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COMMISSION STAFF WORKING DOCUMENT

Subsidiarity Grid

Accompanying the document

Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

**amending Directive 2013/11/EU on alternative dispute resolution for consumer disputes,
as well as Directives (EU) 2015/2302, (EU) 2019/2161 and (EU) 2020/1828**

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Revision of the ADR Directive - Subsidiarity Grid

1. Can the Union act? What is the legal basis and competence of the Unions' intended action?
1.1 Which article(s) of the Treaty are used to support the legislative proposal or policy initiative?
EU consumer protection legislation has served as a tool for strengthening the functioning of the Single Market through harmonization of national laws. For this reason, all consumer protection legislative acts have as a legal basis Article 114 of the TFEU. The complementarity between the objectives to promote the single market and to ensure a high level of consumer protection is made evident by the second paragraph of Article 169 TFEU, which states that the Union should promote the interests of consumers through measures adopted pursuant to Article 114 in the context of the completion of the internal market. By promoting common consumer protection standards across the Union, traders can operate across borders without having to constantly adapt their practices. Article 169 of the TFEU also states that EU measures shall not prevent any Member State from maintaining or introducing more stringent protective measures provided that they are compatible with the Treaties. In this way EU law provides a common basic level of protection to all consumers residing in the EU.
1.2 Is the Union competence represented by this Treaty article exclusive, shared or supporting in nature?
Consumer protection issues are a shared competence of the EU and Member States. Once EU legislation in this domain is adopted through the ordinary legislative procedure, the Member States are responsible for implementing and enforcing the EU rules.
2. Subsidiarity Principle: Why should the EU act?
2.1 Does the proposal fulfil the procedural requirements of Protocol No. 2¹:
- Has there been a wide consultation before proposing the act? - Is there a detailed statement with qualitative and, where possible, quantitative indicators allowing an appraisal of whether the action can best be achieved at Union level?
Before putting forward this proposal, the Commission consulted widely. Those consultation activities included, in line with the Commission's Better Regulation rules: - 2 public consultations (backward and forward-looking) published on the "Have your Say" website in all EU languages – over 100 responses were received for each questionnaire; - Online ADR assembly with participation of over 400 ADR practitioners and other consumer protection stakeholders; - Dedicated workshops with ADR competent authorities, ADR practitioners, European Consumer Centres, etc; - Studies including a data collection study based on national ADR questionnaires, interviews, case studies, etc.; a behavioural study and a mini legal study. - Other ADR-related events (e.g. participation of Commission in national ADR events, ADR networks, etc)

¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12016E/PRO/02&from=EN>

Detailed information on the consultation strategy and the outcome of the stakeholder consultations can be found in Chapter 3 of the Explanatory Memorandum to the proposal and in Annex 2 of the Impact Assessment. The Explanatory Memorandum (Chapter 2) and the Impact Assessment (Chapter 3) contain a section on the principle of subsidiarity.

2.2 Does the explanatory memorandum (and any impact assessment) accompanying the Commission's proposal contain an adequate justification regarding the conformity with the principle of subsidiarity?

The revised ADR directive will provide access to all consumers and traders to high quality and cost-efficient out of court dispute resolution adapted to digital markets. Making ADR simpler and more cost-effective to solve disputes with a cross-border dimension, including possible collective ADR proceedings, could help strengthening cross-border purchases of goods and services, notably in online shopping but also consumption of tourism and travel services within the EU and beyond. Therefore, there is a strong added value in an action at EU level, as most of the problems that this proposal tackles are not limited to the territory of one Member State but are of a cross-border nature.

The objectives of the proposed action cannot be sufficiently achieved by Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the EU. EU action will ensure a consistently high level of consumer protection, more consumer trust in ADR and more networking and exchange of best practices at EU level.

2.3 Based on the answers to the questions below, can the objectives of the proposed action be achieved sufficiently by the Member States acting alone (necessity for EU action)?

(a) Are there significant/appreciable transnational/cross-border aspects to the problems being tackled? Have these been quantified?

The ADR Directive provides an EU out-of-court dispute resolution legal framework to help EU consumers and traders resolve domestic and cross-border disputes in a fair, transparent, affordable and fast way. Nevertheless, the evaluation found that cross-border ADR uptake remained at very low levels due to several barriers:

- consumers may not be sufficiently aware and informed of the applicability of consumer protection rules and of the existence of cross-border means of redress;
- traders are not always keen to engage in ADR;
- other practical challenges e.g. costs, language barriers, no clarity on the applicable law to be used in a cross-border context, lack of easily accessible online procedures.

The Proposal is tackling such issues notably by providing for the creation of ADR contact points to advise consumers with cross border purchase issues on the best redress solutions.

(b) Would national action or the absence of the EU level action conflict with core objectives of the Treaty² or significantly damage the interests of other Member States?

