European Network of Councils for the Judiciary (ENCJ)

Reseau européen des Conseils de la Justice (RECJ)

ELI EUROPEAN LAW INSTITUTE

The Relationship between Formal and Informal Justice: the Courts and Alternative Dispute Resolution

Second Consultation Paper

Prepared by a Joint Project Group established by
The European Law Institute (ELI) and
The European Network of Councils for the Judiciary (ENCJ)

Introduction

1. This joint project was established to consider concerns that arise from the growth of different forms of alternative dispute resolution ("ADR"). There are many types of ADR, including mediation, early neutral evaluation, arbitration, online dispute resolution ("ODR"), and ombudsman determinations. We use the term "ADR" generically in this consultation.

2. The members of the joint project team are listed in **annex 1**.

3. In January 2017, the joint project team issued a first consultation paper focusing on the interface between court-based dispute resolution processes ("CBDRPs") and ADR processes (together "dispute resolutions processes" or "DRPs"). It received a number of responses.

4. At the first consultation stage, the project looked towards three main prospective outputs as follows:-

   (1) A statement of European best practice in relation to the approach that courts and judges should adopt in interacting with all types of ADR processes. This would include guidelines as to the preliminaries and procedures that should be adopted in considering ADR and in referring cases to ADR processes, and how risks of injustice can be reduced or eliminated.

(2) A statement of European best practice in relation to the approach that those responsible for all types of ADR processes should adopt in interacting with courts and judges. This would include guidelines as to the preliminaries and procedures that should be adopted in considering and referring cases which are the subject of an ADR process to a court, and how risks of injustice can be reduced or eliminated.

(3) Recommendations as to the best European models that could be developed and applied for coherent access to DRPs in respect of different types of dispute, and towards which Member States might wish to progress.

5. There are currently three main EU instruments that address the situation.[1] They do not seek to harmonise ADR practices but rather provide a framework within which ADR can function and which is further supplemented by the case law of the CJEU most recently in relation to consumer ADR.[2] None of this addresses what could or should be the best practice for the relationship between the courts or the ADR providers. Moreover, there are concerns about vulnerable parties, whether consumers, ordinary citizens, small businesses, or family litigants, feeling pressured to agree to ADR or to accept solutions without a proper understanding of their legal rights.

6. The intention was that the project should focus on the problems and solutions in relation to the interface between CBDRPs and ADR processes in C2B (consumer to business), C2C (consumer to

[1] These include: Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters ("Mediation Directive") OJ L 136, 24.5.2008, pages 3–8; Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC ("Directive on Consumer ADR") OJ L 165, 18.6.2013, pages 63–79 and Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC ("Regulation on Consumer ODR") OJ L 165, 18.6.2013, pages 1–12.

[2] Case C-317/08 *Alassini and Others* [2010] EU:C:2010:146; Case C-75/16 *Menini and Rampanelli* [2017] EU:C:2017:457

consumer), small B2B (small business to small business), G2B (government to small business) and G2C (government to consumer) disputes, where relationships are often characterised by an actual or potential power imbalance.

The First Consultation

7. The consultation drew attention to the actual or potential problems that the project group had identified, and sought comments on those and any other problems. These problems and risks were as follows:-

   (1) The risk that persons will be denied an independent judicial determination;

   (2) The risk that persons will settle their claims without having first had access to independent legal advice;

   (3) The risk that decision-makers or those conducting ADR processes are inadequately qualified;

   (4) The risk that individual parties have an inadequate understanding of the available methods of dispute resolution;

   (5) Risks of decision-making by an unidentified online or other decision-maker;

   (6) The risk that mediation or other ADR options are under-used, because of their voluntary nature and an absence of quality assurance;

   (7) The risk of abuses of the power of large governmental or commercial entities as the opposing party.

8. The questions asked in the consultation were as follows:-

   (1) What are your experiences as to the risks identified in this consultation paper?

(2) Are there any other important risks thrown up by the wide availability of different ADR processes?

(3) What would you like to see included in a statement of best practice relating to the approach that courts and judges should adopt in interacting with all types of ADR processes?

(4) What would you like to see included in a statement of best practice relating to the approach that those responsible for all types of ADR processes should adopt in interacting with courts and judges?

