

# RECOMMENDATIONS FOR A POWERFUL DIRECTIVE ON ALTERNATIVE DISPUTE RESOLUTION FOR CONSUMER DISPUTES (ADR)

Recommendations of the Federation of German Consumer Organisations (Verbraucherzentrale Bundesverband – vzbv) on the trilogue negotiations (COM(2023) 649)

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## Legal information

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# INTRODUCTION

The European Commission's proposal for a revised Directive on alternative dispute resolution for consumer disputes (ADR) of 17 October 2023 unfortunately does not adequately address the two main EU-wide problems with ADR. Although the European Parliament (Parliament) has fortunately at least supported mandatory ADR for air carriers and maintained the obligations to inform consumers about ADR, it is disappointing that the opportunity for a fundamental reform has not been seized. The Federation of German Consumer Organisations (Verbraucherzentrale Bundesverband - vzbv) regrets that neither the European Commission (Commission) nor the European Parliament<sup>1</sup> nor the Council of the European Union (Council)<sup>2</sup> have endorsed mandatory ADR in the sectors yielding a high number of consumer complaints like tourism and transport.<sup>3</sup>

Since Parliament and Council adopted their mandates to start trilogue negotiations with the Commission, vzbv publishes recommendations for the upcoming negotiations in order to **highlight consumer interests** and to clarify critical aspects of the adjustments made by Parliament and Council to the Commission's proposal. A combination of the various adjustments by the Council and the Parliament would be the right way to best achieve the consumer protection purpose of the directive.

For further information and the substantive justification of the recommendations, please see vzbv's position paper of 1 February 2024.<sup>4</sup>

# RECOMMENDATIONS

## MANDATORY ADR AND SCOPE OF APPLICATION

✚ vzbv **strongly supports the Parliament's position** to make ADR **mandatory for air carriers** as introduced in recital 2a and Art. 1(1) point -1. Such an obligation to participate already exists in Germany (Air carriers are de facto stipulated by law to voluntarily found and join a sector-specific private ADR entity because otherwise the public ADR entity is responsible). This approach works very successfully: more than 38,000 requests for ADR were submitted in 2023.<sup>5</sup> This means that more than

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<sup>1</sup> European Parliament legislative resolution on the Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/11/EU on alternative dispute resolution for consumer disputes (...): [https://www.europarl.europa.eu/doceo/document/TA-9-2024-0139\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/TA-9-2024-0139_EN.pdf), 13/03/2024.

<sup>2</sup> Council of the European Union, Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/11/EU on alternative dispute resolution for consumer disputes (...). Mandate for negotiations with the European Parliament: <https://data.consilium.europa.eu/doc/document/ST-13398-2024-INIT/en/pdf>, 20/09/2024.

<sup>3</sup> See (in German) Consumer Report 2024: [https://www.vzbv.de/sites/default/files/2024-06/240606\\_vzbv\\_Verbraucher-report\\_2024\\_RZ\\_WEB\\_bf.pdf](https://www.vzbv.de/sites/default/files/2024-06/240606_vzbv_Verbraucher-report_2024_RZ_WEB_bf.pdf), p. 11 (last accessed 05/11/2024).

<sup>4</sup> See [https://www.vzbv.de/sites/default/files/2024-11/24-02-06\\_vzbv\\_statement\\_alternative%20dispute%20resolution%20benefits%20everyone.pdf](https://www.vzbv.de/sites/default/files/2024-11/24-02-06_vzbv_statement_alternative%20dispute%20resolution%20benefits%20everyone.pdf) and (in German): [https://www.vzbv.de/sites/default/files/2024-02/24-02-01\\_STN\\_Vorschlag-ADR-Richtlinie.pdf](https://www.vzbv.de/sites/default/files/2024-02/24-02-01_STN_Vorschlag-ADR-Richtlinie.pdf) (last accessed 28/10/2024).

<sup>5</sup> See the annual report for 2023 of Schlichtungsstelle für den öffentlichen Personenverkehr, p. 10 and Schlichtungsstelle Luftverkehr, Bundesamt für Justiz, p. 6.

one in four cases of all ADR procedures in Germany were linked to the aviation sector last year.<sup>6</sup>

- ✚ vzbv **supports the narrower scope of application foreseen by the Parliament and Council** texts. This counters the risk of ADR taking on a de facto market surveillance role. vzbv welcomes the Council's position that unfair commercial practices should not be included in the scope of application. vzbv at the same time is in favour of not unnecessarily restricting the scope<sup>7</sup> to give consumers the opportunity to exercise the rights they have.
- ✚ vzbv **does not recommend to follow the Parliament's adjustment** to implement separate rules for in-house procedures (recital 5a). Rather than clarifying, separate rules would blur the line between independent and qualified ADR and in-house procedures. The idea of having separate rules for procedures by platforms ignores the fact that, for systemic reasons, impartiality cannot be guaranteed here.

## COMPLIANCE WITH ADR OUTCOMES

- ✚ Article 11a inserted by the Parliament is not intended to apply to binding outcomes for consumers, as Article 11 does, but to outcomes for traders (binding and non-binding). vzbv would like to draw attention to the following: Currently, only one ADR entity in Germany makes binding decisions against traders.<sup>8</sup> It would not be possible to deprive from the obligation to follow this decision by means of a (unilateral) written explanation by the trader. In the case where the outcome of an ADR procedure is a proposal by the ADR entity, traders first need to accept the proposal so that it becomes binding. Only then are they obliged to comply with it. Non-compliance is only relevant from this point onwards. Therefore, vzbv is of the view that a duty for a written explanation would, in order to serve consumers, have to apply from the moment the trader rejects a proposal. If this duty is foreseen in the final text of the directive, the paragraph should set **minimum standards for the explanation** of the rejection. Consumers must not be fobbed off with short text modules like „our legal opinion differs from the proposal“. This would not help but only lead to more bureaucracy.

