

# Position Paper

## **UEAPME<sup>1</sup> position on the Regulation of the European Parliament and of the Council on online dispute resolution for consumer disputes (Regulation on consumer ODR) and on the 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)**

### **1. General remarks**

As already stated in our previous position papers and contributions<sup>2</sup>, UEAPME considers the methods of alternative dispute resolution (ADR) as very helpful for the enterprises. Costs are often lower than in normal court cases, and the procedure is faster. Businesses and consumers alike are afraid of enforcing their claims in the jurisdiction of another Member State, due to the financial risks and all other barriers. SMEs need to have access to an efficient and inexpensive system to resolve litigation, both within their Member State and across borders within the European Union. A crucial barrier to doing this rests in the complexity and costs of cross border dispute resolution should something go wrong.

It is important to enhance the possibilities for an effective enforcement of claims in cross border trade issues and to strengthen the trust and confidence for cross border trade. Many SMEs, and especially micro-enterprises, cease trading every year because of unpaid bills they cannot afford to pursue. Therefore, UEAPME welcomes the Commission's initiatives in this area and supports its efforts to find a solution to this issue.

There is a growing tendency at European law making level to increase the information requirements on the trader and label it "consumer protection". In fact, the opposite is true: the consumer is overwhelmed by the information. Furthermore, traders are overburdened by information requirements and especially SMEs with no legal department will hardly be able to comply with all the information requirements in a sufficient way. This invites competitors to file claims against SMEs for infringing competition.

UEAPME suggests customising the extensive information duties to what is practical and necessary, and delete the other detailed requirements. Besides, the (economic) impact of all requirements still should be assessed.

Moreover, it is a contradiction that the European Commission on one hand wants to enhance cross border trade, but creates on the other hand many and complicated information requirements. As such information requirements are even implemented differently in the various Member States, it is already extremely difficult for large businesses with an own legal department to comply with all information requirements of the various Member States. For SMEs, this is "mission impossible".

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<sup>1</sup> UEAPME subscribes to the European Commission's Register of Interest Representatives and to the related code of conduct as requested by the European Transparency Initiative. Our ID number is 55820581197-35.

<sup>2</sup> E.g. UEAPME position paper on the consultation paper on the use of the alternative dispute resolutions (ADR) as a means to resolve disputes related to commercial transaction and practices in the EU (May 2011).

Therefore, it cannot not be repeated often enough, it is important not to overburden traders with unnecessary information obligations.

The enhancement of ADR instruments can be very profitable in business and consumers, but also in business to business relations. However, ADR can never fully substitute the judicial enforcement of claims by litigation in the courts of the Member States. It is important that the access to the juridical systems of the Member States is not restricted through ADR models.

As a general principle, UEAPME strongly recommends that the application of ADR has to be strictly voluntary and an additional option. The possibility of choosing ADR could, in our opinion, be foreseen in the contract. It also must be ensured that safeguards are introduced to prevent frivolous claims from being permitted to the ADR system.

UEAPME is absolutely opposed to ADR in collective dispute resolutions. In our opinion, ADR should only be used in conflicts on an individual basis. In the same framework, UEAPME is opposed to considering ADR at the same level of collective redress and to linking these two instruments, which are very different in their conception and mechanism.

UEAPME is also concerned that the current proposals are not sufficiently balanced between businesses and consumers, and this threatens the success of such an important initiative.

## **2. Regulation of the European Parliament and Council on online dispute resolution for consumer disputes (Regulation on consumer ODR)**

UEAPME welcomes the establishment of an online platform in all EU languages and the possibility via an online template to start an ADR proceeding for contracts concluded online. It needs to be kept in mind that the establishing of an online platform will not be able to solve all problems. Even with a Regulation on consumer ODR barriers such as language, different mentality, geographical distance between business and consumer still remain.

### **Article 2, Scope**

It is important that the scope also includes claims from consumer against traders, but also from traders against consumers, e.g. non-payment or reduced payment.

### **Article 4, Definitions**

Various definitions, e.g. “trader is established”, vary in the Regulation and Directive. It is important that definitions are not just similar but exactly the same; otherwise, they will only lead to confusion and give lawyers a good opportunity to complicate the situation by creating an artificial distinction between the respective definitions. Different wordings will complicate the situation without bringing any benefit. If the same meaning is envisaged, the same terms must be used both in the Regulation and in the Directive.

### **Article 8, subsection 6, Processing and transmission of a complaint**

According to subsection 6, in the event that the consumer and the trader have agreed on more than one ADR entity, the consumer has the choice to select one of the ADR entities. It is difficult to understand that in the event that both the consumer and the trader would be fine with several ADR bodies, the consumer will be granted a unilateral right to choose the ADR entity. We suggest that in such cases, the person who files the claim should have the right to choose.

## **Article 9(b), Resolution of the conflict (Duration)**

According to Article 9(b), the dispute needs to be resolved in 30 days. Even though we welcome a speedy resolution of a conflict, we oppose strict deadlines. If a case is more complex it is important that both parties have the time needed to come up with an acceptable solution.

