



CCBE COMMENTS ON THE COMMISSION'S PROPOSAL FOR A DIRECTIVE ON ALTERNATIVE DISPUTES RESOLUTION (ADR) FOR CONSUMER DISPUTES AND PROPOSAL FOR A REGULATION ON ONLINE DISPUTE RESOLUTION (ODR) FOR CONSUMER DISPUTES

CCBE comments on the Commission's proposal for a Directive on alternative disputes resolution (ADR) for consumer disputes and proposal for a Regulation on online dispute resolution (ODR) for consumer disputes

I. Introduction

The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 31 member countries and 11 further associate and observer countries, and through them around 1 million European lawyers.

In 2011, the Commission launched a consultation on the use of Alternative Dispute Resolution (ADR). With a reply of 30 March 2011, the CCBE supported the Commission's initiative to spread the word about ADR more broadly among consumers. More specifically, in its [response](#), the CCBE underlined, among other issues:

- the importance of raising consumer awareness of existing domestic ADR schemes,
- the existence of various forms of ADR – encompassing non-binding mechanisms such as mediation and conciliation as well as “collaborative lawyering” and “participative proceedings or mechanisms with a binding outcome, such as arbitration or certain ombuds-schemes,
- the danger of imposing on parties a mandatory attempt at ADR, as it could hinder their effective access to justice,
- the importance of having independent and qualified arbitrators/third party decision-makers/mediators, bound by ethical rules.

Having evaluated the reactions to the consultation, on 29 November 2011, the Commission presented two proposals:

First, the Commission introduced a proposal for a [Directive](#) on ADR for consumer disputes (amending Regulation No 2006/2004 and Directive 2009/22/EC). The purpose of the draft Directive is to ensure a European coverage with ADR entities for domestic and cross-border disputes.

Second, the Commission introduced a proposal for a [Regulation](#) on online dispute resolution (ODR) for consumer disputes. This draft ODR Regulation aims to create an EU-wide online platform (‘ODR platform’) providing consumers and businesses with a single point of entry for resolving cross border disputes concerning on-line purchases.

Both legal acts aim at improving the internal market. The Commission envisions the ADR Directive to be implemented first and then to be followed by the ODR Regulation.

The CCBE continues to support the Commission's efforts to facilitate access to ADR by increasing awareness, providing consumers with more information on available ADR mechanisms and increasing the number of choices.

The CCBE supports the use of ADR and ODR for consumer disputes. For many years, lawyers throughout the European Union have actually been training such dispute resolution skills. The members of the Bar are happy to participate in such dispute resolution schemes. Many lawyers have been advocating such approaches for some time.

Many lawyers have created associations, in the field of mediation and elsewhere, or participate in the work of mediation centres together with members of other professions.

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 familiar with the handling of legal disputes and know how to solve them in a way that ensures the enforcement of law.

The participation of lawyers in the ADR and ODR schemes for consumer disputes will be central in order to protect these essential principles.

The involvement of lawyers will allow consumers and traders to accept the intervention of the envisioned authorities. Nominating consumer associations as the authority will not satisfy traders who will see it as impairing impartiality.

Similarly, consumers and traders are very keen on ensuring that dispute resolution is not arbitrary. It is therefore appropriate to apply the rule of law in all cases.

Europe is an area of liberty, security and justice. It must enforce the rule of law and cannot in any way encourage the settlement of disputes outside the framework of legal means.

The CCBE therefore supports these initiatives, but also notes that on these paramount issues of ensuring the safety of consumers and professionals the draft text does not meet the requirements the European Union should promote.

The Commission recalls the necessary independence of the entity which is responsible for settling the dispute, but does not reflect the necessary requirement of impartiality. Such impartiality is simply referred to in Article 1 which provides for an 'impartial, transparent, effective and fair out-of-court resolution of disputes between consumers and traders online'. However, draft Article 6 - which establishes the network of facilitators - seems to entrust this Regulation to consumer associations in particular. Companies might consider that consumer associations, which are stakeholders in the defence of consumers, do not show the necessary impartiality. Moreover, facilitators (draft Article 6 § 2) are not in any case bound to an impartiality rule. Article 12 provides for confidentiality and security of data and for ODR facilitators and ADR entities to be subject to confidentiality rules or any other equivalent duty of confidentiality provided for in national legislation. Consumer associations are not concerned. Moreover, no sanction is provided in case of a violation of legal professional privilege/confidentiality.