(5) What (more) in your experience can courts and judges do to promote or encourage the use of voluntary ADR processes?

(6) How successful in your experience are ADR processes that are made compulsory rather than voluntary?

(7) What in your experience are the best models for access to DRPs whether online or offline?

(8) How can available DRPs best be combined, utilised or made to function effectively alongside one another?

9. It was noteworthy, however, that stakeholders did not generally respond specifically to these questions. Instead they approached the issues raised by this paper from a series of specific standpoints. For example, Professors Hodges and Voet explained their cogent view that an approach which considers only CBDRPs is outdated now that so many sectoral DRPs are available, and that a multi-door court house model of accessing DRPs is itself obsolete.

10. It should not, however, be forgotten that this project is addressing the relationship between CBDRPs and ADR, so the CBDRPs are themselves an important starting point, always acknowledging that they are not the complete picture. Moreover, the project group comprised both experts in ADR and judges, so the emphasis was on the effects of CBDRPs on ADR and vice versa.

The second consultation

11. The first consultation process, together with a review of the ADR literature and international best practice, has confirmed that the first and third proposed outputs would help to fill a gap in the current normative framework for the development of ADR processes in Europe and their interaction with CBDRPs. The second proposed output would likely be duplicative of the existing EU instruments listed in Annex 2 and related instruments such as the European Code of Conduct for Mediators, the Commission Recommendation of 30th March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes (98/257/EC), and the Commission Recommendation of 4th April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (2001/310/EC).

12. In these circumstances, the project group has prepared drafts of the best practice documents envisaged by the first and third outcomes only. These form the subject matter of our second consultation.

13. The documents are reproduced below.

Output 1: A draft statement of European best practice in relation to the approach that courts and judges should adopt in interacting with all types of ADR processes. This will include guidelines as to the preliminaries and procedures that should be adopted in considering ADR and in referring cases to mediation or other ADR processes, and how risks of injustice can be reduced or eliminated

14. The responses to the Consultation Paper made clear that ADR processes are proliferating within Member States, in response to both market practices and regulation. As court-based civil procedure differs greatly across the EU, the interaction between CBDRPs and ADR processes is highly complex. A statement of best practice might address the following aspects of the processes adopted when litigants approach a court, whether it is a conventional court, an online court, or a "multi-door court-house" or Dispute Resolution Centre:-

    (1) The factors that should be taken into account when Member States consider making ADR or mediation a compulsory pre-requisite to CBDRP.

    (2) The factors that courts and judges should take into account when considering whether to require or recommend an ADR or mediation process in a particular case.

    (3) The information that should be made available to disputants before they are required or recommended to take their case to ADR or mediation.

    (4) The ways in which such information should be made available to disputants, and by whom.

    (5) The methods that courts and judges should employ in seeking to obtain the consent of the parties to an ADR or mediation process.

15. Each of these processes requires that regard be had to the risks set out above, and in particular the possibility that one party will be vulnerable and/or unaware of their legal rights.

16. Much of the literature reviewed by the Project Committee is aimed, at the policy level, towards the optimal design of ADR schemes. Relatively little writing addresses the principles that ought to guide judges' interaction with ADR processes under the existing law. Presently, however, judges across the EU interact with mandatory and voluntary, court-annexed and autonomous, binding and non-binding, advisory and facilitative ADR processes at various stages of SME, consumer, G2C, family, and criminal disputes. Further, judges in the EU have to engage with ADR processes based in other Member States. This diversity does not lessen the need for a set of principles at the European level to guide judicial officers' interaction with ADR processes; it underlines the need for principles at a sufficient level of generality to cover the very different DRP "ecosystems" that judges across the EU face. Likewise, the absence of EU-level training, accreditation, or a recognition framework for ADR practitioners underlines judges' responsibility as public officers to guarantee access to justice.

17. Broadly, the principles identified as constituting best practice for Courts and judges in the EU fall under three overlapping categories which relate to the risks identified in the consultation paper: (a) encouraging ADR, (b) Upholding standards in ADR, and (c) Preserving access to justice.

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Draft statement of European best practice in relation to the approach that courts and judges should adopt in interacting with all types of ADR processes

In encouraging ADR, Courts and Judges should have regard to the following principles:

(1) Courts and Judges should be provided with training and continuing professional education in ADR, so that they understand those domestic and EU ADR processes currently available in their Member State.

