

A MODEL FOR A NATIONAL CONSUMER ADR ARCHITECTURE

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C Hodges, I Benöhr and N Creutzfeldt-Banda, *Consumer ADR in Europe* published by
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How would a European state design a CADR system so as to maximise:

- swift, cheap, trusted dispute resolution of C2B complaints, with full restitution where due;
- identification of market and trader issues, wide compliance by traders with trading laws and even higher standards so as to prevent problems arising, prevent escalation or spread of avoidable problems?

The principal design considerations are:

1. to maximise effective trade, and thereby minimise the number of C2B disputes, by providing expert, informed and reliable sources of consumer advice, from a small number of trusted and clearly identifiable bodies. There needs to be a unified national network of advice centres, linked to expert sectoral bodies.
2. to provide a similar structure of CADR, designed so that it is inherently more attractive to consumers and traders than the court system as a process for resolving small disputes involving applying established law to factual trading situations. Hence, it needs to be more user-friendly, quicker, and cheaper than courts, as well as satisfying the essential requirements for any acceptable means of dispute resolution, such as independence, accuracy and consistency of outputs, and so on.

Almost all C2B cases involve small sums of money. Hence, the dispute resolution system has to be proportionate in terms of cost and duration. Even court small claims tracks are often challenged to fulfil the current standards demanded by modern consumers and markets of cost and duration. Above all, the system for C2B disputes has to be user-friendly: court systems almost always fail that test, whether on their own or especially when CADR systems are available as an alternative. Lodging a claim should be done online, and the case taken forward by the CADR body, acting impartially but providing swift feedback to the consumer and trader over settlement (conciliation, provided by phone or online), followed by delivering a decision. Even a court system that involves lodging papers followed by a decision to mediate, and then setting up a mediation, is too slow for modern consumers and traders, and involves disproportionate cost.

It is suggested that the outline of a CADR system should be as follows.

1. There should be a national CADR system. It should be recognisable as a system, and have a simple and consistent structure that can be easily identified and remembered by consumers and traders. Hence, it should not consist of a multitude of different models or operational arrangements. It is not necessary to impose a single operational model on every kind of sector or dispute, since some sectors might differ, but there should not be too many variations and the variations should be few and rational.
2. A CADR body must satisfy the essential requirements. All dispute resolution bodies (including courts and stand-alone arbitrators or mediators) should satisfy the same essential requirements. (A suggested list of essential requirements is discussed elsewhere.)
3. The extent to which proof that a CADR body or scheme satisfies the essential requirements might vary. The extent to which a certification process (whether granted by the state, or an independent body, or self-certification) depends on the circumstances. In any event, there should be an inspection/audit process, and a power to disqualify.
4. The name 'ombudsman' or 'médiateur' should be reserved for independent CADR bodies that satisfy the essential requirements. Such names should not be available for in-house customer relations of customer complaint functions, or any bodies that do not comply with the essential requirements. It is, of course, wholly appropriate for traders to use mediation functions, whether in-house or outsourced. However, confusion and misleading impressions as to independence etc must be avoided between independent CADR bodies and traders' in-house complaint handling functions/personnel.
5. CADR bodies that have power to make determinations on merits, whether formally binding or persuasive, should be independent of regulatory authorities, businesses and consumers or any other interested parties, and have no conflicts of interest.
6. All individuals acting for CADR bodies as mediators or decision-makers should be independent and have no conflicts of interest. They should have professional certification, obtained after undertaking training courses and refreshers approved by professional bodies.
7. The CADR system should be free of charge to consumers.
8. CADR bodies may be funded by the state, or from any other source, provided there are sufficient safeguards to ensure a satisfactory level of trust in their operational and decision-making independence and impartiality.
9. Funding from business is acceptable provided there are (a) governance arrangements that guarantee a majority of non-business personnel on an oversight board, (b) full transparency of the funding, mode of operation, personnel, and performance of the body, and (c) the personnel who are involved in mediation and decision-making functions have no conflict of interest and hold professional certification.
10. Consumers should be able to access accurate, independent and comprehensive information and advice, both before making purchases (including on choosing between competing products and services) and afterwards (on how to contact traders, how to complain, and possibly assistance in the complaint process). The purpose of the advice

function is to support informed and competitive consumer and trading decisions, and to reduce the incidence of problems that need to be resolved as disputes.

