BUSINESSEUROPE

POSITION PAPER

BUSINESSEUROPE
Representative Register
ID number: 3978240953 - 79

15 March 2011

CONSULTATION ON THE USE OF ALTERNATIVE DISPUTE RESOLUTION AS A MEANS TO RESOLVE DISPUTES RELATED TO COMMERCIAL TRANSACTIONS AND PRACTICES IN THE EUROPEAN UNION

EXECUTIVE SUMMARY

- Consumer protection and confidence is important for the smooth functioning of the Single Market. This cannot be accomplished without adequate and effective enforcement of the laws setting out rights and obligations between consumers and traders.
- BUSINESSEUROPE favours the use of alternative dispute resolution (ADRs) to improve redress for consumers. ADRs can provide quick, effective and affordable redress while avoiding excessive litigation.
- A one-size-fits-all solution must be avoided. The diversity and adaptability of ADR systems should be preserved.
- The voluntary nature of ADRs should be preserved. Therefore, compulsory adherence to ADRs should not be the general rule, rather the exception.
- ADR systems must be easy to use and free or as low-cost as possible.
- With regard to cross-border cases, there are already platforms that help consumers finding adequate means to resolve disputes: ECC-net and FIN-Net. The use of these platforms should be improved and further promoted by all relevant stakeholders.
- The best way to increase compliance with ADR decisions is to ensure that the ADR schemes earn the trust and respect of businesses and consumers alike and establish a reputation for being objective and competent.
- Efforts should be devoted to further promote and improve ADRs. Their sectoral and geographical coverage should be encouraged. This is particularly important in the online environment to increase both consumer and business confidence.
- Effective ADR procedures can be developed and designed for various types of collective cases. They are a good way to prevent mass litigation, which remains very complex, lengthy and costly.
- Independence of ADRs should not be mistaken for impartiality. More focus should be put on ensuring impartiality of ADRs.

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1. Consumer enforcement and redress instruments

Consumer protection and confidence is important for the smooth functioning of the Single Market. This cannot be accomplished without adequate and effective enforcement of the laws setting out rights and obligations between consumers and traders.

BUSINESSEUROPE has always supported discussions aimed at ensuring effective and easy access to redress to increase consumers' confidence.

BUSINESSEUROPE has always stressed the underexploited potential of alternative dispute resolution mechanisms (ADRs). Efforts should be devoted to promoting and improving ADRs and their sectoral and geographical coverage should be encouraged.

By their very nature, court actions are and will remain long and complex and will not be the best way to respond to the problems of cost and slowness in obtaining redress.

We are in favour of finding ways to promote the use of ADRs as a way to improve redress for consumers. ADRs can provide quick, effective and affordable redress while avoiding excessive litigation.

ADRs can have strategic importance for completion of the Single Market. Their role in the digital environment is key. In this context, there are already some ADR initiatives that deal with the challenges of settlement of disputes in the online world (e.g. ADR.eu).

Therefore, BUSINESSEUROPE praises the European Commission for putting ADRs at the centre of the debate on consumer redress.

The Commission has already adopted the 1998 and 2001 recommendations which already provide a good basis to build further on the potential of out-of-court mechanisms.

We should not lose sight of what already exists at national level as well as at European level in terms of dispute resolution (e.g. ECC-net, FIN-Net, Solvit) and try to improve and promote it.

In its consultation paper, the Commission points to the existence of 750 ADR schemes relevant to business-to-consumer disputes in the EU. BUSINESSEUROPE believes that this diversity is more an advantage than a disadvantage. Such diversity stems from the creativity and flexibility applied by ADRs to solve disputes, especially in very specific industries and sectors.

Therefore, we believe that any attempt to implement one-size-fits-all solutions would be incompatible with the adaptability needed for the well functioning of an ADR system. Additionally, national best practices should be encouraged.

There are a number of well-working ADR schemes across Europe and within Member States. Most of them are free of charge or low cost and rely on uncomplicated procedures.

In those countries where the option between judicial redress (collective or individual) and ADRs exists, reality shows that consumers prefer ADRs, because they are faster and more efficient. The Nordic countries provide interesting data in this regard.

National business federations have been very active in enlarging the existing offer of ADRs to cover more sectors of activity and to create more awareness among consumers and professionals on existing ADRs systems.

On 14 April 2010, BUSINESSEUROPE organised a roundtable on alternative dispute resolution mechanisms (ADRs) with representatives from the European Parliament, the European Commission and its member federations. The event aimed at discussing how specific examples of ADRs promoted by BUSINESSESSEUROPE and its member federations could serve as best practices to provide better redress to consumers in Europe.