(2) Courts and Judges should inform and educate parties and legal professionals about the availability and potential merits of available ADR processes and give them the opportunity to consider using such process before and during litigation.

(3) To the extent possible under the law of the Member State, Courts and Judges should seek to integrate ADR processes into the justice system, treating them as complementary systems. In considering this issue reference could be made to the non-exhaustive check-list annexed to this Statement of Best Practice.[3]

(4) Court and Judges should, so far as possible, extend an appropriate degree of institutional comity and respect towards ADR processes, entities and practitioners.

(5) In considering the appropriateness of ADR processes, Courts and Judges should have regard to the financial circumstances of the parties and their ability to access legal advice or funding.

(6) To the extent permissible under the law of the Member State, Courts and Judges should have regard to parties' unreasonable refusal or failure to engage, in good faith, in ADR processes when exercising their costs jurisdiction and procedural discretions.

(7) Judges should balance the parties' interests with the public interest in a formal, public, binding determination or authoritative interpretation of the law, and with the court's function of determining and enforcing the public interest.

(8) Judges should consider whether a dispute is likely to raise a question of law that might more properly be determined by a court before an ADR process is engaged.

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[3] The Checklist is set out at Annex 3 to this Consultation.

(9) Courts and Judges should either require the parties or their legal representatives to assess the relative costs of ADR and litigation, or should do so themselves, so as to compare the benefits of each in light of the parties' wishes and interests.

(10) Courts and Judges should consider the parties' preference for speed, cost, and the fair determination of their legal rights as well as non-financial considerations such as the provision of apologies and the preservation of business, familial and other relationships.

(11) Courts and Judges referring parties to a particular ADR process or making an order for mandatory or voluntary ADR should consider the appropriateness of the process to the dispute in the light of factors, including the nature of the dispute and the characteristics of the parties. Relevant factors concerning the nature of the dispute include: the subject matter; procedural history; and, complexity of the dispute. Relevant factors concerning the characteristics of the parties include: the relationship between them; their interests and wishes; their ages and legal capacity; any history or fear of violence by a party; mental illness and intellectual disability; power and informational imbalance; and, familiarity with the relevant Member State and its legal system and language.

(12) Courts and Judges should give reasons for any discretionary decision to make an order for mandatory ADR, and explain the ADR process (and any opt-out options), what the parties should expect and prepare for, and how the ADR process relates to the litigation. Referral orders should, when appropriate, address also principle of confidentiality and duty of the parties to participate at ADR session in good faith.

In encouraging or referring cases to ADR processes, Courts and Judges should have regard to the following principles regarding the standards of those ADR processes:

(13) Before referring a dispute to an ADR process within the court structure, i.e., to a court-annexed process, Courts and Judges should: define and require specific levels of training and experience for ADR neutrals who carry out such processes; adopt written ethical principles to cover the conduct of ADR neutrals; make explicit the method and limitations upon compensation of such processes; and, adopt a mechanism for receiving any complaints regarding the performance and/or any alleged violations of ethical principles, of and by an ADR neutral during such a process;

(14) Before referring a dispute to an ADR process outside the court structure (whether to a court-connected ADR process or to a private ADR process unconnected to the court), Courts and Judges should have regard to the quality and independence of that process and its suitability to the particular dispute and to the parties.

(15) Court and Judges should consider the general level of public confidence in the suitability and quality of ADR processes outside the court structure and their state of development in the relevant Member State.

(16) Courts and Judges should ensure that there are fair and transparent processes available for the parties to choose an appropriate identified ADR provider whenever their case is referred to that process.

(17) Save as prescribed by the law of the Member State, Courts and Judges should ensure that the confidentiality of ADR processes is preserved.

In encouraging or referring cases to ADR processes, Courts and Judges should have regard to the following principles regarding the preservation of access to justice:

(18) Courts and Judges should ensure that parties understand whether an ADR process is mandatory or voluntary, and that consent to a voluntary ADR process is fully informed and freely given.

(19) Courts and Judges should ensure that all contemplated ADR processes respect the rights of the parties under article 6 of the European Convention on Human Rights and article 47 of the EU Charter of Fundamental Rights.

