

BRUSSELS, APRIL 2024

POLICY PAPER

PARTICIPATION OF AIRLINES IN ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

On 13 March 2024, the European Parliament adopted its first reading position on the proposal to revise the Alternative Dispute Resolution (ADR) Directive. Contrary to the European Commission's proposal, and the Opinion of the Transport & Tourism (TRAN) Committee¹, the Internal Market & Consumer Protection (IMCO) Committee proposed to make participation in ADR schemes mandatory for airlines but no other sectors. This amendment was passed as part of the EP's first reading position.²

While airlines are generally supportive of out-of-court dispute resolution, which can be a faster and less costly alternative to legal proceedings, we would like to express our serious concerns about mandating participation in such schemes at the EU level.

As the ADR Directive is based on a minimum harmonisation approach, there are considerable differences in how EU Member States have implemented it, and how the ADR bodies and the relevant procedures have been set up. In some Member States, decisions are binding on the trader, in others they are not. Some Member States have only set up ADR bodies with general competence, while others have ADR bodies with specialised knowledge of different industry sectors.

The 2013 ADR Directive already gave Member States flexibility to decide whether trader participation in ADR schemes should be voluntary or mandatory. As noted by the Commission's 2023 evaluation: "The ADR Directive does not prescribe that ADR should be compulsory on traders, notably to respect one of its objectives that the Directive should not prevent consumers and traders from exercising their right of access to the judicial system. In effect, national ADR frameworks are based on the culture, traditions and resources of the relevant Member States, as they deem fit". Only a handful of Member States have decided to make participation mandatory across the board, while others have done so only for specific sectors or in specific circumstances.³

In addition, the 2023 evaluation also recognised that: "ADR is based on the concept of voluntary participation of the parties to achieve an amicable solution for the dispute in question. From the data in

¹ See: https://www.europarl.europa.eu/doceo/document/TRAN-AD-758110_EN.pdf

² See: https://www.europarl.europa.eu/doceo/document/A-9-2024-0060_EN.pdf

³ Trader participation always required: DK, HU, IS, LT, LV, SK. Trader participation required in certain sectors: AT, CY, CZ, DE, EL, ES, NL. DE. Trader participation required in specific circumstances: BE, HR, PT, SE. In IT, ADR is mandatory before initiating a court procedure.

hand, there is no evidence that mandatory trader participation in ADR is a better solution for consumer outcomes and neither that voluntary ADR is a systemic failure of the Directive to ensure efficient access to ADR across the EU”.

While recognising that there is a substantial volume of disputes in the transport and tourism sectors, we believe that the volume of complaints for airlines is fundamentally caused by the lack of clarity in Reg. 261/2004 on air passenger rights, which the Commission already proposed to reform in 2013. We would again urge the Member States to revise Reg. 261/2004 to make the rules clearer and simpler to apply, which would make a greater contribution to reducing disputes.

In the context of Reg. 261/2004, it must also be taken into account that there are National Enforcement Bodies (NEBs) to deal with infringements or complaints related to passenger rights in each Member State. The NEBs may play a role in handling individual complaints and providing consumer compensation if the national rules provide for it. Some NEBs also serve a double role as ADR bodies (e.g. AESA in Spain). An obligation for the sector to participate in ADR procedures could therefore be redundant in some cases.

The majority of ADR bodies often lack sufficient expertise and resources to deal with disputes related to transport matters and passenger rights. Many ADR bodies operate on the basis of a general competence and only a few Member States have ADR bodies with any specific knowledge of the airline sector and its operational constraints. Specialisation of ADR entities is crucial and should be promoted to ensure smooth functioning and increased trust from consumers and traders.

In addition, some of the current approaches to ADR raise questions. For example, in some cases ADR decisions are binding on the traders, but not on the consumers (who, if they are not satisfied with the outcome, can resort to judicial proceedings, whereas the same does not apply for traders). In some countries where ADR participation is mandatory for traders, such as Italy, claims agencies acting on behalf of passengers are occasionally unwilling to settle claims in the ADR and treat it as a formality to subsequently submit the case to court and collect legal fees. The sanctions regime can also be disproportionate: for example, failing to comply with an ADR decision in Spain may entail a fine of up to 70,000 euros per passenger. There may also be practical challenges in some Member States with a federal system of governance, where there has been a transfer of competence from the national government to regional administrations.⁴

Against this background, imposing mandatory participation of airlines in ADR procedures would not effectively address the underlying issues and could potentially lead to further complications

⁴ For example, in Spain, the regional administrations (Autonomous Communities) have been granted powers to ensure consumer protection and serve as competent ADR authorities, in accordance with the Spanish ADR Act 7/2017. However, the same Act designates AESA, the Spanish Aviation Safety and Security Agency, as the national authority for enforcing Reg. 261/2004. In general, we believe that ADR bodies with specialised knowledge of the airline sector, such as AESA, would be more effective in handling consumer protection claims than general consumer ADR bodies, and therefore should have exclusive competence on any consumer protection claims relating to air transport.



and dissatisfaction among consumers and traders. We are also concerned that it would be disproportionate to single out one sector for special treatment in horizontal EU legislation.

Mandatory ADR would also be an additional cost of doing business for those carriers who do not currently have ADR arrangements in place, and in particular non-Community carriers with very limited service to the European Union. Member States should avoid creating unintentional barriers to market entry that might hamper the sustainable development of Europe's air connectivity and the competitiveness of its aviation market.

Moreover, in most Member States there are only one or two approved ADR providers at present. Where these are private sector enterprises, there is a serious concern among airlines that a mandatory ADR regime would create an effective monopoly or duopoly situation and could lead to increased costs as well as reduced service levels.

As recognised by the European Commission and by the TRAN Committee, **it is most appropriate that Member States have the flexibility to decide whether or not to mandate participation in ADR procedures**, considering the national circumstances as well as the capacity, competence, and specialisation of the national ADR bodies. The proposal already seeks to encourage greater participation in ADR proceedings by requiring traders to provide written explanations whenever they refuse to participate in the procedure. Moreover, the European Consumer Centres will play an important role in advising consumers (and traders) on how to seek redress in cross-border disputes.

We therefore urge the Member States to preserve the voluntary nature of ADR schemes and promote the development of specialised, high-quality ADR bodies. Any decisions to mandate participation of airlines in ADR should only be considered at the national level.