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Jacqueline Minor
Representative of the European Commission in the United Kingdom
Formerly Director of Consumer Policy, DG Sanco
A podcast of the speech will be available soon on the website

An important value underlying use of ADR is cultural. The EU is not an adversarial culture. It seeks compromise and consensus. For example, the final stage of EU law-making is conciliation between the major groups of the Council, Parliament and Commission. Consumer policy is not an anti-business policy. It is pro market.

The ADR Directive and ODR Regulation were passed under the Single Market Act I, which benefitted from the fact that the three legislative partners had committed from the start, including heads of state. It is also part of the digital agenda. In some Member States 80% of purchases are online, 1 in 10, and most have made an online purchase in the past decade (the figure has gone up in the past year). One of the reasons underpinning confidence in online purchasing is to overcome the fear of what would happen if something went wrong.

The commission makes policy on evidence based on consumer experience. Data shows that 1 in 5 or 6 encounters a problem that is more than trivial and deserves some response from the trader. About half complain. Of those who complain, about half get satisfaction—the rest give up. The threshold for those who are willing to go to court is about €500. We have tried to estimate how much it costs: total detriment adds up to about 0.4% of GDP, which is a sizeable sum. If we can reduce that figure, it would make a major contribution to economic health. Economic recovery has to be led by consumer spending. That 0.4% could have been spent in rewarding good businesses.

We tried ADR as a pilot in the energy sector. Of those who used it, 71% were happy. The Commission's hypotheses were:

- ADR is an effective way of delivering consumer redress;
- There is an enormous variety of mechanisms, with big potential differences between Member States;
- There is a low level of awareness;
- There are some big gaps, in both some Member States and sectors.

We wanted to achieve the following:

1. For every consumer transaction, at least one ADR entity should be available; so gaps needed to be filled; but it is not true that one size fits all, so diversity has to be respected.
2. The ADR entities should meet quality principles. We had a useful basis there in the two Recommendations of 1998 and 2001.
3. We should think of ways to make consumers and business aware of the availability of ADR.
4. The system should be fit for the digital age.

In the Directive, the two sets of principles have been subtly evolved. This is an iterative process. Understanding of accessibility, for example, has evolved, with procedural safeguards (largely drafted by UK from their experience with the FOS etc). There is a whole new section on independence and appointments: it may seem impenetrable but is there to deal with médtateurs d'entreprise in France. There are two aspects to transparency: parties and the general public (accountability), partly to enable the ADR network to act as a means to extract better data on how the market functions and malfunctions, such as to identify systemic

problems. Changes can then be made, such as in marketing techniques, or tariffs. The principle of liberty is important: people should not be bound to use ADR. The European Parliament insisted on including legality: where the outcome is binding, the consumer should not get less from ADR than from a court.

On improving awareness, there are provisions on providing information to consumers (the Commission is not entirely satisfied with these, and happier with its original proposal). A trader should only inform the consumer about ADR if it is committed to the process. The idea is that consumers could make a choice.

On the issue of fitness for the digital age, the key is the ODR platform. This was originally conceived for cross-border transactions. As the proposed Regulation went through the legislative process, it became not limited to cross-border transactions. You do not know exactly in which country the 'trader' might be if you buy from, say, Amazon—it might be the subsidiary in UK, Germany, or France but also be subject to the laws of Luxembourg. We tried to keep it simple. There is a pyramidal construction. ODR is a 'switching mechanism', sitting on top of national ADRs. It could also be used for business disputes. It needs to cater for some very small ADR entities, such as in local Chambers of Commerce.

The legislation was adopted in just over a year, which was fast. This progress was partly because of prior preparation of the ground, also cooperation from the member States. It is an exciting vision, with empowered consumers, increased education. It is a modular approach and can be modulated to suit the sector, market or Member State. I am surprised how little discussion it attracted in the popular press.

Professor Christopher Hodges
Centre for Social-Legal Studies, University of Oxford
and Erasmus University, Rotterdam
See full paper and podcast on the website

Consumer ADR (CDR) offers an opportunity to achieve a revolution in the design of European legal systems. But it is necessary to take the right design choices now, if the opportunity is not to be thrown away.

