



April 2012
AK Position Paper

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on
Alternative Dispute Resolution (ADR)

About us

The Federal Chamber of Labour is by law representing the interests of about 3.2 million employees and consumers in Austria. It acts for the interests of its members in fields of social-, educational-, economical-, and consumer issues both on the national and on the EU-level in Brussels. Furthermore the Austrian Federal Chamber of Labour is a part of the Austrian social partnership.

The AK EUROPA office in Brussels was established in 1991 to bring forward the interests of all its members directly vis-à-vis the European Institutions.

Organisation and Tasks of the Austrian Federal Chamber of Labour

The Austrian Federal Chamber of Labour is the umbrella organisation of the nine regional Chambers of Labour in Austria, which have together the statutory mandate to represent the interests of their members.

The Chambers of Labour provide their members a broad range of services, including for instance advice on matters of labour law, consumer rights, social insurance and educational matters.

Herbert Tumpel
President

More than three quarters of the 2 million member-consultations carried out each year concern labour-, social insurance- and insolvency law. Furthermore the Austrian Federal Chamber of Labour makes use of its vested right to state its opinion in the legislation process of the European Union and in Austria in order to shape the interests of the employees and consumers towards the legislator.

All Austrian employees are subject to compulsory membership. The member fee is determined by law and is amounting to 0.5% of the members' gross wages or salaries (up to the social security payroll tax cap maximum). 560.000 - amongst others unemployed, persons on maternity (paternity) leave, community- and military service - of the 3.2 million members are exempt from subscription payment, but are entitled to all services provided by the Austrian Federal Chambers of Labour.

Werner Muhm
Director

Executive Summary

AK considers the expansion of ADR schemes to be an important contribution to enforcing consumers' legal rights and therefore warmly welcomes the actions taken by the Commission in this area. To realize the goal of promoting the internal market in actuality, AK believes it is essential to ensure high quality out-of-court dispute resolution entities. This is the only way to get customers to put their trust in cross-border dispute resolution and reduce current barriers to cross-border transactions.

Funding is an indispensable requirement for creating high-calibre dispute resolution entities and must be clarified in advance, particularly given the broad scope intended for the directive.

AK responds in detail below to the individual points of the proposed directive and also touches on points not contained in the proposed directive but in urgent need of regulation:

The AK position in detail

Article 2 – Scope of Directive

Although AK basically welcomes a broad scope, one should clarify as quickly as possible with the Member States how much funding is required to set up full-coverage ADR in the Member States and whether the Member States can cover the needed funding. Given the tight budget situation in most Member States, alternative funding models will otherwise have to be found and/or resources shifted. It is important in this context to ensure that existing consumer organisations with a proven track record continue to be funded to the extent they are currently. If full-coverage ADR were set up without ensuring the necessary funding, there is a risk that the quality of ADR would suffer, as would the degree of attainment of the objectives pursued in setting up ADR.

One alternative one might consider in this context is to carry out the ambitious objective of full-coverage ADR successively instead of immediately. A first step could be to set up ADR in those areas where directives on specific sectors already provide for ADR. Another advantage of successive implementation is that it would be a chance to gather experience before full-coverage ADR is set up. In any case, one should clarify whether areas such as health and social services fall under the directive.

Lastly, in-depth analysis of the legal basis for the proposed directive is needed in light of the subsidiarity principle.

Article 5 – Access to Alternative Dispute Resolution

The proposed directive provides neither for making participation in out-of-court alternative dispute resolution mandatory for companies nor for making the ADR decision binding. Given the experience Austria has had with voluntary dispute resolution, AK is afraid the system would be accepted poorly or not at all if it were voluntary. In that case, the objectives pursued by the directive would not be achieved. Obligatory participation is the only way to guarantee that a maximum number of cases can be resolved with ADR. As regards the binding effect of decisions for companies, this would certainly improve the enforcement of consumers' legal rights. However, the question arises as to whether a binding effect in this context is in compliance with Article 6 of the European Convention on Human Rights (ECHR).

Article 6 – Impartiality

With the principle of impartiality anchored in Article 6, the proposed directive falls short of the principle of independence anchored in Recommendation 98/257/EG in one important point. It is all the more important that no further deviations from the principle of impartiality occur. It is inconceivable to AK that dispute resolution entities set up and directly funded by companies could be deemed impartial even if they were not subject to instructions from others in making decisions. Neither a separate budget for the

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ADR entity nor freedom from instructions sufficiently guarantees the impartiality of a natural person appointed by a company or from the company side. In fact, the appointment of natural persons should be subject to a parity procedure of the kind used in collegial bodies. Natural persons should be named by an equal number of consumers and company representatives.

