

Oxford CDR Conference September 2013
MAKING CONSUMER ADR WORK
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This paper examines the questions that need to be addressed in implementing the Consumer ADR (CDR) Directive.² First, it looks at the potential vision into which CDR might grow. It then notes criticisms that are made of CDR, and main lines of response to them, before examining how the goals outlined at the start should be achieved in practice, especially by ensuring that systems design is appropriate.

A. The Vision for CDR

This section will look at four aspects of what CDR can achieve, if the system is designed properly: improving access to justice; providing consumer advice to underpin informed purchasing; feeding back data so as to enable firms, markets and regulators to maintain compliance with the rules and constantly raise standards; and responding to emerging consumer issues. Making the right design choices at this stage of implementation is critical to achieving effective outcomes and the goals of CDR. This is also an opportunity to review all current structures and practice.

1. Improving access to justice.

Consumers find lawyers, litigation and courts difficult to access, costly and slow. Many of the very considerable number of consumer claims have low value, and are not cost-proportionate to make through court systems, even small claims procedures. This leads to what is termed ‘rational apathy’ in economic theory.

The EU 2011 consumer survey found that more than one in five (21 per cent) of respondents from 56,471 interviews across the EU had encountered a problem with a good, a service, a retailer or a provider in the previous 12 months, for which they had a legitimate cause to complain.³ More than three-quarters took some form of action in response (77 per cent) while 22 per cent took no action. Those who took action were most likely to have made a complaint to the retailer or provider (65 per cent), with far fewer complaining to a public authority (16 per cent), the manufacturer (13 per cent), utilizing an ADR body (5 per cent) or court (2 per cent) (see Figure 1). The most frequently cited reason for not making a complaint was that the individual had already received a satisfactory response from the retailer/provider (44 per cent). The major reasons for not making a court claim were that the individual had already received a satisfactory response from the retailer/provider (40 per cent), the sum involved

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² Directive 2013/11/EU on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR)³; Regulation (EC) No 534/2013 on online dispute resolution for consumer disputes (Regulation on consumer ODR).

³ *Special Eurobarometer 342. Consumer empowerment* (European Commission, 2011), at http://ec.europa.eu/consumers/consumer_empowerment/docs/report_eurobarometer_342_en.pdf.

was too small (26 per cent), it would have taken too much effort (16 per cent), it would have been too expensive (13 per cent) or too long (12 per cent) (Figure 2). Thus, 67% thought that court process was unattractive and unresponsive.

Figure 1: Actions taken following a problem⁴

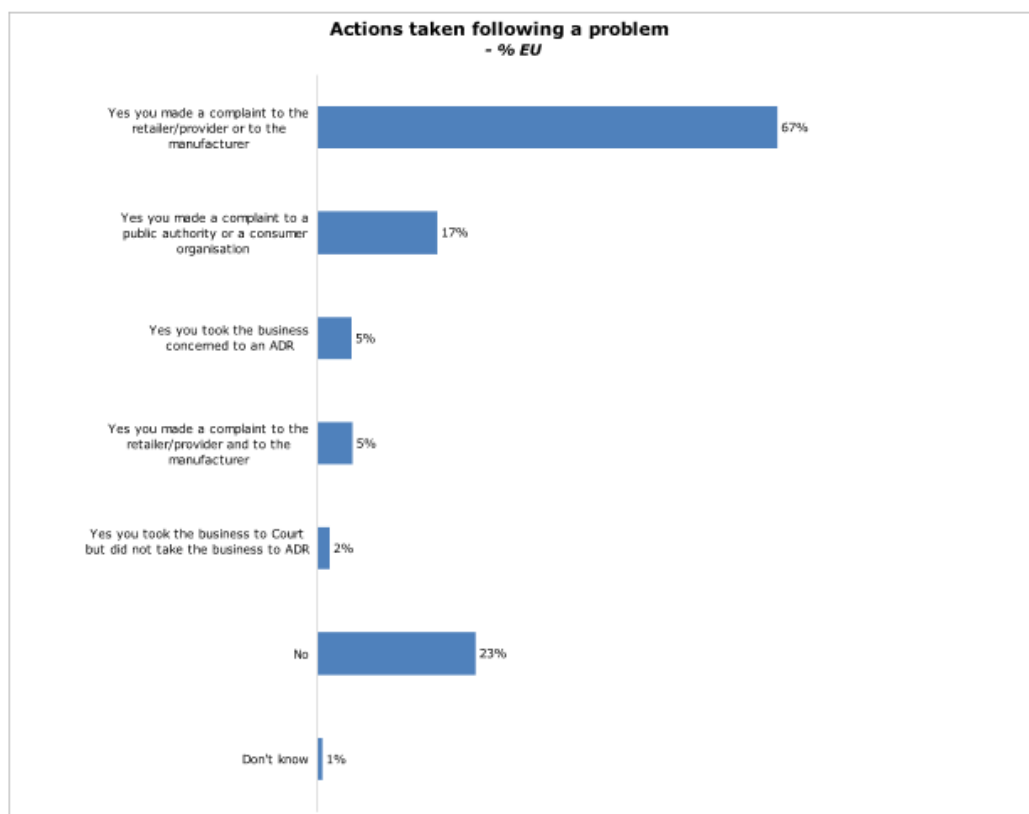
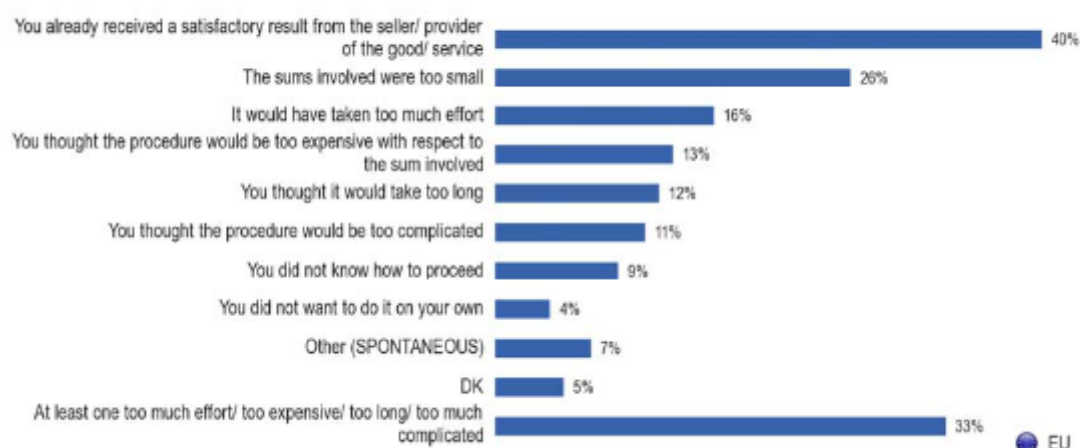


Figure 2: Reasons for not pursuing a court claim⁵

QA36. Thinking about the last time you encountered this kind of problem but didn't take the businesses concerned to Court, what were the main reasons for that?



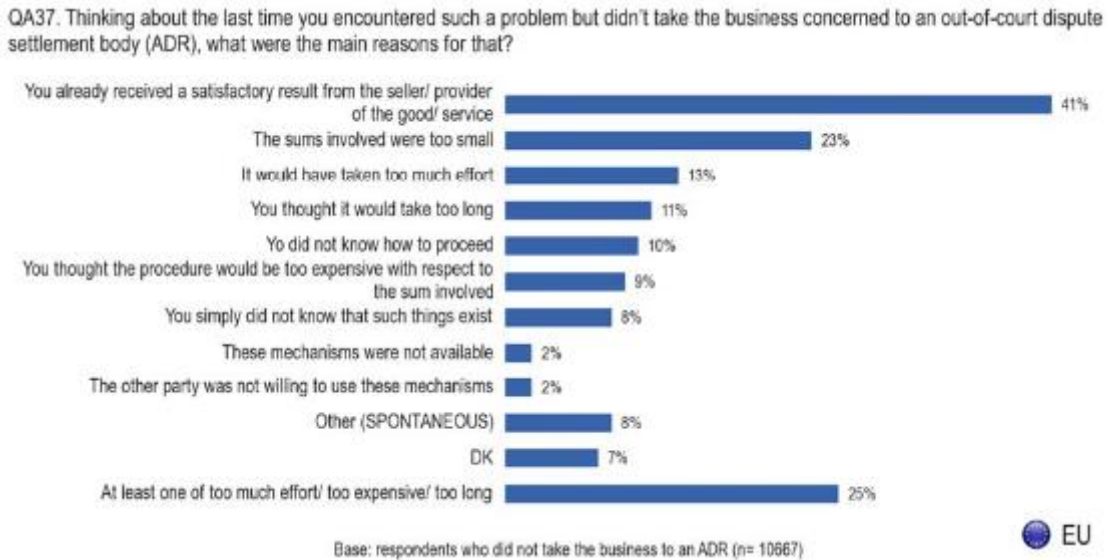
In comparison, the reasons for not taking a complaint to an ADR body were similar to, but had lower numbers than, courts, apart from the fact that 8% said they were unaware of an

⁴ Ibid, Table 5.4.4. Base: Respondents who experienced a problem (n=10945).

⁵ Ibid, QA36, p 204.

ADR body (Figure 3). Importantly, 41% said they had already received a good result from the trader: this is something to be celebrated but extended. However, another way of looking at the data is that 71% were not attracted to CDR for a series of different reasons, and the CDR community should aim for that figure to approach zero.

Figure 3: Reasons for not pursuing a claim with an ADR body⁶



Looking at CDR from the business perspective, the Commission's 2009 business report found that on average, only 8% of retailers in the EU had used ADR mechanisms to settle disputes with customers in the past two years.⁷ How can that low figure be improved? In some countries, such as the Nordics and the Netherlands, it is close to 100%, so this is a problem that arises as a potential challenge on a national basis. Over three-quarters (76%) of retailers who had used ADR mechanisms in the past two years reported that the outcome of their most recent such case had been successful.

Further data on cost, duration and accessibility are discussed below. The important questions are: how do CDR systems compare with courts, especially small claims; how do CDRs compare among themselves; where is there room for improvement in any option, and which options should be invested in or not, or even dropped?

Claim values are typically low

The 2012 Oxford study found the following typical claims data for 2010:⁸

- In France, the FFSA médiateur handled many cases valued at around €100 and some as low as €5. The average award of the national energy médiateur was €373, the average amount in dispute in the cases of the médiateur of EDF was €1,120 (with 23 per cent of cases over €2,000).
- The average value of an award in the arbitration system in Spain was €366.

⁶ Ibid, QA37, p 210.

⁷ Flash Eurobarometer 278. *Business attitudes towards enforcement and redress in the internal market. Analytical report*, at http://ec.europa.eu/consumers/strategy/docs/FI278_Analytical_Report_final_en.pdf

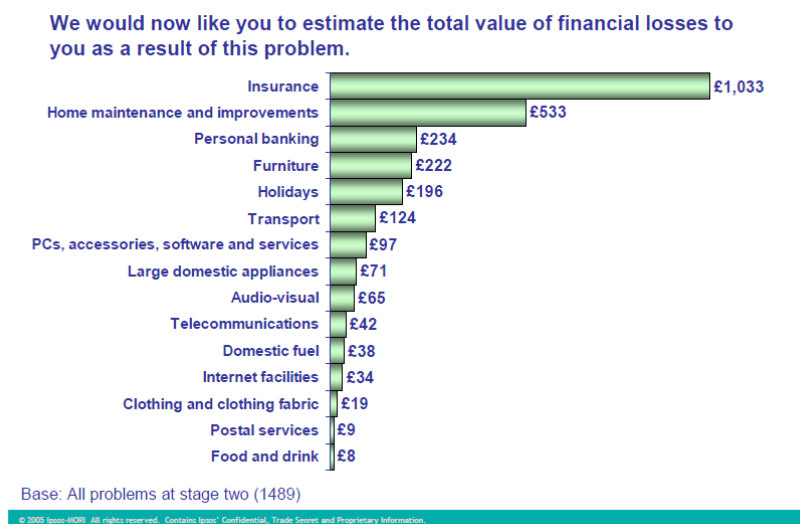
⁸ C Hodges, I Benöhr and N Creutzfeldt-Banda, *Consumer ADR in Europe* (Hart Publishing, 2012), 381.