The vision for Consumer ADR (CDR) is that if it is properly designed it will be able to:

1. Increase consumer access to justice: giving a review of research data on levels and types of consumer complaints, low values, levels at which consumers would take action, comparative costs of courts/small claims and CDR procedures, and CDR advantages in terms of duration, cost, cost-proportionality, accessibility and user-friendliness.
2. Provide advice and education to consumers to underpin informed purchasing and triage whether particular issues constitute breaches of law.
3. Enable the aggregation of data on trading problems, which can be fed back to traders, consumers, markets and regulators so as to give early warning of emerging issues, enable regulators to take swift enforcement action or alter rules, and generally raise standards.
4. Enable traders to respond to consumer issues and preferences.

Various criticisms are being made of CDR, which should be responded to.

This is an opportunity for Member States to critically review not just their coverage of sectors by CDR bodies but also the architecture of the landscape for consumer information and redress. Almost every country could make improvements, and some could make major reforms.

Some reforms may be made towards integrating the follwojng stages: direct contact between consumer and trader; triage by a CDR body; mediation/conciliation (some good arbitration schemes do not have this and/or the previous functions, but it involves some cost); decision-making stage (is arbitration by a panel of three too slow or expensive? Is an ombudsman model more modern?).

Various options were discussed that may be helpful for individual Member States in making decisions on how to implement the Directive and provide full coverage. Various different architectural models exist, so should be evolved differently, such as the models in the Nordics, Netherlands, Germany, France, Spain, UK. A plea was made that CDR should be looked at holistically, especially from the perspective of consumers, so as to maximise simplicity and accessibility. Two possible solutions would not be advisable. Approving multiple small ADR entities/individuals, or reliance on in-company CDRs (médiateurs d'entreprise), might 'tick the box' but would be unlikely to attract consumer confidence or enable regulatory benefits to be realised. It would not be helpful if sensible reforms in the architecture of a national CDR system were blocked by existing interests of individual CDR bodies. It is important to consider not just the existing scope of CDR entities, but also to think about healthcare, education and public (citizen-state) ADR options and landscapes.

The following summary is a compilation of points made during general discussion, and should not be attributed to the meeting in general or to individuals unless identified. The summary is not a chronological record of comments, but is organised by theme.

ADR and Access to Justice; the Quality Criteria; implementing the Quality Principles
Moderator: Christoph Decker, DG SANCO

Access to justice is guaranteed in the ADR Directive, as is observance of the EU's requirements on fundamental rights. Maintaining the independence of ADRs is crucial, as are the principles of legality and applicable law. The legality issue only arises in situations where the ADR entity imposes a solution on a consumer (which many do not), and then only in rare cases. The binding force comes from law or contract (with some limits on freedoms).

Airlines in Germany are to be subject to a law from November 2013 requiring them to join an ADR. The airlines are now joining the German SöP scheme. EU legislation provides statutory levels of compensation for delayed flights, hinging on whether it was the airline's fault. UK CCA undertakes an investigation into what happened. The SöP finds that the facts are not clear in many situations, so goes further to consider the interests involved and how a passenger was treated. It can find that there was no right to compensation but that a passenger was treated badly, for which it suggests a low level of compensation such as vouchers and companies often agree that because they see value in settling. Here, SöP believes it is performing a different function from courts.

ECCs see and help many less confident consumers who never go near courts.

There are various examples of shifting from courts to ADR. In UK, the Lord Chancellor has said that the Prisons Ombudsman should be used instead of judicial review and legal aid. A hurdle has been inserted before going to court without having tried ADR first. Legal aid may be removed in the Netherlands for all consumer claims.

Several called for it to be compulsory for traders to sign up to an ADR scheme. However, some arguments against are: the fundamental rights point about not blocking access to courts, establishing the framework by building on existing structures, and waiting to look at the landscape in a few years, at which point attitudes to ECHR art 6 etc may be different. Evolution will occur organically. Independence is included in the Directive. Three situations are covered: the triangular situation involving consumer, trader and fully independent third party; where the ADR is employed or remunerated by the trader; and where the ADR is employed or remunerated by a trade association.