One issue that appears to be insufficiently clear in this regard is whether the requirement of impartiality should apply only to the decision-makers of the ADR entity or to all persons working for the ADR. AK believes the impartiality of decision-makers in an ADR put together using a collegial appointment procedure would suffice to ensure impartiality. The issue is significant in that consumer organisations already existing in the Member States would be predestined to take on the responsibilities of ADR given their experience and expertise. To avoid parallel structures, the directive should clearly state that the existing consumer organisations meet the necessary requirements in each case.

Article 7 – Transparency

AK welcomes the annual ADR reporting duty set forth in Article 7. To render dispute resolution and the report-

ing duty important beyond individual cases, AK suggests the directive also stipulate that the ADR entity draw up and publish guidelines based on the individual case decisions. The affected companies and industry could then apply these guidelines to any consumer complaints they might receive in order to avoid further out-of-court dispute resolution proceedings.

Article 10 – Consumer Information by Traders

Traders should be required not only to provide information on whether they participate in an ADR but also to state explicitly if they do not participate in any ADR. Otherwise, consumers might not realise until a dispute arises that the trader does not participate in any ADR. This obligation for traders to say whether they do not participate in any ADR would also give consumers the opportunity to take this factor into account in their decision on a contract. It would likewise provide a certain incentive for companies to take part in an ADR or otherwise risk being at a competitive disadvantage.

Demands

AK calls for the following points to be added to the proposed directive.

Principle of Legality – Legal Venue for Consumers – Language

This principle was already anchored in the Commission Recommendation of 30 March 1998 (98/257/EC). According to that recommendation, the decision taken by the ADR body is not permitted to result in the consumer being deprived of the protection afforded by the mandatory provisions of the law of the Member State in whose territory the body is established. This provision is indispensable particularly because the provisions of the proposed directive are to be applicable not only to cross-border disputes but also to disputes within Member States.

In the case of cross-border disputes, Recommendation 98/257/EC stipulated that the decision taken by the body is not permitted to result in the consumer being deprived of the protection afforded by the mandatory provisions applying under the law of the Member State in which he is normally resident in the instances provided for under Article 5 of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations.

Protection for consumers afforded by their own legal system and the resulting consumer benefit principle would be a major contribution to promoting the internal market. To ensure that out-of-court alternative dispute resolution entities in the individual Member States are up to the task they are given, the ADR at the consumers' place of residence should always have jurisdiction for resolving disputes. The establishment of this kind of "legal venue for consumers" could not only ensure the practicality of the consumer benefit principle but also ensure the necessary trust amongst consumers that they will be able to assert their claims also in cross-border transactions. Last but not least, a clear rule on jurisdiction would prevent ADR from failing on account of the parties not agreeing on an ADR entity because each person in cross-border transactions would want to opt for the rule in his/her home state.

If the internal market is really to be promoted, consumer-friendlier regulations are required for yet another existing barrier, namely the language barrier. Not only should consumers be able to file requests for conflict resolution in their native language, the ADR procedures themselves should also be conducted in that language. If the consumer's language is not the contract language, then the contract language might also be conceivable for the ADR, as is already the case with ODR.

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Suspension of the Statute of Limitations

Another important prerequisite for getting consumers to accept ADR is that a request for dispute resolution should have the effect of suspending the statute of limitations. The judgement in the Alassini case (Judgement of the Court (Fourth Chamber) of 18 March 2010, C-317-08) also stated that the suspension of the period for the time-barring of claims is an essential criterion for effective legal protection.

Article 8c in the proposed directive requires that the ADR procedure be free of charge or available at moderate costs for consumers. This provision must in any case remain inviolate; otherwise cost would be a barrier to access. This principle was also viewed as a criterion for efficient legal protection in the judgement in the Alassini case (Judgement of the Court (Fourth Chamber) of 18 March 2010, C-317-08).

Funding

Funding is a pivotal issue, as noted at the outset of this response. Government funding would be the best way to ensure impartiality. A variation on that would be advanced government funding where the costs would subsequently be passed on proportionately to the traders whose cases were resolved. That way the dispute resolution entities would be financed by traders not willing themselves to settle consumer complaints to a reasonable degree. This aspect would have a preventive effect. One should also clarify that funding models of this type must be in harmony with the objective of impartiality.

Should you have any further questions
please do not hesitate to contact

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