## DUTY TO REPLY AND INFORMATION OBLIGATIONS

- ✚ vzbv **supports the Parliament's position** to limit the time period for the duty to reply according to Art. 5(8) to 15 working days. Even for complex credit agreements consumers only have a cancellation period of 14 days – thus traders should be able to manage responding to requests within 15 working days. **vzbv regrets the Council's position** to extend the time period for the duty to reply to 40 working days in complex cases as this means consumers would de facto have to wait eight weeks to receive a response. This is too long in today's fast-moving everyday life. vzbv **welcomes the Council's wording** in recital 13a which clarifies that the

<sup>6</sup> In 2023, the ADR entities in Germany received over 135,000 requests, see: <https://www.schlichtungsforum.de/dateien/2024/07/Auswertung.pdf> (last accessed 04/11/2024).

<sup>7</sup> E.g. if a consumer wants a telephone connection but the provider refuses, this constellation would not be covered under the Council's position.

<sup>8</sup> Decisions of the Insurance Ombudsman Association (Versicherungsbund e.V.) are binding for insurance companies up to a value in disputes of 10.000 Euro, § 11 Abs. 1, § 10 Abs. 3 code of procedure of Versicherungsbund e.V.

longer time period (be it 40 working days or shorter) can only apply to *certain exceptional cases*, thereby minimising the risk of traders rashly claiming that a case would be complex. vzbv therefore calls for **clear criteria** for when a case can be considered to be complex due to its legal situation.<sup>9</sup>

- ❖ The Council's idea in recital 13a of interpreting non-compliance with the duty to reply (of Art. 8(5)) as a refusal to participate, contradicts the directive's aim to increase traders' participation. Therefore, in vzbv's view, the opposite would be important and correct: Traders who do not respond despite being contacted and legally obliged to do so must expect the case to be processed in an ADR procedure. vzbv welcomes the Parliament's position to adjust Art. 21 accordingly which calls on Member States to establish penalties for infringements.
- ❖ vzbv **strongly supports the Parliament's and Council's position** that Article 13(3) of the original directive must not be deleted (as proposed by the Commission). Consumers need clear information on ADR at the time a dispute arises. vzbv at the same time points out that the amended version of Article 13(3) agreed by the Council must not create legal uncertainty with regard to the question of which traders are obligated to give the information. It must be ensured that there is no risk that some traders will be exempt from the obligation to inform consumers about the possibility of ADR. The obligation placed on the trader to inform whether they participate in ADR must apply **to all traders**. In Germany, there is already uncertainty as to which traders have to inform about the competent entity. Is it only the traders who commit to or are obliged to participate<sup>10</sup> that are subject to the information obligation or any trader<sup>11</sup>? For vzbv, it is essential that in case of a dispute every trader considers their willingness to participate in ADR. However, only those who commit to or are obliged to use ADR entities should be required to refer to the relevant entity.

## ADR CONTACT POINTS AND INTERACTIVE TOOL

- ❖ vzbv **welcomes the Council's position** to adjust the Commission's modifications in Art. 14 but highlights the importance of aligning the recital and legislative text as there are still inconsistencies:
  - vzbv especially welcomes recital 15 according to which **any body** with relevant expertise can be designated as ADR contact point and that no cascade should apply for the designation. This must be reflected in Art. 14(2) in the text.
  - vzbv also welcomes that recital 15 states that the ADR contact points should have **clearly defined tasks**. This must be reflected in Art. 14(2) in the text.
- ❖ vzbv recommends, identical to Art. 14(1) of the current ODR Regulation<sup>12</sup>, to introduce an obligation for traders to refer to the new interactive tool by means of a link. This would increase awareness and would not mean any additional bureaucracy, as the existing notice would only have to be replaced once with the new one.

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<sup>9</sup> It should be taken into account that ADR entities are allowed to refuse to deal with disputes that are this complicated that dealing with such a type of dispute would otherwise seriously impair the effective operation of the ADR entity, Art. 5 (4) (f) anyway. This is also regularly stipulated in the rules of procedure, see for example the one of Schlichtungsstelle Energie, § 4 (4) lit. 3.

<sup>10</sup> See Federal Court of Justice, VIII ZR 263/18 para. 36.

<sup>11</sup> See Braun/Weiser in Kommentar zum Verbraucherstreitbeilegungsgesetz 2021, § 37 para. 21.

<sup>12</sup> Regulation (EU) No 524/2013.

## OBLIGATIONS FOR ADR ENTITIES

- ❖ vzbv points out that the Parliament's wording in Art. 17(2) sentence 2 leaves room for interpretation and ambiguity. The wording *where appropriate* does not offer ADR bodies any certainty. If this obligation is foreseen in the final text of the directive, Art. 17(2) sentence 2 should **introduce a kind of threshold**. If an ADR entity informs a trader of unfair terms and conditions during an ADR procedure and the trader amends them, there is no need to inform national authorities<sup>13</sup> simultaneously. This is different in the case of violations that occur repeatedly and over a longer period of time (e.g. at least two months).
- ❖ vzbv **supports the Council's position** to postpone the date of submission of the report in Art. 20(6).

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<sup>13</sup> In Germany, these would be consumer protection organisations like vzbv.