

EuroCommerce Position on the European Commission Proposal for a Directive on Alternative Dispute Resolution and a Regulation on Online Dispute Resolution COM(2011) 793 and COM(2011) 794

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Key Messages

- EuroCommerce appreciates the Commission proposals on ADR and ODR that build on existing ADR entities and avoid setting up new systems which would create administrative burdens for businesses.
- **Where the consumer complaint handling system is operated by natural persons employed collectively, for example by a trade association, it can still be operated in an impartial, transparent, effective and fair manner and should therefore be regarded as an ADR entity.** Moreover, EuroCommerce would like to stress that the **independence of ADR entities should not be related to funding.** ADR entities which are exclusively funded by businesses should fall within the scope of the ADR Directive (Article 2) as long as they satisfy the quality criteria, i.e. expertise and impartiality, transparency, effectiveness and fairness. Impartiality should not be linked to funding.
- Article 6(2) ADR Directive needs to be amended; the equal number of consumer and traders representatives in a collegial body is not relevant, important is that the procedure is based on law and represents a fair system for both parties.
- The time-frame for resolving disputes should not be fixed to 30 (ODR) and 90 days (ADR) and there should be no distinction between online and offline transactions. Instead, it should be ensured that the systems are fair and that the **disputes are solved within a reasonable time period.** It should be taken into account that cross-border cases can be more complicated due to different legal framework that needs to be applied, logistics and higher costs in case of defective costs, etc.
- Businesses should not be required to inform consumers of the ADR entities that they do not adhere to as ADR should remain voluntary alternative to normal court procedures. The requirements on consumer information by traders should be coherent with the recently adopted Directive on Consumer Rights and should not include information in invoices and receipts. **The first port of call should be the retailer from who they purchased their goods.** This should apply online as well as offline.
- **The in-house complaint handling systems to consumers should be promoted stronger; the role they play may assuage the fears of some consumers especially when buying cross-border.**
- **ADR schemes are not cheap to operate.** Therefore, **it is important that there is some incentive to deter unreasonable claims by consumers.** A deposit refundable if successful – or if directed by the scheme because the case was reasonable even if lost – is probably the best way forward.
- It needs to be recognised that **not every transaction is appropriate for ADR.** For example, very small value household goods may result in disputes but they are hardly worthy of an ADR scheme. Moreover, disproportionate administrative burden on ADR entities should be avoided by establishing a **threshold** for a dispute to be admissible. The exact amount should be left to the Member States since product prices differ within the EU.
- ADR should remain **voluntary, flexible, cheap, less formal, consensual and allow recourse to courts** in order to deliver a valuable alternative to traditional justice to the benefit of both businesses and consumers.

1. Introduction

EuroCommerce welcomes the European Commission's proposals on a Directive on Alternative Dispute Resolution¹ (ADR) and a Regulation on Online Dispute Resolution² (ODR) to resolve disputes related to commercial transactions and practices in the European Union.

Moreover, EuroCommerce supports the Commission's aim to make consumers more confident in the internal market and to encourage them to make more use of e-commerce. As things currently stand, the commerce sector is not able to make full use of its potential. Frequently, cross-border distribution is hindered by language problems, logistic and transport costs, cultural differences, density of population, producer rules or territorial supply restrictions imposed by brand manufacturers, even within the EU, payment systems and card costs for currency conversion.

The **fragmentation of the legal framework in Europe** is another reason why cross-border trade is lagging behind; it makes online operators reluctant to engage in cross-border activities. The lack of knowledge regarding the rules to apply to a cross-border contract and the need to abide by a legislation of another Member States as a result of the entry into force of the Rome I Regulation are important issues to be tackled to favour the development of distance selling activities at cross-border level.

EuroCommerce is pleased that the proposed legislation will build on the existing entities in the Member States and that it is providing quality criteria to Member States in order to upgrade their existing ADR mechanisms or to create new ones where they do not already exist. We would like to highlight that ADR mechanisms are successful because they represent easy-to-use solutions that are adapted to the changing needs of consumers and development of economic activities. **It is important that ADR remains voluntary in order to be flexible, fast, easy, cheap and therefore attractive for both consumers and businesses to use ADR as an alternative to court procedures.**

Furthermore we appreciate that the Commission's ODR platform will serve as an interface and will refer cases back to national ADR entities, therefore avoiding new burdensome procedures.

There are a few aspects of the ADR Directive and the ODR Regulation, in particular the scope, the deadline for solving offline and online disputes, and the information obligations of the trader, which need to be adjusted in order to ensure the proper functioning of ADR.

2. Scope

Retailers provide a direct link to consumers, and it is therefore very important for them that their clients are satisfied. **Customer satisfaction includes the proper and timely handling of justified complaints.** There are millions of transactions every day between consumers and businesses. The vast majority of these are completed to the satisfaction of the consumer and the business.