- The average amount claimed in cases before the UK's Ombudsman Service: Communications was £587 and the average award was £198.
- In Germany, 86 per cent of claims made to the Insurance Ombudsman involved claims under €5,000, and over 90 per cent were under €10,000. A normal claim made to the transport ombudsman (Söp) is between €10 and €200.
- In the Netherlands, the average claim value for Geschillencommissie cases varies between sectors, from €206 for taxis and an average of €5,980 for housing guarantees. In 2009, 9 per cent of the Geschillencommissie claims were less than €250, there was no claim involving a value of more than €10,000, and the largest segment of claims (24 per cent) were for €1,001–2,000.

EU 2011 figures estimated the average value of consumer losses as €375, and median €18.⁹

There is, of course, variation in levels of claim value between different types of sectors and problems. An illustration of this variation comes from a 2008 UK survey,¹⁰ shown at Figure 4. The highest average financial detriment per problem was found in the insurance category, followed by home maintenance and improvements and personal banking.

Figure 4. Highest and lowest average consumer detriment by type of goods or service category



The policy conclusion is that there are many claims that have low value, and if the rule of law is to be upheld then dispute resolution processes have to be able to deal with them. That point leads to considerations of cost and cost-proportionality.

Consumers' attitudes to cost proportionality

⁹ *Special Eurobarometer 342. Consumer empowerment* (European Commission, 2011), 175.

¹⁰ *Consumer detriment. Assessing the frequency and impact of consumer problems with goods and services*, Office of Fair Trading, 2008, OFT992, available at http://www.offt.gov.uk/shared_offt/reports/consumer_protection/oft992.pdf

The 2007 Leuven Report concluded that small claims procedures would only be used by European consumers if the amount involved exceeds around €500.¹¹

The Commission's 2011 survey found that the level of financial loss that would have caused people to go to court was given by the majority (53 per cent) as between €101 and €2,500, but 5% said they would go to court for a loss of under €20 and 3% would only go to court over a financial loss in excess of €5,000.¹² A relatively large proportion of consumers either refused or felt unable to answer this question (17%) and 8% said they would never take the business to court, no matter the sum involved. In comparison, the Commission's 2004 Eurobarometer found that only 18 per cent of EU citizens were prepared to go to court for amounts higher than €500 and another 18 per cent for amounts higher than €1,000.¹³

In the 2011 survey, there were the following national variations (see Figure 5). Around a fifth of those in Greece (26%), Estonia (21%), Bulgaria (22%) and Austria (19%) maintain that they would never take a business to court over such an issue, no matter how high their financial loss. At least a third of consumers in five countries have quite low thresholds, claiming that they would take a business to court for sums lower than €200: Latvia, Lithuania (both 38%), Poland (36%), Slovakia (34%) and Spain (33%). By contrast, relatively few people in Cyprus (7%), Malta (9%), Greece (11%) or Finland (12%) would consider going to court for such losses. The highest thresholds, where larger numbers of respondents would only go to court if their losses were above €1,000, €2,500 or even €5,000, occur in Cyprus (46%), Finland (40%), Denmark (38%), and Sweden (37%). The same applies to Norway (46%) and Iceland (43%).

Figure 5: Reasons for not pursuing a claim with an ADR body¹⁴

¹¹ J Stuyck, E Terryn, V Colaert, T Van Dyck, N Peretz, N Hoekx and P Tereszkiewicz, Study on Alternative Means of Consumer Redress other than Redress through Ordinary Judicial Proceedings (Catholic University of Leuven, January 17, 2007) published April 2007.

¹² *Special Eurobarometer 342. Consumer empowerment* (European Commission, 2011), at http://ec.europa.eu/consumers/consumer_empowerment/docs/report_eurobarometer_342_en.pdf.

¹³ *Special Eurobarometer, European Union citizens and access to justice*, October 2004, at http://ec.europa.eu/consumers/redress/reports_studies/execsum_11-04_en.pdf.

¹⁴ *Special Eurobarometer 342. QA38a*, p 217.

QA38a How much would you have to lose in financial terms, because of a problem with a good, a service, a retailer or a provider, to convince you to take the business concerned to Court as an individual?

	20 euros or less	From 21 euros to 50 euros	From 51 euros to 100 euros	From 101 euros to 200 euros	From 201 euros to 500 euros	From 501 euros to 1.000 euros	From 1.001 euros to 2.500 euros	From 2.501 euros to 5.000 euros	More than 5.000 euros	I would never take the business concerned to Court/an out of court dispute settlement body as an individual no matter the sum involved (SPONT.)	Don't know/Refusal
EU27	5%	4%	6%	13%	15%	15%	10%	4%	3%	8%	17%
BE	5%	4%	7%	10%	14%	20%	15%	5%	3%	10%	7%
BG	2%	2%	6%	9%	12%	14%	6%	2%	2%	22%	23%
CZ	6%	6%	6%	10%	24%	15%	11%	3%	2%	6%	11%
DK	4%	1%	3%	11%	16%	19%	21%	11%	6%	4%	4%
DE	6%	4%	8%	15%	17%	17%	10%	3%	2%	7%	11%
EE	4%	2%	7%	10%	14%	16%	7%	3%	2%	21%	14%
IE	1%	2%	4%	10%	16%	20%	12%	4%	4%	8%	19%
EL	2%	2%	2%	5%	9%	15%	15%	8%	6%	26%	10%
ES	9%	6%	8%	10%	14%	12%	11%	4%	4%	5%	17%
FR	6%	4%	6%	14%	17%	17%	12%	3%	2%	5%	14%
IT	2%	3%	5%	7%	11%	15%	12%	7%	7%	13%	18%
CY	2%	0%	2%	3%	9%	19%	23%	11%	12%	11%	8%
LV	6%	7%	10%	15%	12%	9%	6%	1%	1%	13%	20%
LT	7%	6%	10%	15%	22%	9%	4%	2%	1%	11%	13%
LU	3%	1%	3%	6%	12%	20%	17%	10%	8%	5%	15%
HU	3%	5%	8%	12%	19%	11%	5%	3%	2%	18%	14%
MT	2%	1%	2%	4%	7%	14%	18%	8%	8%	17%	19%
NL	4%	3%	4%	9%	14%	22%	19%	7%	6%	5%	7%
AT	6%	6%	9%	10%	10%	11%	8%	4%	3%	19%	14%
PL	4%	7%	2%	23%	20%	9%	5%	2%	1%	5%	22%
PT	3%	2%	4%	5%	9%	12%	8%	2%	1%	11%	43%
RO	9%	8%	7%	7%	11%	9%	3%	1%	1%	6%	38%
SI	3%	2%	4%	6%	12%	17%	15%	6%	7%	16%	12%
SK	6%	6%	9%	13%	14%	13%	8%	3%	3%	12%	13%
FI	1%	1%	4%	6%	13%	18%	19%	11%	10%	6%	11%
SE	3%	2%	4%	9%	13%	22%	20%	8%	9%	3%	7%
UK	8%	2%	5%	17%	15%	14%	9%	3%	2%	6%	19%
IS	2%	2%	4%	7%	14%	19%	21%	13%	9%	2%	7%
NO	5%	2%	3%	5%	11%	20%	22%	14%	10%	1%	7%
Highest percentage per country						Lowest percentage per country					
Highest percentage per item						Lowest percentage per item					

Socio-demographic analysis revealed that the most reluctant respondents, i.e. who say they would never go to Court are: the oldest respondents aged 55+ (12%), the lesser educated who left school aged fifteen or younger (13%), interviewees who live alone (12%), house persons (11%), retired people (12%), widowed respondents (17%), those who never used a computer (15%).¹⁵ These data indicate that requiring many people to fill in a claim form might simply not capture them.

Cost to consumers

¹⁵ Special Eurobarometer 342, p 217.

It is well established that standard court procedures involve some cost, and that some national systems can be expensive.¹⁶

The European Small Claim Procedure (ESCP), applying to claims under €2,000, was ‘intended to simplify and speed up litigation concerning claims in cross-border cases, and to reduce costs’¹⁷ but appears to have been a significant failure.¹⁸ It prescribes standard forms and time limits for service of documents and response by parties and the court which may end up making the process inevitably longer than a CDR procedure. Plus, a loser pays rule applies, and although a lawyer is not required, one is not made clearly unnecessary.¹⁹ A 2012 ECC-Net survey reported that the ESCP was free to consumers in 76% of Member States but not in 24%. Court fees ranged from €15 to about €200.²⁰ ECCs indicated that their caseload used the ESCP in less than 1% of all handled cases, and that language was a significant problem (cited by 35% of survey respondents).²¹ The ECCs cited problems of lack of awareness, information or support to consumers (courts not making forms available) and lack of effective enforcement of judgments. It is not known how many people used lawyers, and at what cost.

The Oxford study found that the vast majority of CADR schemes are *free* to consumers. This is a general principle in France, Spain and Sweden, and applies in almost all of the schemes in Germany and the UK (save for those post-conciliation arbitration stages of many private schemes, for which a charge is imposed). An exception applies in the Netherlands, where consumers pay a registration fee to SGC that varies depending on the sectoral Board, and generally ranges between €25 and €125.

In general, ombudsmen systems are free to consumers. CDR systems that involve a mediation stage are usually free and those that involve arbitration can involve modest access costs. However, the costs are low and are intentionally kept attractive in comparison with the cost of court fees for small claims procedures. Nevertheless, if consumers choose to instruct a lawyer, even in relation to a small claims procedure, their cost will increase. The Directive specifies that CDR services shall be either free or available at a nominal fee to consumers, and access does not require retaining a lawyer.²² This should make CDR more attractive than courts. The word ‘nominal’ is significant: it does not connote full cost recovery by CDR entities. Some CDR bodies charge consumers a fee because in some types of case it can assist by encouraging some consumers to evaluate the basis and quantum of a claim in an objective manner. In short, it can help refocus annoyance at, for example, an unsatisfactory holiday into a level of compensation that is more realistic than an exaggerated sum.

¹⁶ CJS Hodges, S Vogenauer and M Tulibacka, *The Costs and Funding of Civil Litigation. A Comparative Perspective* (Oxford: Hart Publishing, 2010).

¹⁷ Regulation (EC) No 861/2007 establishing a European Small Claims Procedure, art 1.

¹⁸ C Crifò, ‘Europeanisation, Harmonisation and Unspoken Premises: The Case of Service Rules in the Regulation on a European Small Claims Procedure (Reg. No. 861/2007)’ (2011) 30 *Civil Justice Quarterly* 283 (‘an ungainly juggernaut’; ‘the legal landscape appears, far from simplified, further complicated’); XE Kramer, ‘Small Claim, Simple Recovery?’ (2011) 1 *ERA Forum* 119.

¹⁹ *Ibid*, arts 16 and 10.

²⁰ *European Small Claims Procedure Report* (ECC-Net, 2012).

²¹ See also EA Ontanu and E Pannebakker, ‘Tackling Language Obstacles in Cross-Border Litigation: The European Order for Payment and the European Small Claims Procedure Approach’ (2012) 5(3) *Erasmus Law Review*.

²² Directive on consumer ADR, art 8(b) and (c).