(20) Courts and Judges should ensure that parties understand the nature of the ADR process, its relation to the legal proceedings, and how their rights might be affected by their conduct in the ADR process.

(21) Courts and Judges should consider whether the need to preserve the parties' access to justice necessitates any ancillary court orders such as the interruption or suspension of an applicable limitation or prescription period.

18. The statement of best practice suggested by Output 1 might achieve a status similar to the European Code of Conduct for Mediators referred to in recital 17 to the Mediation Directive.

Output 3: Draft recommendations as to the best European models that can be developed and applied for coherent access to DRPs in respect of different types of dispute, and towards which Member States may wish to progress

19. This aspect of the project requires (at least in theory) an examination of the way in which available DRPs can be combined, utilised or made to function effectively alongside one another. As noted above, responses to the consultation paper revealed a great diversity of both CBDRPs and ADR processes across the EU, as well as diversity in the substantive law (despite progress towards legal harmonisation), in economic and market conditions, and in the mode of government service delivery. In reality, however, the possibilities are not limitless. They are constrained by culture and technology. Disputants will not take a dispute to any provider they

do not trust, and they will only use technology that is made user-friendly enough to be accessible.

20. Some Member States are developing ODR platforms that will aim to solve disputes that arrive on their portal by any available means including ombudsmen suggested solutions, mediation and court determination. This is known in some quarters as the (online) "multi-door court-house model" where any disputant can arrive at the portal or the court-house and expect to be directed to the appropriate DRP provider after a triage process that determines the most effective approach to the solution of the complaint.

21. Other Member States have adopted purely private web-based solutions that have the same effect, save that they potentially (at least) exclude ultimate judicial DRP, even if other DRPs fail.

22. It will be hard to identify a best solution for all Member States and all cultural backgrounds, but a series of possible best practice approaches may be possible. The likely candidates for best practice are:

    (1) The multi-door court house model.

    (2) The online multi-door court model.

    (3) The Belmed style non-court-based ADR and ombudsman model.

    (4) A network of regulated private ADR providers.

23. It may be that this output 3 is unachievable in the short term, but the project group thought it desirable to ask stakeholders whether such an exercise would be worthwhile. The responses revealed that, even if it is impossible to identify any one of these models as definitive of best practice for all Member States at the present time, it is possible to distil criteria by which models can be assessed. There is likely to be more than one compliant solution in any given Member State at a given point in its development; best practice at the present time might comprise a combination of models in some Member States.

24. To the extent that ADR processes are attractive, it is because they allow parties to utilise a method of dispute resolution which fulfils their expectations of speed, cost, and fairness, presumably better than the courts. Generally, ADR is said to enjoy an advantage over CBDRP in speed and cost, without compromising parties' expectations of fairness and without compromising parties' ultimate rights to access the state justice system.

25. Two problems arise in this context. First, how do parties find the most appropriate ADR process? Secondly, how do Member States ensure that parties understand enough about the available ADR processes to evaluate them accurately? If parties are unable to find the appropriate ADR process and service provider, or if it becomes too difficult or costly to evaluate the alternatives, these benefits are lost. The response of the *Groupement européen des magistrates pour la mediation,* for example, highlighted that it was not the *number* of potential ADR processes that cause difficulty so much as the challenges (real or perceived) that face the potential user in engaging them.

26. In many Member States, there will be only one alternative to CBDRPs for any given type of dispute. For example, sectoral ombudsman processes are only available to disputes between consumers and sectoral service providers in, for example, telecoms, utilities, or the travel industry. Such ombudsmen facilities are not generally available in family disputes. Moreover, ODR is unlikely to enter the family law terrain of most Member States in the near-term, so the (offline) "multi-door court-house model" remains best practice in family law in most Member States (although the Netherlands had until recently a well-developed family ODR system). The EU's ODR process is also only available in C2B disputes, but not in G2C or C2C disputes. In many Member States, there is an undeveloped network of sectoral ombudsmen processes, so that mediation, ODR and CBDRPs are the only choices available.