In most cases, when something goes wrong, the matter is resolved amicably between the business and the consumer directly. Businesses rely on their reputation and have no desire to put it at risk. The number of cases where no agreement can be reached between a business and a consumer is in reality very small. One of our large retail companies in the UK sells approximately 50mln products per year (number of orders processed approximately 15mln), receives around 40.000 customer queries with problems and is only engaged in approximately 50 court cases commenced by consumers at an annual basis.

¹ Proposal for a Directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), COM(2011) 793 final

² Proposal for a Regulation of the European Parliament and of the Council on online dispute resolution for consumer disputes (Regulation on consumer ODR), COM(2011) 794 final

In practice, retailers frequently offer remedies to their clients that go beyond current legal requirements as a gesture of goodwill. Many retailers will apply company-specific dispute resolution mechanisms as part of their general complaints handling policy. It enables retailers to deal effectively with arising problems when they cannot be resolved directly between the individual store and the consumer and provides a simple solution to the satisfaction of the consumer.

The in-house complaint handling systems to consumers should be promoted stronger; the role they play may assuage the fears of some consumers especially when buying cross-border.

Additionally, many retailers are a member of an ADR entity. The funding of ADR entities differs per Member State and sometimes even within one Member State. The functioning of the different ADR entities in the different Member States largely depends on cultural and legal traditions. Many different schemes already exist in the Member States, even in one Member State there are different ADR entities, specialised in certain sectors.

The current proposal excludes from its scope those entities where the natural persons in charge of dispute resolution are employed exclusively by the trader. **Where the consumer complaint handling system is operated by natural persons employed collectively, for example by a trade association, it can still be operated in an impartial, transparent, effective and fair manner and should therefore be regarded as an ADR entity.** Moreover, EuroCommerce would like to stress that the **independence of ADR entities should not be related to funding.** Independence of an ADR entity can be ensured when it is funded publicly, collectively by an entire sector and even in cases when it is funded solely by an individual company. Most of the businesses funded entities work with an independent third party.

Moreover, natural persons employed by a retailer should be allowed to participate in the ruling of an ADR entity, not only because they are expert but also because they can harvest valuable experiences for their employers. It goes without saying that they cannot participate when the employer is one of the parties to the dispute.

Efficient and effectively operating ADR entities should be recognised and it should be prevented that Member States, unnecessary, have to set up additional ADR entities dealing with the same sectors. If the standards that are set are applied, monitored and audited this should ensure independence. The auditing process costs should not be paid by businesses, the schemes are already costly for them.

The principles of impartiality and independence in Article 6 of the ADR Directive should be respected, i.e. the person appointed should possess the necessary knowledge, skills and experience, etc. Paragraph 2 of this Article needs to be amended; the equal number of consumer and traders representatives in a collegial body is not relevant, important is that the procedure is based on law and represents a fair system for both parties.

EuroCommerce is therefore calling for redefining Article 2 and amending Article 6(2) of the ADR Directive.

3. Time-frame of procedures

The benefit of ADR is to provide an alternative to court procedures in order to solve a dispute as fast as possible at a low cost. It is in the interest of a business to provide a consumer with a satisfactory solution within a short period of time. However, the timeframe for solving a dispute depends on the specificities of a claim. More important than fixing a deadline, is that the quality criteria are respected and that the ADR entities reflect a fair system for both the consumer and the business involved in the procedure.

EuroCommerce reiterates that to most consumer problems a solution is found between the business and the consumer directly. A distinction should be made between consumer complaints and disputes. **ADR entities shall only deal with those cases which cannot be solved between the two concerned parties.** This means that disputes shall not be admitted to an ADR scheme if the consumer has not made a complaint to the trader beforehand. In order to guarantee just and fair ADR procedures, the parties must have sufficient time to be heard, to respond to and comment on any claims made by the other party. In many cases, a technical assessment of a product is needed, which will extend the timeframe of the procedure. In countries, where consumers are satisfied with the results of the existing ADR systems, such as Denmark and the Netherlands procedures can take up to 5-7 months. In Denmark this is an average including cases that are refused or ended by an amicable solution.

Moreover, there should be **no distinction between the timeframes allowed for solving disputes online or offline.** According to the ODR Regulation, an online dispute has to be solved within 30 days while the resolution of online disputes can be expected to be more time consuming since they concern cross-border cases. In case of a defective product, it might even take more time, since the product need to be sent back and forward in order to assess the problem. In cross-border cases, the disputes will also need to be translated for the parties to respond which will only extend the time period further. It needs to be clarified who will pay for the translation costs.

Furthermore, ODR cases will involve cross-border disputes, for which the applicable law needs to be determined. Due to the **Rome I Regulation**, the business needs to take into account the law of the Member State where the consumer resides. The ADR entity may need to apply a foreign law which will make the case **more complicated** than a national dispute. Therefore it is not realistic to have a shorter deadline for ODR than for ADR.

EuroCommerce is therefore calling for replacing the deadlines as mentioned in Article 8(d) of the ADR Directive(90 days) and Article 9(b) of the ODR Regulation (30 days) by "within a reasonable time".