Cross-border claims involve extra and uncertain costs and delay, because they inherently involve the claimant having to go through court proceedings in two jurisdictions. It was said in 1998 that use of the cross-border exequatur procedure would only rationally produce potentially positive economic effects for claims valued over 2,000 ECU.²³ Despite the abolition of the exequatur from January 2015, the system will still require a suit in the consumer's state, followed by obtaining a certificate there and then taking enforcement action in the state of the trader.²⁴

Duration

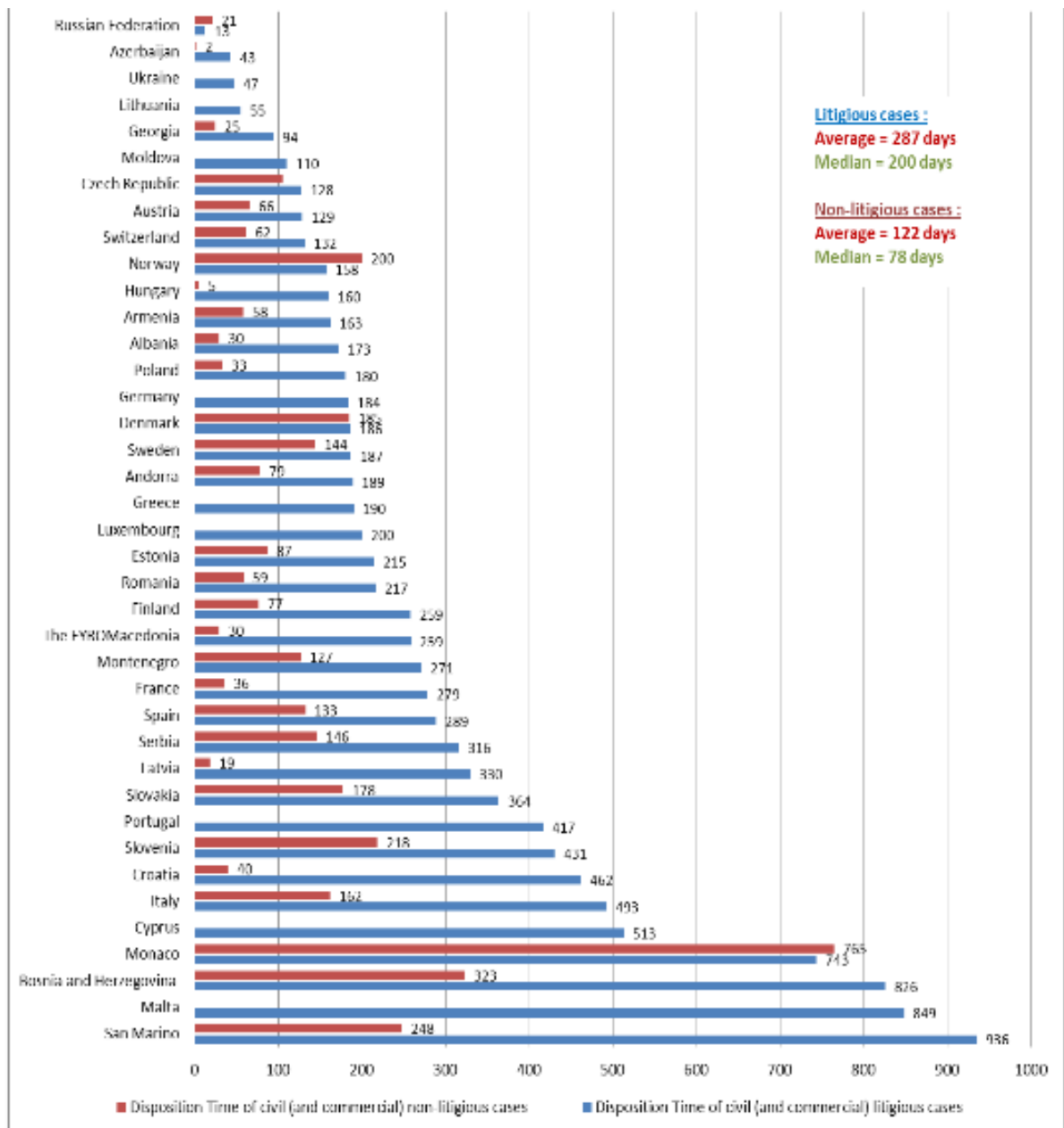
Almost all CDR bodies can achieve faster performance than courts. The CEPEJ data from national governments recorded that the average time in 2010 for resolution of litigious cases across European jurisdictions was 287 days, with the variations shown in Figure 6.²⁵ Within the EU, these figures show a range from 55 days for Lithuania to 849 days for Malta, with the highly efficient German civil procedure system at 184 days. Of course these figures are averages and cover many types of claims, but the message of the length of court proceedings generally is clear.

Figure 6: Disposition time of litigious and non-litigious civil and commercial cases in first instance courts in 2010 in days

²³ 'European Consumer Law Group Jurisdiction and Applicable Law in Cross-Border Consumer Complaints. Socio-Legal Remarks on an Ongoing Dilemma Concerning Effective Legal Protection for Consumer-Citizens in the European Union' (1998) 21 *Journal of Consumer Policy* 315–337, 318, summarising V Gessner, 'Pursuing Cross-Border Claims in Europe' (1998) 21 *Journal of Consumer Policy* 334–337.

²⁴ Regulation (EC) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

²⁵ CEPEJ 2012, Fig 9.12, http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2012/Rapport_en.pdf



Some CDR services are capable of resolving issues very quickly. The Directive provides that the maximum time for CDR procedures shall be 90 calendar days, extendable for highly complex disputes. Many CDR bodies achieve under that period.²⁶ The Oxford study found the data set out in Table 1 for CDR bodies.²⁷ U.K. Ombudsman Services resolved 34% of complaints in 2012-13 (6,500) using early resolution and mutually acceptable settlement, by which it contacts both parties, preferably by phone, to discuss the complaint and its resolution and try to reach agreement. It cited the following case study:

We received a call from a complainant at 2.50pm and by 3.17 pm the same day the company and the complainant had agreed to a resolution. The customer had cancelled her contract but it had mistakenly rolled over – a simple shortfall in customer service. The complainant verbally accepted our account of the complaint and agreed to send across supporting evidence. When

²⁶ Directive on consumer ADR, art 8(e).

²⁷ C Hodges, I Benöhr and N Creutzfeldt-Banda, *Consumer ADR in Europe* (Hart Publishing, 2012), 381.

we spoke to the company it acknowledged the error it had made and agreed to the proposed resolution.²⁸

Table 1: Average duration per case in months by country and CDR scheme

France	<i>Telecoms: 3</i>	<i>Insurance: 3 - 6</i>	<i>Banks: 6</i>		<i>GDF/SUEZ: 2</i>	<i>Travel: 2 - 4</i>
					<i>National Energy mediator: 6</i>	
Germany	<i>Telecoms: 4</i>	<i>Insurance: 4.1</i>	<i>Banks: no data</i>			<i>Travel: 3</i>
Poland	<i>Telecoms: no data</i>	<i>Consumer arbitration tribunals: 0.5 - 2</i>	<i>Banking: 1.1</i>	<i>Trade inspection consumer: no data</i>	<i>Energy: no data</i>	
Spain	<i>Telecoms: no data</i>	<i>Insurance /pensions: 4</i>	<i>Banking: 4-6</i>	<i>Investment: no data</i>	<i>Energy: 2</i>	
UK	<i>Telecoms: 6 or less</i>	<i>Pensions: 10.9</i>	<i>Banks/Insurance: 2.2</i>	<i>FLA: 2</i>	<i>Energy: xx</i>	<i>Travel: 2-2.5</i>

User-friendliness and accessibility

It is clear from the consumer survey data that the extent to which making a complaint is easy or, conversely, involves hassle, affects whether a consumer will expend the effort in lodging a complaint about a matter that has a low value. Some national court and especially small claims and money claims procedures permit lodging claims online. Online facilities for money claims are positive innovations and increasingly used.²⁹

CDR systems increasingly accept online complaints, and some even decline telephone contacts so as to improve cost efficiency and make consumers focus on not wasting time by having to assemble the relevant documentation before just picking up the phone (such as the French telecom médiateur). In virtually every case, the procedure adopted by a CDR scheme will be more streamlined and less formal than normal court procedure. Small claims procedures have aimed to achieve the same goals, but cannot offer, for example, instant telephone advice and mediation. There could be a national portal, such as the Belgian national Belmed.³⁰

Overall, therefore, if they are designed and operated effectively, CDR schemes can offer advantages in relation to courts³¹ of speed, accessibility, informality, expertise, lower cost to the state (but sometimes internalised cost to the sector), increased acceptability of decisions, potentially lower regulatory burden, and increased motivation.

²⁸ Annual Report and Accounts 2012-2013 (Ombudsman Services Limited, 2013), 13.

²⁹ In England see <https://www.moneyclaim.gov.uk/web/mcol/welcome>.

³⁰ S Voet, 'Belgium' in C Hodges, I Benöhr and N Creutzfeldt-Banda, *Consumer ADR in Europe* (Hart Publishing, 2012) ; S Voet, "Public Enforcement & A(O)DR as Mechanisms for Resolving Mass Problems: A Belgian Perspective" in C. Hodges and A. Stadler (eds), *Resolving Mass Disputes: ADR and Settlement of Mass Claims* (Edward Elgar, 2013).

³¹ CH van Rhee and A Uzelac (eds), *Civil Justice between Efficiency and Quality: from Ius Commune to the CEPEJ* (Antwerp: Intersentia, 2008)

In order to achieve the goal of increasing access to justice, it is clear that the costs of access for consumers must be low, accessibility must be as easy as possible, the processing costs for business must be low, and for both sides the costs must be proportionate. It appears that even though small claims procedures may have low costs, the level of cost and the accessibility are simply not attractive enough for many consumers, either by themselves or when compared with CDR systems. It is clear that CDR can offer a means of capturing and processing many consumer claims, even those of small value.

2. Providing consumer advice, to underpin informed purchasing.

Many CDR bodies carry out a highly valuable advice function to consumers. The inquiry may be ‘This has happened, is the trader in the right, or do I have grounds to complain?’ The consumer could ask a lawyer this question, but there would often be a cost, or could ask an advice body, which might be free, but many such questions are directed to CDR bodies. Consumers may use the CDR body as a source of expert advice in consumer law and specialist sectoral rules, what is acceptable market practice, and whether there might be cause for complaint, as well as a source of dispute resolution.

Every CDR body receives more inquiries than formal claims. One observation by the Oxford team was that in countries where there is a strong and effective consumer advice function, the number of requests for post-purchase advice and complaints received by the national CDR body appears to be remarkably low. In 2010, the ARN in Sweden received on around 11,000 cases, although a relatively small number of sectoral CDR bodies also received an unidentified but seemingly modest number of cases.³² The Swedish system is intentionally designed to provide effective pre- and post-purchase advice to consumers, and clearly does so. Design features that invest in advice systems do appear to produce more effective purchasing, and give rise to fewer complaints. This means providing good sources of independent pre-contract advice, and fully transparent information on products and services.³³ Both the advice system and the complaint system should operate within structures that are as simple as possible, so they can be easily understood by consumers, and hence maximise access.

3. Enabling the CDR system to deliver regulatory outputs.

A major potential advantage of CDR lies in its ability to affect—and improve—market behaviour. CDR entities should feedback aggregated market information, to inform regulators, customers and the market. The aim should be to enable problems to be identified, and for corrective action to be taken, swiftly.

The history of payment protection insurance (PPI) in the U.K. is an example.³⁴ In over 500,000 cases brought to the Financial Ombudsman Service and many more to banks,³⁵ the

³² F Weber, C Hodges and N Creutzfeldt-Banda, Sweden’ in C Hodges, I Benöhr and N Creutzfeldt-Banda, *Consumer ADR in Europe* (Hart Publishing, 2012), 381.

³³ Encouraged by, for example, Directive 2011/83/EU on consumer rights.

³⁴ ‘PPI was a major retail market, with sales of over 5 million policies a year during 2000 to 2005, with premiums in the region of £7 billion a year. It was very profitable for firms. Often the underlying loan served as a loss leader on which to sell PPI. It was targeted at consumers taking on debt, many of whom were financially

total paid out for mis-sold PPI between January 2011 and January 2013 exceeded £8 billion, and in 2011/2012 there were 157,716 PPI cases (60% of new cases).³⁶

The underlying mis-selling behavior could have been stopped earlier, and prevented this mass of cases, if the Ombudsman's complaints data could be aggregated and passed on to traders, consumers and regulators, and if the relevant regulator had power to intervene to stop the practice and insist that traders rectify the position and pay redress: since 2010, the regulator now has a toolbox of such relevant powers to use.³⁷ The availability of online claims technology enables immediate oversight and interrogation of the relevant data, so that trends in types of emerging problems and bad trading behaviour can be swiftly identified.

