'on the development and functioning of ADR entities' every four years. In these reports,

⁵⁹¹ ADR assembly 2021, Breakout session 1A.

⁵⁹² Alexandre Biard, 'Monitoring Consumer ADR Quality in the EU: A Critical Perspective' (2018) 2 *European Review of Private Law* 171.

⁵⁹³ European Commission, 'Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes (ADR Report)' COM (2019) 425 final.

⁵⁹⁴ Alexandre Biard and Christopher Hodges, 'Médiation de La Consommation: Un Bilan, Des Défis, Des Pistes de Réflexion Pour l'avenir' (2019) 2 *Contrats Concurrence Consommation* 1.

⁵⁹⁵ Alexandre Biard, 'On the Road to High-Quality Consumer ADR: the Belgian Experience' in Loic Cadiet, Burkhard Hess, Marta Requejo Isidro (eds) *Privatising Dispute Resolution - Trends and Limits* (Nomos 2019).

⁵⁹⁶ Sabine Bernheim-Desvaux, 'La Commission d'évaluation et de Contrôle de La Médiation de La Consommation (CECMC) Publie Son Rapport d'activité 2019-2021' (2021) 12 *Contrats Concurrence Consommation* 1.

⁵⁹⁷ Alexandre Biard, 'Monitoring Consumer ADR Quality in the EU: A Critical Perspective' (2018) 2 *European Review of Private Law* 171.

they should both identify best practices and shortcomings of the ADR proceedings and entities, and make recommendations on how to improve consumer ADR. Pursuant to article 26, the Commission should on its turn provide a report on the application of the Directive every four years, of which one of the elements concerns the use and development of ADR entities.

In general, Competent Authorities operate as the regulators of the ADR sector in their own Member States.⁵⁹⁸ For example, while they cannot do anything directly about the lack of trader participation in ADR, the Belgian Competent Authority organises campaigns to make traders and consumers aware of the existence of ADR schemes.

⁵⁹⁸ Alexandre Biard, 'Impact of Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK' (2019) 42 *Journal of Consumer Policy* 109.

7. Funding issues

Recital 46

In order to function efficiently, ADR entities should have sufficient human, material and financial resources at their disposal. Member States should decide on an appropriate form of funding for ADR entities on their territories, without restricting the funding of entities that are already operational. This Directive should be without prejudice to the question of whether ADR entities are publicly or privately funded or funded through a combination of public and private funding. However, ADR entities should be encouraged to specifically consider private forms of funding and to utilise public funds only at Member States' discretion. This Directive should not affect the possibility for businesses or for professional organisations or business associations to fund ADR entities.

The Directive explicitly addresses funding and clarifies that Member States should establish 'an appropriate form of funding' for the ADR entities. While the Directive keeps open the possibility for both public and private funding, it expresses a clear preference for private funding. In Germany for example, some private entities are entirely funded privately, while others are funded by both public and private funds.⁵⁹⁹ According to Appiano, it is indeed difficult to rely on public funds in times of scarce economic resources of the government.⁶⁰⁰ Funding is needed to ensure the quality of ADR procedures: otherwise, it will be difficult to provide qualitative services within 90 days and train staff according to the needed expertise. However, it is important that ADR bodies can maintain their financial autonomy, especially vis-à-vis traders, as the opposite might create perceptions of partiality.⁶⁰¹ In general, there is little data available on the availability of funding for ADR entities. However, the fact that for example the Belgian residual ADR body lacks human and financial resources might indicate that there are more funding problems across the EU.⁶⁰²

⁵⁹⁹ Rosa Miquel, 'The implementation of the consumer ADR directive in Germany' in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016).

⁶⁰⁰ Ermenegildo M Appiano, 'ADR e ODR per le liti consumeristiche nel diritto UE' (2013) 2 *Contratto e impresa / Europa* 965, 971.

⁶⁰¹ Alexandre Biard, 'Impact of Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK' (2019) 42 *Journal of Consumer Policy* 109.

⁶⁰² Grégory Renier and Nathalie Jouant, 'Le Service de Médiation pour le Consommateur (SMC) : un après' (2016) 112 *DCCR* 103.

8. The ODR Regulation

Recital 11

Given the increasing importance of online commerce and in particular cross-border trade as a pillar of Union economic activity, a properly functioning ADR infrastructure for consumer disputes and a properly integrated online dispute resolution (ODR) framework for consumer disputes arising from online transactions are necessary in order to achieve the Single Market Act's aim of boosting citizens' confidence in the internal market.