It should be added that the law itself cannot be removed from dispute resolution. The resolution must not only be 'impartial, transparent, effective and fair'; it should also be lawful. Settling a dispute does not make sense if it does not follow the law of the State.

Lawyers throughout the European Union are willing to engage in an effort to promote ADR options in the field of consumer law and in other areas of law, whenever possible.

Given the multitude of stakeholders in the field of ADR, the CCBE does, however, not see the need for the Commission to step in and to run an ODR platform itself. Building such a platform would not only entail costs, but also be related to building new bureaucracies and supervising authorities in the Member States. Eventually, it would not resolve the key issue for the reluctance of consumers to make use of dispute resolution options in other countries which is the existence of different languages.

Following the sequence aimed at by the Commission, the CCBE will first comment on the proposal for an ADR Directive (II.) and then on the proposal for an ODR regulation (III.).

II. Proposal for a Directive on Alternative Dispute Resolution

A. Importance of Evidence regarding the Purpose and Background of the Directive

The Directive aims at a European coverage with ADR entities for domestic and cross-border disputes between consumers and businesses. The ADR entities are supposed to offer an impartial, transparent, effective and fair dispute resolution process. Such coverage is supposed to improve access to justice for consumers and to improve the functioning of the internal market (Art. 1).

The Commission believes that the effectiveness of ADR proceedings is affected by a lack of competency, a lack of knowledge among consumers and businesses as well as by divergence in the quality of ADR proceedings (Commission Explanatory Memorandum, p. 2). It suggests that a significant number of European consumers ("approximately 20%") would encounter problems when acquiring goods or services in the internal market (Commission Explanatory Memorandum, p. 2). The

Commission maintains that the EU GDP would suffer a damage of an "estimated" 0,4% each year due to such problems.

Unfortunately, the Commission does not submit any empirical evidence (other than a bare footnote reference to a Eurobarometer) for these far-reaching claims. Whereas encompassing studies have been undertaken in the past with respect to existing ADR mechanisms, there appears to be little evidence on the actual potential benefit for consumers. Accordingly, the Commission does not state what surveys have been undertaken over what respective periods of time with what scope. The Commission also does not state why such findings would be reliable. Thus, at least based on the Commission's explanatory memorandum, the need for action appears to be rather a factual allegation than a finding for which any empirical evidence would have been submitted.

B. Scope of Application and EU Competency

Pursuant to Art. 2 Abs. 1 the Directive is supposed to apply to:

"procedures for the out-of-court resolution of contractual disputes arising from the sale of goods or provision of services by a trader established in the Union to a consumer resident in the Union through the intervention of a dispute resolution entity which proposes or imposes a solution or brings the parties together with the aim of facilitating an amicable solution, hereinafter 'ADR procedures'".

In terms of EU competence, the Commission suggests that the development of a well-functioning ADR system within the Union built on existing domestic ADR entities would be a precondition for the establishment of an EU-wide ODR platform.

In other words, the desire to establish a European online dispute resolution platform serves as a pretext for the EU competency with respect to the establishment of ADR entities (Commission Explanatory Memorandum, p. 6f.). In view of the subsidiarity principle, it is, however, not clear that the EU needs to prescribe its member states what requirements ADR entities need to satisfy for the handling of domestic disputes.

Whereas it may be rather possible to justify some EU initiative with respect to cross-border online sales, it remains likewise questionable that the Commission itself needs to take the initiative for an ODR platform.