In order to achieve this, the following operational functionality is necessary:

- a. The CDR body records all complaints electronically [complainant, trader, issue, evidence, outcome: individual consumers' names should be anonymised if passed on].
- b. The CDR body publishes aggregated details periodically (or swiftly in cases of urgency such as major threats to public safety or detriment). Information is sent to traders or their representatives, to regulators, and published online and to the media and consumer commentators. The Directive's requirement for CDR bodies to publish annual activity reports on their websites on numbers of disputes, systematic or significant problems, rate of compliance with outcomes supports this function.³⁸ It may be advisable for some CDR bodies to publish more frequent data and in greater detail. The Directive also provides for cooperation and exchange of information between CDR entities and enforcement bodies,³⁹ although this provision should be included in the ODR Regulation.⁴⁰
- c. There should be close and regular cooperation between CDR bodies and regulators.⁴¹
- d. Public regulatory bodies need appropriate powers to intervene and to respond to emerging issues, such as to stop ongoing abuse, change behaviour, and oversee mass redress. If consumers are paid back by traders, voluntarily or under threat of regulatory compulsion, this will be far quicker and more efficient than having to apply to CDR systems, or the court. Very effective examples of such powers and solutions are available in some Member States.

A system such as the above is entirely familiar from various other contexts, such as the pharmacovigilance, medical device vigilance and general product safety systems.

In order that (i) the optimal number of complaints may be attracted and (ii) CDR systems may capture all market data, so that it can be aggregated into an overview picture, there should be a small number of CDR entities. Permitting individual mediators, and perhaps a

vulnerable, as their focus was typically on securing the loan with the insurance incidental to the transaction.' *The Financial Conduct Authority: Approach to Regulation* (Financial Services Authority, June 2011), para 5.12.

³⁵ See *Finalised guidance. Payment protection products. FSA/OFT joint guidance* (Office of Fair Trading and FSA, 2013).

³⁶ *Annual Review, financial year 2011/2012 of consumer complaints about insurance, credit, banking, savings, investments* (Financial Ombudsman Service, 2013), at www.financial-ombudsman.org.uk/publications/ar12/ar12.pdf

³⁷ Financial Services and Markets Act 2000 as amended, ss 383, 384, 387, 388 and especially 404.

³⁸ Directive on consumer ADR, art 17.

³⁹ Directive on consumer ADR, art 8(b) and (c).

⁴⁰ J Hoernle, 'Encouraging online alternative dispute resolution (ADR) in the EU and beyond', *European Law Review* 2013, 38(2), 187-208.

⁴¹ Directive on consumer ADR, art 17.

large number of individual mediators, to handle any individual type of case might ‘tick the box’ of full coverage, but is unlikely to attract sufficient consumer trust and confidence and therefore will not to maximise the number of possible claims attracted to the system. It will also be more difficult to assemble the complete aggregated data that will be needed for full transparency and regulatory purposes and thereby enable efficient regulatory coordination. Thus, a system that has integrated administrative systems is advisable.

4. Responding to consumer issues.

Which are the most frequent types of disputes? So which are the sectors that are most likely to give rise to complaints? And which types of technical expertise will be most important?

The European Consumer Centres across the EU handled more than 72,000 enquiries from consumers during 2012, of which 32,000 were complaints from consumers who experienced problems while purchasing goods or services from a trader located in a different country.⁴² The sectoral breakdown is at Table 7, and numbers in recent years at Table 2. Around 60% of complaints concerned e-commerce. But if complaints are split by sectors, the transport sector is highest, attracting about one third of all cross-border complaints, of which 22% were linked to the air transport.

Figure 7: Complaints to ECC-Net in 2012 by sector

Main economic sectors concerned by complaints	Percentage
Transport, of which:	32.1%
- Air transport (including problems with luggage)	21.6%
- Car rental	3.4%
Timeshare related products and package holidays	7.4%
Recreational, sporting and cultural services	7.0%
Furnishing, household equipment and routine household maintenance	6.8%
Audio-visual, photographic and information processing equipment	5.6%
Health	5.1%
Communication	4.7%
Clothing and footwear	4.5%
Hotels and restaurants	4.5%
Personal care goods and services	3.0%
Financial services and insurance	2.5%

Table 2: Cross-border complaints and information requests received by ECCs⁴³

	2007	2008	2009	2010	2011	2012
Contacts	50.930	62.569	60.755	71.292	70.207	72.067
Complaints	24.810	26.674	27.601	28.927	26.909	32.197
Information requests	22.284	29.243	25.875	27.060	28.108	26.399

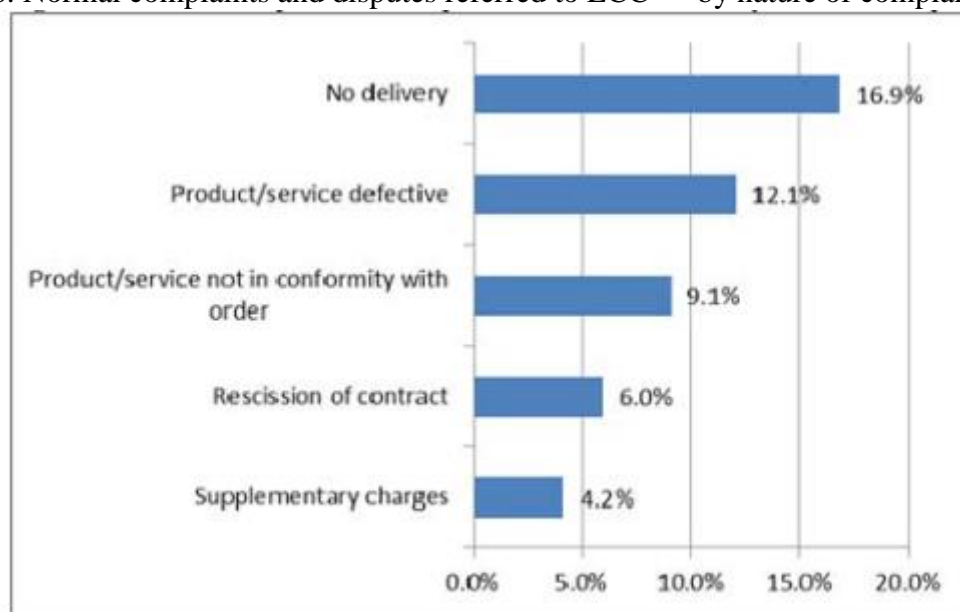
The most frequent reasons for complaining to ECCs in 2012 concerned non-delivery of the product or service, the product or service having defects or not conforming with the order are linked to distance purchases, which are all issues associated with distance purchasing. Other

⁴² *Help and Advice on your Purchases Abroad. The European Consumer Centres Network 2012 Annual Report*, available at http://ec.europa.eu/consumers/ecc/docs/report_ecc-net_2012_en.pdf.

⁴³ Consumer Scoreboard 2013, Fig 20, p 31, at http://ec.europa.eu/consumers/consumer_research/editions/docs/9th_edition_scoreboard_en.pdf.

important issues concern the rescission of the contract and the additional charging of supplements. These problems account for almost half of all complaints (Figure 8).⁴⁴

Figure 8: Normal complaints and disputes referred to ECC — by nature of complaint, 2012



* Only the main categories are included

Source: ECC Network

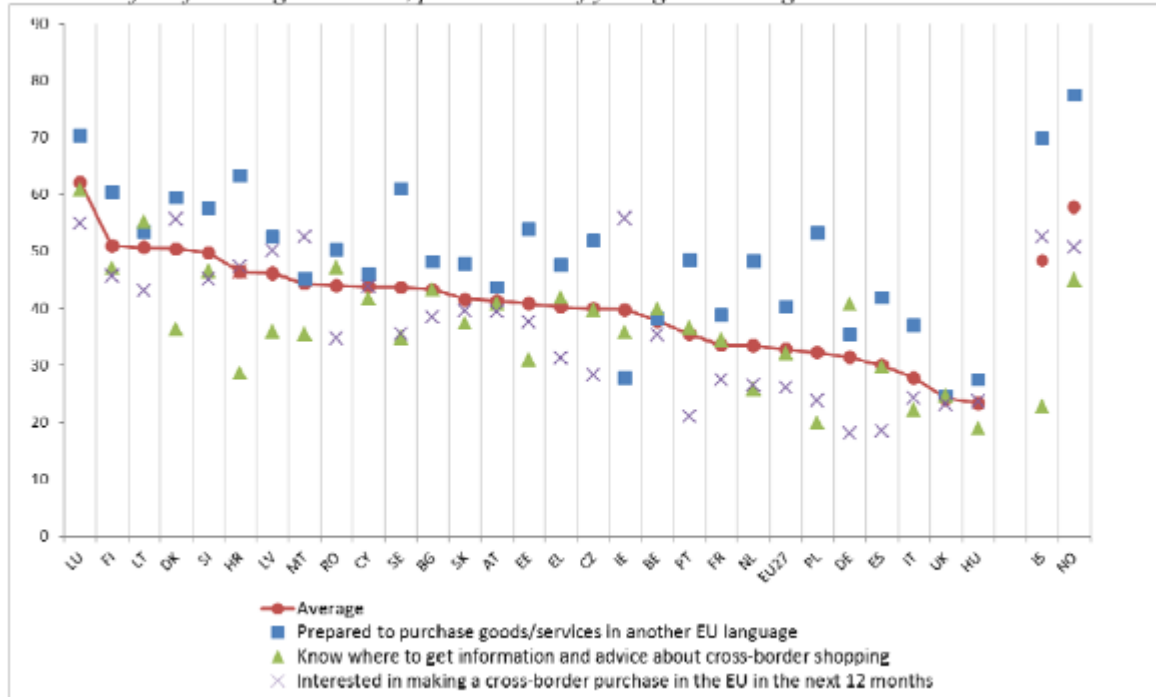
Dissatisfaction is reflected in levels of consumer trust. The 2013 Consumer Scoreboard found trust in online purchases shows a high degree of variation across the EU,⁴⁵ as reflected in Figure 9. When averaging the percentages of consumers who feel confident buying online domestically and from another EU country, the highest values are seen in Ireland (71%), Denmark (67%), the United Kingdom (62%) and Luxembourg (61%), compared to 29 % in Croatia, 34 % in Estonia and 35 % in Hungary and Italy. Outside the EU, Norway also registers a high level of trust in online purchases (66%). Thus, the vast majority of consumer claims are about matters that should be very simple to adjudicate, without needing complex procedures. Non-delivery, for example, needs minimal evidence: perhaps a couple of emails or documents evidenced by pdf, and perhaps a formal statement or delivery tracking record.

Figure 9: Trust in online purchases, 2012, EU27 (% consumers)

⁴⁴ Consumer Scoreboard 2013, p 31.

⁴⁵ Consumer Scoreboard 2013, p 14.

For each of the following statements, please tell me if you agree or disagree with it?



Source of raw data: Flash Eurobarometer 358

In 2012, 60% of complaints registered by ECCs were related to online purchases. This proportion has been growing over the years in line with the general development of e-commerce. The major problems with goods purchased via the Internet are non-delivery and late delivery. Delays affect almost a third of respondents (29.7%) who have made domestic online purchases and 19.3% of those purchasing from other EU countries. Non-delivery is reported for 8.2% of domestic and 5.8% of EU cross-border online purchases. Higher incidence of problems in domestic transactions may be at least partly due to the fact that consumers on average conduct more online transactions with domestic rather than with foreign sellers. This clearly indicates that swift ODR procedures are called for.