Recital 12

This Directive and Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes (5) are two interlinked and complementary legislative instruments. Regulation (EU) No 524/2013 provides for the establishment of an ODR platform which offers consumers and traders a single point of entry for the out-of-court resolution of online disputes, through ADR entities which are linked to the platform and offer ADR through quality ADR procedures. The availability of quality ADR entities across the Union is thus a precondition for the proper functioning of the ODR platform.

Article 5

Access to ADR entities and ADR procedures

2. Member States shall ensure that ADR entities:

(e) accept both domestic and cross-border disputes, including disputes covered by Regulation (EU) No 524/2013;

Recital 9 ODR Regulation

This Regulation should apply to the out-of-court resolution of disputes initiated by consumers resident in the Union against traders established in the Union which are covered by Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes (Directive on consumer ADR) (3).

Recital 10 ODR Regulation

In order to ensure that the ODR platform can also be used for ADR procedures which allow traders to submit complaints against consumers, this Regulation should also apply to the out-of-court resolution of disputes initiated by traders against consumers where the relevant ADR procedures are offered by ADR entities listed in accordance with Article 20(2) of Directive 2013/11/EU. The application of this Regulation to such disputes should not impose any obligation on Member States to ensure that the ADR entities offer such procedures.

Recital 23 ODR Regulation

Ensuring that all ADR entities listed in accordance with Article 20(2) of Directive 2013/11/EU are registered with the ODR platform should allow for full coverage in online out-of-court resolution for disputes arising from online sales or service contracts.

Recital 30 ODR Regulation

In order to ensure broad consumer awareness of the existence of the ODR platform, traders established within the Union engaging in online sales or service contracts should provide, on their websites, an electronic link to the ODR platform. Traders should also provide their email address so that consumers have a first point of contact. A significant proportion of online sales and service contracts are concluded using online marketplaces, which bring together or facilitate online transactions between consumers and traders. Online marketplaces are online platforms which allow traders to make their products and services available to consumers. Such online marketplaces should therefore have the same obligation to provide an electronic link to the ODR platform. This obligation should be without prejudice to Article 13 of Directive 2013/11/EU concerning the requirement that traders inform consumers about the ADR procedures by which those traders are covered and about whether or not they commit to use ADR procedures to resolve disputes with consumers. Furthermore, that obligation should be

without prejudice to point (t) of Article 6(1) and to Article 8 of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights. Point (t) of Article 6(1) of Directive 2011/83/EU stipulates for consumer contracts concluded at a distance or off premises, that the trader is to inform the consumer about the possibility of having recourse to an out-of-court complaint and redress mechanism to which the trader is subject, and the methods for having access to it, before the consumer is bound by the contract. For the same consumer awareness reasons, Member States should encourage consumer associations and business associations to provide an electronic link to the website of the ODR platform.

The ODR Regulation sets up an EU-wide online platform for disputes arising from online transactions, both domestic and cross-border ones, with the ultimate goal of making consumer ADR more accessible. The platform is connected with all the national ADR entities notified by the Member States to the Commission and operates in all EU official languages.⁶⁰³ The ODR platform has been integrated into the ‘Your Europe’ portal in order to rationalise the number of existing websites.⁶⁰⁴

a. Scope

The scope of application of the ODR Regulation does not coincide perfectly with that of the Directive.

The ODR Regulation sets up the EU ODR platform dealing with all e-commerce disputes, which may be initiated either by a consumer against a trader or by a trader against a consumer,⁶⁰⁵ for instance, because of defamatory comments in feedback reviews or money claims for unpaid goods or services, as long as the legislation of the Member State where the consumer is habitually resident allows so.⁶⁰⁶ However, the ODR Regulation does not oblige the Member States to provide for such a procedure.⁶⁰⁷

Vigoriti asserts that ODR is a ‘necessary and unavoidable implication of e-commerce’,⁶⁰⁸ as e-commerce has influenced consumers’ expectations about how and how quickly their claims should be handled.⁶⁰⁹ Article 4 of the ODR Regulation defines in a partially innovative manner the concepts of ‘online contract’ and ‘online marketplace’, covering the cases when the consumer has ordered goods or services on the website or other electronic means where the trader offers them. Ruotolo believes

⁶⁰³ Eva Théocaridi, ‘Effectiveness of the ADR Directive: Standard of Average Consumer and Exceptions’ (2016) 1 *European Review of Private Law* 103, 105.

⁶⁰⁴ Hervé Jacquemin, ‘Optimal Integration of the European Dispute Resolution Platform’ (2012) <[https://www.europarl.europa.eu/thinktank/en/document/IPOL-IMCO_NT\(2012\)475101](https://www.europarl.europa.eu/thinktank/en/document/IPOL-IMCO_NT(2012)475101)>.

