CCBE RESPONSE TO THE EUROPEAN COMMISSION'S CONSULTATION PAPER ON THE USE OF ALTERNATIVE DISPUTE RESOLUTION AS A MEANS TO RESOLVE DISPUTES RELATED TO COMMERCIAL TRANSACTIONS AND PRACTICES IN THE EUROPEAN UNION.

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CCBE response to the European Commission's consultation paper on the use of Alternative Dispute Resolution as a means to resolve disputes related to commercial transactions and practices in the European Union.

The Council of Bars and Law Societies of Europe (CCBE) represents around 1 million lawyers through its member bars and law societies from 31 full member countries and 11 further associate and observer member countries. The CCBE responds regularly on behalf of its members on policy issues that affect European citizens and lawyers.

The European Commission has recently published a consultation paper on the use of Alternative Dispute Resolution (ADR) in the European Union.

The Consultation Paper (the Paper) refers to dispute resolution procedures, which are designed as an alternative to resolving a dispute in court. These procedures enable the consumer to obtain compensation for harm suffered as a consequence of an illegal practice by a trader. The Paper covers out-of-court mechanisms that lead to the settling of a dispute through the intervention of a third party. The third party can propose or impose a solution, or merely bring the parties together to assist them in finding a solution. The Paper does not cover customer complaint-handling mechanisms operated by businesses or amicable settlements negotiated directly between parties to a dispute.

The purpose of the Paper is to consult stakeholders on the difficulties identified and the possible ways in which the use of ADR within the EU could be improved. It also gives stakeholders an opportunity to complete the data gathered by the Commission so far.

The present document provides the CCBE's response to the Commission's consultation.

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

From a general perspective, it is desirable for existing national ADR programmes to be made known to citizens and traders within Member States and abroad. Making those programmes available online is certainly the least expensive and most effective way to provide information to the public. The programmes could be published online in the language of the relevant Member State. It would also be useful for a Member State to provide general and basic information on ADR programmes in other languages, also taking into account the potential users of the programmes and providing links to the websites where the legal instruments are published.

Against this background, it should be pointed out that, in order to make an ADR system beneficial for consumers, it is important that the rules on jurisdiction allow the latter to commence (or to defend) ADR proceedings in the State where they are domiciled, as in the context of court proceedings under Article 15 of Regulation (EC) 44/2001. The other solution, requiring them to initiate proceedings in the State of the trader, would make access to ADR more difficult for them, greatly limiting the effectiveness of the system.

Based on this principle, it seems particularly important that EU and national policies focus on raising consumer awareness of domestic ADR schemes, since these are most likely to be used by individuals seeking to protect their rights.

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

The CCBE would welcome all initiatives that would make it easier for consumers to access information on ADR schemes. Competent authorities in Member States should provide some coordination in order to avoid duplication and dispersion of information.

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

The answer to the first question is affirmative. An obligation on businesses to inform consumers of the existence of ADR schemes does not seem disproportionate. Such obligation already exists in some Member States (e.g. Italy, with regard to financial services). Information on ADR could be provided together with that supplied comercially or be published on the trader's website, letterhead etc.

However, it should be noted that information provided by the business is likely to concern only the ADR schemes in the Member State where the business is based. Hence its relevance in cross-border cases is limited, especially if we assume that, as we recommend, consumers are able to access ADR in the Member State where they are domiciled.

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

All the information on an ADR scheme should be available online, in more than one language if possible.

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

The different forms of ADR should be considered separately.

1) Arbitration – The award is binding on the parties in the same way as a court ruling and can be enforced.

2) Mediation – The result of mediation, if accepted, is an agreement between the parties. In order to ensure compliance by all the involved parties, it could be useful to consider the mediation agreement (or the minutes of the mediation) as having the same value as an enforcement order, if it is drafted by lawyers. The agreement (or the minutes of the mediation) could also be accepted as a valid title to constitute a mortgage on real estate.

3) Conciliation - led by a judge or his/her nominee.

Attention must also be paid to other forms of ADR, such as: binding decisions taken by a third party, "collaborative lawyer proceedings" or "participative proceedings".

We recall that "collaborative lawyer proceedings" is a mode of conflict resolution consisting of two or more intervening lawyers who have subscribed to the "Collaborative Lawyers' Charter". They agree to devote their efforts to reaching an amicable settlement. They undertake to withdraw from the case in the event that a settlement is not reached.