Summary

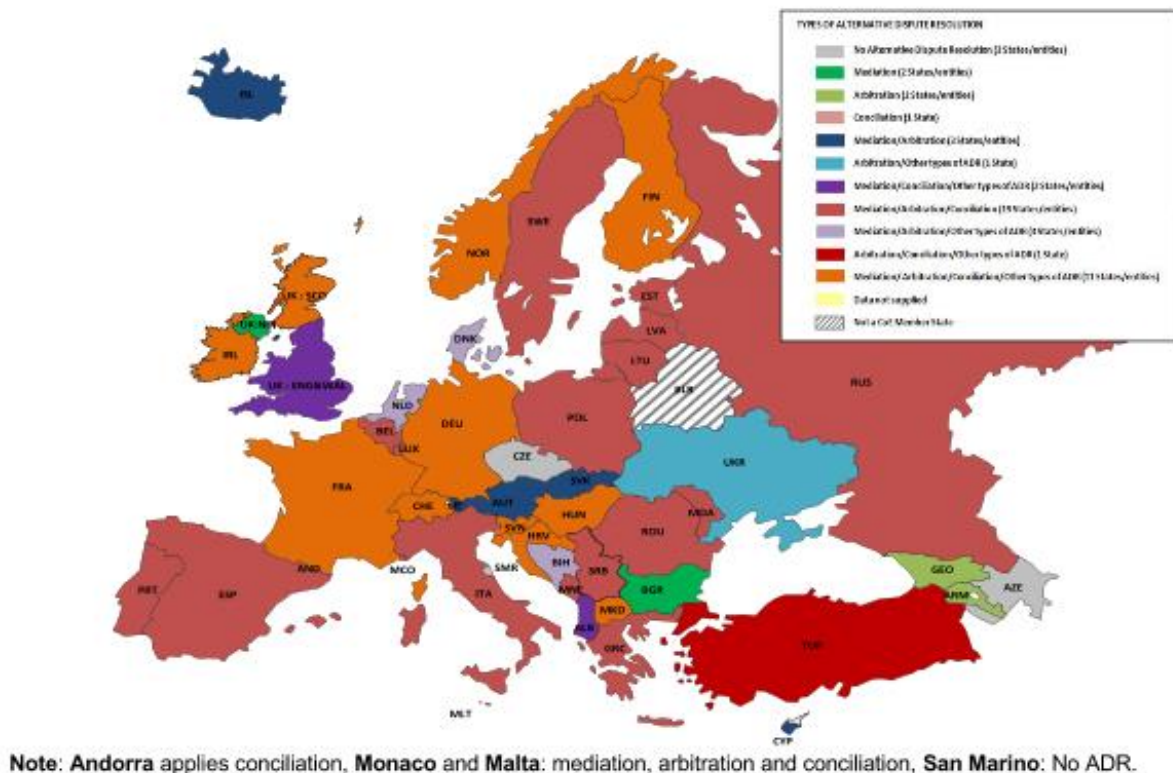
In summary, CDR offers enormous potential. It should be attractive for consumers to use, cheaper for users, regulate and improve market behaviour, and deliver collective redress far more quickly, cheaply and effectively than collective litigation. But if CDR is to achieve these benefits, design choices are of fundamental importance.

B. How Do We Achieve the Goals? Objectives

The three principal objectives of the 2013 CDR Directive and ODR Regulation are to fill gaps in coverage (of sectors and within Member States), to address the lack of awareness of CDR as an option, and to address variations in quality. We should, therefore, ask how Member States can best construct national systems that offer full, effective and efficient coverage, raise awareness of CDR schemes, and ensure a sufficient and standard level of quality.

The first objective is addressed by the Directive providing that Member States must ensure that a consumer-to-business ('C2B') complaint can be submitted to an ADR entity (art 5.1), so providing 'full coverage'. However, different types and patterns of ADR exist across Europe (see Figure 10),⁴⁶ so every country faces a challenge in reforming or creating its national landscape of CDR bodies. This is discussed further below.

Figure 10: Types of Alternative Dispute resolution applied in European states or entities in 2010.



The third objective, ensuring adequate and uniform quality by CDR bodies, is addressed by the following requirements in the Directive:

1. The primary principle: Consumer ADR ('CDR') must be effective (art 8).
2. Quality principles must be respected.
 - a. CDR entities must be expert, independent and impartial (art 6.1).
 - b. CDR entities that do not meet the standards must be improved or closed (arts 18-20).
 - c. National competent authorities ('NCAs') overseeing CDR entities must be effective.
 - d. Data on the operation of CDR entities should be published (art 7).
 - e. There should be agreement and clarity on which rules are being applied (art 7.1.1), i.e. law, fairness, equity, terms and conditions, etc.

Therefore, the method of ensuring quality is to establish mandated quality standards, and provide a regulatory framework of competent authorities to oversee CDR bodies, enlisting techniques of transparency, oversight and enforcement. As with any legal norms, compliance and enforcement will be important.

⁴⁶ CEPEJ 2012, Fig 6.1, http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2012/Rapport_en.pdf

C. Anticipating and Responding to Criticism

A series of criticisms are being made about CDR.⁴⁷ These need to be listened to and answered if CDR is not to gain a bad reputation, and hence lack sufficient consumer support, fail to achieve its considerable potential, and perhaps even fail altogether as a technique. Some of the most important criticisms are as follows.

The first criticism is that CDR is unconstitutional because it privatises justice. It transfers the exclusive Constitutional right to make legally binding decisions about legal rights from courts to CDR bodies, in particular to private bodies. In effect, a system of private courts is being created, and that is unconstitutional and undesirable. Further, deciding issues of law and rights should be the exclusive preserve of state institutions.⁴⁸ The argument is that privatised resolution procedures can result in outcomes that have little to do with the rights involved, and raise concerns about the risk of abuse flowing from imbalances of power and conflicts of interest.

The second criticism is that some CDR systems breach ECHR article 6, either for defendants or for consumers, in making CDR mandatory and blocking access to the courts. The third criticism is that private CDR bodies have no—or inadequate—oversight, transparency of operation, legal expertise.⁴⁹ They cannot be trusted. They will not make decisions that are legally accurate or consistent. A further related aspect of criticism is that mandatory consumer rights will not be fully endorsed, and that will mean that traders have inefficient behavioural incentives and due process values will be compromised.

Some have argued that the choice of goals, and of processes to implement those goals, makes a difference to outcomes in dispute resolution design.⁵⁰ It is possible that it may be necessary to review ECHR article 6 at some stage, but for the moment, it is taken as axiomatic that the goal of CDR is to apply the law, and reach accurate judgments by processes that satisfy traditional due process requirements, such as independence, no conflicts of interest, no bias, each party has an equal and fair opportunity to present evidence and argument, to know what opponents say, and to challenge opponents' versions. However, it does not follow that the procedure that may be applied by a court is relevant for every case. Some valid economies can be made, such as apply in small claims procedures. CDR systems address a major need to improve access to justice for a vast number of consumer claims that are not raised because they do not satisfy cost-proportionality thresholds and available systems are not user-friendly enough for busy or disadvantaged people. So CDR processes must reduce cost and informality, and improve accessibility and speed, while remaining fair.

Against that background, some possible responses to the criticisms above include the following arguments. First, the Directive specifically provides that before agreeing or following a proposed CDR solution, the parties are informed that participation in the

⁴⁷ eg H Eidenmüller and M Engel, 'Against False settlement: Designing Efficient Consumer Rights Enforcement Schemes in Europe' paper presented at a conference at the European University Institute, Florence on 27/28 June 2013 and a conference at the Goethe University, Frankfurt on 20/21 July 2013.

⁴⁸ R Verkijk, 'Mandatory Mediation: Informal Injustice?' in A Uzelac and CH van Rhee (eds), *Public and Private Justice. Dispute Resolution in Modern Societies* (Antwerp: Intersentia, 2007); H Genn, *Judging Civil Justice. The Hamlyn Lectures 2008* (Cambridge: Cambridge University Press, 2010).

⁴⁹ A comment made to the author in 2013 was "How will a CDR employee identify an unfair contract term?".

⁵⁰ S Smith and J Martinez, 'An Analytic Framework for Dispute Systems Design' (2009) 14(1) *Harvard Negotiation Law Review* 1401-1447.

procedure does not preclude the possibility of seeking redress through court proceedings, that they are informed of the legal effect of agreeing to or following such a proposed solution, and that before expressing their consent to a proposed solution or amicable settlement they are allowed a reasonable period of time to reflect.⁵¹

Secondly, the Directive provides that solutions imposed consumers shall not result in the consumer being deprived of the protection afforded by law. Where no conflict of law arises, the law is that of the member State where the consumer and trader are habitually resident.⁵² Where a conflict of laws arises, the normal conflict rules of Regulation 593/2008 article 6(1) and (2) apply.⁵³

Thirdly, the attack is weak in relation to the many arbitration-based CDR systems that involve a legally-qualified chair (who is often a judge). The Dutch geschillencommissie, and Nordic, Spanish and Portuguese CDRs, for example, clearly function to achieve every Board applying all relevant law. Similarly, many ombudsmen, notably those in Germany, are distinguished judges. Sectoral ombudsmen, even if not judges, claim to possess detailed knowledge of the relevant sectoral legislation and rules, codes or guidance. Such technical matters can be extremely complex and detail, for example in relation to financial services or telecoms. The level of knowledge and expertise can far exceed that of many judges. A complaint made in Portugal some years ago was that judges sitting as arbitrators were familiar with the civil code but almost totally unaware of the consumer code.

A fourth possible response is that CDR is well-established in many Member States. Many consumers choose it over the courts. Numbers will increase as the profile of CDR increases, provided it can be seen to be constitutionally acceptable and a more attractive than other options for relevant types of claim, or at least a viable and competitive option. This suggests that consumers are exercising choice as between dispute resolution systems, and are more interested in values of speed and cost than in absolutely forensic legal accuracy if it costs too much and takes too long, provided an adequate standard is maintained and there is no bias. Consumers may choose to compromise their 'rights' if they feel that considerations of cost, speed and uncertainty apply.

All litigants may feel uncertainty over exactly where 'right' or 'justice' may lie on the merits and law of a case, especially if it has to be resolved in a procedure that can only deliver a binary 'win or lose' outcome delivered by a third party. It is individuals' constitutional right to dispose of their rights as they see fit. Individuals may decide to sue, compromise, waive or ignore the enforcement of their rights. A decision to waive a right to enforcement in court cannot be irrational nor contrary to the validity of a modern legal system, as long as the decision is reached freely, without undue influence. It may be argued that such a decision should be reached in full knowledge of all relevant matters, i.e. after a full forensic investigation and determination of the legal position by an expert, but it is not irrational for people to waive such a right on any grounds they choose, such as cost or lack of convenience. Against this background, options such as waiver, negotiation, ADR, CDR or involving regulators offer reasonable alternatives to use of courts, which cannot be viewed as undemocratic or undermining legality. The EU has taken major policy steps to promote ADR

⁵¹ Directive on consumer ADR, art 9(b) and (c).

⁵² Directive on consumer ADR, art 11(a).

⁵³ Directive on consumer ADR, art 11(b).

as an integral part of the court process,⁵⁴ and CDR is little different in relation to issues of constitutionality and protection of due process. An attack on CDR applies equally to ADR.

Supporters of mediation argue that many people are less concerned with rights than with resolution, restoring peaceful relationships, and moving on, so outcomes can have little to do with rights.⁵⁵ Mediation has strong advantages in the right circumstances, such as where it is important for the parties to avoid an adversarial confrontation and to restore bilateral relations and communication.⁵⁶

The overwhelming picture of consumer-to-business complaints is that many, and most, are about issues that do not involve much money, and many consumers would act rationally in not taking a matter up, or not going very far with it. Cost-proportionality is a real issue, even for countries with low cost procedures. The statistics across the EU as a whole already show far greater use of CDR options than courts' small claim procedures.