⁶⁰⁵ The notion of ‘consumer’ reflects the definition of the Directive, and the ODR Regulation applies only to consumers residing in the EU. Therefore, it is uncertain what is the position of companies and business travellers falling under the broader definition of ‘consumer’ under Directive 90/314/CEE on package travel who purchase airline tickets online. See Gianpaolo M Ruotolo, ‘La Soluzione Delle Controversie Online Dei Consumatori Nell’Unione Europea Tra Armonizzazione E Diritto Internazionale Privato’ (2015) X *Studi sull’integrazione europea* 359, 368.

⁶⁰⁶ For example in Belgium, Germany, Luxemburg and Poland.

⁶⁰⁷ Mariacristina Bottino, ‘La nuova normativa europea in materia di risoluzione alternativa delle controversie dei consumatori’ (2014) 1 *Contratto e impresa/Europa* 395, 411.

⁶⁰⁸ Vincenzo Vigoriti, ‘Superabili ambiguità. Le proposte europee in tema di ADR e di ODR’ (2012) 5 *Nuova giurisprudenza civile commentata* 319, 325.

⁶⁰⁹ Carol Brennan and others, ‘Designing Consumer Redress: Making Redress Accessible for Consumer-Citizens’ (The Foundation for Law, Justice and Society 2015) 10.

that the ODR Regulation could be interpreted to include any transaction carried out remotely, through any means of electronic communication, including telephones.⁶¹⁰

On the other hand, the ODR Regulation does not cover offline disputes, even though the Parliamentary Committee for Internal Market and Consumer Protection proposed extending its scope to offline transactions to enhance consumer protection and increase consumer confidence in the internal market and reduce costs.⁶¹¹ Jacquemin and Lachapell criticise such a narrow scope as, analysing the reasons for the adoption of the Directive and the ODR Regulation, they believe that some of the criticisms emerging with regard to ADR proceedings could have been effectively addressed with an ODR platform, with no distinction between online and offline disputes.⁶¹² Cortés deems it preferable to extend access to the ODR platform and its case management tools to other disputes, although he agrees that, at the early stage of its implementation, the legislator might have opted for a more limited scope. On top of that, he remembers that consumer ADR entities are often publicly subsidised, and running an ODR platform demands high investments that may be postponed to a later phase.⁶¹³

Until ODR does not cover all kinds of consumer disputes, possibly providing a single point of contact, consumer redress will depend on the effective implementation of the ADR Directive into national law.⁶¹⁴

b. Improving the ADR-ODR connection

The digitalisation process in consumer ADR demands a reflection on the main advantages and disadvantages of digital tools and the concrete benefits that consumers and traders may expect from modern dispute management tools.⁶¹⁵ The increasingly blurred distinction between ADR and ODR is due to the progressive incorporation of digital tools in ADR proceedings on the one hand and the attribution of dispute resolution tasks to ODR platforms on the other. Therefore, both institutes could benefit from looking at the respective features that guarantee high-quality services for consumers.

⁶¹⁰ Gianpaolo M Ruotolo, 'La Soluzione Delle Controversie Online Dei Consumatori Nell'Unione Europea Tra Armonizzazione E Diritto Internazionale Privato' (2015) X Studi sull'integrazione europea 359, 368.

⁶¹¹ Hans Micklitz and Giovanni Sartor, 'Assessing the scope of European dispute resolution platform' (2013) <[https://www.europarl.europa.eu/thinktank/en/document/IPOL-IMCO_NT\(2012\)475102](https://www.europarl.europa.eu/thinktank/en/document/IPOL-IMCO_NT(2012)475102)> and Pablo Cortés, 'The New Landscape of Consumer Redress' in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 21.

⁶¹² Hervé Jacquemin and Amélie Lachapelle, 'Renforcer la confiance des consommateurs par le règlement extrajudiciaire des litiges' (2014) 209 *Journal de droit européen* 186.

⁶¹³ Pablo Cortés, 'The New Landscape of Consumer Redress' in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 21.

⁶¹⁴ Joanna Page and Laurel Bonnyman, 'ADR and ODR—Achieving Better Dispute Resolution for Consumers in the EU' (2016) 17 *ERA Forum* 145, 160.

