

## **Legislative proposal amending the current directive on alternative dispute resolution between consumers and businesses worsens the situation**

Recommendations on the legislative proposal amending the current Directive 2013/11/EU on alternative dispute resolution for consumer disputes

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### **Summary:**

- *The European Commission presented a proposal to amend Directive 2013/11/EU on alternative dispute resolution (ADR) for consumer disputes.*
- *The Verbraucherkommission Baden-Württemberg acknowledges the need to revise the existing directive, but considers some of the major amendments in this draft to be highly detrimental to consumers and the long-established instrument of consumer ADR.*
- *The Verbraucherkommission Baden-Württemberg therefore recommends that the state government of Baden-Württemberg and all decision-makers involved should not approve this initiative and that they should advocate strongly in Berlin and Brussels for the rejection of this amendment initiative and in favour of the recommended changes.*
- *The attractiveness of consumer ADR can and should be increased by making it (partially) free of charge not only for consumers but also for businesses, e.g. by creating the cost incentives that the Verbraucherschutzministerkonferenz (Conference of Consumer Protection Ministers) called for on 30 June 2023 (e.g. introduction of free-of-charge proceedings at the conciliation body for proceedings up to a fixed amount in dispute [de minimis limit]) or similar (e.g. three proceedings per company per year free of charge). This could be achieved immediately at German level.*

### **Overview:**

*Alternative dispute resolution (ADR) has proven to be a useful and tried-and-tested means of resolving disputes between consumers and companies: reaching an amicable settlement is the best form of dispute resolution and also avoids the time-consuming process of going to court. Since 2016, any dispute arising from a consumer contract can be settled by an impartial ADR entity. The Verbraucherkommission Baden-Württemberg accompanied the process of setting up this ADR option from the outset and issued recommendations. Unfortunately, practice over the past few years has shown that, on the one hand, comparatively few companies have taken part in ADR and, on the other hand, the level of awareness on the consumer side was not very high. The*

*Verbraucherkommission Baden-Württemberg hoped that an amendment to the ADR directive would improve the situation. However, the current draft directive is heading in the wrong direction. In the following, the Verbraucherkommission Baden-Württemberg highlights the problems and makes specific recommendations.*

## **Background**

The authors of the draft directive amending the current Directive 2013/11/EU on alternative dispute resolution for consumer disputes state in the recitals that the expectations placed in the original Directive 2013/11/EU are not fully met.

- Access to ADR often fails due to a lack of knowledge and trust on the part of consumers;
- the willingness of traders to participate in this procedure is too low;
- the scope of application is too narrow;
- Access is hindered as it is often not clear which ADR entity is competent and as language problems exist as well as barriers for vulnerable persons - and other factors.

These findings appear to be correct; however, the consequences drawn from this are not adequately addressed in the current EU draft directive. This can be observed in the following three problems.

### **Problem n° 1: Lack of awareness and fees as an obstacle**

The proposed amendments to the directive do not contribute to making ADR better known to consumers and reducing the reluctance of companies. They actually undermine these objectives.

Background: Informing consumers about the ADR procedure is regulated in Art. 13 of Directive 2013/11/EU. According to paras. 1 and 2, traders who are legally or contractually obliged must provide corresponding information in their general terms and conditions and on their website. Although this obligation has been extended to all (larger) companies in Section 36 Verbraucherstreitbeilegungsgesetz (German Act implementing the ADR directive), it has not made a significant impact on the awareness of consumer ADR. It can be observed that these announcements are rarely used in the event of a dispute. In comparison, the information to be provided by the trader about this procedure and his (existing or non-existing) willingness to participate (implemented in Section 37 VSBG) in accordance with Paragraph 3 of Article 13 is more effective.

However, this proposal for a directive aims to abolish this obligation to provide information. This is not in the interests of a better ADR culture and consumer awareness. It

is true that ADR is not sufficiently observed in practice. In view of its central importance, this must be taken as an opportunity to improve the provisions of Article 13(3) - and not to abolish them.

Proposal from the Verbraucherkommission Baden-Württemberg:

Since uncertainties have occurred as to the point in time at which the information on the ADR procedure must be provided, it should be specified that it must already be provided with the first negative response to the consumer's complaint.

