Conseil des barreaux européens
Council of Bars and Law Societies of Europe
Association internationale sans but lucratif
Rue Joseph II, 40 /8 – 1000 Bruxelles
T. : +32 (0)2 234 65 10
Email : ccbe@ccbe.eu – www.ccbe.eu

CCBE comments on the ELI/ENCJ Consultation Paper on 'The Relationship between Formal and Informal Justice: the Court and Alternative Dispute Resolution'

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The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 32 member countries and 13 further associate and observer countries, and through them more than 1 million European lawyers. The CCBE responds regularly on behalf of its members on policy issues which affect European citizens and lawyers.

The CCBE is grateful for this opportunity to contribute to the current reflection of the European Law Institute (ELI) and the European Network of Councils for the Judiciary (ENCJ) on the important topic of alternative dispute resolution (ADR).

With this paper, the CCBE wishes to provide some general comments on the issues addressed in the consultation paper.

The role of lawyers in ADR processes

The CCBE supports the use of ADR processes as a voluntary alternative to judicial proceedings, particularly as regards consumer disputes. For many years, lawyers throughout the European Union have developed such dispute resolution skills through training and practice, and a high number of Bars have set up their own register of mediators (who are members of the Bar, receive specific training, have professional indemnity insurance, etc.) together with mediation centres.

Lawyers are, due to their understanding of the legal order and the rights and interests of the parties, one of the best-positioned professionals to participate in ADR schemes. As a result of their legal status, lawyers are independent and subject to strict ethical rules, including the duty of confidentiality and legal professional secrecy. Due to their professional experience, lawyers are well acquainted with the handling of legal disputes and know how to solve them in the best interest of their clients and in accordance with applicable laws.

The participation and involvement of lawyers is therefore an essential component for the proper deployment of ADR schemes.

Risks and needs in relation to ADR

It is important to recognise that alongside many significant benefits, ADR processes (including Online Dispute Resolution (ODR)) also bring their own set of risks and challenges, most significantly in relation to the impartiality, transparency, effectiveness, fairness, and lawfulness of the dispute resolution process. Contrary to what its voluntary nature might suggest, an ADR process may be used in a way that does not necessarily align well with the rights of the individual or interests of justice. Strong safeguards are therefore necessary to prevent undue practices.

The risks outlined by the consultation paper are all significant factors to consider around the promotion of ADR. The issue that ADR might deny an independent judicial determination and the risk that persons settle their claims without having first had access to independent legal advice, is one which may be particularly pressing in the current financial climate. In this regard, the CCBE would like to highlight the importance that legal aid is also made available for non-court-based resolution processes.

In the following sections the CCBE would like to draw attention to several other issues that need to be addressed when deploying ADR and ODR mechanisms.

Impartiality and neutrality of ADR processes

Impartiality and neutrality are basic principles of any ADR process. The increase in the number of ADR schemes run by all sorts of private entities also increases the risks of lack of independence and conflicts of interest. Any ADR and ODR process needs to be designed and implemented with a strong commitment towards ensuring the impartiality and neutrality of the relevant dispute resolution service.

Capacity and capability of parties to engage in ADR processes

A further risk relates to the capacity and capability of parties to engage in ADR processes. There may be concerns around the adequacy of support to individuals, for instance, with learning difficulties or who may be required to use online platforms from a position of digital poverty. Even formal court processes may not address these challenges particularly well, but there needs to be recognition that there are a number of people who are not able to effectively participate in dispute resolution processes without the benefit of professional advice or representation.

This point also illustrates the need to ensure that parties engaging in ADR procedures retain the right to seek a judicial remedy satisfying the requirements of a fair trial pursuant to Article 6 ECHR.

The need for transparency and precise definitions of ADR and ODR concepts

The number of ADR schemes has grown considerably over the last years which raises the need for transparency and precise definitions of ADR and ODR concepts.

In order to avoid that parties are being misled about the true purposes and legal consequences of the process they are engaging with, especially in a cross-border context, it is important to work towards common definitions regarding the main concepts of ADR and ODR.

