Position of Detailhandel Nederland on Alternative Dispute Resolution

Detailhandel Nederland, further referred to as Dutch Retail Association, represents the Dutch council for SME-retailers (MKB-Nederland) and of large retailers (Raad Nederlandse Detailhandel).

Registered as interest representative: nr 22232504133-92

Please find hereunder the reaction of the Dutch Retail Association on the consultation of the European Commission: 'On the use of Alternative Dispute Resolution as a means to resolve disputes related to commercial transactions and practices in the European Union'.

Preliminary remarks

The views of the European Commission as expressed in the consultation document show a too negative opinion about how Alternative Dispute Resolution (ADR) mechanisms work in practice. The Commission argues that these mechanisms are used too little, are unknown by consumers and businesses, that there are gaps in coverage, and so forth.

However, if one looks at the everyday reality, this negativism seems far from justified. On a weekly base, billions of transactions take place in the European Union – national or cross-border, direct or by means of distance sales – without any problem. In the few cases in which a problem does arise, more often than not, parties are able to resolve the problems in an amicable way. In both relative

and absolute numbers disputes that require a resolution by a third party are rare.

In addition, the Dutch Retail Association would like to underline that in general mechanisms of formal dispute resolution are the end of a trajectory. As the use of these mechanisms does clearly cost time and money the emphasis should lay on earlier phases in which problems can be resolved. Thus, the focus should be on facilitating constructive dialogue between parties themselves and not on end-of-the-line interventions, such as ADR.

Companies often are hesitant to draw attention to ADR as it could easily lead to the conclusion that apparently the company in question frequently makes mistakes it cannot solve on its own. For this reason companies prefer to draw the attention of consumers to the applicable general terms and conditions, ideally drafted in collaboration with consumer representatives. These general terms and conditions could convince the customer that he or she is dealing with a decent undertaking, which is in principle ready to solve any problem if it occurs in a consumer friendly manner.

We stress that one of the best ways to improve consumer protection would be a fully harmonized set of European consumer rights rules, applicable in all member states. This would especially alleviate fear among consumers to engage in cross-border transactions. Such an approach would create trust and make it easier to resolve problems in case they arise in an early phase in the trajectory. This is probably more productive than stimulating resolution mechanisms at the end of the trajectory. At this late stage there is often already a certain level of distrust among parties.

Against this background we truly regret that the ongoing discussion on revision of the European rules on consumer rights are not in any way heading toward full harmonization. This will probably mean that the current patchwork of rules, in particular on the important aspect of guarantees in case of non-conformity, remains in place.

With regard to ADR it is often difficult to strike a balance between the level of

care of the procedure (such as safeguards regarding that everything must be in writing and that there is an adversarial process) on the one hand and the level of speediness and cost on the other. Striking this balance will become increasingly difficult as the financial interest at stake is low. The European Commission omits in the consultation document to pay attention to the fact that striking the aforementioned balance is also an issue from a company perspective. It is apparently not widely known that in these situations companies often do take a pragmatic approach and compensate customers for supposed damages. This even when from a legal point of view there is no necessity to do so. Getting the issue quickly to rest is more important.

Who, in these situations, wants to take the route of formal dispute resolution, for sake of principles, needs to accepts that this comes at a price to him. From a practical point of view, more often than not, it won't be necessary for a third party to make a decision in these cases. It often concerns everyday cases, whereby customers and businesses simply vote with their feet if they are unsatisfied with the outcome. This provides for a much more efficient and effective remedy compared with lengthy proceedings over principles. For a company one could add to this, that possible damages to its image among customers, provides for a strong incentive to seek a satisfying outcome for the consumer.

The European Commission rightfully notes (point 15 of the consultation document) that there is already a wide range of ADR-instruments in place. Against this backdrop it is not surprising that there is limited knowledge among consumers and businesses of these instruments. There is simply an overload of schemes. Moreover, does it simply takes time to create awareness among stakeholders of the options they can rely on, and have them subsequently change their behavior.

In this respect it is not helpful that the EU is known for pouring streams of new rules and regulations over consumers and businesses, obstructing the uptake of options that already exist. The EU should use its means more sparingly. It should formulate measures based on actual needs in society. These measures should be tailor-made – regarding solely B2C agreements, SME-clients, and or distance

sales – and rely on adequate support from future users. New EU-measures on ADR can be regarded as disproportional and not in line with the principle of subsidiarity. Regarding the situation in the Netherlands, there exists in our view no justification for EU intervention. In the case the EU would be able to justify actions in the field of ADR, these should never jeopardize the existing situation in the Netherlands in which prevalence is given to self-regulation.

Answer to questions

1) What are the most efficient ways to raise the awareness of national consumers and consumers from other Member States about ADR schemes?

Given the enormous amount of ADR-instruments and their diversity regarding their content and status, having a centralized approach where EU or national governments inform the public about schemes and their specifics, is not a realistic approach. However, the EU and its Member States can provide information from a more general perspective, explaining what ADR is all about. Negative experiences with a Dutch website displaying the several labels and options with regard to ADR, show how difficult already informing on national level can be.

2) What should be the role of the European Consumer Centres Network, national authorities (including regulators) and NGOs in raising consumer and business awareness of ADR?

Our preferred approach is that the parties directly involved with the ADR-instrument, should inform consumers. These parties are best situated to decide which target group to approach and the means by which to do so. Consumer authorities could play a role in this, as can government funding for such activities. Either way, it remains a fact that an overload of options muddle a clear perspective on reality.

3) Should businesses be required to inform consumers when they are part of an ADR scheme? If so, what would be the most efficient

ways?