11. Such advice should ideally available from state-authorized bodies, even if funded by business (as on the Nordic model of local Consumer Advice Offices funded by local government, and sectoral State Bureaux funded by business associations).
12. The structure of advice and information bodies, of regulatory and of CADR bodies, should be simple and easy for consumers and traders to understand: a clear national structure is important.
 - a. For advice bodies, there should be a national body with comprehensive web information, linked with an appropriate number of local outlets, and with a limited number of national sectoral bodies acting as centres of expertise.
 - b. For CADR, there should be an ultimate and residual national CADR body, linked with an appropriate number of sectoral bodies that would be competent for handling all issues within their sectors.
 - c. For regulators, there should be an ultimate and residual national consumer authority function, linked with an appropriate number of sectoral authorities that would be competent for issues within their sectors, and with a network of local enforcement authorities.
13. When any issue arises with a product or service that has been sold, consumers should be encouraged to contact (a) the supplier, (b) any appropriate source of independent advice.
14. Traders may if they wish inform consumers of a relevant, approved CADR scheme at any time, before or after purchase.
15. Traders should be required to refer consumers to the relevant CADR scheme, or inform them of their ability to contact it, when a dispute has arisen, pointing out that the facility is not available until the expiry of the time within which the trader may try to resolve the issue, or unless the trader sends a deadlock notification within that period. The cost of this should be kept to a minimum. If the existence of CADR bodies is sufficiently well-known in the country, this notification requirement may be unnecessary.
16. When a dispute arises, consumers should be required to contact the trader first before referring any dispute to court or to a CADR scheme, and to allow the trader an opportunity to respond to the problem within a fixed time. This would not be required where the trader is suspected of being fraudulent or having committed an offence, in which case the enforcement authority should be told as soon as possible.
17. CADR bodies should not be contacted until the trader has been given a reasonable time to respond: the cost to CADR bodies of rejecting premature complaints can be huge. This assumes that the advice function and the CADR function are split.
18. The time that the trader should be allowed to respond and to try to resolve the issue should be fixed, and approved by the regulatory authorities, in consultation with all stakeholders. Current standards of 8 weeks seem to apply, but this may vary with size of trader and sector and type of problem. However, any variations should be kept to a minimum, since a national standard time would be simple to remember.

19. The dispute resolution system should follow a simple sequence:
 1. Consumer contacts the trader
 2. Consumer contacts the CADR, or is referred by the trader.
 3. CADR tries to conciliate.
 4. CADR makes a formal determination on a fair solution.
20. In diagrammatic form, the consumer should start at the bottom of a pyramid structure. Most disputes would be resolved at the bottom level, and more would be solved at each higher level, leaving a minimal number to be formally resolved at the highest level. (See pyramid below).
21. When a dispute is received by a CADR body, after the trader has been given a reasonable time to solve it, the CADR body should normally first try to reach a solution through conciliation, and if that is not possible within a reasonable time or with reasonable and proportionate effort, should then make a determination on a fair and legal outcome.
22. A CADR body should give a written decision that gives reasons of proportionate length that substantiates the determination.
23. After a CADR body has given a determination, whether it is binding or non-binding, the opponent should be given a reasonable (fixed) time to comply, or provide reasoned objections. The nature of CADR cases is that it would be disproportionate to provide a CADR appeal facility.
24. If a party to a CADR case wishes to enforce a non-binding CADR determination, there should be a fast track court procedure, so as to save costs. The procedure should not require the need to re-examine all the evidence afresh (the case file would be transferred to the court by the CADR), and give a reasonable opportunity for either side to introduce fresh evidence (but subject to a possible cost penalty if the court's time is wasted). The court should be free to make its own determination on the evidence: there should not be a presumption of liability.
25. In principle, the outcomes of disputes, and performance of CADR bodies, should be transparent. Relevant aggregated data should be published by CADR bodies, which can be aggregated with data from public agencies or any other source, so as to give a full picture of market issues that might affect consumer trading. Such aggregated data could inform consumer advice and choice, safety issues, protection issues, and enforcement action. The necessary data includes the number of complaints received, the identity of the traders, the outcomes of contacts (settled by the parties, withdrawn, subject to a decision by the CADR body, complaint upheld or rejected), the nature of the issues raised.
26. However, it may be disproportionately costly to make available the outcome and reasoning in every individual case. Hence, the amount of information made public may vary sector and type of case. The level of information made public should be decided by the oversight agency and stakeholders, in consultation with the CADR's governing body.
27. CADR bodies should publish Key Performance Targets, indicating if these are agreed with regulators or stakeholders, and their outputs on performance achieved against such targets, at least on an annual basis. Matters covered should include total administrative

cost, cost per case handled, number of complaints processed and outcomes, duration of processing.

28. A consumer should be free to bring a complaint in court (thereby complying with ECHR art 6).
 - a. The court would be the correct track if any point of law needs to be decided.
 - b. The court would also be appropriate as a safety-net or long-stop for any case where the CADR system has broken down, or for any other valid reason.
 - c. However, the court would normally not accept straightforward cases that could be resolved by an available CADR system, unless and until that CADR system had been tried and not produced a result.
 - d. Court guidance may provide that a case should not be commenced unless and until appropriate contact and ADR has occurred between the parties.
 - e. Court rules may provide that where a case has been commenced before appropriate contact and ADR has not occurred between the parties, the commencing party may or should not be able to recover his costs, and may or should be liable for the opponents' costs.
29. The function of CADR bodies is to apply established law to factual disputes. In principle, CADR bodies should not decide issues of law (although there can be a measure of discretion in cases of little legal importance).
30. CADR bodies should refer issues of law to a court for determination.
31. Equally, courts should refer a case to a relevant CADR body if it involves application of fixed law and it is proportionate for a CADR body to process it. This will usually be the case in mass cases.

Dispute resolution pyramid