Processes that, for example, are merely intended to handle customer complaints directly by the trader (such as their internal customer complaint department or an entity which is affiliated with the trader) or facilitate direct amicable settlements between a consumer and the trader, should not be labelled as ADR processes.

Another example relates to the use of the term 'mediation' which, even if defined in Article 3 of Directive 2008/52/EC, still gives rise to different interpretations. There is often some confusion between mediation and conciliation processes and many different mediation methods are developing outside the structured process of mediation and covering various issues, such as mediation in criminal law, banking mediation, corporate credit mediator, mediation in human resources and work relations. Some further specification at European level of the term 'mediation' would therefore be desirable to facilitate the identification of this particular process and prevent a possible dilution of the concept.

Transparency about the overall process, including the entity that controls the specific process in question as well as potential conflicts of interest of parties, is also a crucial factor for assessing the impartiality and neutrality of the relevant ADR process.

The importance of the non-compulsory nature of ADR processes

In principle, ADR should remain non-compulsory for two main reasons. The first reason is the nature of the dispute. Not all disputes may be suited for ADR. For instance, it might be necessary to make decisions on questions of principle on legal issues prior to the initiation of mediation, or the parties do not wish to enter into a dialogue due to difficult circumstances.

The second reason is the need for ownership of the process by the parties. A distinctive feature of ADR is that it enables the development of a solution by the parties themselves. To support such aspirations towards a collaborative solution, parties must agree to use ADR from the very beginning. Otherwise it risks becoming a mere formal step prior to going to court.

A statement of best practice could include a number of factors around the overall suitability of ADR for the type of dispute and the persons involved in the dispute. Contentious family separation disputes, for instance, may not be appropriate for ADR. There may be factors, as suggested above, around the capacity and capability of the persons involved in the dispute which may make ADR unsuitable. There may also be issues around the availability of ADR processes, particularly in more rural areas, though this may be mitigated over time with the wider availability of ODR.

In order to stimulate the use of ADR, incentives could be developed, such as fast access to a judge for the approval of an agreement, social and tax incentives, or priority status given to cases which were, prior to the referral to court, subject to e.g. mediation.

In addition, ADR should not be seen as a form of privatisation of justice. As a consequence, the cost of the ADR processes should, as often as possible, be supported by the State, in assuming its function and responsibility of rendering justice and, therefore, of settling disputes between citizens.

In this regard, it is important to stress that ADR procedures should never generally exclude the parties' right to initiate court proceedings.

The right to information and legal assistance

As it is stated in the consultation paper, the primary risk is the lack of information on the process of ADR, low level of information flow in the society and public in general and lack of information provided by the judges and courts about the possibilities of ADR methods. A solution could be to systematically inform all parties to court proceedings on applicable ADR processes, and to disseminate information on ADR among the public with practical advice how to initiate such a process, as this is lacking in most Member States.

Also, bearing in mind that dispute resolution often entails questions of law beyond the grasp of persons lacking legal training, parties entering into an ADR process should always have the possibility to be assisted by a lawyer in order to safeguard their rights and ensure they are in a position to take informed decisions. ADR procedures should never generally exclude the possibility for individuals to avail themselves of legal advice or to initiate court proceedings.

Confidentiality of ADR

There is an urgent need for a uniform approach to confidentiality of the ADR and ODR process. In particular, this requires clarification as to who is bound by the confidentiality requirement, and the extent thereof.

The need to ensure the quality of ADR/ODR schemes

In most countries, initial training and continuing education are left to all professional stakeholders who wish to develop ADR activities. There is no harmonised scientific content, or even a minimum training framework. Likewise, there is an overall lack of common minimum standards that ADR and ODR service providers will have to comply with, inter alia to ensure that their procedures are fair and impartial. In order to ensure the quality of ADR and ODR, the CCBE considers that there is an urgent need for such – ideally EU-wide – training framework as well as a common system of accrediting ADR and ODR service providers satisfying certain minimum standards. This could also facilitate the cross-border use of ADR in the EU.