Mediation was made compulsory before going to court in Italy. The law was suspended after the Constitutional Court declared the law illegal on grounds relating to the legislative process, and it is now back in force. Mediation is also compulsory in Bulgaria. In Ireland the Financial Ombudsman binds the consumer as well as the bank, but for constitutional reasons there has to be an appeal to the court.

The business sector in France considers that its médiateurs d'entreprise model is well-established and it is important to build on existing schemes. The point is somewhat controversial: some consider that levels of consumer trust can never be optimised by such a system. The Directive requires Member States to approve an in-company ADR system. There is wide agreement that companies need in-house customer complaint systems in any event, and some concern that levels of problems are rising (eg on an industrial scale in the banking sector) and that external ADRs may not be able to cope.

It will be important for ADRs to have joint training, auditing, discussion of typical cases, so as to maintain quality and quality standards.

National models, achieving full coverage, sources of funding, building business support
Moderator: Professor Christopher Hodges

The Minister proposed in Belgium that all CDRs should be merged into a single entity, but existing CDRs did not see added value in that. A Federal Ombudsman Service will be created and will act as a residual CDR, providing logistics and infrastructure. The innovative Belgian ODR system Belmed is a success. Consumers are attracted to the website, which directs their complaints to sectoral CDRs. The Ministry collects data and detects mass problems. The Federal Ombudsman will have standing to initiate a class action. There will be a private class action, but no provision for funding of claims.

Sweden has a new consumer centre, with a single phone number, which passes complaints on to the national or sectoral ADRs. It might close down its consumer advice system.

The Netherlands will continue its self-regulatory policy on ADR, and will add a residual board to the existing geschillencommissie structure. Trade associations guarantee payment to the DGS administration and payment of any awards to a consumer if a trader does not pay. For non-association traders, they are thinking of asking for a guarantee before processing a complaint. Traders In the separate financial services stricture, KiFiD has a board of there, the chair of which is a former Supreme Court judge, who sits with two others drawn from two different consumer (not business) lists.

Ireland lobbied for recognition of its small claims process as an ADR but it was not included in the Directive. There are few sectoral ADR bodies, so implementation will be a significant challenge.

Austria started an online pilot in May. They are not overwhelmed by complaints. It is headed by a former President of the Supreme Court. Telecom and energy are 'actively engaged'. They intend the ODR platform to be an umbrella, with a limited number of sectoral ADRs, but not to be obligatory or to have binding decisions. State funding is difficult. If funding is collected on a case-by-case basis, businesses might not participate.

Lithuania has a state board, funded by the state. Business compliance rate of 25% is far too low, and they might make awards binding.

Portugal adopted an incentive of lower fees on setting up a new business if it at that stage joined the ADR system.

There is general concern over how to encourage traders to sign up. One approach is to focus on the most important sectors in terms of consumer complaints. It is not helpful to identify provider sectors. The Oxford research found that many sectors started from a position of rejecting ADR but could then switch to enthusiastic support in a very short period. The airlines absolutely refused to join ADR schemes until compelled to do so in Germany by law, but after a trial period are not very enthusiastic. German railways have also changed their behaviour as a result of learning from what the ADR system has told them. In Sweden the ARN can work with trust marks: an ECC Report is to be published on 16 October. In France, MEDEF has supported ADR, while many companies are tentative about joining external schemes, and see no need. One car manufacturer has established an internal ADR, and the others are waiting to see how well it works. UK lawyers argued against imposition of regulation, which came with establishment of an ombudsman, and are not trying to have the regulatory system simplified but are not objecting to the ombudsman function, which they now regard as helpful, as it tells them what their customers think and feel, which many professionals would not otherwise know. Many ADRs find that if they handle a complaint well, the customer displays a higher level of trust in the trader because of the good performance of the ADR body!