As for binding decisions taken by a third party, this is a form of transaction whereby a third party is entrusted with the task of deciding upon technical points (valuation of property, assessing what work is to be performed), that decision being final.

Participative proceedings necessarily involve the presence of lawyers.

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

The answer is yes. Industry sector organisations could establish ADR programmes and bind all their member companies to use such ADR schemes in case of disputes, before seeking judicial means of redress.

However, consumers and companies should have the choice either to use the industry ADR scheme or to go to court.

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

The option of imposing on the parties a mandatory attempt at ADR could hinder their effective access to justice.

The parties may, particularly if not appropriately assisted by a lawyer, accept undue limitations of their rights, while losing the possibility of seeking redress in court.

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

In the case of optional arbitration or binding decisions taken by a third party, the award would be binding upon the parties. In the case of mediation, conciliation, "collaborative lawyer proceedings" or "participative proceedings", the result of the ADR would be binding only if the parties freely reach an agreement.

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

Consumer disputes are of a different nature to those between SMEs, and having only one ADR scheme for these two kinds of disputes is not advisable.

In the first phase, the primary objective should be the creation of a network of ADR centres, reasonably distributed over each Member State's territory. In the future, when it will be possible to determine the workload of the network, and subject to the availability of funds, it will be possible to improve the offer of specialised services, including those for SMEs.

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

Consumers familiar with cross-border e-commerce transactions are likely to use ODR schemes without excessive difficulty. The diffusion of ODR programmes has the advantage of being less costly and easier to organise. However, the ECJ held in its judgment of 18 March 2010 that online mediation must not be the only option for the parties.

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

The institution of "single entry points" could be useful to give direction and information to consumers. The possibility of dealing with disputes depends specifically on how those "single entry points" are organised and on their capacity to handle ADR cases.

However, the establishment of possible "single entry points" is completely without prejudice to the question of ADR service quality control, which must be dealt with by national certification bodies federated in an international certifying body (such as the International Mediation Institute - IMI).

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

It seems premature to consider the possibility that ADR schemes also apply to collective claims, due to their complexity and to the activities that they require (in order to establish facts and to correctly apply the relevant law). ADR schemes should focus on simple and low-value disputes.

Against this background, it seems nevertheless reasonable that in the case of cross-border collective ADR the rules on choice of jurisdiction should allow ADR procedures to take place where the trader is established, with a view to simplifying them.

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

Arbitration, binding decisions taken by a third party, mediation, "collaborative lawyer proceedings" and "participative proceedings" are used to resolve cross-border disputes.

These systems require fast and cost-effective proceedings, the outcome of which (award/agreement) should be easy to comply with. There is no need to establish different rules for the ADR of cross-border disputes. The most important problem is the one of linguistic organisation, since it could be necessary for arbitrators and mediators to know the language in which the contract and the documents are drafted. Arbitrators and mediators should be able to work in more than one language in order to avoid translation costs.

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

Both public and private funding should contribute to the setting-up and functioning of an ADR network. However, at this stage, it is still difficult to determine what the economic implications of establishing ADR structures would be. These would also depend on the nature of ADR schemes (mandatory or voluntary). Mandatory schemes would require more resources than voluntary ones, since they would have the capacity of handling a higher number of cases and would be evenly distributed in the territory of each Member State.

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

Independence must be guaranteed by the quality of the arbitrators, third-party decision-makers or mediators, bound by ethical rules, but in any case, the free choice of the parties must be respected. The creation of easily accessible lists of lawyers adhering to those rules and having followed certified relevant training would facilitate access to independent and qualified practitioners.

In any case, the industry funding should only cover fixed costs, whilst arbitrators, mediators and "collaborative lawyers" should be paid directly by the parties.

Question 16 – What should be the cost of ADR for consumers?

The costs should be proportionate to the value of the claim. In the case of arbitration or binding decisions taken by third parties, the losing party should bear the cost of the proceedings. In the case of mediation, or "participative proceedings", the allocation of costs would depend on the agreement of the parties. The Court of Justice, in its judgment of 18 March 2010 referred to above, noted that mandatory mediation, or conciliation, should not entail significant costs on the parties. For

"collaborative lawyer proceedings", this does not apply. Each of the parties bears the cost of its lawyer. The agreement reached between the parties deals with this matter.

The CCBE remains available to further clarify and expand on the points dealt with in the paragraphs above.