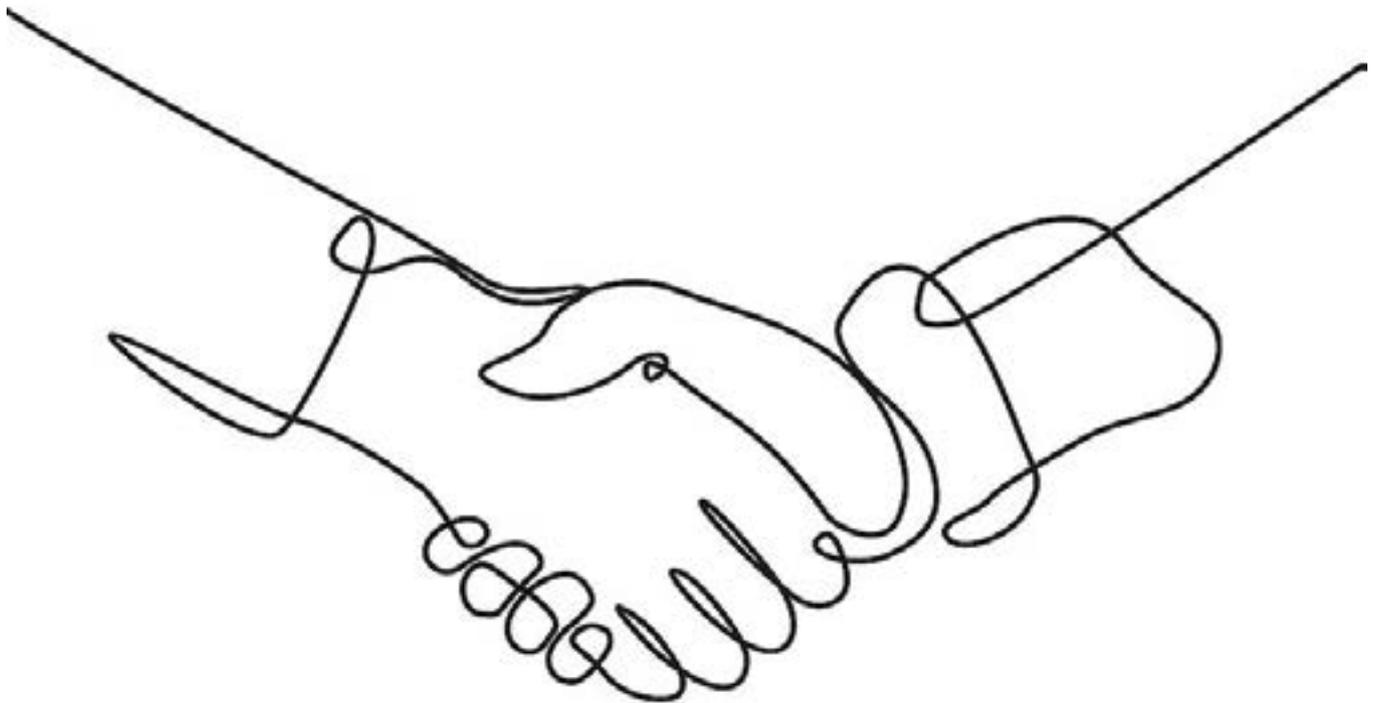


The Relationship between Formal and Informal Justice: The Courts and Alternative Dispute Resolution

Report of the European Law Institute and of the
European Network of Councils for the Judiciary





European Network of Councils
for the Judiciary (ENCJ)

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Statement
of the European Law Institute
and of
the European Network of Councils for the Judiciary

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

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

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The European Network of Councils for the Judiciary (ENCJ)

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The principal objectives of the ENCJ are the improvement of cooperation between Councils for the Judiciary and the members of the Judiciary and the promotion of best practices to enable the Judiciary to deliver timely, effective and quality justice for the benefit of all citizens.