Without EU level action, different national initiatives to address cross-border ADR disputes would likely result in divergent national rules and potentially overlapping requirements, leading to legal uncertainty and increasing administrative burden for companies to operate cross-border, therefore conflicting with the Treaty objective of establishing the internal market. The revised ADR Directive

² https://europa.eu/european-union/about-eu/eu-in-brief_en

will retain the minimum harmonisation approach whilst the main objective is to widen its scope to cover more consumer disputes, simplify cross-border ADR by improving assistance to consumers and traders and by user-friendly tools for better signposting of ADR entities.
(c) To what extent do Member States have the ability or possibility to enact appropriate measures?
Member State measures on their own could not bring about sufficient improvement in simplifying cross-border ADR. Coordinated action is required to achieve the objectives of this initiative; for instance, creating ADR contact points across all the EU Member States to promote cross-border ADR, assist consumers by signposting them to competent ADR entities, and giving practical assistance e.g. machine translation, documentation, etc. These ADR contact points aim to increase ADR uptake to resolve cross-border disputes. The proposal incentivises the use of digital tools to simplify cross-border ADR (communication, case-handling, document management, etc) as to render cross-border faster, more consistent and simpler.
(d) How does the problem and its causes (e.g. negative externalities, spill-over effects) vary across the national, regional and local levels of the EU?
Given the minimum harmonisation approach, Member States have different ADR frameworks, architectures and fees - depending on their resources, legal culture, perception, etc - which hinder in different ways the access to cross-border ADR. Since these are cross-border disputes, they are present across national, regional and local levels throughout the EU. The objective of this initiative is exactly to improve the access both for traders and consumers to cross-border ADR.
(e) Is the problem widespread across the EU or limited to a few Member States?
Low cross-border ADR uptake is registered across all the EU Member States; nevertheless in certain Member States, out-of-court dispute resolution in general is still limited for various reasons e.g. ADR was only introduced through the transposition of the ADR Directive in 2015; lack of resources and investment in ADR through public budget, or complex architecture e.g. where many ADR entities are established without a residual ADR entity, high rate of rejected cases, etc. The evaluation concluded that although the ADR Directive has been transposed across all the EU Member States and there has been good progress in access to out-of-court dispute resolution; there are persistent gaps in its implementation. The Commission has been awarding grants to quality ADR entities since 2018 to improve awareness-raising, digitalisation, capacity building, etc.
(f) Are Member States overstretched in achieving the objectives of the planned measure?
The planned measures build on what exists at national and EU level today and therefore, do not require from Member States to overstretch. The newly establish ADR contact points will absorb the current ODR contact points - in the vast majority already sitting in European Consumer Centres. These bodies have a lot of experience in assisting consumers resolve cross-border disputes an established infrastructure to assist consumers in cross border cases and they promote consumer rights in general. The EU budget is already earmarked to support the ECC-Net and award ADR grants through the Single Market Programme. Given that the scope of the ADR Directive is to be widened to cover disputes related to statutory consumer rights be they explicitly written in a contract or not, some additional resources may be needed for ADR entities.

(g) How do the views/preferred courses of action of national, regional and local authorities differ across the EU?
Member States expressed support for the measures planned under this proposal, during the meetings bringing together Member State representatives from Ministries responsible consumer protection (e.g. Informal Ministerial in Prague under the Czech Presidency of the Council) and in replies by authorities to the Call for Evidence and other consultation activities in the context of this initiative. In general, they considered that boosting traders' participation in ADR and strengthening the accreditation process of national ADR entities as crucial to increase consumer trust in cross-border ADR. No objections were raised by the authorities on the widening of the scope of the ADR Directive.
2.4 Based on the answer to the questions below, can the objectives of the proposed action be better achieved at Union level by reason of scale or effects of that action (EU added value)?
(a) Are there clear benefits from EU level action?
There is a strong value added in improving the access to quality ADR to resolve cross-border disputes in the Single Market. Traders and consumers will benefit from effective and fair procedures to solve their disputes and will therefore increase their trust in selling or purchasing in another EU country. Legal costs will be lower than having to use tribunals. A robust cross-border ADR framework with the possibility of participation by third country traders will create a level-playing field for traders operating in the single market.
(b) Are there economies of scale? Can the objectives be met more efficiently at EU level (larger benefits per unit cost)? Will the functioning of the internal market be improved?
A stronger ADR framework will enable more consumers to benefit from effective redress. Simpler and streamlined procedures will reduce the overall cost of ADR processes across all MS. Both effects will play together and reduce the average cost for one ADR process in a similar manner in all EU countries. There will be improved consistency among outcomes of similar disputes, possibilities to group them in one collective case, allowing to make better use of the limited resources in ADR entities. Long-term investments into digitalisation of ADR processes will also lead to substantial cost savings for all actors in ADR. Online traders will no longer have to provide the link to the ODR platform on their websites; hence reducing information obligations.
(c) What are the benefits in replacing different national policies and rules with a more homogenous policy approach?
The proposal does not seek to change the national ADR architectures but the targeted amendments aim at simplifying cross-border ADR, boosting trader participation in ADR through the duty to reply to enquires by ADR entities as to whether they will be participating or not in an ADR process and making it more cost-effective by reducing the administrative burden on ADR competent authorities and on ADR entities. The proposal does not intend to make trader participation mandatory; Member States will remain free to decide on binding v. non-binding ADR outcome, mandatory v. voluntary trader participation in ADR.
(d) Do the benefits of EU-level action outweigh the loss of competence of the Member States and the local and regional authorities (beyond the costs and benefits of acting at national, regional and local levels)?