C. No Need for further requirements to Improve Access to Alternative Dispute Resolution for ADR entities

The Commission defines improved access to alternative dispute resolution as its core objective. It might achieve this aim by defining some of the objectives and leaving the realization to the many stakeholders which are already today actively involved in providing ADR services all across Europe. However, the Commission aims at obligating Member States to establish an infrastructure that is supposed to monitor compliance with the requirements of the ADR Directive (Art. 15 ff.). Moreover, the Commission adds to building up further bureaucracy by obligating the Member States to ensure that the persons in charge of alternative dispute resolution possess the necessary knowledge, skills and experience (Art. 6 Abs. 1).

Pursuant to Art. 5 Para. 1 of the Draft Directive, Member States shall ensure that disputes covered by this Directive can be submitted to an ADR entity which complies with the requirements set out in this Directive. The requirements go into great details as to what is requested from an ADR entity. These requirements are made regardless of the ADR process. However, for such ADR processes as conciliation or mediation which do not aim at a binding outcome, less rigid standards would be required. Accordingly, the CCBE suggests to explicitly exempt arbitration proceedings from the scope of application of the ADR Directive. Such restriction of the scope of application would also allow the Commission to drop or reduce many restrictions.

One of the requirements by the Directive is that such ADR entities have a website enabling the parties to submit a complaint online and to enable the parties to exchange information with them via electronic means. While this requirement is understandable, it also is deemed to entail further bureaucracy: To this end, Member States need to have the possibility to provide for the creation of a residual ADR

entity that deals with disputes for the resolution of which no specific entity is competent (Art. 5 Para. 3, Reason 13).

The Commission goes as far as to require the Member States to ensure that ADR entities where natural persons in charge of dispute resolution form part of a collegial body provide for an equal number of representatives of consumers' interests and of representatives of traders' interests in that body (Art. 6 Para. 2). As a matter of fact, such provision is likely to create more antagonism in some ADR entities than ever existed until now. The vast majority does not consider itself to belong either to the consumer or to the business camp.

D. Costs and Duration of Proceedings

Art. 8 also provides for the ADR procedure to be "free of charge or at moderate costs for consumers". Accordingly, the Commission aims at obligating the ADR entities to offer their services at no or low cost. At least in some of the Member States, from the ADR entities' perspective, this attitude can only be perceived as a disregard for the professional work of ADR entities. Moreover, it is unclear how these mechanisms are going to be funded. Although consumers will only participate if costs are moderate, it is rather unlikely that Member States will accept new financial burdens in times of indebtedness. If accordingly the Member States end up imposing these costs on the industry, European companies will have to carry an additional burden.

The disputes are supposed to be resolved within 90 days. A 90 days duration of an ADR procedure might be aimed at in principle. However, as it depends on the cooperation of the Parties, it may not definitely be concluded within this period of time, particularly given that duration also depends on the number of complaints, location and number of ADR entities and of course on the staff of those entities.

E. Information of Consumer

The CCBE largely agrees with the information duties provided for by the Commission. Based on the Commission's most recent proposal, ADR entities will have to make publicly available on their websites and in printed form at their premises a vast array of information (i.e. regarding the persons in charge of ADR, the source of financing, their memberships in ADR networks, the types of disputes they are handling and a lot more).

Furthermore, pursuant to Art. 9, the consumer needs to be informed before he agrees to a solution that his agreement is voluntary. Moreover, the consumer needs to be informed that his approval is voluntary and that the recommended solution may be less beneficial than the solution of a court proceeding. Furthermore, the consumer needs to be informed that the solution of the ADR proceeding may be less favourable than the one in front of a court.

Finally, the consumer should learn that he has the right to be represented by independent counsel. The CCBE welcomes that the Commission underlined the fundamental due process principle that parties may be represented or assisted by a third party at any stage of the procedure.

However, the CCBE considers that article 8 (b) should be amended as follows:

*"The parties have access to the procedure without being obliged to use a legal representative; nonetheless parties may be represented or assisted by a third party **duly authorized to do so under the national law of the Member State, where it is established**, at any stage of the procedure."*

The Draft Directive also provides for the right to withdraw from an agreement reached. Whereas it is understandable that such approach is adopted, it may affect the settlement rate.

