Ecommerce Europe reply to the Call for Evidence on Alternative Dispute Resolution

1. Introduction

The aim of the ADR Directive is ensuring access to simple, efficient, fast, and low-costs ways of resolving domestic and cross-border disputes which arise from sales or service contracts concluded online or offline between consumers and traders. Ecommerce Europe fully supports this objective and believes that access for consumers to simple and low-cost dispute settlement mechanisms will enhance their trust and confidence in the internal market. Similarly, traders also have an interest in effective dispute settlements. Businesses, whether online or offline, have a long-term interest in building trust by having good customer relations and finding quick and adequate solutions to potential issues.

Ecommerce Europe welcomes the opportunity to provide additional input for the Commission's evaluation process. Overall, we consider that the Directive has successfully created a standard for EU-wide out-of-court commercial dispute resolution mechanisms. Wide-spread infringements have been better tackled thanks to an enhanced cooperation among EU public authorities. Ecommerce Europe believes that participation in ADR procedures should remain voluntary. We consider that mandatory ADR would not be appropriate in every case and could even disrupt the trader's internal processes by unintentionally encouraging consumers to bypass the trader's existing customer services, resulting in a worse service (and outcome) for consumers. ADR bodies should keep a focus on disputes rather than general inquiries and complaints. As set out in Article 23 of the Directive, the Directive should only apply after the consumer-complaint handling systems of the trader. It should remain the last resort for genuine consumer complaints before court-based proceedings are commenced.

However, Ecommerce Europe notes that there is room for improvement in the EU framework which will help trader participation in ADR schemes and ultimately facilitate better consumer protection. With this paper, we would like to share our views on the most relevant aspects to include in the ongoing evaluation.

2. Fragmented ADR landscape

The ADR Directive currently follows a minimum-harmonisation approach, setting only minimum requirements for ADR entities to be certified by national authorities. Member States have been free to further adapt the rules to the national situation and go beyond what is stated in the general EU rules. As a consequence, the ADR landscape has evolved into a mosaic of different systems, counting over 400 certified ADR entities in the EU. The ADR structure per country can vary from sectoral ADR bodies, in-house ADR entities or mediators, to broader ombudsman schemes. As an example, the Geschillencommissie in the Netherlands and the National Board for Consumer Disputes (ARN) in Sweden are generally considered more structured and clustered ADR entities, whereas in France, approximately 94 certified ADR entities exist.

Consequently, considering the cross-border nature of e-commerce, this creates challenges for consumers and businesses wishing to make use of dispute mechanisms in a cross-border context. Against this backdrop, traders, who usually have interest in selling at an EU scale, are faced with even more hurdles when it comes to their incentives to participate in ADR procedures. Similarly, due to the different procedural rules and criteria across Member States, consumers may decide not to take action in cross-border cases or may not be able to identify the right entity to approach. Ecommerce Europe thus argues that the Commission's objective should be to introduce and harmonise procedures across EU Member States while

building on lessons learnt at national level and involving the businesses and their representatives in the process.

In cross-border cases, we generally observe that the dispute is allocated to the national ADR entity by which the trader is covered. This is in line with Article 5.1 of the ADR Directive that ensures that disputes covered by the ADR Directive which involve a trader established on their respective territories can be submitted to an ADR entity which complies with the requirements set out in the Directive. In practice however, we observe difficulties for national ADR schemes to deal with the laws of the consumer's country of residence. For instance, in case a German consumer would order a product from a French website (directing sales to the German Market), the French ADR scheme would need to apply the German law (under Rome II). The same applies to customers from all over Europe. This can be quite a complicated process for a national ADR body and may explain part of the reluctance to handle claims brought forward by ECC through the ODR platform. This could be significantly improved if in a cross-border setting, it would be allowed for the ADR body of the country where the website is established is allowed to rule the case under its own law. Or, if consumers would be enabled to pursue an ADR dispute settlement in their country of residence regardless of the country in which the trader is established. Alternatively, the ODR system could be transformed into a pan-European ADR system for cross-border complaints only. This EU ADR should then be able to set up the resources to cope with the different national legislations. Since there would be one and only EU ADR (instead of asking each national ADR to deal with several legislation), this could help deal with cross-border disputes. Overall, we believe that Article 5.1 needs to be further clarified to take into account these difficulties.

