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ADR Workshop: Key Challenges

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1. Research to be published shortly by Oxford and Erasmus Universities shows that there is an increasing number of consumer ADR systems in Member States but
 - a. The models of ADR systems vary from sector to sector. Some ADR providers are located in regulators (are they independent?) or in trade associations (many can satisfy the principle of independence if certain conditions are satisfied, and operate well), some ombudsmen are statutory bodies whose use is mandatory for all companies operating in a sector, others are private ombudsmen. Hence there are variations in whether ADR bodies are mandatory/voluntary, and whether observance by traders of ADR decisions are mandatory/voluntary.
 - b. The national models for organisation (architecture) of ADR providers vary considerably: the Netherlands/Nordic model of a unified national system in which one (or two) Foundations operate ADR functions and bodies for each of 50 sectors is admirable, but probably not replicable in all other Member States. The UK has an advanced system in which different types of scheme exist for different sectors.
 - c. ADR is usually sectorally-based, eg telecoms, energy, travel, etc. This means there are gaps in coverage, and overlaps or gaps between different schemes.
 - d. ADR coverage and operating practice is developing at a different speed across different sectors and countries. Some schemes are little used, often because they do not satisfy the principle of independence or are not visible enough.
2. However, on the plus side:
 - a. Many ADR schemes offer very quick and cheap services and solutions. They are far quicker and cheaper than courts, even Small Claims schemes. Where they are effective, they can attract *high volumes* of applications. A significant percentage of applications can merely be requests for information or to obtain an independent view, but that performs a useful function that saves wasting money on courts, regulators and dissatisfaction.
 - b. The techniques that are used by different systems are the same

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- i. mediation/conciliation techniques aimed at producing agreement between the parties or non-binding recommendations,
 - ii. arbitration/adjudication techniques producing decisions that are binding on companies that have agreed in advance to be bound;
 - iii. arbitration/adjudication techniques where both consumer and trader have agreed in advance to be bound by the decision.
- c. There is broad agreement on the basic criteria that apply to ADR providers. They should be based on the principles of independence, fairness, etc, that are based on the Commission's 1998 and 2001 Recommendations.
- d. The best operating practice is clear, and could be adopted across the EU. It involves adopting a succession of techniques, in a pyramid: direct negotiation (customer care); mediation/conciliation; recommendation/decision. The best schemes are making internal efficiency gains by adopting online techniques.
- e. The overwhelming majority of ADR schemes do *not* charge fees to consumers: some do and the extent to which an access fee might be appropriate given the cost and the risk of abusing claims, should be reviewed on a sector by sector basis. In most schemes, business funds the ADR scheme, through an annual fee (often payable and so collectable by the trade association) and a complaint fee (payable per company (which acts as an incentive to have a good customer complaints function, and to settle cases).
- f. Companies often change their attitude to ADR schemes, from distrust to strong support, when they realise that ADR schemes that satisfy the principles are *cheaper* than wasting money on courts and lawyers, and *better* at maintaining trading reputations and customer relations – in competitive markets.
- g. Most complaints are low value. Costs need to be proportional, and ADR systems can be.
- h. Many ADR schemes that might involve cases with high values have cut-offs, since companies, especially financial services companies, prefer that decisions that might have major, widespread and costly commercial implications should be made by courts and not arbitrators or ombudsmen.
- i. ADR schemes often process mass similar claims. Accordingly, they provide an alternative to court-based collective redress solutions – and usually pathways that are far quicker and cheaper than courts.

3. The Key Challenges are:

- a. To create a coherent and integrated model for national and pan-EU dispute resolution.
- b. To ensure that coverage is comprehensive, and gaps are filled: across Member States and sectors.

- c. In practice, this means encouraging business to adopt ADR more quickly. That is because funding should not be an issue where, if the system is created according to the right principles, business funds a sectoral system since it sees the commercial advantages of doing so.
 - d. To arrange that the ADR system operates so as to gain efficiency and better market standards (i.e. as part of the regulatory system). This would also reduce the number of disputes.
4. The proposed solutions are:
- a. To update the Recommendations into binding **essential requirements** (ERs).
 - b. To require that ADR providers will produce transparent data on their operations that will
 - i. Enable there to be confidence that the ERs (especially on independence) is satisfied;
 - ii. Enable external comparisons to be made between the performance of different ADR providers on **Key Performance Indicators** such as speed, cost, efficiency and innovation (for example in reducing costs and ease of access through use of online complaint systems).
 - iii. Enable there to be effective feedback on the performance of traders in the sector, and of the market sector as a whole, so that pressure will be applied to raise performance standards, maintain competition and innovation, and provide early warning of new quality, safety and performance issues.
 - c. A mediation/conciliation process has to operate confidentially if it is to be successful. There is no reason why an adjudication process (whether involving a court or an arbitrator) should necessarily be confidential. But outcomes should be published, so as to provide confidence in the system – and to enable the system to perform the added and efficient function of valuable feedback on market operations.
 - d. To agree a policy approach, that would encourage public and private ADR providers, operating within a coherent matrix across the EU. Small countries need a single national point of access (based on the ECC office) that could refer claims to a sectoral ADR body that satisfied the ERs, wherever that might be located (in the country, or in another MS). That would need upgrading a system for reviewing that ADR bodies satisfy the ERs: this is probably able to be done on the basis of self-certification by a body, subject to oversight, inspection and control (including decertification and sanctions) by a national competent body.
 - e. There needs to be a new relationship between the courts and ADR providers. Decisions on law should be made by courts, and ADR bodies should refer such cases to them (as the German Insurance Ombudsman does). Courts should refer decisions that apply the law in simple, low value cases to the relevant ADR body, thereby ensuring that costs are proportionate.