A fourth criticism is that CDR bodies will reach inconsistent decisions. This is a reasonable criticism, but it could equally be said of courts across Europe. It will be necessary to ensure high standards and consistency. In creating the CDR regulatory framework, it is important to learn from recent experience of creating a not dissimilar pan-EU regulatory system, and avoid the 'notified body problem'. Under the EU New Legislative Framework for marketing of products (formerly the New Approach),⁵⁷ the regulatory structure consists of three levels: regulators, notified bodies and manufacturers. Notified bodies are private sector bodies that have public responsibilities as approval, certification or auditing-type functions. Member States have approved too many of them, so there exist variations in quality, speed, cost, and waiting times. The result is that good notified bodies are full up and some manufacturers divert top using quicker and cheaper ones that are of lesser quality. The structural problems that arise in the notified bodies have strong similarities with the structure and potential problems that might arise for CDR bodies. It will not be acceptable for bodies (whether public or private) to gain a reputation for low quality in dispensing justice. The lessons from NCA oversight of notified bodies under the New Framework for product regulation (as is provided in proposed revisions of the Medical Devices legislation) is that close coordination, peer-review, joint inspections and other mechanisms between NCAs will be required.

The CDR community would be well advised to take heed of these potential criticisms, and to take steps to avoid or minimise them. Careful thought should be given to how individual CDR bodies, as well as the CDR community, will prove that they have the required and consistent level of technical expertise, and that decisions reached are just, legal and fair. There will be a need for training, to ensure standards of competence and horizontal consistency in processes and decisions. As with the EU's response to notified bodies, involvement in joint audits may a good idea. A criticism based on lack of transparency of CDR bodies runs the risk of highlighting the lack of transparency by courts. CDR bodies

⁵⁴ Directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters, [2008] O.J. L 136/3.

⁵⁵ M Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' 9:1 *Law and Society Review* (1974) 165-230.

⁵⁶ S Roberts and M Palmer, *Dispute Processes. ADR and the Primary Forms of Decision-Making* (Cambridge: Cambridge University Press, 2005).

⁵⁷ Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93; Decision No 768/2008/EC of the European Parliament and of the Council of 9 July 2008 on a common framework for the marketing of products, and repealing Council Decision 93/465/EEC.

should not be as secretive and closed to scrutiny as judges and courts traditionally are. It may be that CDR bodies can demonstrate that they are more just than courts, and so deserve greater trust.

The criticism noted above that that mandatory consumer rights will not be fully endorsed, and that traders have inefficient behavioural incentives has little force. Individual court judgments bind the defendant only. A major criticism of the enforcement system in Germany, for instance, is that a court judgment on an unfair contract term does not have *erga omnes* effect, and multiple individual proceedings are necessary so that every relevant defendant can be bound. In contrast, the argument in favour of CDR starts with a proposition that many more individual consumer complaints will be dealt with because the cost-disproportionality threshold is likely to be overcome. That is certainly likely to be the case in a significant number of Member States. Further, as noted above, a major design feature of CDR is that individual complaints may be aggregated and information that identifies wrongful trading can be passed to consumers, the market and regulators. Pressure can then be exerted through reputational, purchasing and public enforcement means. It is not difficult to envisage a significant rise in the number of illegal practices that are identified, and instances in which effective action being taken. Again, the picture will vary across member states, and to some extent will depend on national reforms so as to enable transparency, media pressure, customer switching, and public enforcement, so as to enable realisation of these benefits to be maximised.

Further criticisms of CDR rest on financial grounds. A fifth attack is that the CDR system's two-tier structure of regulators and CDR bodies will be unnecessarily expensive. A sixth objection comes from certain major consumer trading sectors that have extensive and sophisticated in-house customer care and complaint departments, and they do not see a need to pay for any extra CDR. Indeed, this is linked with a generic challenge over how to encourage business to join and fund ADR schemes, and how to extend the coverage of ADR schemes to more sectors.

Are CDR schemes cheaper than lawyers and courts? Cost data is not fully available, but the Oxford study found that cost varies with the nature of the case type and whether a CDR scheme includes a triage-mediation stage or just a decision stage. In relation to differences arising from the nature of case types, a pension case may clearly involve more time and expertise than a simple non-delivery of goods case. Thus, the cost per case in 2010 for UK Pensions Ombudsman was roughly £3,000, and the inherent complexity was apparent from the longer average duration of his cases than some other schemes. In contrast, the cost for Ombudsman Services in 2012-13 was £66 per contact or, £411 per complaint resolved (thus including the cost of handling contacts), which covers a range of different complaint types for several sectors.⁵⁸ The cost per case in Sweden in 2010 was €300 and the Netherlands perhaps €900, but these are very general figures, averaged across many different types of cases. Comprehensive cost data is not available from Spain, but the average cost per case was over €400 in 2010, whilst the average value of awards was only €366.

In relation to concerns put by those business sectors that are sceptical about CDR, the following points are made. Firstly, if effective in-house customer care exists, the demand for external CDR should be low, so the cost of maintaining external CDR infrastructure can be

⁵⁸ Annual Report and Accounts 2012-2013 (Ombudsman Services Limited, 2013). Gross turnover £8,088,517, 122,589 contacts and 19,639 complaints resolved.

kept low. Secondly, CDR is cheaper than lawyers and litigation.⁵⁹ Thirdly, CDR enables traders to keep their consumers to a greater extent than where complaints lead to argumentative procedures or unresolved issues. Fourthly, it provides a mechanism to deal with consumers who do not wish to settle on a reasonable basis or those who are just disaffected. Fifthly, the availability of effective CDR will reduce the perceived need for class actions. The Oxford research noted numerous examples where a business sector had initially been sceptical about the costs and benefits of CDR but had dramatically changed the view once a scheme had been introduced.

A seventh concern voiced by business is that if CDR becomes too accessible and cheap it will give rise to a lot of unfounded claims or minor issues. Possible responses would be that CDR can be designed to systems act as a swift filter for unfounded claims, and that any valid claim deserves to be dealt with since multiple small claims can add up to a large illicit profit for a business.

Overall, it is suggested that CDR systems can withstand these criticisms, but they should be aware of them, and of the need to *demonstrate* that CDR systems comply with constitutional and ethical requirements, and to build consumer confidence by such demonstration. The CDR community will need to develop strong accountability, oversight mechanisms, quality control, transparency, training, performance data, and auditing.

D. Deployment of Techniques

CDR systems have adopted a variety of models, involving a different combination of dispute resolution techniques. To some extent, the techniques found in different CDR systems can be seen against the historical development of dispute resolution techniques, moving from court systems, and small claims, outside states' justice structures to arbitration (within free-standing or specific consumer structures), to mediation (customer care systems within companies, ADR alongside or within court procedures), to ombudsmen structures. Some countries may wish to review whether their existing structures could in fact be modernised. For example, should a CDR system that was designed 40 years ago in the context of arbitration be converted towards more of an ombudsman model?

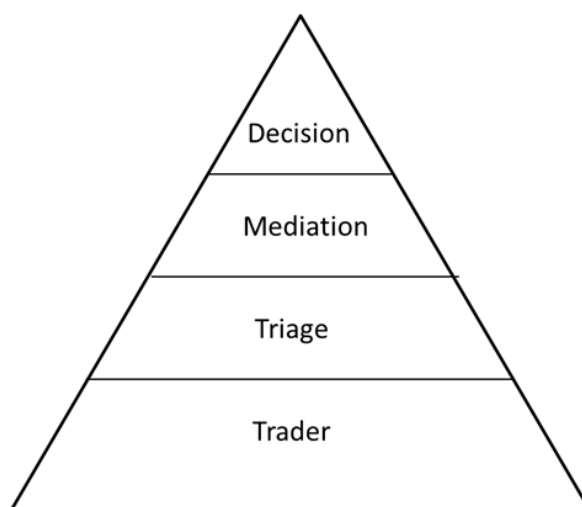
The main techniques are triage, mediation/conciliation, and a decision. For simplicity, I will refer below to 'mediation' meaning what is sometimes differentiated into mediation or conciliation, the difference being that mediation is usually defined to exclude the ability of the third party intermediary from proposing his or her own solution to the dispute, whereas this more active role is permitted in conciliation. For the purposes of the present discussion, there is little difference between the two.

The following models show the main variations in the use of these techniques. Two points should be remembered before proceeding. First, a consumer has the option of starting a judicial procedure at any point before either committing to a binding arbitration or a decision of other CDR schemes becomes binding. Second, the first stage in every CDR system is to encourage and allow a reasonable period for contact to occur between the parties and direct negotiation between them.

⁵⁹ One large company that has a large internal customer complaint function and also a significant level of demand for an external CDR function, estimated to the author that if its caseload were to be handled by the lawyers and the courts its annual expenditure on the CDR system would be at least ten times higher.

The most sophisticated models include all of main techniques in sequential stages. Many systems are designed to integrate several techniques within a specific sequence, so as to enable different forces to act together within a pyramid structure within which claims can be resolved first in the quickest and cheapest fashion, whilst allowing progression to more adjudicatory (and hence more costly and slower) techniques. This is designed to resolve cases at the earlier stages of the system, thereby promoting speed and cost-proportionality, and appears to do so in many schemes, resulting in a pyramid structure of how far complaints get in the system (Figure 11).

Figure 11: Pyramid structure of stages of complaint resolution



Where a third party CDR becomes involved, the first stage could be triage/mediation, followed by a decision (whether arbitration or otherwise). Functionally, the mediation stage is where the parties exercise their right to dispose of their rights by agreeing to a settlement, and the decision stage involves a declaration by a third party of the legal result having applied the law to the facts and rights involved.

Some CDR schemes, especially those involving technical matters, such as sectors that involve particular market practices, and especially extensive and complex regulatory or other rules, such as financial services, telecoms, energy, utilities, package holidays and motor vehicles, have in-house staff who have detailed and specialist knowledge and are capable of speedily carrying out the initial function of advising the consumer whether there may be a cause for complaint as a result of a breach of a rule that would not be familiar to many non-specialists. The advice function is usually free and is the equivalent of going to a lawyer (who would usually need to be paid). A significant proportion of matters can be resolved at this stage. The independent person can say to the consumer 'I have looked at your case and you do not have a legal complaint' or to a trader 'You are clearly in the wrong, you should pay up immediately'. Some CDR schemes set their pricing tariffs to incentivise traders to settle at this point before a matter is processed as a formal complaint.

Anecdotal evidence is that where the former happens, many consumers take no further action, and are content that their matter has been scrutinised by an expert. They have the psychological satisfaction of having 'told someone', 'got it off their chest' and 'been listened to'. But they can increasingly be aware that every contact can be logged so that even if an individual matter turns out not to be a 'complaint', the nature of the issue raised and the

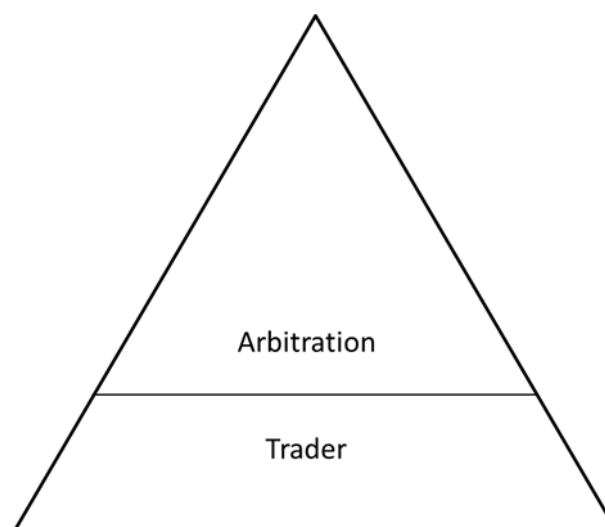
identity or sector of the trader can be used if passed on to regulatory enforcers to form an essential part of market surveillance activities. Every piece of information tells those supervising markets and traders what is actually going on.

Another technique that can be used is to direct consumers and traders to a website where they can find frequently asked questions and answers, and decisions on frequently-occurring problems (as well as a fuller analysis of all decisions).