Operating Consumer ADR: best techniques, avoiding variations in quality, building consumer confidence and consumer usage

Moderators: Lewis Shand Smith, Ombudsman Services; Stephane Mialot, French Energy Ombudsman

Ombudsman Services in UK is a private ADR body that covers several areas, including energy, telecoms, and aspects of property, environmental and intellectual property disputes. The numbers of contacts and investigations are rising, the latter currently at 30,000 pa. The triage stage is very quick. Cases may be resolved in 'Mutually Acceptable Settlement', and ultimately a decision, which involves negotiation and then coercive stages on the trader. More difficult cases are put through a more traditional investigative track. Contacts arrive by website, phone, and email. OS has invested in a new IT system that allows complaints by text. Cases can be cheap to run; fees are based on subscription and case fee elements; costs must be kept low and are currently £400 per complaint. Most are dealt with within a 42 day deadline. Internal quality control is very strong. People are becoming more aware of

ombudsmen and of their rights. Since the Directive, OS has seen much greater interest in businesses in joining voluntarily. OS does not currently have jurisdiction to look at terms and conditions, but this might change. [The UK FOS does.]

The French energy médiateur is a statutory body, issuing 2,400 non-binding awards pa. There are 30 staff for dispute resolution, plus training, HR and IT functions. In-company mediation is 'like kitchen soup'—you like whatever you see. 99% of people will abandon a complaint if they are told by an independent person that a case is helpless, so quality is important. Testing an ADR is almost impossible for an outsider. The principle of confidentiality makes checking quality difficult.

Sweden supports adherence to non-binding decisions by publication by a private sector organisation of a black list. The publisher contacts traders before publication, and that increases acceptance at that stage. There is wide national adverse publicity against those whose names are published. It is a powerful system.

The UK Financial Ombudsman Service's funding comes from industry. This is a good model for two reasons: it creates peer pressure on compliance and reducing cost. FOS has a new system of quarterly billing, which is proving effective, since someone in each bank has to write out a cheque for a large sum regularly, and it focuses their minds on how they can reduce the cost by improving their actions.

Large and small traders should be considered separately. Small traders might be looked at as a group, in which not all will have cases. The 'polluter pays' principle is applied. The UK Legal Ombudsman has had a claims management company operator arrested and charged with criminal offences.

In regulated sectors, there is a list of who should be taxed. In unregulated sectors, it can be difficult to identify which company or subsidiary is the right one to be charged or enforced against.

Different ADRs have different models and goals. CEDR is a charity that aims to spread ADR techniques in managing conflict, so does not seek to make a profit out of its CDR schemes, and runs some at a loss. It can set costs not at a commercial level, but at a level of what of it would cost business to use ADR instead of courts.

There is an anecdote in which all relevant groups were discussing ADR and everyone supported it. The sticking point was who would fund it. Government said it could not. Consumers said they would not. Business said they would, but consumers said business would not be independent. Moral: something has to give.

Assessing quality of outcome is very difficult. One should anticipate an increasing pressure to explain how CDR works. That may lead to more guidance. That might lead to CDRs being judicially reviewed, and to end up looking more like courts, but with greater cost.

There should be thought on who creates precedent and settles legal questions. The German Insurance Ombudsman declines to accept cases in which the legal rules are unclear, and says that such a case must be taken to court. The UK Legal Ombudsman can refer cases to court, and he and the FOS can start a test case, paying the costs of both sides.

An Ofcom survey found that 27% of contacts were eligible to go to ADR, but only 4% did so. There is some way to go in relation to knowledge and perception.

In Germany, many people send complaints to a consumer association (funded by the state), which has the ability to start injunction proceedings, and operates well, as does the private business body, which is very active in policing unfair competition law. Some consumers see ODR as too impartial, since it is not on the consumers' side! SöP frequently receives comments from consumers thanking them for telling the consumer he/she has no right! They are happy for the impartial assessment. There is much psychology research that people will support a system in which the enforcement of rules is known to be by a fair mechanism (with transparency). Many CDRs find that if they handle complaints well, consumers' trust in the trader increases. Transparency of governance and funding is crucial. Tilburg University has a relevant MCOD research project. British Columbia has introduced a comprehensive consumer service online plus ODR.

Using the information: publication, data protection, working with regulators

Moderators: David Thomas, UK Financial Ombudsman Service and Legal Ombudsman; Henrik Øe, Danish Consumer Ombudsman

There are various different national models for ADR and public regulators/enforcement bodies.

