



**Independent
Retail Europe**

**COMMISSION PROPOSAL AMENDING
DIRECTIVE 2013/11/EU ON ALTERNATIVE
DISPUTE RESOLUTION FOR CONSUMER
DISPUTES
- COMMENTS OF INDEPENDENT RETAIL EUROPE -**

DECEMBER 2023



EXECUTIVE SUMMARY

Independent Retail Europe welcomes the European Commission's [proposal](#) for a Directive amending the Directive on alternative dispute resolution for consumer disputes. The Commission's proposal aims to simplify and modernise the rules on out-of-court dispute resolution. To ensure that this revision delivers an optimal level of modernisation whilst respecting the nature of ADR entities, and without creating legal uncertainty that would discourage traders from joining ADR schemes, we invite the co-legislators to consider the following aspects.

ADR entities are private dispute resolution bodies that act as a mediator with the objective of finding a settlement in a dispute between a consumer and a trader, in case the consumer has incurred a damage or loss as a result of a contract with that trader. ADR entities are neither a court, nor a public enforcement authority. Their role is limited to finding the best solution, in the form of a settlement, in contractual disputes between consumers and traders. ADR entities aim to find solutions to an individual dispute that arose due to concrete damages or losses that have been incurred by a complainant as a result of a contract. Given ADR entities' specific nature, they cannot be asked to interpret the law (that is the exclusive role of courts), nor to impose actions that constitute enforcement (i.e. bring about general behavioural changes not limited to the individual dispute at stake, or sanctions).

Given the specific nature and purpose of ADR entities, **non-contractual and pre-contractual situations that did not lead to the conclusion of a contract shall not be included in the scope of ADR schemes.**

In addition, an extension of ADR to situations where there is no calculable or demonstrable loss or damage as a result of a contract would lead to a considerable increase of unfounded or inadmissible disputes. This will discourage traders from participating in ADR and lead to an overburdening of ADR entities as well as many disappointed consumers.

Concerning claims about abusive practices and terms, consumers shall only be able to request ADR when the disputed practice is listed as unfair under the UCPD (or under other consumer rights legislation) or when there is a previous court judgment/decision that identifies such practice as unfair or misleading. It should be clarified that only practices that have been previously identified as unfair or abusive by law can be subject to a claim under the ADR legislation. Otherwise, there is a risk of ADR entities deciding whether or not a certain practice is unfair or misleading. This is the role of the legislator and the courts, not of ADR entities.

COMMENTS OF INDEPENDENT RETAIL EUROPE ON THE SCOPE OF THE COMMISSION PROPOSAL AMENDING THE DIRECTIVES ON ALTERNATIVE DISPUTE RESOLUTION FOR CONSUMERS

1. Non-contractual and pre-contractual situations that do not lead to the conclusion of a contract shall not be in the scope of ADR

The current proposal extends the scope of voluntary ADR processes against any trader selling goods or services to consumers residing in the EU. Further, it includes in the scope non-contractual and pre-contractual stages. We call on co-legislators to remove non-contractual and pre-contractual stages

from the scope of application when such situations have not led to a contract. Maintaining those situations would undermine the efficiency of ADR for consumers while dis-incentivising traders to participate in ADR schemes.

First of all, a contract sets out the rules and obligations of each party. Without it, there is no clear framework for and proof of actual damage or financial loss. **An extension of the scope of ADR schemes to cases where the consumer did not conclude a contract creates major uncertainty about the extent of the consumer's loss to be compensated through ADR.** It would undermine consumers' ability to demonstrate that they have standing to request mediation through ADR.

Moreover, extending the scope to non-contractual and pre-contractual situations that did not lead to a contract would fundamentally change the nature of ADR schemes, transforming them into (private) courts and/or enforcement authorities: ADR entities would suddenly be required to assess if a certain practice is misleading or unfair in itself, irrespectively of whether there is a consumer damage to be compensated. What kind of solution could ADR propose to an individual complainant who does not have a contract and, where therefore, no concrete loss/detriment can be established. It is certainly not in the competences of ADR to impose general behavioural remedies that go beyond the compensation of an individual damage resulting from the individual dispute.