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List of abbreviations

ADR	Alternative Dispute Resolution
B2B	Small Business to Small Business
C2B	Consumer to Business
C2C	Consumer to Consumer
CBDRPs	Court-Based Dispute Resolution Processes
CJEU	Court of Justice of the European Union
DRPs	Dispute Resolution Processes
G2B	Government to Small Business
G2C	Government to Consumer
ISDS	Investor-state Dispute Settlement
ODR	Online Dispute Resolution

I. Introduction

The present project deals with how Courts and Judges should act in considering or referring cases to ADR.

Over the past 40 years, there has been a significant growth in and use of alternative forms of dispute resolution throughout Europe. In addition to national developments, there have been developments at the European level. There are currently three main ADR instruments in force in the EU (the ADR instruments).¹ Their aims are to 'contribute to the proper functioning of the internal market' and to ensure access to 'simple, efficient, fast and low-cost' ways of resolving disputes. They aim at limited harmonisation and leave much choice for Member States. In addition to official promotion of ADR, there has been a growth in private sector promotion of ADR through, for instance, contractual clauses in consumer or business contracts that specify that any disputes arising under the contract must be resolved via a relevant form of ADR eg a form of mandatory ODR mechanism or arbitration scheme.

The various developments have left a patchwork quilt of ADR provision. In some Member States the use of some forms of ADR, such as mediation, prior to resort to formal litigation before the courts is a mandatory pre-requisite (eg Italy). In other Member States, such as the United Kingdom, the use of ADR is optional, albeit its use is promoted by the State generally and by courts in particular. Such differential development may lead to a myriad of different ADR bodies that are alien and unfamiliar to foreign nationals. This in turn may undermine trust and confidence in such mechanisms and their ability to deliver cost-effective, timely and fair dispute resolution across Member States' borders. Furthermore, there is a growing risk, and in some cases reality, that ADR is being developed in a manner that is improperly intruding on the legitimate ambit of the judicial branch of the State or government.

These two issues are exacerbated by internal inconsistency in existing EU instruments; both those which directly concern ADR techniques and those which indirectly include ADR mechanisms. In particular, they are not always consistent, either internally or amongst themselves; they betray a misunderstanding of different types of ADR. By way of example, the Mediation Directive has been the least problematic and most successful instrument. It is, however, limited to one form of ADR where it does at least lay-out a basic framework for cross-border cases, including importantly reference to the European Code of Conduct for Mediators. By way of contrast the ADR Directive, which covers all domestic consumer cases and includes mediation as a type of ADR, introduces a differentiation between ADR mechanisms that impose a binding decision and those that do not. The result being that where a consumer submits to an adjudicator's binding decision there are certain legal protections. If, however, they voluntarily enter into a procedure which results in a non-

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.

binding outcome, which is not in their interests legally, they have no such protection or safeguard. The binding/non-binding distinction may, in short, be missing the problem. Further confusion arises in respect of Ombudsperson Schemes. In some jurisdictions Ombudspersons are referred to as ‘médiateur’, which can equally to the unwary be suggestive of the person providing some form of mediation, whereas it is likely in fact to be a form of adjudication. There is a need for clarity of definition.

Further problems can arise through a misunderstanding of the distinction between the consensual process that yields a binding determination and the consensual process that yields a consensual result. The Competition Damages Directive, for instance, incorrectly treats arbitration as a consensual dispute resolution mechanism suggesting that it is akin to mediation, whereas the former is only consensual in terms of disputant agreement to the process not the result, with the latter consensual in terms of agreement to process and result. The failure to properly distinguish between the nature and form of differing ADR processes can have a variety of unintended and unhelpful consequences. These inconsistencies across the acquis in respect of ADR need careful examination and consideration to see if a more consistent approach could be adopted, one which will then be able to underpin effective and appropriate protection for disputants, and one that could ensure that future development is properly principled and does not deprive, or run the risk of depriving, consumers and citizens generally of their right of access to justice. This also comes against the challenging background of very public disquiet at one form of ADR, arbitration, in the context of EU trade negotiations with the US and the subject of ISDS.

