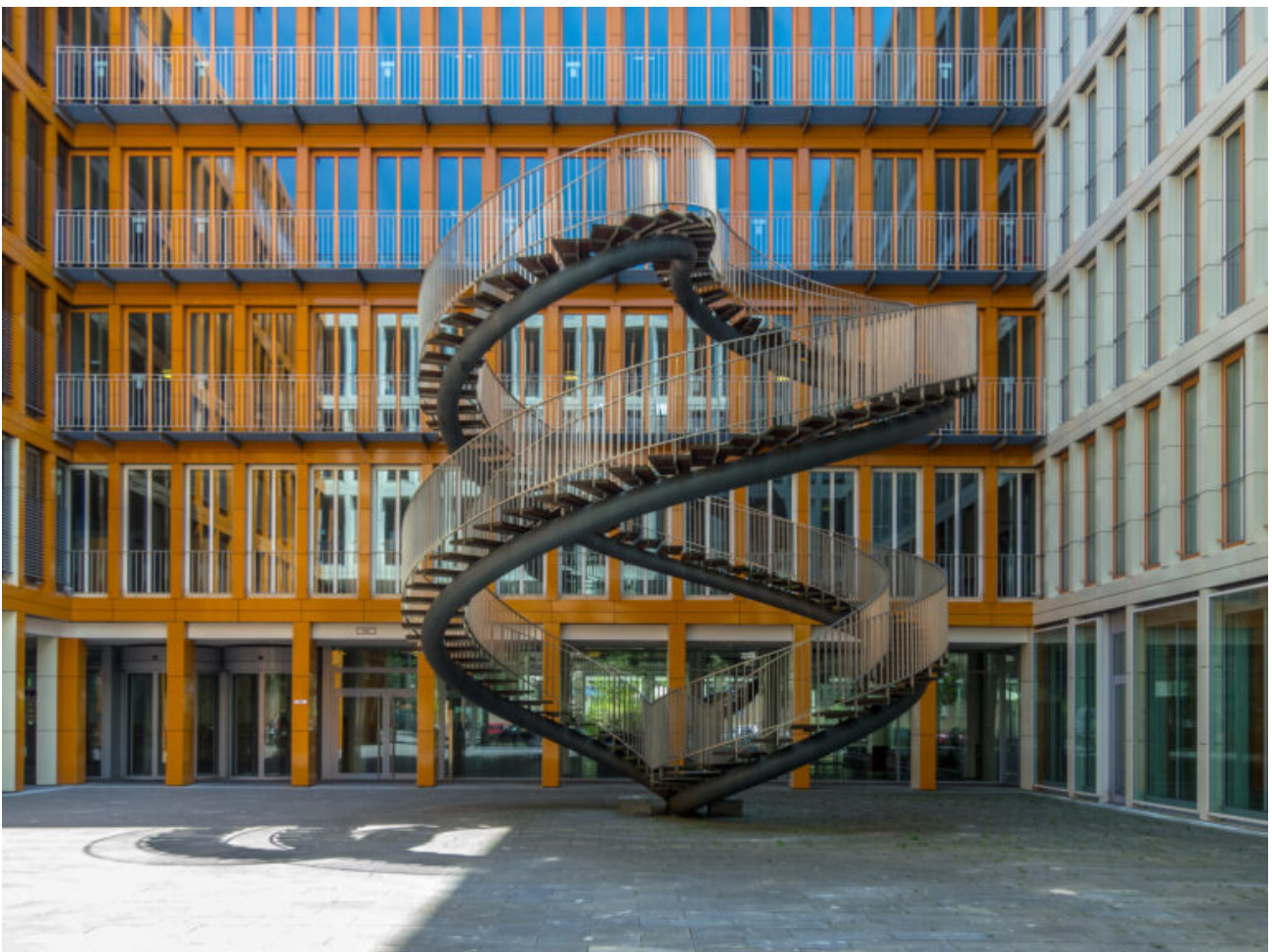


LEUVEN BLOG FOR PUBLIC LAW

A Leuven view on Public Law

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The Stairway to (better) Consumer ADR



The European Alternative Dispute Resolution (ADR) legal framework aims to provide consumers with efficient tools to obtain redress. However, Directive 2013/11/EU on consumer ADR fails to guarantee full access to justice to all consumers across Member States and economic sectors equally. In their report for the European Commission, Prof. dr. Stefaan Voet, Sofia Caruso, Anna D'Agostino and Stien Dethier offer recommendations based on academic research arising from the Directive's implementation. In this post, the authors highlight two of the most

compelling areas of intervention: the lack of awareness of ADR and the scarce traders' participation in ADR procedures.

Directive 2013/11/EU on consumer ADR aims to ensure EU consumers' access to high-quality out-of-court procedures to solve their contractual disputes over a product or a service with an EU trader. The measure forms part of a broader set of legislative and non-legislative tools aiming to enhance the enforcement of substantive consumer rights. Since simple, efficient, low-cost ADR is often the only realistic and viable option for consumers seeking redress for their low-value claims, effective ADR improves consumers' trust in the internal market (Rec. 4 Directive).

The Directive adopts a minimum harmonisation approach, establishing minimal binding requirements for ADR entities (Artt. 4(1)h and 6-11) to be certified by competent national authorities (Art. 20). Such an inclusive approach enabled the Directive to encompass the existing diverse landscape of consumer ADR in the different Member States. However, it also raised some concerns regarding the Directive's potential to end the disparities in ADR coverage, quality and awareness across the EU (Rec. 6 Directive).