ADR is not just private. The UK FOS has a compulsory jurisdiction with decisions that are binding on business. Systems in the Czech Republic and Hungary and similar.

Denmark has a national consumer agency, and separate ADRs approved by the Minister with one residual ADR. The ADR decisions are not legally binding (that would be contrary to the Constitution) but become legally binding if the trader does not object within 30 days. There are only two Ombudsman, one each for the public and private sectors. The Consumer Ombudsman is the private sector enforcement official, not an ombudsman in the sense used in many other countries, but as used in Nordic states. He receives 6,000 contacts a year, and all provide sources of information. He receives information from consumers, the Consumer Council, competitors, ECC-Net, Parliament, lawyers, the Ministry of Justice. An important aspect of the role is to tell trade associations about problems that have been identified, so that they can raise them with members and make guidelines.

He prioritises actions. In recent years there have been 25 bank bankruptcies: a private class action was started in only one case. The Consumer Ombudsman can take test cases, such as in relation to selling a 7 year financial product to a 92 year old woman. He alone has the power to ask the court to make a class action an opt-out basis. That procedure, along with his other enforcement powers, has proved to be very powerful, and he has regularly threatened to use it during negotiations but never had to start a class action in court: responsible companies always want to settle. They do not want to attract bad publicity, and it is notable that they have recently wanted to announce that they voluntarily wish to follow a decision from an ADR body. Issues that might give rise to inconsistent decisions can be taken to court for a ruling. The Consumer Ombudsman can prioritise cases that are of general relevance, and pay the court costs. In a private class action currently before the court, the Consumer Ombudsman has intervened to settle 80% of individual claims, 99% of which were accepted.

The UK Legal Ombudsman has 262 full time, and 20 part time staff.

The principle of transparency supports publication of aggregated market data. There may be a business model to sell knowledge back to business, and training. Is it a public task to process information? The answer to that question might affect views on whether business or the state should pay for the task. In the energy sector, complaints are about price and regulatory burden: deregulation has been much discussed but the example of financial services is salutary if there is inadequate regulation and transparency/feedback of information, so the process is vital.

Participants were unable to identify any impediments to publication of data apart from data protection legislation, which would require excluding the name of the consumer. No impediment exists in UK and virtually all ombudsmen now do this. In Denmark, decisions from individual ADRs are made public but the volume of these makes it difficult to read them all to gain an overview, so informal mechanisms are helpful. In the Swedish telecom sector there is a high degree of collaboration between the ADR body and industry and regulator over passing on information. In Belgium there is currently no cooperation; all regulators have complaints functions but they are little used. In Germany, regulators are said to be efficient, but prevented from passing on information about enforcement actions, which frustrates other CPC enforcers. SöP feeds back information to transport companies, but not regulators. In Austria, the consumer association (funded by the state) is a good source of information, and takes 200 court proceedings a year, usually injunctions and individual actions. In Spain, the compliance record with CDR arbitration is poor. The UK Civil Aviation Authority has some ADR function, and is thinking of privatising it.

Various participants felt that it was not ideal for ADR functions to be located within public regulatory bodies. The reasons were: confusion of functions and hence consumer and business trust, private bodies being able to operate under greater scrutiny and with private but transparent funding, saving state funding. If ADRs are separate from regulators, it is important to enable information to be passed on and made public.

Developing the ODR platform

Moderator: Christoph Decker, DG SANCO

The EU ODR platform is a switching mechanism. It will operate in all languages. There will be information on available ADRs, and a feedback system on the quality of ADR systems. The level of detail is intentionally not too high, so as not to deter use. Article 14 provides that online traders need to provide a link to the relevant platform.

There was some criticism of the need for a trader's agreement to a specific ADR body before a complaint can be passed on to that ADR body. The reason for this rule is to maintain the voluntary nature of ADR, and also to enable the system to filter some claims.

It was suggested that the platform could provide target information to a complainant. Perhaps a link could be made to the small claims procedure. Amazon's Order Defect Rate imposes penalties on traders if they have too many complaints, and supports Trusted Trader Schemes. There is concern that data on unjustified complaints should be removed.