On top of that, there are a number of situations within the EU where the parties to a CBDRP are required first to engage in an ADR process. An example is the requirement to engage in ADR prior to a CBDRP in Italy.² There are other states where the penalties imposed by the courts for failing to participate in an ADR process make such participation effectively mandatory.³ Mandatory ADR does, however, bring with it certain complexities that are beyond the scope of the current project, and the project group proposes that a further study of both: (a) the different ways in which ADR can be made mandatory; and (b) the advantages and disadvantages of mandatory ADR be conducted.

This Statement is a product of the work of the joint project group which was established to consider the abovementioned concerns that arise from the growth of different forms of ADR. There are many types of ADR, including mediation, early neutral evaluation, arbitration, online dispute resolution, and ombudsperson determinations. The term ‘ADR’ is used generically in this final report. The steps undertaken in the preparation of the Statement are explained in Annex 1.

It should be noted that the present project only deals with how Courts and Judges should act in considering or referring cases to ADR. It does not deal with the legislative or policy issues concerning when and how Member States should or might provide in their laws for mandatory references to one or more ADR processes.

² Article 5 of decreto legislativo n 28 Attuazione dell’articolo 60 della legge 18 giugno 2009, n 69, in materia di mediazione finalizzata alla conciliazione delle controversie civili e commerciali (Legislative Decree No 28 implementing Article 60 of Law No 69 of 18 June 2009 on mediation in civil and commercial matters) of 4 March 2010.

³ *Reid v Buckinghamshire NHS Trust* [2015] EWHC B21 (Costs), para 12.

The project group annexed a non-exhaustive check-list of issues that Member States might consider when: (a) making ADR a compulsory prerequisite to CBDRP; and (b) requiring or recommending parties take part in a specific ADR process following commencing of proceedings. That check-list is reproduced in Annex 2 to this report. The project group acknowledges, however, that it raises different questions from those included in the central thesis of this report.

Accordingly, as we have said, the project group recommends that the whole issue of making ADR processes mandatory should be considered further in a future project.

With that introduction, this final report now deals with its two outcomes: first, the statement of best European practice in relation to the approach that Courts and Judges should adopt in interacting with ADR processes, and secondly, the best European models that could be developed for coherent access to DRPs.

II. The approach Courts and Judges should adopt in interacting with ADR processes

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) To the extent permissible 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.
- (2) Courts and Judges should make best efforts to extend an appropriate degree of institutional comity and respect towards ADR processes, entities and practitioners.
- (3) 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.
- (4) Courts and Judges should inform 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.
- (5) Courts and Judges should consider whether to require the parties or their legal representatives to assess the relative costs and incentives of ADR and litigation, or should consider doing so themselves, so as to compare the benefits of each in light of the parties' wishes and interests.
- (6) Courts and Judges should consider the parties' concerns about 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.
- (7) When 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.
- (8) Courts and Judges referring parties to a particular ADR process or making an order for 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 the 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.

- (9) Courts and Judges should give reasons for any discretionary decision to make an order requiring 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, also address the principle of confidentiality and the duty of the parties to participate in ADR in good faith.
- (10) Judges should consider, in the context of the engagement of an ADR process, whether a dispute is likely to raise a question of law that might more appropriately be determined by a court.
- (11) 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, if exercising a costs jurisdiction and a procedural discretion.

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:

- (12) Courts and Judges should, where appropriate, 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.
- (13) Courts and Judges should, where appropriate, consider whether there are fair and transparent processes available for the parties to choose an ADR provider when their case is referred to that process.
- (14) Before referring a dispute to an ADR process within the court structure, ie to a court-annexed process, Courts and Judges should ensure that the following factors are satisfied: specific levels of training and experience for ADR neutrals who carry out such processes; the existence of written ethical principles covering the conduct of ADR neutrals; the specification of the cost of the ADR process; the identification of the method of and any limitations on the ADR process; and a specified mechanism for a complaints procedure in relation to the performance or ethical violation of an ADR neutral in respect such a process.
- (15) 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.
- (16) Save as prescribed by the law of the Member State, Courts and Judges should ensure that the confidentiality of ADR processes is preserved, including in relation to the court in charge of the case.