Member States will retain their current power to accredit and monitor the ADR entities established on their territories and the competence to design the overall ADR architecture. The authorities will continue notifying the quality ADR entities to the Commission.
(e) Will there be improved legal clarity for those having to implement the legislation?
It is expected that EU rules will lead to improved legal certainty as compared to today's fragmented ADR framework e.g. in terms of coverage of non-contractual disputes and willingness by non-EU traders to participate in ADR. Moreover, the possibility to set up collective ADR structures at national level will lead to more consistent decisions on similar cases.
3. Proportionality: How the EU should act
3.1 Does the explanatory memorandum (and any impact assessment) accompanying the Commission's proposal contain an adequate justification regarding the proportionality of the proposal and a statement allowing appraisal of the compliance of the proposal with the principle of proportionality?
The proposal does not go beyond what is strictly necessary to achieve its objectives. It maintains the minimum harmonisation approach, enabling a degree of flexibility on Member States to decide whether trader participation in ADR is mandatory or voluntary, or mixed depending on the market sectors; whether the outcome of ADR is to be binding or not; the implementation of collective ADR; consumer fees; ADR framework, etc. Streamlining reporting obligations for ADR entities and competent authorities will improve the data comparability across the EU. Although the introduction of the trader's duty of reply to enquiries by ADR entities is expected to increase business engagement in ADR and increase some costs, the costs will be offset by the removal of disclosure obligations for traders who do not intend nor are obliged to participate in ADR. Moreover, the repeal of the ODR Regulation will alleviate the burden on online traders of including the link to the ODR platform and a dedicated email address on their website. The impact assessment carried out a proportionality test to ensure that proposed policy options are proportionate based on costs and resources. The proposal has an ambitious and future-proof approach leading to higher benefits for consumers and society in general.
3.2 Based on the answers to the questions below and information available from any impact assessment, the explanatory memorandum or other sources, is the proposed action an appropriate way to achieve the intended objectives?
(a) Is the initiative limited to those aspects that Member States cannot achieve satisfactorily on their own, and where the Union can do better?
The proposal focuses on cross-border aspects and introduces solutions which could not be achieved by Member States on their own, as explained above in replies to the sub-questions of question 2.3.
(b) Is the form of Union action (choice of instrument) justified, as simple as possible, and coherent with the satisfactory achievement of, and ensuring compliance with the objectives pursued (e.g. choice between regulation, (framework) directive, recommendation, or alternative regulatory methods such as co-legislation, etc.)?

The review to the ADR Directive is planned through targeted amendments as the aim is to strengthen the EU ADR framework rather than to revamp it. The Commission is issuing a Recommendation addressed to online marketplaces and EU trade associations to incentivise rather than to oblige them to set up dispute resolution mechanisms in alignment with the quality criteria laid down in the ADR Directive. In addition, the Commission plans to repeal the ODR Regulation which provides for an EU ODR Platform managed by the Commission which has proved not to be cost-effective given the low number of disputes which are resolved through it.
(c) Does the Union action leave as much scope for national decision as possible while achieving satisfactorily the objectives set? (e.g. is it possible to limit the European action to minimum standards or use a less stringent policy instrument or approach?)
A directive is binding as to the result of achieving the functioning of the internal market, but it leaves to the national authorities the choice of format and methods. This will enable Member States to amend the legislation in force (as a result of having transposed Directive 2013/11/EU) to the extent necessary to ensure compliance, hence minimising the impact of such a reform on their legislative systems. Due to the minimum harmonisation approach, many regulatory choices are left to the Member States.
(d) Does the initiative create financial or administrative cost for the Union, national governments, regional or local authorities, economic operators or citizens? Are these costs commensurate with the objective to be achieved?
The proposed provisions are limited to what is necessary and proportionate to achieve the objectives of the initiative while respecting national legal traditions and, where possible, providing flexibility to Member States to achieve the requirements in line with their national laws and systems. The amendments proposed contain cost reduction measures and therefore it is expected that new costs will be balanced by cost reductions.
(e) While respecting the Union law, have special circumstances applying in individual Member States been taken into account?
Existing Member States' ADR frameworks were thoroughly examined in the preparation of this proposal (including through a legal mapping carried out in the external contractor study). The proposed provisions should apply without difficulties to all Member States.