The advice function morphs into a scrutiny function in weeding out clearly unfounded claims and a triage function in identifying the degree of complexity of a genuine complaint. Complaints can therefore be assigned to ‘tracks’, depending on seriousness and complexity, and the extent of evidence or seniority of staff who might need to be involved. The triage and mediation stages can be quick and therefore cheap. They tend to be found more in sectoral ombudsmen systems than in arbitration-based systems.

In contrast to the multi-tiered structure, many historical CDR schemes use only an arbitration model, with no mediation (Figure 12). This simple approach might save costs, and its use depends on the type of case and on the general level of demand in the system. It is possible that CDR systems in smaller countries, for example, might function effectively and quickly.

Figure 12: Arbitration CDR model



Once all evidence has been collected, claims are all submitted to an arbitration panel of three people for a decision, with or without a hearing. This ‘slot machine’ approach is similar to the model of a court: you insert the claim and the answer is extruded. It is a binary outcome: in a claim between two parties, one wins and one loses. The arguments for this model include the fact that it is strong on applying the law, in a manner that is similar to a court. The chair of the arbitration panel is usually a judge or at least legally qualified. Disadvantages can include the inherent cost and duration of involving an administrator to prepare the documentation and three arbitrators.

An important factor in choosing between the tiered mediation-decision and decision-only structure is cost, to which considerations of volume also arise. The Dutch geschillencommissie (DGS) system and the Nordic arbitration systems are notably cheap. In

2013, DGS has only 45 administrative staff, supporting 53 sectoral Boards. In 2010 its administrative cost was €5.5 m. The Dutch system has historically used the arbitration model but it is to pilot the addition of a mediation stage in 2014 in relation to disputes involving kindergarten. It will probably use a panel of external mediators, paid on an hourly basis. An alternative would be to use a module fee, so parties have full predictability of cost, although different fees might have to be set for different types of case.

In contrast, the Dutch financial services CDR, KiFiD, has an initial phase that combines mediation and expert evaluation with decision-making in the form of the Ombudsman, but this comes at a cost.

However, DGS is also to introduce a funnel or sieve system. The DGS model might think of introducing a 'light' procedure, under which both parties would submit their positions and a single judge would look at the case (quickly) and email to both his/her suggested solution. Perhaps the solution might not be binding, but could be accepted by both sides, thereby stopping the case from going further to the full Board.

In contrast, the U.K. Financial Ombudsman Service will soon have 3,500 staff. In 2012/13 its frontline customer-contact division received 2,161,439 initial enquiries and complaints; 508,881 new cases were referred to adjudicators and ombudsmen for further dispute-resolution work; 198,897 cases were resolved by adjudicators through mediation, recommended settlements and adjudications, and 24,332 cases were resolved by ombudsmen making formal decisions at the final "appeal" stage of our dispute-resolution process. This is a classic illustration of the pyramid design.

Similarly, the U.K. Ombudsman Services (covering energy, and part of the communications sector) had 156 full time equivalent employees on 31 March 2013, and responded to 122,589 new contacts during 2012/13, an average of 490 per working day. OS's use of the triage and mediation stages is achieving notably increased speeding up in case resolution and introducing efficiencies. Use of ICT has had a notable impact here. Similarly, 60%-70% of complaints to DGS in 2013 are submitted online.

Is there a difference between arbitration and ombudsman models? Many so-called arbitration schemes are in fact merely recommendations rather than binding arbitrations, to which both parties adhere before the procedure starts. The arbitration-like quality of such non-binding decisions lies in the fact that they are typically reached by a panel of three people. That approach may be democratic and clearly avoid bias, but inherently involves some time and cost.

Is there a difference between med-arb and Ombudsmen systems? An advantage of the latter is the ability to filter cases, and use case-handlers to apply triage and mediation techniques. That approach also exists in some med-arb schemes but not all. Numerous countries started with the arbitration model, and have bolted on initial mediation stages, or are now doing so. Adding a triage-mediation stage has costs but can resolve many cases very quickly. As noted above, Ombudsman Services is able to resolve a complaint within 30 minutes, and 30% through fast initial procedures before commencing a formal decision-stage procedure. That is impressive.

Is it important that CDR decisions should be binding? The requirements of ECHR article 6 establish the rule about not removing a person's right of access to a court. That rule

establishes the context for CDR schemes. In a number of countries, adherence by traders to CDR decisions is notably high. In Nordic countries adherence is part of business culture and supported by pressure from swiftly-deployed media ‘name and shame’ publicity and peer pressure from trade associations. In many sectors in Sweden adherence is effectively 100%, but there are exceptions, such as involving rogue traders or where traders believe that a point of law or principle is involved. Where rogue traders are involved, any form of civil dispute resolution may be ineffective in any event, because the rogue disappears or has no assets. Civil claims are not a solution to rogue trading: public enforcement is. Where points of principle are involved, the trader wants these to be resolved by a more authoritative tribunal, perhaps one that can consider the wider implications for a sector or policy, rather than just the fairness of an individual case. There is a strong argument for providing that points of law should be referred (under a specific mechanism) to a court, regulator or parliament. These considerations are all mirrored in CDR schemes in numerous other countries.

The Netherlands achieves a consistently high adherence because of its unique structure, in which trade associations agree terms and conditions with consumer associations, and then pay for and support the related sectoral geschillencommissie board, guaranteeing that any decision will be paid by the trade association. That model is attractive, but does not offer a guarantee where the trader is not a member of a trade association.

I tend to view the issue of adherence by business to CDR recommendations as an issue for which improved solutions will emerge. The EU is only at the early stages of constructing its new CDR structures, and virtually every national system and individual CDR should review its practices and make reforming improvements. In 2015, and not before proper functionality has been established, a major marketing drive can be launched to inform consumers of the availability of CDR options. That should increase the number of consumer contacts that will arise. By then, responsible traders should have a higher level of understanding that it is in their interests to join, support and adhere to CDR decisions. The issue of adherence and whether any further steps are necessary in relation to achieving binding results can be reconsidered in the light of the context that then prevails.

Clearly, some major choices have to be made about which techniques should be used in CDR systems. There are perhaps more options than many people think. No existing scheme or country should think that its current model is necessarily the right one for the future.

E. Architectural Structures

The most important thing is to look at CDR through the eyes of consumers. Do they see:

- Simple structures that they can remember and easily contact/access? or
- Confusing and multiple CDR bodies, with different procedures?
- Cheap, or no cost, CDR schemes?
- Variations in quality?

There are the following principal models:

1. A single integrated national CDR scheme (Figure 13).
2. The Nordic pyramid, in which a national state-funded CDR body handles any type of complaint and is supplemented by a number of sectoral CDR bodies, each covering a

particular important sector, such as financial services, transport, communications, or utilities (Figure 14).

3. The Netherlands unified horizontal sectoral schemes (Figure 15).
4. A large number of individual CDR bodies/mediators (Figure 16). They might or might not be coordinated in some way (this might emerge in U.K.).

Figure 13. Single national integrated CDR

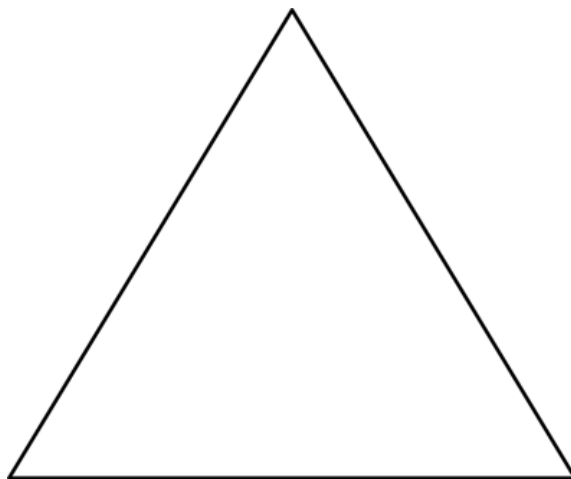


Figure 14. National umbrella/residual CDR with sectoral CDRs (Nordics)

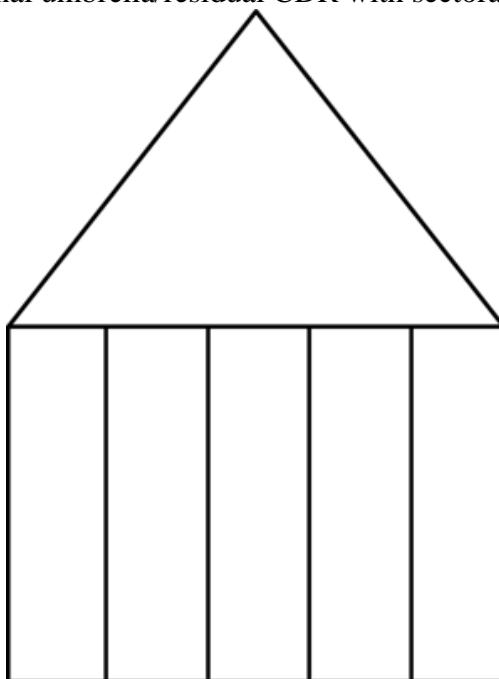
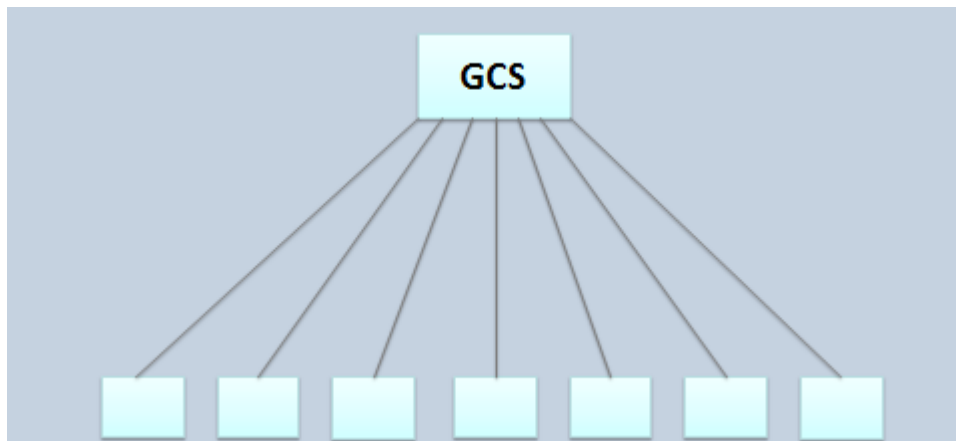


Figure 15. Horizontal sectoral coverage (the Netherlands)



Should the structure be public or private? There are the following considerations:

- Some governments' or regulators' first thought might be to create a CDR scheme within their own structure? There are three reasons against that:
 - Is it better for private funds to pay for it than public funds?
 - Will consumers be more prepared to send complaints to a CDR body than a regulator?
 - It is better for the functions of regulator and DR body to be separate.
- So maybe a trade sector should be persuaded to set up and fund a regulated CDR body? But, would it not be better for several sectors to jointly fund a CDR body, and for consumers to have the simplicity of seeing one, or a small number, of CDR bodies? So, therefore, perhaps all/several regulated sectors should jointly fund a CDR body that covers all of them? That would keep costs down.
- Statutory CDR bodies find it difficult to change and evolve.
- How do non-statutory bodies have the authority to compel non-members to join, or to abide by decisions, or to pay the CDR body's costs? Payment of costs can be achieved by law that authorises (one or more) approved CDR bodies to impose reasonable costs on a trader about whom a complaint is notified.

Perhaps the answer in some countries may be to evolve in stages. For example, one might first create joined-up structures that formally satisfy the requirements of the Directive, but as a second stage address the merging of individual CDR bodies. In one sense, the number of legal entities does not matter; what matters is that there is effective functionality of the entire system, and that it is simple for everyone to understand.

The problem of overlapping jurisdiction between different CDR bodies is a factor that may point strongly towards a unified model. For example, a consumer who purchases legal services using a banking facility on her mobile phone would fall under the jurisdiction of three CDRs: financial services, communications, and legal services. If there is one 'ombudsman' for each of those sectors, which one is going to have jurisdiction? If more than one has jurisdiction, will each one have the right expertise? Can expertise be outsourced horizontally, but if so will that delay resolution of the issue? These issues suggest, firstly, that a coordinated structure is needed, in which the appropriate legal technical expertise in the relevant technical sector(s) is available to the CDR function [and the consumer should not be concerned with how that is organised and delivered]. But, secondly, it also suggests that a single organisational structure may be the ultimate answer.