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:

- (17) 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.
- (18) Courts and Judges should, so far as possible, 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, so far as possible, 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.
- (20) 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 and remind the parties, when applicable, that they might need to act to interrupt or suspend an applicable limitation or prescription period.
- (21) Courts and Judges should inform the parties of any issues that may arise as to the national and/or international enforcement of the outcome of an ADR process.

Background and comments

This statement of European best practice is based upon the principles of fairness, trust and access to justice (see Article 3 of the European Code of Conduct for Mediators).

ADR processes must be available to consumers, individuals and small businesses in order to ensure access to justice. It is simply not possible for courts to deal with every dispute, large or small. Consumers in the 21st century have multiple energy, telecoms, employment, pensions and travel contracts, to name but a few. They have numerous interactions with local and national institutions of the state, and disputes arise in these and many other areas.

Where, however, Courts and Judges are permitted to refer disputes to an ADR process, whether it be mediation, arbitration or an ombudsperson determination, they need to have regard to some basic principles to ensure that the parties to the dispute: (a) can trust the ADR provider to which they are referred; (b) can be assured a fair and just outcome if the dispute is resolved by that ADR process; and (c) will not suffer an impairment to their rights in respect of limitation or enforcement as a result of an ADR process.

The statement of European best practice includes guidelines as to the preliminaries and procedures that should be adopted in considering ADR and in referring cases to an ADR process, and how risks of injustice can be reduced or eliminated.

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. Accordingly, this statement of best practice addresses 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:

- a. *Reasons*. 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.
- b. *Information*. The information that should be made available to disputants before they are required or recommended to take their case to ADR or mediation.
- c. *Modalities*. The ways in which such information should be made available to disputants, and by whom.
- d. *Consent*. The methods that Courts and Judges should employ in seeking to obtain the consent of the parties to any form of ADR including mediation.

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

Much of the literature reviewed (Annex 4) by the project group is aimed, at the policy level, towards the optimal design of ADR schemes. Relatively little writing addresses the principles that ought to guide the interaction of Courts and Judges with ADR processes under existing laws. 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 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.

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. Councils for the Judiciary can and should encourage the use of court-promoted ADR and provide guidelines as to the training of judges in relation to ADR processes generally and in relation to those processes aimed at reducing court backlogs.

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 above: (a) Encouraging ADR; (b) Upholding standards in ADR; and (c) Preserving access to justice.

It is hoped that this Statement of Best Practice might achieve a status similar to the European Code of Conduct for Mediators referred to in recital 17 to the *Mediation Directive*.

III. Coherent access to Dispute Resolution Processes (DRPs)

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

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 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 appropriate ADR processes for any particular kind of dispute which suits their needs and meets 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, user-friendly 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 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 DRPs including court processes; (b) compare the advantages and disadvantages of each available DRP; (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 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; and (c) a 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 European Convention on Human Rights and Article 47 of the Charter.

Background and comments

This aspect of the project required (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. Responses to the consultations revealed a great diversity of both CBDRPs and ADR processes across the EU, as well as diversity in 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.

Some Member States are developing ODR platforms that will aim to solve disputes that arrive on their portal by any available means including ombudsperson 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.

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.

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 is possible. The likely candidates for best practice are:

- a. The multi-door court house model.⁴
- b. The online multi-door court model.⁵
- c. The Belmed⁶ style non-court-based ADR and ombudsperson model.
- d. A network of regulated private ADR providers.

The responses to the consultations 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.

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 user-friendliness, 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.

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 médiation* (GEMME), 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.

In many Member States, there will be only one alternative to CBDRPs for any given type of dispute. For example, sectoral ombudsperson processes are only available to disputes between consumers and sectoral service providers in, for example, telecoms, utilities, or the travel industry. Such ombudsperson 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

⁴ 'The Courthouse as a Dispute Resolution Center offering a multiple choice of options or ways enabling fast resolution of legal disputes', see Michal Malacka, 'Multi-Door Courthouse Established through the European Mediation Directive?' [2016] 16 ICLR 1, 127.