⁶¹⁵ European Consumer Summit 2022, Workshop 1.

b.1. Exporting good practices from ADR to ODR

Technological development should be assessed based on its capability to ensure fair procedures and outcomes, especially when artificial intelligence is employed to elaborate settlement proposals. However, most ODR algorithms are not covered by the ADR Directive and its quality standards, thus fairness is not guaranteed, as well as privacy and transparency.⁶¹⁶ This issue has not been extensively dealt with in the literature, but Cortés suggests introducing an accreditation system also for ODR platforms similar to the one in place for ADR entities in order to increase consumer trust in these tools.⁶¹⁷ The ODR fairness should also be measured on the specific needs of vulnerable consumers, who may be negatively affected by the digitalised procedure.⁶¹⁸

Another relevant difference concerns the cooperation duties with national enforcement bodies, which are not required under the ODR Regulation. Cortés and Voet believe this were a missed opportunity since the volume of data processed through the platform could provide authorities with a more precise picture of the main problems of given market sectors and eventually improve enforcement. The same cooperation provisions of the Directive should be extended to ODR platforms, which would encourage sharing behavioural patterns and frequent complaints with the appropriate agencies.⁶¹⁹

b.2. Importing ODR features in ADR

The increasing number of online sales has led to an increasing need for efficient online after-sales tools. Large online marketplace, such as eBay, PayPal and Amazon, have developed efficient systems for handling consumer complaints, which are part of their economic success as they present themselves as trustworthy businesses attractive to consumers. As technology has become more affordable, automated tools for managing consumer questions and complaints are found on websites in the form of chatbots or algorithmic analyses of complaints. Therefore, the EU ODR platform seems to be only one of the possible choices available to consumers, with the peculiarity that all businesses active online have to propose a link to it.⁶²⁰ In practice, ODR technology is expensive, and only a few major traders invested in building their own ODR platforms.

Although still developing, consumers are increasingly opting for ODR, and ADR entities should also provide digital solutions making use of the new technologies to deliver accessible, more coherent and faster outcomes.

The most relevant difference between the Directive and the ODR Regulation concerns language in cross-border disputes (see *above* 2.c.1), which constitute 50% of the cases

⁶¹⁶ European Consumer Summit 2022, Workshop 1.

⁶¹⁷ Pablo Cortés, *The Law of Consumer Redress in an Evolving Digital Market: Upgrading from Alternative to Online Dispute Resolution* (Cambridge University Press 2017) 62-63.

⁶¹⁸ European Consumer Summit 2022, Workshop 1.

⁶¹⁹ Pablo Cortés, *The Law of Consumer Redress in an Evolving Digital Market: Upgrading from Alternative to Online Dispute Resolution* (Cambridge University Press 2017) 62-63 and Stefaan Voet, 'Online ADR in Europa en België: a new frontier' (2013) 3 *Nederlands-Vlaams tijdschrift voor mediation en conflictmanagement* 26.

⁶²⁰ European Consumer Summit 2022, Workshop 1.

filed on the EU ODR platform.⁶²¹ Language is one of the major obstacles in cross-border cases, as consumers expect to join a dispute resolution process in their own language or the language of the transaction, but are generally not knowledgeable enough in a different language to engage in ADR proceedings.⁶²² The EU ODR platform provides electronic standard complaints and response forms in all of EU languages powered by an automatic translation tool and assisted by human intervention when translating settlements. However, once the dispute is referred to one of the ADR entities linked to the platform, the proceeding is carried out in the language chosen by the entity.⁶²³ In order to overcome this issue, the ODR Regulation designates ODR advisors as the intermediaries to assist parties' communications with the ADR entities. However, Cortés is sceptical of such a solution, as ODR advisors have very limited manpower, and their intervention is likely to raise the costs and slow the procedure. Therefore, he recommends addressing the quality of automated translation, which is still poor for some language pairs. Additionally, language should be more accessible, less formal and legal.⁶²⁴

b.3. Coordinating ADR and ODR

The EU ODR platform is meant to facilitate access to consumer ADR.⁶²⁵ Therefore, incomplete or minimum implementation of the Directive will determine a poor implementation of the ODR Regulation, as the functioning of the ODR platform will largely depend on the availability of high-quality ADR services at the national level.⁶²⁶ However, the final result will also depend on coordinating measures between the two institutes.

First of all, Article 5 of the ODR Regulation requires all traders and intermediaries operating online to include an 'easily accessible' link to the EU ODR platform on their websites. Also, ADR entities dealing with e-commerce disputes have to provide the same link, and they may use the online case management tool of the platform to handle the claims they receive. Nevertheless, as Dalla Bontà points out, such an indication may be misleading for the consumer who believes that the professional implicitly agrees to join the ADR proceeding, should that be necessary. As a consequence, the consumer may be disappointed to receive a negative reply or no reply at all. Moreover, should the latter decide to proceed with the claim, the dispute would take place offline, contrary to the European legislator's intentions.⁶²⁷ The automatic referral to ADR entities when

⁶²¹ Commission, Functioning of the European ODR Platform (Statistical report) (2021) <<https://ec.europa.eu/info/sites/default/files/2021-report-final.pdf>>.