27. Thus, instead of promoting one model as representing European best practice, the Project Group has sought to develop a list of principles by which proposed reforms might be assessed and

compared. Again, these principles are drafted by reference to the risks identified in the consultation paper. They are addressed to the relevant policy community in Member States: administrators and legislatures, academics, stakeholders such as traders and consumer representatives, and ADR service providers themselves. For example, in Member States where legal professionals provide ADR services, legal professional bodies could play a role in choosing and adapting the best model.

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Draft recommendations as to the principles underlying the best European models that can be developed and applied for coherent access to DRPs in respect of different types of dispute, and towards which Member States may wish to progress

General

(1) In developing DRPs in the internet age, Member States should have regard to the balance that exists between the needs and expectations of disputing parties as to (a) the speed of resolution of their dispute, (b) the cost of that resolution, (c) the fairness of the DRP process in which the parties engage, and (d) the justice of the outcome thereby achieved. By way of a simple example, a consumer may be content with a simple cheap and final expedited process to resolve a dispute over a small utility bill, but may be less content with such a process to resolve a dispute as to the ownership of a matrimonial home.

(2) In general terms, the expectation should be that disputing parties should be provided with access to a range of ADR processes for any particular kind of dispute which suit their needs and meet their expectations in relation to speed, cost, fairness and outcome.

(3) In general terms also, the range of ADR processes available to disputing parties should be clearly ascertainable both

online and otherwise, and well publicised by both the national courts and ADR service providers.

(4) The first point of access to any DRP or DRP portal should be intuitive and easily comprehensible to all types of disputing party.

Locating and choosing the appropriate DRP

(5) All and any DRP website, portal or information mechanism should provide clear and comprehensive information in appropriate languages about the nature of the available DRP process including the identity of the dispute resolution provider, the cost of the process, the expected duration of the process, the methodology to be adopted and the consequences of engaging in that process.

(6) In addition, all and any DRP website, portal or information mechanism should (a) make the user aware of other available DRP processes including court processes, (b) compare the advantages and disadvantages of each available DRP process, (c) provide links to those processes whether electronic or otherwise, and (d) explain any limitation on the parties' legal rights which the process may entail.

(7) In so far as DRP providers are preparing information intended to direct disputing parties to an appropriate choice of DRP process for their type of dispute, they should ensure that they utilise one or more of the following best practice devices suitable for both represented and unrepresented parties: (a) a simple "frequently asked questions" presentation, (b) a simple "self-test" questionnaire aimed at establishing the party's suitability for the DRP concerned, (c) DRP online and/or a telephone helpline.

(8) Disputing parties are to be provided with the information mentioned in these principles with the objective of enabling them to reach an informed decision as to the appropriate

DRP for them to follow in the light of their needs and expectations as to speed, cost, process and outcome.

Achieving a harmonious relationship between CBDRP and ADR processes

(9) ADR providers should cooperate with the courts of the relevant Member States and with the legal professions in those Member States in order to integrate ADR processes into the justice framework.

(10) All and any DRP website, portal or information mechanism should make clear (a) when and in what circumstances the disputing parties may still access a CBDRP, even after they have utilised one or more ADR process, and (b) that disputing parties will always retain their rights under article 6 of the ECHR and article 47 of the Charter.

Second Consultation Questions

28. In these circumstances, the project group would be grateful for answers to the following questions from the European Commission, European judicial networks, judges, ADR providers and other stakeholders.

29. The questions are:-

(1) Does the "draft statement of European best practice in relation to the approach that courts and judges should adopt in interacting with all types of ADR processes" accurately reflect such best practice?

(2) What improvements can be suggested?

(3) Do the "draft recommendations as to the principles underlying the best European models that can be developed and applied for coherent access to DRPs" accurately reflect such principles?

(4) What improvements can be suggested?

30. These outcomes are due to be discussed at ELI's General Assembly in Vienna on 7th September 2017.

31. Responses would be appreciated by Friday 25 August 2017 in order that they can be collated in advance of the Vienna meeting.