3. Costs

Regarding the level playing field in the EU, it is of importance to harmonize the extent to which the implication of ADR/ODR is voluntary. It is quite costly for firms and sectoral associations to participate in the dispute resolution processes. When there are many firms which do not participate in ADR schemes, in particular in Member States which offer less extensive ADR mechanisms, this places those firms that do participate, and therefore cover the costs, at an unfair competitive disadvantage. Similarly, the study conducted by KU Leuven[1] confirms that the funding structure of ADR procedures creates an obstacle to business participation in ADR schemes (in countries where it is not mandatory). The study concludes that when the fees for traders are smaller, higher participation rates are registered and traders are more collaborative. It is therefore key for the Commission to consider funding options for alternative dispute resolution in light of trader participation rates as well as to maintain the level playing field. Additionally, several Ecommerce Europe members have indirectly made participation in an ADR scheme mandatory by including it in the conditions of their membership or Trustmark certification. This however also means that branch organisations often bear a large part of the costs of alternative dispute settlements.

Ecommerce Europe strongly believes in the public value of strong out-of-court dispute settlement mechanisms and considers it, as also the ADR Directive does, a responsibility of Member States authorities to enable this system. We therefore also believe that public funding should be made available to ensure the availability of low-cost, effective, and impartial mechanisms for all parties involved.

[1] [1] Prof. dr. Stefaan Voet, Sofia Caruso, Anna D'Agostino, Stien Dethier (June 2022). Recommendations from academic research regarding future needs of the EU framework of the consumer Alternative Dispute Resolution (ADR): Executive Summary. https://ec.europa.eu/info/sites/default/files/executive_summary_0.pdf

4. Perception and neutrality of ADR

While Ecommerce Europe naturally supports that the objective of the ADR Directive is to provide consumers with a lost-cost, accessible and effective way to solve disputes, to ultimately protect them better, we also would like to underline the importance of impartiality and neutrality of the ADR Directive and ADR entities. As the recommendations from KU Leuven[2] highlight, both "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'. Ecommerce Europe fully supports measures aimed at improving trust of both parties in ADR entities, such as equal representation of traders and consumers within the board of ADR entities and a strong supervisory role of competent authorities towards ADR entities.

In contrast to the ADR Directive, the ODR Regulation is more neutral in its original set-up, as it deals with all e-commerce disputes, initiated either by a consumer against a trader or by a trader against a consumer (even if this still depends on national level, in which not all countries allow this procedure). Considering the perception of traders that ADR entities and the ADR Directive are biased against them, we would suggest broadening the scope of the ADR directive to allow traders to initiate a dispute against a client. In particular as in the last years, businesses have increasingly been experiencing challenges with consumers for instance returning empty parcels or leaving defamatory comments or fake statements in feedback reviews. We believe that enabling businesses to solve such issues in a low-cost, but formalised manner, could help improve overall trust and participation of traders in ADR systems. Furthermore, to improve the system's cost effectiveness and the trust of the consumer in the system, the Commission could consider the introduction of certain safeguards to determine in which cases ADR might not be appropriate. For instance, when a consumer is refusing the engage with the trader to first attempt to resolve its complaint through the trader's complaint handling processes, when a consumer has repeatedly lodged unsuccessful ADR requests on the same topic, or when a consumer is reasonably suspected of being involved in fraudulent practices against the trader and/or has repeatedly violated the trader's terms and conditions.

5. Digitalisation

Ecommerce Europe believes there is room for improvement on the digital uptake within consumer protection, which could both enhance existing practices and increase the future ambition of consumer rules. Digitalisation could support all parties involved in an ADR procedure and drive a more efficient complaint-handling framework in both domestic and cross-border settings. At the time the ADR Directive was drafted, the digitalisation of ADR procedures and the development of artificial intelligence for solving disputes were in a very early stage. Currently, Ecommerce Europe sees a lot of potential in using digital instruments to improve consumer awareness of the existing ADR procedures, for instance through EU-wide online campaigns. Moreover, digital tools, especially AI solutions could be useful and cost-effective for ADR entities. AI-based solutions might be particularly suited for applications in case management systems and classification of cases leading towards more consistency to resolve similar disputes and faster approach. Additionally, the use of AI tools could help to redirect and signpost consumers towards a competent ADR body depending on the nature of the dispute, also in a cross-border setting. Furthermore, digitalisation has clear potential in solving language differences between parties by automated translation services.