From the roundtable, a number of common, fundamental principles and criteria were drawn. By fulfilling such principles ADRs could become more trusted, credible and recognised – and be able to function across borders:

- ADR systems must be effective, fast, easy to use and free or as low-cost as possible.
- ADRs are voluntary instruments: one cannot be forced to participate, but there are strong incentives for doing so. Such incentives can be improved in various ways.
- Diversity needs to be preserved.
- There must not be one-size-fits-all ADRs.

2. Specific comments on how to address the current shortcomings identified by the Commission:

How to increase consumers and traders awareness on ADRs?

The aim has to be that disputes are settled directly between the trader and the consumer. This means the consumer should always be advised first to contact the trader. In most cases, disputes arise from differences in contract interpretation and misunderstandings rather than breaches of contract. In this regard, companies have a responsibility to streamline their complaint handling mechanisms.

However, if an agreement cannot be reached without help from a third party, then it is naturally important that both the consumer and the trader are aware of ADR schemes.

To make this happen there must be a stronger commitment from all relevant stakeholders.

BUSINESSEUROPE has already engaged in a number of initiatives to raise awareness about ADRs. BUSINESSEUROPE is prepared to work together with its member federations to further promote awareness systematically and consistently.

In BUSINESSEUROPE's view, EU institutions and Member States' public entities have an important role informing consumers about the existing redress mechanisms and the way they function.

These authorities should also point out the role of consumer centres and associations in what concerns consumer education and information:

- Regarding rights and responsibilities;
- On the existing mechanisms for enforcement and redress at their disposal; and
- On mechanisms that best suit the consumer's specific case.

With regard to cross-border cases, there are already platforms that help consumers finding adequate means to resolve disputes: ECC-net and FIN-Net. Use of these platforms should be increased. They could function as a single entry point to inform consumers and businesses of the most appropriate ADRs to solve a particular cross-border dispute. Additionally, the creation of more cross-border consumer centres like the Euro-Info-Consommateur (covering consumer-related disputes between France and Germany) should be encouraged.

Trade associations and consumer associations should also be involved in the promotion of information on ADRs.

Should businesses inform consumers when they are part of an ADR scheme?

Where ADRs exist it is always important that consumers are well informed of their existence. In certain more dispute prone sectors this information is either encouraged (e-commerce, postal services, financial instruments) or required (e.g. payment services, consumer credit, telecom and energy services). However, we do not believe that such an obligation should be extended to all sectors since it does not match the voluntary character of ADRs. It is in the interest of business to advertise a particular ADRs scheme if it is available and if it provides clear benefits for both businesses and consumers. Information on ADRs can be provided at points of sale, in the company's website, commercial documents and correspondence between consumers but flexibility should be ensured.

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

The easiest way of ADRs to inform and explain to users their main features is through their website or the websites of national authorities, national consumer associations, ECC-net or companies covered or through promotional material such as brochures. Annual reports published by most ADR schemes should be made public. The most important features are:

- Structure and nature of the ADR scheme (mediation, arbitration or other);
- Scope and competences;
- Terms and conditions of use and disclaimers;
- Information and guarantees of data protection;
- Criteria for the acceptance of a complaint;
- Simple instructions on how to make a complaint;
- Cost;
- If possible, the number of cases handled and its compliance rate.

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

To help reaching this goal a more intensive communication policy on the proven advantages of ADRs should by adopted by all stakeholders involved.

The best way to increase compliance with ADR decisions is to ensure that the ADR schemes earn the trust and respect of businesses and consumers alike and establish a reputation for being objective and competent.

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

European and national legislation already establishes compulsory adherence to ADR schemes in certain sectors. However, we should bear in mind that the voluntary nature of ADRs is a core characteristic of these schemes. The EU recognises this, for example, in Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters (mediation directive) which recital 13 states that mediation should '*be a voluntary process in the sense that the parties are themselves in charge of the process and may organise it as they wish and terminate it at any time*'. Therefore, we believe that compulsory adherence should not be the rule but rather the exception. This should essentially be evaluated on a sectoral and cost-benefit basis.

Should an attempt to resolve a dispute via individual or collective ADR be a mandatory first step before going to court? Should ADR decisions be binding on the trader? On both parties?

The voluntary nature of ADRs should be preserved as much as possible.

We do not believe that making ADRs a mandatory first step as a general rule is the right route. Several options could be envisaged but they should not be considered to be exhaustive.

First of all, one should bear in mind that from the consumer point of view, any clause in a contract obliging to undergo a compulsory out-of-court scheme might be considered as unfair contractual clause within the meaning of Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

One option could be to consider, in certain cases, an out-of-court system as mandatory first step to resolve a dispute but parties should be allowed to pursue the judicial route if they are not satisfied with the decision. This could be done through an ADR clause negotiated in a specific contract. In such cases, the ADR scheme would work as a conciliatory system.