⁶²² Commission, Flash Eurobarometer Report Cross-Border and Consumer Protection (March 2011).

⁶²³ Pablo Cortés, 'The New Landscape of Consumer Redress' in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 21 and Marco BM Loos, 'Enforcing Consumer Rights through ADR at the Detriment of Consumer Law' (2016) 1 *European Review of Private Law* 61, 75.

⁶²⁴ Pablo Cortés, *The Law of Consumer Redress in an Evolving Digital Market: Upgrading from Alternative to Online Dispute Resolution* (Cambridge University Press 2017) 123.

⁶²⁵ Stefaan Voet, 'CDR-landschap in België' in Stefaan Voet (ed), *CDR in België. Buitengerechtelijke beslechting en oplossing van geschillen* (die Keure 2018) 2.

⁶²⁶ Naomi Creutzfeldt, 'Implementation of the Consumer ADR Directive' (2016) 4 *Journal of European Consumer and Market Law* 169, 174.

⁶²⁷ Silvana Dalla Bontà, 'Una giustizia "co-esistenziale" online nello spazio giuridico europeo? Spunti critici sul pacchetto ADR-ODR per i consumatori' (2021) 1 *Giustizia consensuale* 191, 212.

the trader has refused to consider the complaint and ADR is mandatory would solve at least part of these problems.⁶²⁸

Secondly, practical obstacles in filing the complaint should be removed, for example, by ensuring that the link to the EU ODR platform is easy to find on the website and that all trader's contact details are provided. Indeed, when submitting the complaint form, the consumer must fill in such data, either through the platform search engine listing the contact details of some of the major traders, or manually. Cortés recommends enriching the database, following the example of private ODRs.⁶²⁹

A peculiarity of the ODR platform is the possibility to resolve the dispute directly with the trader, a new module introduced in 2019.⁶³⁰ The platform allows for a 'direct talk' between the parties who can exchange messages and attachments and eventually find a solution without involving an ADR entity, a form of direct negotiation between consumer and trader.⁶³¹ When the trader decides not to engage in the negotiation, they can either agree to resort to an ADR entity (generally at their expense) or do not respond for the 30 days necessary to dismiss the complaint automatically. In the latter case, the consumer will receive an automated response stating that the case is closed, leaving him or her choosing between turning to an ADR entity, going to court, or dropping the case, as in most cases.⁶³² In order to contrast such a phenomenon, Cortés suggests redesigning the platform to let traders actively communicate whether they will join the ADR process or not and, when they do not reply, automatically refer consumers to the appropriate ADR entity.⁶³³

Furthermore, the EU ODR platform should be interoperable with all of the national platforms set up in the Member States,⁶³⁴ which Cortés believes could contrast forum

⁶²⁸ Pablo Cortés, 'The New Landscape of Consumer Redress' in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 33 and Pablo Cortés, *The Law of Consumer Redress in an Evolving Digital Market: Upgrading from Alternative to Online Dispute Resolution* (Cambridge University Press 2017) 62-63.

⁶²⁹ For instance, Resolverer.co.uk. See Pablo Cortés, *The Law of Consumer Redress in an Evolving Digital Market: Upgrading from Alternative to Online Dispute Resolution* (Cambridge University Press 2017) 118.

⁶³⁰ Silvana Dalla Bontà, 'Una giustizia "co-esistenziale" online nello spazio giuridico europeo? Spunti critici sul pacchetto ADR-ODR per i consumatori' (2021) 1 *Giustizia consensuale* 191, 214. See also Commission, *Functioning of the European ODR Platform (Statistical report)* (2021) <<https://ec.europa.eu/info/sites/default/files/2021-report-final.pdf>>.

⁶³¹ Silvana Dalla Bontà, 'Una giustizia "co-esistenziale" online nello spazio giuridico europeo? Spunti critici sul pacchetto ADR-ODR per i consumatori' (2021) 1 *Giustizia consensuale* 191, 214.