⁵ ODR platform where any disputant can arrive at 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.

⁶ See the website in Belgium at: <http://economie.fgov.be/en/disputes/consumer_disputes/Belmed/#.Wb-mYctvGUK>.

C2C disputes. In many Member States, there is not a developed network of sectoral ombudsperson processes, so that mediation, ODR and CBDRPs are the only choices available.

Thus, instead of promoting one model as representing European best practice, the project group has developed a list of principles by which proposed reforms might be assessed and compared. Again, these principles are drafted by reference to the risks identified above. 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.

IV. Future possible actions

In the course of its deliberations, the project group acknowledged the limitations of the exercise it has been able to undertake. It concluded that there was scope for further work in this area for a number of reasons.

First, there has, up to now, been little consideration of the relationship between Courts and Judges on the one hand and ADR processes on the other hand. Secondly, ADR processes, as has already been emphasised, are developing rapidly, but at different speeds and in different directions in different parts of Europe. Thirdly, in some Member States, there has apparently been little thought given to the desirability of introducing some form of mandatory ADR so as to relieve the burden on the courts and to improve access to justice.

Moreover, the responses to our consultations have revealed that in many Member States, there is great cultural and economic resistance to the promotion and use of ADR processes. For the reasons suggested above, the availability of ADR processes to complement court structures promotes access to justice for consumers, individuals and SMEs alike. But ADR can only grow where ADR providers are trusted to provide fair and just outcomes.

The project group is also conscious that some private dispute resolution systems employ digital means to make decisions. Moreover, the EU's ODR platform and other national platforms and ADR schemes inevitably collect much data about cases, types of cases and outcomes. In future, a use for such data might be found to prevent or remedy repeated inappropriate behaviour or to assist regulators and law makers. The question is how far such data could be used as meta data or in an anonymised form, since it is now largely protected by confidentiality.

The project group considered that further work could usefully be undertaken in the following areas:

- a. To establish factors that should be taken into account when Member States consider: (a) making ADR processes a mandatory pre-requisite to CBDRP; and (b) requiring or recommending parties to take part in an ADR process.
- b. To consider the ways in which ADR processes can be successfully promoted and integrated with CBDRPs in Member States, bearing in mind the risks mentioned in this report.
- c. To consider whether there could or should be 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.
- d. To consider whether the existing and innovative models for interaction between ADR processes in consumer, government and business fields might be mapped, so as to produce a vision of the ideal European dispute resolution systems for in-country and cross-border disputes, based on developing European jurisprudence and private international law.
- e. To consider how digital data generated by public and private dispute resolution systems might in future be put to beneficial use without infringing necessary confidentiality.

V. Annexes

Annex 1: Methodology

The joint project group issued two consultation papers in January 2017 and July 2017 respectively. This final report takes due account of the responses that were received to each consultation.

The first consultation paper focused on the interface between CDRPs and ADR processes (together DRPs).

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, to 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, to 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.

The second consultation paper sought comments on drafts of the first and third of these outputs, viz: statements of best European practice in relation to the approach that Courts and Judges should adopt in interacting with ADR processes, and of best European models that could be developed for coherent access to DRPs.

There are currently three main EU instruments that address the situation and are summarised in Annex 3. They do not seek to harmonise ADR practices but rather provide a framework within which ADR can function. They are further supplemented by the case law of the CJEU, most recently in relation to consumer ADR.⁷ None of this addresses what could or should be the best practice for the relationship between Courts and Judges on the one hand and ADR providers on the other hand. 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.

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

⁷ 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 to 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

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

- (1) The risk that persons would be denied an independent judicial determination;
- (2) The risk that persons would 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; and
- (7) The risk of abuses of the power of large governmental or commercial entities as the opposing party.