Allowing ADR for non-contractual and pre-contractual situations where there is no final contract will **open the door to abuses** as, in the absence of any formal contract, this will enable to exploit the possibility of making unfounded claims or engaging in opportunistic behaviour. It can also lead to a **massive increase in unfounded or inadmissible disputes** since consumers will often not be able to evaluate or demonstrate their legal position in circumstances where there is no contract. It risks leading to arbitrary decisions and is likely to lead to an overburdening of existing ADR schemes.

Moreover, given the uncertainty created for businesses, which may suddenly face claims from totally random persons (since there is no need for a contract), it is expected that **the extension of the scope to pre-contractual stages and abusive practices outside of the conclusion of a contract would act as a major barrier for businesses, causing them to avoid ADR as much as possible.**

Key issues:

- ➔ **Non-contractual and pre-contractual situations that did not lead to the conclusion of a contract shall be excluded from the scope.**
- ➔ **If there is no contract, there is a strong uncertainty about the extent of the consumer's loss and possible compensation.**
- ➔ **High risk of the rise of inadmissible disputes, which will overburden ADR schemes.**
- ➔ **The extension of the scope to pre-contractual stages and abusive practices outside of the conclusion of a contract would act as a major barrier for businesses to participate in ADR schemes.**

2. Legal certainty established by judges of unfair and misleading practices

Where a practice is not explicitly listed as unfair under the UCPD, it is up to the legislator or the courts to assess whether that practice fulfils the criteria in the UCPD to be considered as unfair and/or misleading. The same goes for unfair clauses under the UCTD.

However, the current proposal would allow ADR entities (which are private schemes) to determine and assess whether a particular practice is misleading and unfair, outside of the well-established legal framework. It is not the task of the ADR entity to assess the unfairness of a particular practice or contract; ADR entities can only rely on existing legal decisions on exactly the same practice as the one at stake. Any assessment of the legality of a practice or wording is and must remain the role of a judge.

To respect legality, and ensure legal certainty for companies, consumers and society alike, it is crucial that consumers can only request ADR where the disputed practice is already identified as unfair under the UCPD, or any other consumer rights legislation, or when there is a previous judgment or a clear decision from an enforcement authority that identifies the specific practice as unfair or misleading.

Consumers shall only be allowed to request for ADR where the disputed practice is already considered as unfair under the UCPD, or if there is a previous judgment (or at least a final enforcement decision by the competent national authorities) stating that such practice is unfair or misleading.

Key issues:

- ➔ The proposal shall clarify that ADR cannot be resorted to assessing the unfairness of a practice, but only when a practice has already been explicitly identified as unfair under the black list of the UCPD, by a judgment of a court or a final decision from an enforcement authority.
- ➔ It is up to a court to assess whether or not a practice fulfils the criteria set out in the UCPD or the UCTD to be considered an unfair and/or misleading claim, and not to ADR entities.

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*Established in 1963, **Independent Retail Europe** (formerly UGAL – the Union of groups of independent retailers of Europe) is the European association that acts as an umbrella organisation for groups of independent retailers in the food and non-food sectors.*

Independent Retail Europe represents retail groups characterised by the provision of a support network to independent SME retail entrepreneurs; joint purchasing of goods and services to attain efficiencies and economies of scale, as well as respect for the independent character of the individual retailer. Our members are groups of independent retailers, associations representing them as well as wider service organizations built to support independent retailers.

Independent Retail Europe represents 23 groups and their over 462.000 independent retailers, who manage more than 737.000 sales outlets, with a combined retail turnover of more than 1,385 billion euros and generating a combined wholesale turnover of 604 billion euros. This represents a total employment of more than 6.391.000 persons.

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