⁶³² 89% of complaints formally launched on the platform were automatically closed after the 30-day legal deadline for the trader to eventually agree to proceed to an ADR procedure, 6% were refused by the trader and 4% withdrawn by consumer. As a result, only 1% of the complaints filed through the EU ODR platform reached an ADR body, which could still reject the claim for lack of competence or other elements. However, these data do not indicate the number of consumers who solved their dispute directly on the platform or outside the platform, which resulted to be the 20% of survey responders, while 19% of responded were still discussing with the trader. See Commission, *Functioning of the European ODR Platform (Statistical report)* (2021).

⁶³³ Pablo Cortés, *The Law of Consumer Redress in an Evolving Digital Market: Upgrading from Alternative to Online Dispute Resolution* (Cambridge University Press 2017) 124-132.

⁶³⁴ Pablo Cortés, *The Law of Consumer Redress in an Evolving Digital Market: Upgrading from Alternative to Online Dispute Resolution* (Cambridge University Press 2017) 121 and Carol Brennan and others, 'Designing Consumer Redress: Making Redress Accessible for Consumer-Citizens' (The Foundation for Law, Justice and Society 2015) 10.

shopping phenomena by providing a single access point and signposting complaints to certified ADR entities.

Finally, consumers need to know that they will obtain effective protection once they start an ADR or ODR proceeding. Therefore, Cortés proposes to introduce a trustmark for those traders who are willing to solve their disputes through the EU ODR platform and eventually one of the certified ADR entities linked to the platform thereof. The trustmark would ensure consumers that, should they successfully engage in an out-of-court proceeding, they would obtain either a settlement or an adjudicative decision that the trader will be willing to comply with.⁶³⁵

c. ODR as ADR or something different?

In 2020, 12% of EU consumers who experienced a problem used ODR schemes, compared to 5% that resorted to an ADR entity or the 2% that went to court. They also reported a higher satisfaction rate, as ODR generally reduces case-handling time and costs and eventually helps the parties to find a mutually acceptable certified ADR entity.⁶³⁶

The EU ODR platform provides different kinds of services: information about consumer rights, a ‘self-test’ function for identifying the most appropriate solution to the consumer’s specific problem, forms to launch complaints directed at the trader or engage in ‘direct talks’ with the latter. The ‘direct talk’ function raises attention, as the number of requests filed in 2020 was significantly higher than the complaints submitted in the same period, showing that ODR platforms are gradually becoming digital dispute resolution spaces where consumers and traders can find a solution without the involvement of an ADR entity. The literature is divided between those believing that ODR platforms should merely facilitate dispute resolution and those who think artificial intelligence should play a part in dispute resolution.

As less than 2% of the complaints filed through the ODR platform scale up to an ADR entity, it is clear that the platform is not being used as envisaged by the legislator.⁶³⁷ However, Hodges believes the EU ODR platform could help overcome many of the barriers to effective ADR, such as the lack of visibility, findability, language, low trader participation and different admissibility criteria, by providing a single entry point offering information and automated translations. He intends to capitalise on the high volume of consumer visits – 3,3 million unique visitors in 2020⁶³⁸ – to inform consumers about their rights and the available means to enforce them.⁶³⁹ Voet said that the role of ODR platforms should be limited to facilitating the drafting of consumer complaints, which should be automatically sent to the competent ADR entity, although he does not exclude that the ADR entity thereof may decide to handle the dispute

⁶³⁵ Pablo Cortés, ‘The New Landscape of Consumer Redress’ in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 33.

⁶³⁶ European Consumer Summit 2022.

⁶³⁷ Christopher Hodges, ‘Developments and Issues in Consumer ADR and Consumer Ombudsmen in Europe’ (The Foundation for Law, Justice and Society 2019) 5.

⁶³⁸ Commission, *Functioning of the European ODR Platform* (Statistical report) (2021).

⁶³⁹ Christopher Hodges, ‘Developments and Issues in Consumer ADR and Consumer Ombudsmen in Europe’ (The Foundation for Law, Justice and Society 2019) 5.

through the platform.⁶⁴⁰ Some scholars warned against the substitution of human intervention with algorithms,⁶⁴¹ as is the case in other legal systems where technology is the ‘fourth element’ of the procedure in the forms of assisted negotiation and automated mediation, and it manages information, formulates proposals, and softens the possibly aggressive language of the parties to facilitate settling.⁶⁴² They believe artificial intelligence cannot guarantee fair procedures and outcomes, especially in complex and individual cases.⁶⁴³

On the other hand, the EU ODR platform receives many low-value complaints, which could be clustered into groups of claims presenting similar features, such as parking ticket claims for instance.⁶⁴⁴ Scholars believe such simple and repeated cases could be effectively settled through an online negotiation tool⁶⁴⁵ proposing computer-generated solutions based on past similar cases.⁶⁴⁶ This is the case of eBay’s ODR, which is designed to automatically offer the dissatisfied customer a choice between returning the item, obtaining a partial refund or being sent a new one.⁶⁴⁷ High volumes of similar cases allow for building efficient AI-generated solutions, thus ‘unlocking’ the information contained in the platform database. Disputes are valuable sources of information about the problems arising in a market, and such information could be eventually shared with the competent authorities in order to intervene on market misconducts.