## **Article 13, Consumer information**

Pursuant to this article, the trader is obliged to inform the consumers about the ODR platform and about its e-mail addresses. We call to keep the compulsory information from the trader to the consumer at a responsible minimum and leave it up to the trader's discretion to provide more information to the consumer. The more information obligations are shifted to the trader, the more difficult it is for traders and in particular SMEs to engage in cross border trade. Furthermore, it would be a paradox that even traders who choose - for whatever reason - not to participate in the ODR platform, would still be obliged to provide information of it on their homepage and maybe even as part of their standard terms.

## **3. 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)**

UEAPME also welcomes the proposal on Consumer ADR, but stresses once again the importance to introduce safeguards against frivolous and meritless claims. In addition, it is important to strike a fair balance between consumers and businesses.

### **Article 2, Scope / Article 4, Definitions**

It is important that the scope also includes claims consumer against traders, but also traders against consumers, e.g. non-payment or reduced payment.

Various terms need to be either defined or more clearly defined, e.g. procedures for the out-of-court resolution of contractual disputes, goods.

### **Article 3, Relationship with other Union legislation**

It is stated that the Directive is without prejudice to Regulation (EC) No 864/2007 (Rome II). What this means in practice is not clear and therefore needs to be clarified, preferably through a rewording of the text of this provision.

### **Article 4, Definitions**

Various definitions, e.g. "trader is established", vary in the Regulation and Directive. It is important that definitions are not just similar but exactly the same; otherwise, they will only lead to confusion and serve lawyers a good opportunity to complicate the situation by creating an artificial distinction between the respective definitions. Different wordings will complicate the situation without bringing any benefit from the different wording. If the same meaning is envisaged, the same terms must be used both in the Regulation and in the Directive.

### **Article 8(c), Effectiveness (Costs)**

Pursuant Article 8(c), the ADR procedure should either be free of charge or at moderate costs for consumers. First of all, it is not understandable why the consumer should be privileged with regard to the costs. It is not considered as a fair balance if one party pays nothing or little and the other party pays the full amount of the costs. Secondly, the "loser pays" principle is also considered as a safeguard against frivolous and meritless

claims. Therefore, all parties should be obliged to pay the costs of the ADR procedure adjusted by the success of the claim.

### **Article 8(d), Effectiveness (Duration)**

According to Article 8(d), the dispute needs to be resolved in 90 days. Even though we welcome a speedy resolution of a conflict, we oppose strict deadlines. If a case is more complex it is important that both parties have the time needed to come up with an acceptable solution.

### **Article 9, Fairness**

Article 9 foresees a catalogue about which consumers need to be informed before agreeing to a suggested settlement. It is only fair if all parties to the dispute receive the same information, therefore the catalogue foreseen in Article 9 needs to be presented to all parties of a dispute, consumers and traders alike.

### **Article 10, Consumer information by traders**

The amount of information obligations from the traders is increasing more and more with each Directive / Regulation. It is already quite difficult to comply with all the information obligations for the trader of the current law. Every additional information requirement increases the burdens for the traders. Before adding a new information obligation for the trader, it should be first asked whether it makes sense, whether the information is relevant for the consumer and if both are answered yes, whether it could be reasonable that the consumer obtains this information by him/herself. The information requirement in this case is not reasonable as the trader has the choice of not participating in any ADR procedure and therefore should not be obliged to provide information which will not be of any value to the other party.

### **Article 12, General information**

It is neither understandable nor reasonable that business organisations shall be obliged to make publicly available at their premises and on their website the list of ADR entities referred to in Article 17(3). The traders who want to participate will be happy to provide such information the others should not be obliged to do so. In particular, if the business organisations consider the ADR Directive too unbalanced, they would need to recommend to their members not to rely on it - which is their right. In such situations, it would be obscure if they still would have to provide the information for the ADR entities both on their website and in their premises. On the other hand, if the ADR Directive will be beneficial for the businesses - and there is a strong possibility that it could - business organisation might themselves be interested in publishing relevant information on their websites.

### **Article 18, Penalties**

Penalties are not in line with the fundamental principle of voluntariness, on which ADR and in particular mediation is based upon, and as such must be avoided at all costs.

## **4. Conclusion**

The adoption of a simplified, cost effective and efficient system of European Alternative Dispute resolutions will offer significant benefits to the promotion of SME competitiveness and enterprise in the European Union and mark an important step in realising the vision of the Lisbon Process, that seeks to create a dynamic knowledge based globally competitive Europe.

The new system needs to be cost effective giving access to all, to generate quality results, should be well publicised and open to all and SMEs should have the option to insure against the cost of using the scheme.

Both the Regulation and the Directive need to be more balanced than the current drafts, and in particular the information requirements of the traders need to be kept to a reasonable amount.

Even though the Regulation and Directive were drafted from the same DG and came out at the same time, the definitions are not consistent. Keeping in mind that DG Justice is currently preparing a B2B ADR proposal, it needs to be ensured that definitions are not just similar but exactly the same; otherwise they will only lead to confusion among business community and consumers. If the same meaning is envisaged, the same terms must be used both in the Regulation and in the Directive. The same principle should apply to the ADR procedures; there is no need to have different procedures for similar mediation processes.

UEAPME welcomes the European Commission's interest in this area, urges the earliest possible action and would be happy to support its work by participating in any ad-hoc "Steering Group" or "Working Party" and confirms its willingness to assist in this area.

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