Further proposal concerning fees:

The attractiveness of consumer ADR can and should be increased by making it partially free of charge not only for consumers but also for traders. The cost incentives that the Verbraucherschutzministerkonferenz (Conference of Consumer Protection Ministers) called for on 30 June 2023 (e.g. introduction of free-of-charge proceedings at the conciliation body for proceedings up to a fixed amount in dispute [de minimis limit]) or similar (e.g. three proceedings per company per year free of charge) appear suitable. This would also not exclude the charging of minor expenses. This could be achieved immediately at German level and should be realised without delay. This can be justified essentially by the fact that access to justice for consumers is required by the rule of law, particularly for smaller amounts in dispute, especially as this avoids the need for more expensive court proceedings. Companies must also be incentivised on a broad basis to allow themselves to try out and to be convinced by the added value of ADR procedures without undergoing cost risks, in particular to overcome prejudices and misconceptions, so that they are then willing to participate in the long term. One common misconception, for example, is that ADR only mediates compromises without legal assessment and that it is not impartial but on the side of the consumer.

**Problem n° 2: Declaration by traders**

The provision also contained in Art. 13 (3) of the current directive that the trader must also declare his (lack of) willingness to participate in this procedure should be abolished. This can discourage consumers from at least attempting to initiate such an ADR procedure.

Proposal from the Verbraucherkommission Baden-Württemberg:

In addition, it should be considered to establish an obligation to indicate the competent ADR entity (with contact details, possibly a direct link to its homepage) on the business papers of traders (similar to the entry in the trade register pursuant to Section 125a HGB, Section 35a GmbHG, etc.). This would make the institution of consumer ADR much more visible than the information in the general terms and conditions or/and on the website, which can only be found with some effort and searching.

### **Problem n° 3: Encouraging the willingness of entrepreneurs to participate**

According to the proposal for the directive, the abolition of the information obligation under Art. 13 (3) is to be compensated for by obliging the trader in a new Art. 5 (8) to respond within 20 working days to a request from an ADR entity as to whether it will participate in the ADR procedure.

The Verbraucherkommission Baden-Württemberg points out: This expectation is erroneous because a consumer who has not been informed about this procedure will not make a corresponding request. But even if he has - more or less by chance - learnt of this possibility, this obligation to reply is in no way suitable for triggering a willingness to participate. On the contrary, in most cases the request is likely to be perceived as a nuisance and trigger a negative reaction or, as it is not linked to any sanction, remain unheeded.

#### Proposal from the Verbraucherkommission Baden-Württemberg:

In order to encourage traders' willingness to participate, an offer of simple moderation analogous to Section 9 (4) of the Rules of Procedure of SÖP (Schlichtungsstelle für den öffentlichen Personenverkehr, German ADR for public transport) should instead be submitted at the same time as the request for conciliation. This would give the company the opportunity to avoid formal ADR proceedings by proposing an agreement. Instead of the procedural costs otherwise incurred, only a flat fee for expenses could be charged, at least in the area of state consumer ADR entities.

### **Future perspectives: Impartiality of ADR and contact points**

It is advisable not to trigger a defensive reaction from companies towards the ADR procedure, but to work towards a positive attitude. A significant contribution to this could be made by counteracting the impression that ADR is a one-sided offer focussed on consumer interests. If, as announced, the intermediary function of the EU ODR platform is replaced by a support function of contact points in the Member States (Art. 14 (2) in the form of the draft), this should be taken into account when appointing them; in any case, for this reason - in contrast to the draft - not only consumer protection organisations should be able to be entrusted with this task.

#### Proposal from the Verbraucherkommission Baden-Württemberg:

On the other hand, it would be beneficial to set up independent contact points that can be called upon by consumers and traders throughout the EU and forward the application to the competent ADR entity while simultaneously initiating an informal moderation procedure. Automated processes and translation tools could also be used. This would eliminate access and acceptance problems and avoid procedural effort and costs.

## **Conclusions**

The Consumer Commission considers some of the major proposals contained in the draft amendment to Directive 2013/11/EU on alternative dispute resolution for consumer disputes to be detrimental to consumers and the long-established instrument of consumer arbitration.

It therefore recommends that the state government of Baden-Württemberg does not approve this initiative and strongly advocates for the rejection of this amendment initiative, as well as for the recommended, sustainable changes.

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*This paper was adopted with one abstention.*