Companies will, generally speaking, be reticent to draw attention to their involvement in an ADR-instrument. We are not in favor of obligations for businesses to actively inform their consumers about these schemes. In the as stated unwanted situation in which companies will be obliged to publish their involvement in such schemes, this should entail minimum of administrative burdens and costs to business. In addition, it should be noted that in general when it becomes clear that between the consumer and the trader a dispute has arisen which cannot be solved in an amicable way, the trader will inform the consumer about ADR. By doing so the trader indicates that he prefers to seek a solution by use of an out-of-court resolution mechanism and that he attaches great value to preserve consumer trust and to maintain his business reputation.

4) How should ADR schemes inform their users about their main features?

We are not in favor of ADR schemes promoting themselves. Instead, the ADR-instrument as such should convince companies that it is in their best interest to inform consumers about it, for example via their general terms and conditions and/or their website. The schemes themselves could also make use of a website to inform consumers about the main features of the scheme.

5) What means could be effective in persuading consumers and traders to use ADR for individual or multiple claims and to comply with ADR decisions?

The starting point should be the voluntary take-up, not the top-down imposing of ADR. The reason for this is that voluntary take-up carries with it a higher level of support within and with a company, than anything imposed from above.

6) Should adherence by the industry to an ADR scheme be made mandatory? If so, under what conditions? In which sectors?

ADR is, essentially, a form of self-regulation. Hence, no justification exists for involvement of the European Union other than lending support, on request, of grass-roots initiatives.

7) Should an attempt to resolve a dispute via individual or collective ADR be a mandatory first step before going to court? If so, under what conditions? In which sectors?

We are against making ADR a precondition for access to court. In everyday reality, in the Netherlands, consumers in our sector turn to Arbitration Committees, hence imposing such an obligation is unnecessary. The consumer who attaches value to rulings that deliver an enforceable title, should of course remain able to go to court instead of an Arbitration Committee.

8) Should ADR decisions be binding on the trader? On both parties? If so, under what conditions? In which sectors?

Reasoned from the idea that ADR should be established from a grass-root initiative, so as to optimally serve needs in the market, no reason exists to impose top-down rules as to the binding nature of the ADR-instrument. Parties involved in the establishment of the ADR-instrument in question are able to determine the status of a ruling by themselves. In general the principle applies that the use of an ADR-instrument leads to a mutually binding decision, both for the consumer and the trader. This principle of binding decision is a prerequisite for a proper functioning ADR-scheme.

9) What are the most efficient ways of improving consumer ADR coverage? Would it be feasible to run an ADR scheme which is open for consumer disputes as well as for disputes of SMEs?

If no ADR-instrument exists, this does not necessarily imply a lack of it. ADR is a form of dispute resolution, a way that can be cost-efficient and from that perspective deserves preference above court procedures. Still, one could and should be able to opt for written procedures for reasons other than cost-efficiency.

10) How could ADR coverage for e-commerce transactions be improved? Do you think that a centralised ODR scheme for cross-border e-commerce transactions would help consumers to resolve disputes and obtain compensation?

Whether or not to open ADR for online transactions, should be left to parties

involved to decide. The same applies to the question whether or not to open ADR solely to B2C or also to B2B agreements. A sound functioning European wide ADR-scheme can only be established provided that the material consumer rights for transactions are harmonized. From our perspective there is no need for a common Online Dispute Resolution Scheme (ODR) scheme with a high level of abstraction, with little practical added value. We could however agree if the EU opt to draft a checklist with points of attention, meant for parties who wish to add ODR handling to their ADR-scheme.

11) Do you think that the existence of a "single entry point" or "umbrella organisations" could improve consumers' ' access to ADR? Should their role be limited to providing information or should they also deal with disputes when no specific ADR scheme exists?

So called 'single entry points' and 'umbrella organizations' could play a role in informing consumers about the existence of ADR-schemes. It should however be noted (see also question 3) that in general when it becomes clear that between the consumer and the trader a dispute has arisen which cannot be solved in an amicable way, the trader will inform the consumer about ADR.

12) Which particular features should ADR schemes include to deal with collective claims?

We believe that ADR schemes are most suited to address individual cases in which a consumer and a trader have not managed to resolve a problem themselves. We are aware of the wish of the European Commission to explore the possibilities for an European approach for collective redress. In this respect, we believe that utmost care should be taken, for class action like schemes could all too easy foster an excessive claim culture. Against this backdrop we favor that ADR schemes remain a tool for solving individual disputes.

13) What are the most efficient ways to improve the resolution of cross-border disputes via ADR? Are there any particular forms of ADR that are more suitable for cross-border disputes?

See answer 10.

14) What is the most efficient way to fund an ADR scheme?

Resolving disputes is and remains primarily a task of the government. Creating ADR for the sake of relieving government from its tasks and responsibilities is not acceptable. On points where ADR implies a shift of government tasks to the private sector, full coverage of ADR by the government is appropriate.

15) How best to maintain independence, when the ADR scheme is totally or partially funded by the industry?

In the Netherlands ADR mechanisms are in general structured as follows: the committee which collects information about a dispute and ultimately delivers a mutually binding decision for the consumer and the trader, is chaired by a fully independent person (mostly someone with a legal background, for example a judge or a lawyer working in private practice). Members of the committee are mostly someone who is nominated by a consumer organization and someone who represents a sector organization. This works well to guarantee the independence of the committee.

16) What should be the cost of ADR for consumers?

For ADR the participation of the consumer is of high importance. Yet a threshold should prevent too rapid use of ADR, instead of having parties try to resolve a dispute by themselves first.

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