A combination of the two perspectives could result in designing a ‘claim triage’ to achieve early settlement of consumer cases. According to Cortés, consumers should initially receive tailored advice on their rights and the different options to pursue their claims, filtering the unfounded ones. This first phase also provides the consumer with a first assessment of the strength of the case, and it could be carried out automatically when there are many similar disputes. In e-commerce, examples of such disputes concern non-delivery of purchased goods, late delivery or non-conformity of delivered goods. Secondly, consumers and traders should be put in touch in order to exchange information. A neutral third party could run the negotiation and, in case no agreement is reached, adjudication by an ADR entity would follow.⁶⁴⁸ Vulnerable consumers should receive appropriate assistance in order to overcome ODR technology barriers.

⁶⁴⁰ Stefaan Voet, ‘Online ADR in Europa en België: a new frontier’ (2013) 3 *Nederlands-Vlaams tijdschrift voor mediation en conflictmanagement* 26.

⁶⁴¹ ADR Assembly 2021, Breakout session 2.

⁶⁴² Silvana Dalla Bontà, ‘Una giustizia “co-esistenziale” online nello spazio giuridico europeo? Spunti critici sul pacchetto ADR-ODR per i consumatori’ (2021) 1 *Giustizia consensuale* 191, 209.

⁶⁴³ ADR Assembly 2021, Breakout session 2.

⁶⁴⁴ For example, the 77% of spares and accessories for vehicles was linked to a specific issue experienced by many consumers in relation to a particular trader. See Commission, *Functioning of the European ODR Platform (Statistical report)* (2021).

⁶⁴⁵ Pablo Cortés, *The Law of Consumer Redress in an Evolving Digital Market: Upgrading from Alternative to Online Dispute Resolution* (Cambridge University Press 2017) 62-63 and Carol Brennan and others, ‘Designing Consumer Redress: Making Redress Accessible for Consumer-Citizens’ (The Foundation for Law, Justice and Society 2015) 10.

⁶⁴⁶ Pablo Cortés, *The Law of Consumer Redress in an Evolving Digital Market: Upgrading from Alternative to Online Dispute Resolution* (Cambridge University Press 2017) 129.

⁶⁴⁷ e-Bay handles over 80% of consumer disputes automatically. See Pablo Cortés, *The Law of Consumer Redress in an Evolving Digital Market: Upgrading from Alternative to Online Dispute Resolution* (Cambridge University Press 2017) 129.

⁶⁴⁸ Pablo Cortés, *The Law of Consumer Redress in an Evolving Digital Market: Upgrading from Alternative to Online Dispute Resolution* (Cambridge University Press 2017) 123.

In conclusion, the distinction between ODR and ADR schemes is increasingly blurred, as ADR entities are gradually incorporating technology in their procedures, and ODR bodies might have to respect higher quality standards in the future. However, as most ADR entities are reluctant to invest in the ODR technology, they are relying on the use of the EU ODR platform and its services,⁶⁴⁹ thus the relationship between the two is likely to evolve.

Country-specific remarks

In **Belgium**, the Consumer Ombudsman Service makes use of ODR, which has several advantages compared to emails or other traditional means. First of all, it has a chat box function, where all participants can write and upload documents. Secondly, it guarantees better time management, and they reported having spent less time solving a higher number of cases. Also, the platform is easily accessible simply with an email and a password, although not yet via smartphone.⁶⁵⁰

In **France**, there is a growing interest in regulating ODR services. ‘Online conciliation, mediation or arbitration services’ are defined as procedures at least partly dematerialized. Therefore, if on the one hand a simple online form would not be enough to qualify as an online service, algorithms are not necessary either, and their use is limited as the solutions provided must result from human intervention. The law requires online procedures to comply with obligations of impartiality, independence, competence, diligence, confidentiality and data protection, with particular regard to excluding algorithmic or automated personal data processing.⁶⁵¹