F. Information Duty of Business

The key element of the Directive is the establishment of an information duty of businesses regarding the ADR coverage. The CCBE supports the establishment of such an information duty as it appears to increase the dispute resolution options for business and consumers and as it appears to be least intrusive. At the same time, one should not underestimate the costs related to adding the required information in the appropriate places.

Conseil des barreaux européens – Council of Bars and Law Societies of Europe

association internationale sans but lucratif

Avenue de la Joyeuse Entrée 1-5 – B 1040 Brussels – Belgium – Tel.+32 (0)2 234 65 10 – Fax.+32 (0)2 234 65 11/12 – E-mail ccbe@ccbe.eu – www.ccbe.eu

June 2012

Business is obligated to inform consumers about the ADR entities by which they are covered and which are competent to deal with potential disputes between themselves and consumers (Art. 10 Para. 1). This information shall be mentioned on the website as well as in terms and conditions and in invoices and receipts. (Art. 10 Para. 2).

Taking the subsidiarity principle into consideration, this appears to be a highly effective approach: It does not require state intervention and serves the purpose of the Directive to spread the message regarding ADR and increase the use of ADR. It only remains unclear why this far-reaching duty that is not limited to cross-border contexts.

G. Cooperation between ADR entities in Cross-Border Disputes

Art. 13 requires the Member States to ensure that ADR entities cooperate on the resolution of cross-border disputes. Member States are even supposed to "encourage ADR entities that deal with disputes in a sector-specific area to become a member of that network". This provision expresses little respect for the freedom of association and a clear desire to centralize ADR entities within cross-border networks. From the CCBE's perspective, it should not be the role of the Member States to become monitoring institutions for the creation of ADR networks.

H. Sanctions on ADR entities and businesses

The Commission does not want to leave it at the introduction of new duties and at the shaping of a new dispute resolution landscape. It also envisions "effective, proportionate and deterring" sanctions as required by Art. 18 if business or ADR entities do not comply with their information duty.

III. Proposal for a Regulation regarding ONLINE Dispute Resolution

A. Purpose

The purpose of the ODR regulation is the establishment of a platform that facilitates the online dispute resolution between consumers and businesses. This new platform is supposed to facilitate the functioning of the digital dimension of the internal market and to the realization of a high level of consumer protection (Art. 1).

B. Scope of Application

The Regulation shall apply to the out-of-court resolution of contractual disputes arising from the cross-border online sale of goods or provision of services between consumers and traders through the intervention of an ADR entity (Art. 2, 4).

There are two fundamental differences between the ADR Directive and the ODR Regulation. First, as opposed to the ADR Directive, the ODR Regulation only applies only to **cross-border** sales of goods or provision of services. Second, it only applies if these transactions take place **online**. The CCBE welcomes this self-restraint of the Commission in view of its competency.

C. Establishment of an Online Dispute Resolution Platform and of a net of Online Dispute Resolution

The ODR Platform shall be an interactive website which can be accessed electronically and free of charge in all official languages of the Union. The ODR platform shall be a single point of entry to consumers and traders seeking the out-of-court resolution of disputes covered by this Regulation (Art. 5 Para. 2).

Whereas the CCBE supports the purpose of the Directive and the Regulation to the extent that the Commission aims at increasing the consumers' and traders' awareness for a broader array of dispute resolution options, it does not see the need for the Commission to go about creating a new institution.

Conseil des barreaux européens – Council of Bars and Law Societies of Europe

association internationale sans but lucratif

Avenue de la Joyeuse Entrée 1-5 – B 1040 Brussels – Belgium – Tel.+32 (0)2 234 65 10 – Fax.+32 (0)2 234 65 11/12 – E-mail ccbe@ccbe.eu – www.ccbe.eu

June 2012

The attempt to centralize the dispute resolution landscape in one EU-controlled platform raises concerns in view of the subsidiarity principle.