4. Consumer information by traders

EuroCommerce acknowledges the lack of consumer and business awareness of ADR entities. For cross-border cases the Commission will set up the ODR platform which will refer consumers to the relevant ADR schemes. In order to increase awareness, information campaigns by public authorities, consumer organisations, NGOs etc. are best suited to contribute to consumer awareness because this is where consumers expect to find such information. This includes an easy access to the names and contact details of the bodies responsible for out-of-court settlement of consumer disputes. It seems however very difficult to inform consumers on all the existing ADR entities; it would, in turn, overburden the consumer with information that he/she does not need.

European Consumer Centres (ECC) or any other national contact point could play an important role by providing assistance and the necessary information to the consumer. The ECC can even be in a position to advise consumers on whether it makes sense to refer to an ADR scheme, and what their obligations are. For cross-border disputes, such national points act as intermediaries between the various national schemes. NGOs can, in cooperation with the ECC, provide information on the existing ADR schemes and the possibilities open to the consumer.

The information requirements for businesses in the proposals are too stringent. The obligation to make information available in invoices and receipts (Article 10(2) of the ADR Directive) will result in huge administrative burden for businesses. In practice, for example in offline shops and in particular for mixed shops (food and non-food) this obligation will not be practical. There are initiatives by some businesses to work with paperless receipts in order to contribute to sustainability. This kind of environmentally friendly initiatives would be

discouraged. The information should be coherent with the recently adopted **Consumer Rights Directive**³ meaning that **the trader shall provide the consumer with information in a clear and comprehensible manner on the possibility, where applicable, 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.**

The most important point is that consumers should know where to go for advice when they have a problem. **The first port of call should be the retailer from who they purchased their goods.** This should apply online as well as offline. As mentioned above, in many cases retailers already go beyond the legal requirements to protect their reputation and ensure the customer returns because they are satisfied with the outcome.

ADR schemes are not cheap to operate. In the Netherlands, in 2010, the costs for businesses were 3mln Euros, 1.5mln Euros for the Government and 0.4mln Euros for consumers. In the UK in the consumer credit area the Financial Ombudsman requires £500 that a company has to pay win or lose when a consumer complaints. Consumer advisers now regularly put in claims for £400 in the knowledge it is cheaper for a business to settle than go to the Ombudsman. Therefore, **it is important that there is some incentive to deter unreasonable claims by consumers.** A deposit refundable if successful – or if directed by the scheme because the case was reasonable even if lost – is probably the best way forward.

Moreover, it needs to be recognised that **not every transaction is appropriate for ADR.** For example, very small value household goods may result in disputes but they are hardly worthy of an ADR scheme. Disproportionate administrative burden on ADR entities should be avoided by establishing a **threshold** for a dispute to be admissible. The exact amount should be left to the Member States since product prices differ within the EU.

There should be **no obligation on businesses to inform their customers unless and until the consumer has a problem.** At that point, businesses should want to advise their consumers of how the dispute might be resolved.

The obligation to **inform consumers on the ODR platform in all textual messages** sent to the consumer by electronic means (Article 13(1) of the ODR Regulation) will overburden consumers with too much information.

Moreover, there should be **no obligation on traders to inform consumers about ADR entities of which they are not a member of** (Article 10(1) of the ADR Directive). The consumer will not be able to resolve its dispute through this ADR entity since the trader is not a member of it and therefore it is irrelevant to provide this information.

It is more efficient to inform consumers about the existence of ADR entities upon request and when a consumer submits a complaint to the consumer complaint handling system operated by the trader. Hereby the consumer is ensured to receive correct information and assistance regarding his or her complaints. **It is not in the interest of the trader to hide the fact that it has committed to use an ADR entity to resolve disputes with consumers.**

Depending on the specific dispute, it should be up to the **parties to decide which specific course of remedy they may wish to take.** ADR is easy to access, cheap, fast and in the interest of both parties. Generally traders first use their in-house complaint procedures when available. It is in the interest of a trader to quickly resolve consumer complaints as it leads to more satisfied consumers and a better image. Therefore consumers should always first go back to the shop in case of a problem.

³ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance [OJ L 304, 22.11.2011, p. 64–88]

The **ADR procedures should remain simple, to ensure that they are easy, fast and cheap.** If too many consumers contact ADR entities as a first step, this will overburden the ADR entities and slow down the procedure of solving the disputes.

EuroCommerce and the commerce sector

EuroCommerce represents the retail, wholesale and international trade sectors in Europe. Its membership includes commerce federations and companies in 31 European countries.

Commerce plays a unique role in the European economy, acting as the link between manufacturers and the nearly 500 million consumers across Europe over a billion times a day. It is a dynamic and labour-intensive sector, generating 11% of the EU's GDP. One company out of three in Europe is active in the commerce sector. Over 95% of the 6 million companies in commerce are small and medium-sized enterprises. It also includes some of Europe's most successful companies. The sector is a major source of employment creation: 31 million Europeans work in commerce, which is one of the few remaining job-creating activities in Europe. It also supports millions of dependent jobs throughout the supply chain from small local suppliers to international businesses.