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Annex 1
List of members of the joint project team

European Law Institute

Diana Wallis (England & Wales)

Dr John Sorabji (England & Wales)

Ales Zalar, President of ECDR (Slovenia)

Justice Paul Gilligan (Ireland)

Professor Dr Stefaan Voet (Belgium)

Professor Dr Fabrizzio Cafaggi (Italy)

Professor Christopher Hodges (England & Wales)

Tomasz Dudek (ELI project officer)

European Network of Councils for the Judiciary

Sir Geoffrey Vos, Chancellor of the High Court (England & Wales) (Chair)

Judge Lourdes Arastey Sahún (Spain)

Judge Stanislav Georgiev (Bulgaria)

Justice John Hedigan (Ireland)

Professor Alessio Zacharia (Italy)

Mr David Simone (Italian COSMAG)

Monique van der Goes, Director ENCJ

Annex 2

The existing EU instruments

32. There are the following three principal existing EU instruments:-

(1) Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters ("Mediation Directive") OJ L 136, 24.5.2008, pages 3–8;

(2) Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC ("Directive on Consumer ADR") OJ L 165, 18.6.2013, pages 63–79; and

(3) Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC ("Regulation on Consumer ODR") OJ L 165, 18.6.2013, pages 1–12.

33. The Mediation Directive was a justice instrument intended to encourage the use of mediation and was aimed at ensuring a balanced relationship between mediation and judicial proceedings (article 1).[4] The Directive applies in cross-border disputes and requires member states to encourage voluntary codes of conducts for mediators (article 4), and allows courts to invite the parties to court proceedings to use mediation to settle their disputes (article 5), and to make the outcomes enforceable by agreement (article 6).

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[4] The legal basis of the Mediation Directive was Article 61(c) and the second indent of Article 67(5) of the Treaty Establishing the European Community *viz*: The Community has set itself the objective of maintaining and developing an area of freedom, security and justice, in which the free movement of persons is ensured. To that end the Community has to adopt, inter alia, measures in the field of judicial cooperation in civil matters that are necessary for the proper functioning of the internal market.

34. The Directive on Consumer ADR was an internal market instrument which aimed to ensure that consumers can, on a voluntary basis, submit complaints against traders to entities offering independent fast and fair ADR (see article 1).[5] Article 8 provides for the ADR procedures to be available to consumers both online and offline, without charge or at a nominal fee, and to provide an outcome within 90 days. Article 10 provides that an agreement between a consumer and a trader to submit complaints to an ADR entity shall not be binding if it is concluded before the dispute has materialised and has the effect of preventing the consumer of availing himself of the right to bring an action in a court. Article 9 provides that where the ADR procedure proposes a solution, the parties must be informed that they have a choice as to whether or not to agree that proposed solution (see also article 11).

35. The Regulation on Consumer ODR provides for the European Commission ("EC") to establish a user-friendly ODR platform as a non-obligatory single point of entry for consumers and traders seeking an out-of-court resolution of disputes by a competent ADR entity covered by the Regulation, especially in a cross-border dispute. It connects consumers who seek to use it with traders and national ADR entities listed under the Directive on Consumer ADR. The platform was launched in early 2016 in accordance with the provisions of the Commission Implementing Regulation (EU) 2015/1051.

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[5] The legal basis of the Directive on Consumer ADR is Article 169(1) and point (a) of Article 169(2) of the Treaty on the Functioning of the European Union (TFEU) *viz*: that the Union is to contribute to the attainment of a high level of consumer protection through measures adopted pursuant to Article 114 TFEU. Article 38 of the Charter of Fundamental Rights of the European Union provides that Union policies are to ensure a high level of consumer protection.

36. In some, normally regulated, sectors (notably communications,[6] energy,[7] consumer credit,[8] payment services,[9] and for bus and coach passengers[10]) EU law requires all traders to be subject to adequate and effective ADR schemes. In some other sectors, EU legislation encourages disputes to be resolved by ADR. In many of these regulated sectors, Member States have specific sectoral ADR facilities, such as financial ombudsmen or ADR sections within regulatory authorities.

[6] Directives No 2009/136/EC and No 2009/140/EC; OJ L337, 18.12.2009 p.11 & 37.

[7] Directives No 2009/72/EC and No 2009/73/EC; OJ L 211, 14.8.2009 p. 55 & 94.

[8] Directive No 2008/48/EC.

[9] Directive No 2007/64 /EC.

[10] Directive (EC) 2009/136 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services; Directive (EC) 2009/72 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, [2009] OJ L211/55; and Directive (EC) 2009/73 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC; Directive (EC) 2008/48 on credit agreements for consumers; Directive (EC) 2007/64 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC; Regulation (EU) No 181/2011 on bus and coach passenger rights (complaints function either in house or external; also complaints and enforcement authority).