The questions asked in the first 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?

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 CBDRLPs is outdated now that so many sectoral DRPs are available, and that a multi-door court house model of accessing DRPs is itself obsolete.

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

The second consultation

The first consultation process, together with a review of the ADR literature and international best practice, 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 CBDRLPs.

The second proposed output was thought likely be duplicative of the existing EU instruments listed in Annex 3 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). The project group does, however, now suggest that the ELI or other groups might consider in the future the circumstances in which they might produce a statement of European best practice relating to the approach that those responsible for all types of ADR processes should adopt in interacting with Courts and Judges.

In these circumstances, the project group prepared drafts of the best practice documents envisaged by the first and third outcomes only for the second consultation.

Several responses to the second consultation made the point that, in some Member States, the judicial responsibilities assumed in the draft statement of best European practice did not exist under the laws of these Member States. The project group has made changes to the draft statement of best European practice referred to below to take account of this point, but would emphasise that the statement is intended to apply to the numerous different situations existing in the many Member States. Indeed, this report is also intended to be of interest to states outside the EU where ADR processes also need to interact with CBDRLPs.

A further point made by the Spanish response to the second consultation was that the draft statement of European best practice started 'from a very concrete model' and aimed to 'outline principles to which the countries of the [EU] should ideally aspire'. The project group accepts the second, but not the first point. The statement has been drafted so as to apply to as broad a range of country situations as possible. It acknowledges a lack of jurisdiction in

some states, and the difference between mandatory, voluntary and court-encouraged references to ADR.

It is this last point that has led the project group to consider that more work may need to be done after the conclusion of this project on issues relating to any jurisdictional requirement to seek a solution through an ADR process.

Annex 2: Draft checklists

Draft checklist of issues to be taken into account when Member States consider making ADR a compulsory prerequisite to CDRP (checklist 1)

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 eg small claims, family disputes, community disputes, workplace disputes?
- The level of public awareness, trust and confidence in ADR, or in any specific form of ADR process?
- The availability and accessibility of qualified ADR service providers?
- Whether there is any available system of quality assurance eg 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 or reduced charge 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 likely duration of the ADR process?
- What kind of interactions, if any, between the pre-commencement ADR process and formal litigation are required and/or allowed?
- Whether the parties are likely actually to participate in the ADR process, and whether any resolution made as a result of it will be capable of enforcement?

2. What kind of incentives or requirements may exist for disputants and/or their lawyers prior to the commencement of 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 in an ADR, or specific form of ADR, information session.
- Any duty of disputants to participate in a specific form of ADR prior to commencing litigation.

Draft 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 (checklist 2)

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, ie a screening process.
- A duty or discretion for courts:
 - i. to design and incorporate their own ADR scheme or schemes within their formal court processes, eg 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 ie a court-connected mediation provider; and
 - iii. either as an alternative to or in addition to court-annexed or court-connected ADR schemes, to recommend parties to 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 eg, 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.

Annex 3: The existing EU instruments

There are the following three principal existing EU instruments:

- a. 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;
- b. 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
- c. 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.

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).⁸ The *Mediation 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).

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).⁹ Article 8 provides for ADR procedures to be available to consumers both online and offline, without charge or at a nominal fee, and for an outcome to be reached 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).

The *Regulation on Consumer ODR* provides for the European Commission 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

⁸ 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 [EU] 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 [EU] 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.

⁹ 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.

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.

In some, normally regulated, sectors (notably communications,¹⁰ energy,¹¹ consumer credit,¹² payment services,¹³ and for bus and coach passengers¹⁴) 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 ombudsperson or ADR sections within regulatory authorities.

¹⁰ Directives No 2009/136/EC and No 2009/140/EC; OJ L337, 18.12.2009 pages 11 & 37.

¹¹ Directives No 2009/72/EC and No 2009/73/EC; OJ L 211, 14.8.2009 pages 55 & 94.

¹² Directive No 2008/48/EC.

¹³ Directive No 2007/64 /EC.

¹⁴ 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).

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