SignalConso is a ‘*startup d’État*’ linked to the DGCCRF, an interoperable platform accessible to consumers, traders and ADR entities in order to signal problems faced by consumers.⁶⁵² Consumers can find suggestions on how to solve their issues, get information about their rights, and eventually file a report. The report reaches the trader, which can be a big business or an SME, who has the opportunity to fix the problem, thus bringing the solution directly to the consumer. The platform adopts a ‘trust approach’, expecting traders to comply with grounded claims, while it offers no means to further escalate the complaint in the eventuality of non-compliance. However, all of the reports are collected by the platform, which eventually submits data on serial and severe complaints to the DGCCRF. The authority can proceed by surveying the trader that generated such disputes and eventually investigate as part of its activity for the repression of frauds. Consumers may also opt to signal a problem without filing a complaint, thus highlighting that the primary function of the platform is to make the market a better place for consumers. By June 2022, *SignalConso* received over 300,000,000 reports, which received an answer from the trader in most cases where an identifiable consumer made a complaint. At *SignalConso* they observed that the platform is not used to address any kind of consumer problem, but their number is increasing with the improvement of the platform.⁶⁵³ In the design, the balance between simplicity and details is key. The developers adopted a user-centric approach, co-

⁶⁴⁹ *ibid.*, 44-65.

⁶⁵⁰ European Consumer Summit 2022, Workshop 1.

⁶⁵¹ ADR Assembly 2021, Breakout session 2.

⁶⁵² *SignalConso* <<https://signal.conso.gouv.fr/>>.

⁶⁵³ European Consumer Summit 2022, Workshop 1.

creating the website with consumers in the product development phase, smoothening the steps where users would drop their cases because the procedure was too burdensome, and designing an easily accessible portal for traders to engage with their clients.⁶⁵⁴

In **Germany**, the first attempt to introduce ODR has been *Ombudsmann.de*, an ADR entity offering online procedures that eventually ceased its activity under the huge volume of complaints submitted. In 2009 *Online Schlichter* was launched, funded by federal States, traders and business associations, and it is nowadays one of the most important ADR entities in Germany mainly dealing with defective goods or late delivery of goods. However, its jurisdiction is limited to disputes where at least one party resides in one of the federal States financing the entity.⁶⁵⁵

In the **Netherlands**, ADR procedures were already quite digitised when the pandemic pushed for the full implementation of ODR. Virtual and hybrid hearings have been appreciated, especially by SMEs, because they allow for saving time and money. On the other hand, ADR entities faced technical difficulties in upholding procedural safeguards and involving digitally illiterate consumers, which required adopting a case-by-case approach. However, Dutch ADR entities consider embedding virtual hearing permanently as an addiction that could be interesting for SMEs and those consumers who are more confident with new technologies.⁶⁵⁶

⁶⁵⁴ European Consumer Summit 2022, Workshop 1.

⁶⁵⁵ Rosa Miquel, 'The implementation of the consumer ADR directive in Germany' in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 172.

⁶⁵⁶ ADR assembly 2021, Breakout session 1D.

9. Conclusions

a. 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,⁶⁵⁷ 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.⁶⁵⁸ 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.

b. 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.⁶⁵⁹

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

⁶⁵⁷ For instance bakeries, greengrocers’ and butchers’ shops.

⁶⁵⁸ France and Germany exclude arbitration from the scope of their implementing legislations, while France covers in-house mediators under the legislation thereof.

⁶⁵⁹ A high number of complaints is dismissed at the early stage of the procedure because they are incomplete or directed to the wrong entity.

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.⁶⁶⁰

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,⁶⁶¹ 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.

c. 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.

c.1. 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

⁶⁶⁰ As in Belgium.

⁶⁶¹ In practise, there are significant differences in access to ADR across the Member States and the different economic sectors.

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.

c.2. 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.3. 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.

c.4. 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 found, 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,⁶⁶² while in other Member States parties are not necessarily more satisfied by law-oriented procedures.⁶⁶³

⁶⁶² e.g., Germany.

⁶⁶³ e.g., Italy and the UK are examples of jurisdictions where equity-oriented procedures are appreciated.

c.5. 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.⁶⁶⁴ 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.⁶⁶⁵

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,⁶⁶⁶ and name and shame techniques.

c.6. 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.

⁶⁶⁴ e.g., telecommunications, energy.

⁶⁶⁵ 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.

⁶⁶⁶ This is the case in the Netherlands.

d. 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.

e. 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.

f. Competent national authorities (Articles 18 - 20)

All Member States⁶⁶⁷ 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 broad⁶⁶⁸. 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 must gather information themselves.

g. 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 fairer and more 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.

⁶⁶⁷ Except for France.

⁶⁶⁸ e.g., the nominal fee.