Annex 3

CHECKLIST OF ISSUES FOR MEMBER STATES CONSIDERING DEVELOPING THEIR APPROACH TO ADR

Checklist of issues to be taken into account when Member States consider making ADR a compulsory prerequisite to CBDRP

1) Issues to be considered

- Which types of dispute are prima-facie eligible for ADR, and if eligible, which type of ADR process is the most appropriate for the particular dispute;

- Is ADR or a specific ADR process most suitable for one particular form of dispute or for multiple different forms of dispute i.e., small claims, family disputes, community disputes, workplace disputes etc;

- The level of public awareness, trust and confidence in ADR, or in any specific form of ADR process;

- The scope of availability and accessibility of qualified ADR service providers;

- Whether there is any available system of quality assurance e.g., registration, licensing, accreditation, monitoring and evaluation of ADR practice;

- Whether the ADR process is free of charge or whether it is available at a modest (reduced) fee at the pre-commencement stage;

- The availability of legal aid;

- Whether the parties' right to opt out of an ADR process is to be retained;

- Whether to include a duty to participate in good faith in the ADR process;

- The duration of ADR;

- What kind of interactions, if any, between the pre-commencement ADR process and formal litigation are required and/or allowed.

2) What kind of incentives or requirements may exist for disputants and/or their lawyers' prior to commencement litigation?

- The ethical duty of lawyers to inform and advise their clients about ADR or any specific form of ADR;

- Any duty of disputants and their lawyers to consider ADR, and any specific form of ADR, and to certify that they have done so;

- Any duty of disputants to participate at a ADR, or specific form of ADR, information session;

- Any duty of disputants to participate in a specific form of ADR prior to commencing litigation.

Checklist of issues to be taken into account when Member States consider whether to require or recommend parties take part in a specific ADR process following commencing of proceedings

1) Which kinds of ADR-related powers may be entrusted to courts and judges?

- A duty or discretion to require parties to take part in a relevant form of ADR information session;

- A duty or discretion to consider whether a claim is eligible for ADR i.e., a screening process;

- A duty or discretion for courts:

    (i) to design and incorporate its own ADR scheme or schemes within its formal court processes, e.g. court-annexed mediation, and if so should such a scheme or schemes operate in first instance courts and/or in appeal courts;

    (ii) either as an alternative to or in addition to court-annexed scheme or schemes, to refer disputes to a private ADR process i.e., a court-connected mediation provider;

    (iii) either as an alternative to or in addition to court-annexed or court-connected ADR schemes, to recommend parties utilise a specific form of ADR process that is carried out by a private provider of the parties' choice

- A duty (automatic referral) or discretion (presumptive referral in all cases unless there is a reason not to refer in a specific case) to refer cases to a specific form of ADR.

2) What kind of legal requirements, incentives and smart sanctions may be available for disputants and their lawyers?

- The ethical duty of lawyers to inform and advise their clients about ADR;

- The duty of disputants and their lawyers to consider ADR or a specific form of ADR and certify to the court that they have done so;

- The duty of lawyers to provide their clients and the court with an estimated comparison of the cost of any specific form of ADR and of litigation;

- A duty of represented parties to participate by their lawyers at any telephone screening conference for any specific form of ADR;

- A duty of disputants to participate at either an in-court or out-of-court information session for any specific form of ADR;

- A duty of disputants to participate at a non-binding form of ADR post-commencement of litigation e.g., a non-binding mediation;

- A retained right to opt-out from any mandatory post-commencement ADR referral scheme;

- A litigation cost sanction for any unreasonable refusal to consider participation, or to participate, in good faith in any specific form of ADR;

- Any increase in lawyers' fees arising from participation in a specific form of ADR;

- The availability of legal aid for compulsory referral to a specific form of ADR;

- The mandatory participation in any specific form of ADR as a condition for granted legal aid for litigation;

- The full or partial reimbursement of court filing fees if parties have used any or any specified form of ADR to resolve their dispute and/or have resolved their dispute;

- Any free of charge or low cost court-annexed or court-connected ADR scheme.