A second option could be that parties that submit a dispute to an ADR mechanism decide whether or not to attribute a binding nature to the solution reached. Here, the ADR scheme would be closer to the concept of arbitration. This option would be in line with the Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes.

This should not prevent Member States from maintaining or adopting other systems if they are proven to be more adaptable to their national reality.

How could ADR coverage for e-commerce transactions be improved?

BUSINESSEUROPE acknowledges the importance of improving means of redress in the online environment to increase consumer and business (in particular SMEs) confidence, and consequently help boosting e-commerce. Judicial actions face limitations when dealing with the challenges of the fast-changing online world. Here, alternative dispute resolution could play an even more relevant role.

In this light, a distinction should be made between mechanisms to solve disputes related to online transactions and online mechanisms to solve online disputes.

With regard the first type of ADR mechanisms, ECC-net already provides a solution for cross border transactions which in most cases are concluded online. In addition, in some sectors (e.g. French mediator for telecommunications, Geschillencommissie in the Netherlands) the possibility to solve disputes online already exists.

As regards the second type, it would also be important to progress with the creation of online dispute resolution (ODRs) schemes. These would be equipped with the necessary technical requirements to meet the even stronger rapidity demands from both consumers and companies engaging in online trade.

Would it be feasible to run an ADR scheme which is open for consumer disputes as well as for disputes of SMEs?

The differences between business-to-consumer and business-to-business markets (e.g. motivation for purchase, information requirements, level of protection) should be taken into account in the way an ADR scheme functions. SMEs and consumers are separate categories and need differential treatment. Therefore, in BUSINESSEUROPE's view it is difficult to envisage an ADR mechanism that could deal simultaneously with both consumer and SME complaints.

At most, specific help could be foreseen to re-direct both consumers and companies to the appropriate schemes. The growing presence of SMEs in cross-border commerce, thanks partly to electronic commerce, has created a need for ADR to adapt in terms of both flexibility and costs.

To meet this growing need for ADRs designed for business-to-business related disputes, a number of national business federations are setting up programs to develop ADRs for business-to-business relations (e.g. Lewiatan's – Federation of Polish Enterprises – programme to promote B2B arbitration).

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

Effective ADR procedures can be developed and designed for various types of collective cases. They are a good way to prevent mass litigation, which remains very complex, lengthy and costly.

Several examples can be found where ADRs dealt successfully with mass claims:

- the UK codes for travel, holidays and motor vehicles already process collective claims satisfactorily;
- the ADR system in Sweden has for many years been used to address collective claims;
- Out-of-court collective actions have proved successful in the Italian Cirio and Parmalat cases where the main banking groups undertook conciliation procedures in agreement with the main consumer associations. The volume of unresolved claims after conciliation was 1%: approximately 150 cases for 14,000 examined;
- The Dutch Collective Settlements Act, working on the basis of a settlement agreement, enable the effective and efficient settlement of mass damages claims *(Dexia settlement, Shell Hydrocarbon Reserves settlement, Convenium settlement)*. Once such a collective settlement is concluded, the parties may jointly request the Amsterdam Court of Appeal to declare it binding.

It should be noted that also here there is no one-size-fits-all approach. Some ADRs already deal with collective cases by applying a previous decision to subsequent cases of the same characteristics and type of parties involved. The features that an ADR scheme must have to deal with collective claims vary widely. It depends on the sector, nature of the claim and number and type of claimants.

With a view to providing redress, even for mass cases, BUSINESSEUROPE therefore strongly believes that ADRs should be the *main focus of action* at EU level.

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

This is an important element of the debate. BUSINESSEUROPE acknowledges that it would not be adequate for the consumer to support the mains costs of ADRs schemes. The financing should come from public authorities, from companies or from both. Also here, there should be pragmatic rather than one-size-fits-all solutions.

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

To answer this question a distinction should be made between impartiality and independence. The mediation directive makes this distinction in its recital 17 and article 3(b). What is asked from an ADR scheme is that it provides impartiality when dealing with complaints. Otherwise, if the requirement was independence (financial), most ADRs would have to disappear because they are funded by companies. In order to provide such guarantees of impartiality a certain number of principles could be followed.

These principles are:

- Ensuring transparency throughout the whole procedure;
- Own budget and liberty in obtaining proofs;
- Avoid remuneration based on results;
- Mediator should indicate any situation of conflicting interests or incompatibilities.

By following these and other similar principles one could increase the credibility of ADR schemes and, consequently, their attractiveness.

What should be the cost of ADR for consumers?

ADRs schemes should essentially be free of charge for consumers. However, in order to prevent the filing of unfounded complaints a small fee could be requested, in some cases, under the condition that it would be reimbursed to the consumer if he wins the case.

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