These concerns are reinforced by the practicalities of the approach. Based on the ideas of the Commission, the ODR platform will work with an automated translation software. This automatic translation software is supposed to translate whatever is entered into this platform.

The ODR platform is supposed to generate proposals for ADR entities although the ADR Directive already requires the businesses to inform consumers about ADR entities which they cover. The Commission even intends to further specify and monitor how the functions of the ODR platform are supposed to look in detail. It shall release legal acts which provide for the details (Art. 5 Para. 6).

With respect to cooperation, the question also remains why there is a need for EU intervention and regulation. Each Member State shall designate one ODR contact point and communicate its name and contact details to the Commission (Art. 6 Abs. 1). They are supposed to facilitate communication between the Parties and the competent ADR entity. They also are responsible for the ongoing exchange between and among the ADR entities (Art. 6 Para. 3-6). Some practitioners have suggested that an alternative approach would be to use the existing ECC-Net centres in each Member State to direct consumers towards ADR schemes in other Member States.”

D. Processing and Transmission of a Complaint

Once a complaint is submitted to the platform, it shall be processed if the complaint form is fully completed. Upon receipt of a fully completed complaint form, the ODR platform shall communicate to the complainant party, in the language of the complaint, and send by e-mail to the respondent party, in the language of the contract, information about eligible ADR entities (Art. 8 Abs. 2). The CCBE trusts that existing networks and industry initiatives would be well equipped to make sure that language and IT-standards would continuously be at a top level.

Furthermore, the 30 day limit imposed on cases seems arbitrary. Ideally, any limits on the length of time a dispute takes to settle should be something decided either by member states or the individual ADR schemes. The swiftness of the resolution of a dispute might be seen as one part of the criteria a trader uses for deciding which scheme to join and some ADR schemes might choose to trade off cost burden against the speed of resolution. Parties should be made aware of the average resolution time at the outset and given an estimate of how long a particular case might take. However, as with the Directive, if complete removal of this requirement proves difficult, then replacement of the specific 30 day limit with a requirement for cases to be resolved in a "reasonable" amount of time would be a second best option

Whereas the platform idea indeed appears to be appealing, it is unclear why it would need to be hosted by the EU and paid for by the Member States.

E. Information of Consumers

The CCBE is supportive of the idea that businesses established within the Union engaging in the cross-border online sale of goods or provision of services inform consumers about whatever ADR scheme might be promoted further. If it turns out to be the ODR platform, they may want to inform the consumers about this platform and about their e-mail address. The CCBE also is in favour of this information to be made easily, directly, prominently and permanently accessible on the business' websites or other messages and include an electronic link to the ODR platform (Art. 13 Abs. 1).

F. Sanctions on ADR entities and businesses

The compliance by ADR entities with the obligations set in the Regulation shall be monitored by competent authorities which need to be established by Member States. From the CCBE's perspective, such new authorities and corresponding obligations should be kept to a minimum.

IV. Conclusion:

In summary, the CCBE:

- supports the use of ADR and ODR for consumer disputes;
- stresses that the participation of lawyers in the ADR and ODR schemes for consumer disputes is central. 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. Moreover, due to their professional experience, lawyers are familiar with the handling of legal disputes and know how to solve them in a way that ensures the enforcement of law;
- agrees with the introduction of information duties and the need to inform consumers about the right to be represented;
- invites the Commission to consider whether it could exercise some self-restraint in terms of the scope of the Directive and the Regulation; in particular, the CCBE notes that the Commission has failed to submit empirical evidence for the need to act. This is also relevant as the EU lacks competency for a Directive that aims at affecting the handling of domestic disputes. Whereas the proposal for online dispute resolution is limited to cross-border contexts;
- raises the question why the EU would not provide incentives for private entities to connect to a platform or a similar information network rather than to have the Brussels administration build one;
- acknowledges that costs should be kept low for consumers, but also expects professional work to be compensated adequately;
- suggests to exempt arbitration from the scope of application and to relax the standards for the dispute resolution entities and mechanisms which aim at a non-binding outcome.