It is important to remember the option of outsourcing. Some larger Member States already have very good CDR bodies, for example with expertise in particular sectors such as financial services, insurance, transport, communications, energy. They have capacity. There is no need to reinvent the wheel. Cases or services could be outsourced, contributing efficiency.

One should be strongly aware of the risks of publicising the availability of particular ADR schemes too early. It would be disastrous to raise consumer expectations about the availability, and particularly the quality, of CDR schemes before both adequate coverage and consistent quality have been established.

I strongly suggest that the focus should be on establishing operationally effective, inter-connected systems across the landscape. CDR structures should be established over the coming two years and *only after that* should a coordinated marketing campaign be undertaken to inform consumers about the availability of effective CDR schemes. However, that will not be the end of the evolutionary process, and further scrutiny and reform is likely to be needed over several years.

Some long term issues need to be borne in mind. This Directive covers breach of contract claims, with some exclusions. First, how can the excluded areas be accommodated in due course? Second, what about other types of disputes, e.g. personal injury claims? Some businesses and member States have compensation schemes or insurance arrangements for personal injury schemes, and they might be integrated into future systems. Third, public ombudsmen and complaints systems might be integrated, for citizen complaints against public bodies. Fourth, what about international, even global DR systems?

F. How can full coverage be achieved?

There are two facets of the challenge to achieve full coverage: filling in gaps between existing sectoral/vertical CDR bodies, and ensuring that there is residual coverage of traders who do not fall under an existing body. The Directive provides that it is acceptable for member states to ensure that a residual body exists that complements existing bodies.⁶⁰

The Nordic states have no problem in this respect, they already have full coverage by the existence of a general Board. But they might look at the processes involved in order to introduce some modernisations.

The Netherlands might create a general sectoral Board to sit alongside all the sectoral Boards, all administered by DGS (Figure 15). It may be that the Dutch government would continue its policy of funding the infrastructure of DGS in relation to the general Board, as it does with all sectoral Boards, as a matter of national policy on promoting a collaborative culture. Such a policy would be admirable, although not every government might decide the same way. Individual case fees would have to be paid by traders and/or consumers. The clear majority of CDR systems across Europe are free to consumers, and that seems to be a developing trend. If case fees are to be paid by individual traders, there are three possible options on how that might be achieved. Firstly, the CDR body might submit the bill after the case is over. That is not a satisfactory solution, since traders who lose or small independent traders might simply not pay. If many did that, the CDR body might risk financial collapse, and it would not be

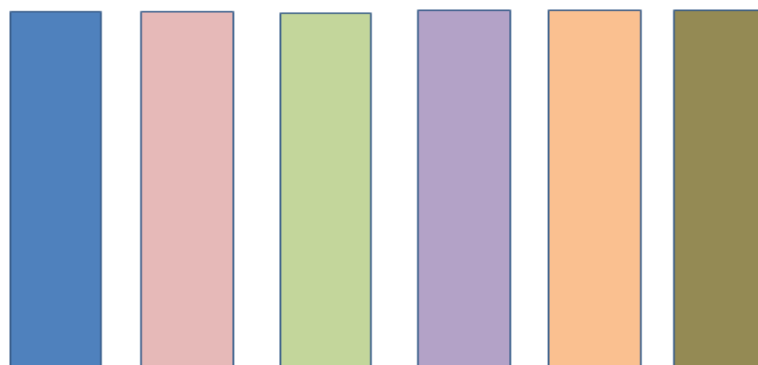
⁶⁰ Directive on consumer ADR, art 5.3.

fair for the honest to subsidise the wrongdoers. This would be a classic economic ‘moral hazard’ problem. Secondly, legislation could provide that the fees of approved CDR bodies would be recoverable as a debt, perhaps on a fast track basis, and the trader would be ‘named and shamed’. That would be an improvement on the first option, but might still involve an unacceptable level of non-compliance and debt collection costs. Thirdly, the CDR body could demand a deposit from a trader before processing every case. If it were not paid the CDR body would refuse to process the case and might cancel any pre-existing registration with it by the trader.

A government could create a single national Consumer Ombudsman by merging all existing CDR bodies. The Belgian Minister has proposed such a solution but faced objections from existing CDR bodies. It would presumably involve the body being fully funded from state funds, albeit perhaps with general revenue raised from traders (and therefore, of course, ultimately consumers). One wonders how many other governments would be prepared to provide funds.

Countries like the UK have a number of CDR bodies of different types. The same applies in Germany, but with as yet fewer sectors covered (Figure 16). The challenge is how to join them up into an integral system.

Figure 16: Multiple CDR schemes



If this diversity is allowed to continue various problems are predictable. Firstly, consumers may be confused by the sheer number of CDRs, and have difficulty in identifying whether a relevant one exists. That will especially be so if (unlike the Netherlands) the procedures, rules and structures of each are different. Secondly, there may be demarcation disputes between different schemes where several have concurrent ‘jurisdiction’. A dispute involving legal services bought using mobile phone banking could currently involve three possible ombudsmen. (However, this point should not be overstated: the jurisdiction should principally depend on whether the nature of the dispute concerns legal services, communications or banking.) It would be unfortunate if there were to be ‘forum shopping’ between the ombudsmen based on different fee structures or, worse, different levels of expertise and decisions.

The creation of ODR platforms covering each Member State, whether through the EU-level ODR platform itself or nationally, would increase accessibility and functionality.

It is usually argued that competition is beneficial, and promotes innovation. That argument would suggest that there should be a diversity of CDR bodies. But there are cogent arguments

why at least a partial exception should be made in relation to CDR bodies. It is similar to the reason why there is a monopoly of state courts. The argument rests on considerations of avoiding confusion, ensuring standardisation and consistency, and enabling data to be collected effectively for regulatory purposes.

Competitive and innovative forces are likely to continue to apply as between national CDR models. Pressure to reduce price and increase performance may come simply from pan-EU comparisons of different bodies.

An option for rationalisation of existing diverse national sectoral bodies is that they might join up. In the current economic climate, many governments are unlikely to pay for the creation on a single scheme. So if rationalisation is to occur—and I believe that it is important from the consumer and business perspectives that it does occur—a spontaneous ‘bottom up’ movement by CDR bodies may be quicker and less painful than a merger imposed by government.

One should remember the paramount importance of *functionality*. How many bodies exist is less important than that every CDR body should function in a similar fashion, so as to enhance the predictability and simplicity of the system as a whole in a way that it can easily remain in the consciousness of consumers. Operational connectivity between CDR bodies is currently more important than how many legal entities exist, as long as there are not too many legal entities.

A consumer wants to access the CDR system with maximum ease and minimal inconvenience. Three features are important to have well in mind in approaching the re-design choice of the CDR landscape:

- *Simplicity*: ease of visibility and comprehension of the system and its availability for both consumers and traders. It needs to be clearly visible and therefore to have a simple structure. It is definitely not advisable to maintain a large number of unconnected individual sectoral schemes, especially if they all have different rules and procedures.
- *Standardised operating procedures*. Avoid confusion, aid understanding. But at the same time it is necessary to permit variations in the detailed operational procedures for different types of disputes that different sectors give rise to. The Netherlands achieve necessary sectoral variations by operating all sectoral boards within a single structure that is easy to understand.
- *Accessibility*: it must be simple for consumers to access the system. This strongly suggests use of ICT.
- *Interconnectivity*: consumers might initially direct a complaint to the wrong sectorial body, so that body needs to be able to refer it on to its correct home. That may require approval under data protection legislation. It would also suggest that the procedures adopted by different CDR bodies should have strong basic similarity. That is needed both to assist disputants and also to allow for effective public comparisons to be made in the effectiveness and operation of different bodies (including those in different countries).

What about Member States who have undeveloped CDR systems and need to develop them virtually from scratch? A sectoral regulator could create a CDR scheme in-house. But does it want to pay for it? Would it be preferable to persuade the trade association to fund an independent CDR operator? Would it also lead to the creation of too many CDR schemes if every regulator did the same? Would consumers be confused if there were CDRs in the enforcement bodies for general consumer protection, financial services, communications, utilities, energy, motor vehicles, travel, and so on, even if they all operated in the same way? Would the overall system collect an optimal number of complaints? Could economies of scale not be achieved by having at least some combinations?

It should not be forgotten that sectoral CDR services, such as for the expert areas of financial services, transport, energy, communications, can be outsourced by any national system to an expert scheme in another country..

G. Summing up

CDR has enormous potential. It can constitute ‘disruptive’ technological innovation in relation to dispute resolution. The innovation lies in adopting a new approach towards ‘telescoping’ traditional court procedures so as to enable claims of lower value to become financially and behaviourally viable to raise, in the context of an architecture that courts and lawyers are unable to achieve. Many more consumer complaints and inquiries can be dealt with than at present, and greater enforcement and hence compliance and increases in trading standards can result. All ADR also has the cultural context of resolving disputes in a more collaborative and consensus-like manner than through adversarialism. Such values make an important statement about the culture of Europe. But in order to achieve these benefits, CDR systems must have the right design features and be operated well.

1. Traders should be encouraged to deal with complaints in-house (customer care departments) within a reasonable time, on a Good Practice basis. That would reduce the demand for and cost of CDR.
2. Based on an research into existing systems,⁶¹ the following is one ideal national model, but others exist:
 - a. A general (residual) CDR body. It might be distinct or located in another CDR body that handles some sectoral issues. The body should either be authorised by law to charge non-aligned traders a case fee, or should be able to require a deposit as a condition of processing a case.
 - b. Expert CDR bodies for specialist sectors, e.g. financial services, insurance, telecoms, energy, utilities. These entities should be fully funded by their sectors, minimising public expenditure on any residual function.
 - c. In-house ADR functions should be phased out and be integrated into customer complaint functions.
 - d. Specialist CDR entities should be encouraged to serve multiple Member States: this brings expertise and economies of scale, especially for smaller Member States or group of States, such as Benelux. Size of infrastructure enables the ability to work in

⁶¹ C Hodges, I Benöhr and N Cruezfeldt-Banda, *Consumer ADR in Europe* (Hart Publishing, 2012); and subsequent research into further Member States to be published in due course.

multiple languages and areas of sectoral regulatory expertise. (The U.K. Financial Ombudsman Service works in 29 languages.)

- e. The service to consumers should be seamless. There should be a minimum number of easily identifiable points of entry (e.g. a single national/EU website). Cases should be cross-referred between CDR entities, and there should be no gaps between them (art 16 requires collaboration).
3. The above structure contains sufficient flexibility to accommodate national variations, since some are inevitable given the current diversity. It also refrains from specifying the number of (vertical) sectoral entities, since that will depend on the national context. The more vertical entities that exist, the less specialist expertise it will be necessary for the (horizontal) residual body to have in-house. But there is no reason why some vertical CDR entities should not be based outside a Member State.
4. Funding for CDR should comprise:
- a. State sponsorship in some models, e.g. of the general/residual CDR body, is symbolically appropriate, and recognises the official and reliable nature of the CDR system. In sponsoring CDR, the state should be saving money that would otherwise be required for courts. Courts should emphasise that they are a last resort for dispute resolution, since CDR systems, even small claims systems, should be quicker, cheaper, more user-friendly and more effective.
 - b. The majority of funding should come from business. This can be a combination of annual fee and fee-per-case, the latter acting as an incentive to resolving genuine cases swiftly or before the CDR process. More business should be made aware of—as many businesses have already concluded—the advantages of cost, speed, and reputation in supporting CDR systems.
 - c. The goal should be that access should be free to consumers (not just a nominal fee: art 8c). But a fee may be appropriate for more complex cases, or as a barrier to deter malicious or unfounded claims. The need for such a barrier should be founded on empirical research and monitoring.