[2] Ibid.

Ecommerce Europe considers that the use of digital tools is still highly fragmented, with some countries making more use of it than others. We therefore believe that the Commission should encourage national governments to stimulate ADR bodies to invest in the development and uptake of digital tools. This should ideally be supported by government funding to ensure that digital tools would be available all across Europe and not only in countries where sufficient funding exists. While we thus strongly support incentivising the use of AI applications, we also recognize the importance of maintaining a human element. For instance, we think that digital tools could be very successfully combined with more traditional support tools (e.g., email, helpline) to ensure that consumers and traders with fewer digital skills have access to ADR.

6. Ecommerce Europe's views on the proposed policy options

The following policy options have been mentioned by the Commission during recent meetings and events to be considered for the revision. For each suggestion, you can find below Ecommerce Europe's key considerations.

- **The ODR Platform**

During recent events, DG JUST has expressed that they are questioning the added value of the ODR Platform, considering it is not used very often. This could mean that the ODR Regulation could be repealed or that significant improvements to the platform will be made. Ecommerce Europe shares the Commission's views on the limited value of the ODR platform. In practice, we observe that often the ODT platform just works to redirect consumers to national ADR schemes. Ecommerce Europe would therefore support finding a better alternative to the ODR platform. It should however be considered that two elements of the platform have proven useful. Namely, the mechanism through which consumers can directly interact with traders, and the translation services. To allow for effective cross-border dispute resolution, these options need to be integrated in any new system that would be designed.

- **Extension of the scope to non-EU traders**

Ecommerce Europe would in principle support an extension of the scope of the ADR directive which enables consumers and non-EU traders to resolve disputes via ADR mechanisms. As participation in ADR is (in most cases) voluntary for traders, it should be no problem for non-EU traders to participate voluntarily in ADR executed by European based entities. Ecommerce Europe believes that this might help consumers that purchase goods and services from outside the EU, but also foresees potential difficulties in the execution of an ADR decision against the non-EU trader in the jurisdiction of these traders.

- **Extension of the scope to certain non-contractual issues**

It has been mentioned that one of the potential revisions could be the extension of the scope of the ADR directive to certain non-contractions issues such as misleading advertising, bad pre-contractual information, etc. Ecommerce Europe finds that, if the scope would be extended to non-contractual issues, which in any case should only be possible on a voluntary basis, traders should also have the possibility to file non-contractual claims against consumers. For instance, there are increasing cases of consumer fraud (e.g., return fraud), which might very well be resolved through ADR procedures. However, we should also be cautious about the confusion it could create with regards to existing enforcement of such non-contractual issues.

- **Extension of the scope to C2C contracts concluded via an intermediary**

Ecommerce Europe foresees some obstacles in the extension to C2C contracts. Who would be the parties involved in such an ADR system? The intermediary should not be involved as a party in the dispute, as the contract is between the seller and the buyer. At most, it could offer consumers engaging in C2C contracts information on the referral to a relevant ADR entity. It should be considered how such an extension would

impact the number of cases being brought forward (considering for instance the increased use of social commerce) as well as the resources of ADR bodies.

- **ADR alignment with platforms' dispute resolution systems**

In principle, Ecommerce Europe supports alignment between different pieces of legislation, especially when applicable to the same actors. We therefore encourage the alignment of the ADR Directive with the obligations for online platforms regarding out-of-court dispute resolution established in the Digital Services Act (DSA). Where the disputes are not solely about the seller-buyer contractual relationship, but involve the platforms' services, the DSA states that recipients of the service shall be entitled to select any certified out-of-court dispute settlement body, free of service. These bodies have to be certified by the Digital Service Coordinator. We believe that this Article (art. 21) sufficiently covers the need for online platforms to engage in out-of-court dispute resolution mechanisms. We urge the Commission to first allow the DSA to enter into application before drawing conclusions on the need to specifically regulate platforms' dispute resolution systems further. Additionally, we would like to stress the difference between a complaint and relative internal complaint handling mechanisms from platforms and dispute settlement. We believe that consumers are often able to resolve their complaint through the trader's complaint handling processes before they turn into a dispute at all. Finally, Ecommerce Europe is cautious about introducing business-model specific obligations in the ADR Directive. We would rather support principle-based rules, that are not overly prescriptive and also allow companies the flexibility to compete with other businesses by offering the best possible customer service.