Awareness

Firstly, one of the main reasons why the ADR Directive's uptake has overall been low in the Member States is that neither consumers nor traders seem to be fully aware of ADR and its benefits. The EU public consultation on ADR confirmed that the lack of awareness still is a major challenge.

This problem was already foreseen in 2013. When the Directive was drafted, it entrusted ADR entities, consumer organisations, the ECC network and Member States to promote ADR procedures and increase the uptake by traders and consumers (Article 15 (4) ADR Directive). Many ADR entities have successfully done so through informative campaigns and consumer-friendly tutorials. However, there is a call for more awareness-raising by ADR entities as vulnerable consumers may still face difficulties in finding the easiest pathway to redress when a dispute with a trader arises.

In most cases however, awareness is not enough. Consumers need guidance on how to navigate the ADR landscape. This is even more true when there are no or several ADR entities in a certain economic sector. For example, the Belgian Energy Ombudsman raises awareness by regularly appearing in the media. Such personification helps consumers identify the entity to whom they can submit their complaints and enhances their trust in ADR.

Traders should also contribute to consumer awareness. Indeed, the Directive requires traders to signpost consumers to the competent ADR entity, but most traders have failed to act accordingly. Moreover, traders complying with the general information duties might still refuse to participate in ADR, thus frustrating consumers' expectations.

In fact, traders are generally reluctant to settle consumer disputes with the input of a third party. This could be due to a lack of awareness of the benefits of ADR, this time on the traders' side. Some traders are biased and believe ADR entities are consumer agencies in disguise, especially when the costs of the procedure fall entirely on them.

Trader participation in ADR procedures

Trader participation presents another major challenge in the ADR legal framework. The Directive is still very much 'no strings attached': participation is voluntary, and outcomes are not binding. Therefore, while the Directive mandates full ADR coverage across all sectors, effective full coverage depends on the willingness of traders to participate in the procedures. Trader participation is especially critical with residual ADR entities, namely entities acting as a safety net in sectors where no ADR entity is available (Rec. 24 Directive). An example of this is the Belgian Consumer Mediation Service. They seem to be less attractive to traders due to their lack of specialisation, closeness to traders and trader awareness.

There is considerable discussion in the academic literature on whether to introduce mandatory participation for traders. While Article 10 of the Directive expressly regulates mandatory participation for consumers, it does not place any boundaries on mandatory participation for traders. Such considerable leeway to Member States has been criticised as it weakens the level playing field of ADR in the EU.

The low trader participation rate is the main argument scholars put forward in favour of mandatory participation. Conversely, authors arguing against it contend that mandatory ADR is a *contradictio in terminis* and should be an addition but not an alternative to judicial proceedings. Moreover, some scholars question whether making both participation mandatory and outcomes binding would violate Art. 6 ECHR and Art. 47 of the Charter of Fundamental Rights of the EU.

In practice, Member States have made trader participation mandatory mostly in specific sectors where the power imbalance between consumers and traders is especially striking, such as energy, finance and telecommunications. In sectors where this is not the case, the relevant literature suggests that both 'carrot' and 'stick'

incentives could increase trader participation. Traders often object to bearing the costs of the procedure. A possible solution could be to make the first case free or pay a fee proportional to the number of clients and cases investigated. Another option could be imposing a case fee on traders refusing to settle at the early stage of the procedure.

Furthermore, ADR entities could operate a 'name and shame' practice, publishing the names of the traders who do and do not participate in ADR. The publication of these so-called 'white lists' and 'black lists' could both incentivise traders to participate in ADR and increase transparency (Art. 7 Directive).

Lastly, the courts could encourage the parties to opt for ADR; they could refuse straightforward cases for which ADR schemes are available, make the submission of claims conditional on an attempt to use ADR, and/or impose sanctions on the parties that fail to do so. The effectiveness of these carrot and stick incentives of course also depends on other factors, such as effective court proceedings, the availability of information to consumers and the competitiveness of the market.

Conclusions

Seven years after the entry into force of the Directive, the Commission has announced its REFIT by 2023. The amendments should tackle *inter alia* two significant obstacles to the enforcement of consumer rights through ADR. Firstly, consumers lack awareness of dispute resolution procedures, an informative gap that seems insurmountable without traders' collaboration. Secondly, even when consumers initiate an ADR procedure, trader participation and compliance rates are still low, which may frustrate consumers' expectations. Therefore, consumers and traders should receive better information on the benefits of ADR procedures, which should be better delivered and tailored to recipients' features. Additionally, the ADR landscape should be rationalised, ensuring full coverage across economic sectors and clear signposting to ADR entities in order to enable consumers to fully exploit the ADR potential.

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This blogpost highlights a few of the conclusions from the extensive academic study on the ADR Directive the authors have conducted on behalf of the European Commission.

The full report can be found under ‘ADR-related studies’ at:

https://ec.europa.eu/info/live-work-travel-eu/consumer-rights-and-complaints/resolve-your-consumer-complaint/alternative-dispute-resolution-consumers_en#cross-border-adr-roundtable

ADR, CONSUMER ADR, CONSUMERS, EU LAW

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