European Network of Councils for the Judiciary (ENCJ)

Réseau européen des Conseils de la Justice (RECJ)

ELI EUROPEAN LAW INSTITUTE

The Relationship between Formal and Informal Justice: the Courts and Alternative Dispute Resolution

CONSULTATION PAPER

Introduction

1. This joint project was established to consider the concerns that have arisen in Europe as a result of the exponential growth of numerous different forms of alternative dispute resolution ("ADR"). There are many types of ADR. Even the terminology is sometimes confusing. ADR includes various types of mediation, early neutral evaluation, arbitration, online dispute resolution ("ODR"), and ombudsman determinations.

2. The members of the joint project team are listed in annex 1.

3. In this consultation paper, we use the term ADR generically and for simplicity. We do so in the knowledge that in some contexts it will, viewed strictly, be used inaccurately.

4. This consultation paper focuses on the interface between court-based dispute resolutions processes ("DRPs") and ADR processes. In short, how should courts and judges behave when considering, requiring or recommending ADR, and how should ADR providers behave when considering, requiring or recommending court-based DRPs? These issues have led us also to consider what might be regarded as the best model or models for accessing DRPs, acknowledging the diversity of solutions adopted across Europe.

5. There are currently three main EU instruments that address the situation. They do not seek to harmonise ADR practices or the regulatory framework, let alone to provide best practice for the courts or the ADR providers. Moreover, there are concerns about vulnerable parties, whether consumers, ordinary citizens, small businesses, or family litigants, feeling pressured to agree to ADR or to accept solutions without a proper understanding of their legal rights.

6. The project looks towards three main prospective outputs:-

   (1) A statement of European best practice in relation to the approach that courts and judges should adopt in interacting with all types of ADR processes. This will include guidelines as to the preliminaries and procedures that should be adopted in considering ADR and in referring cases to ADR processes, and how risks of injustice can be reduced or eliminated.

(2) A statement of European best practice in relation to the approach that those responsible for all types of ADR processes should adopt in interacting with courts and judges. This will include guidelines as to the preliminaries and procedures that should be adopted in considering and referring cases which are the subject of an ADR process to a court, and how risks of injustice can be reduced or eliminated.

(3) Recommendations as to the best European models that can be developed and applied for coherent access to DRPs in respect of different types of dispute, and towards which Member States may wish to progress.

7. It is beyond the scope of this project, for example, to identify difficulties in the substance of court-based DRPs or commercial arbitration. The intention is that the project should focus on the problems and solutions in relation to the interface between court-based and ADR processes in C2B (consumer to business), C2C (consumer to consumer), small B2B (business to business), G2B (government to business) and G2C (government to consumer) disputes. Most of these relationships are characterised by a potential power imbalance.

The purpose of this Consultation Paper

8. This consultation paper aims to draw attention to the potential problems that the project group has already identified, seek comments on those problems and the identification of any further issues that stakeholders and observers would wish to put forward for consideration, and to invite comments on the potential solutions to the issues raised.

The existing EU instruments

9. There are the following three principal existing EU instruments:-

(1) Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters ("Mediation Directive") OJ L 136, 24.5.2008, pages 3–8;

(2) Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC ("Directive on Consumer ADR") OJ L 165, 18.6.2013, pages 63–79; and

(3) Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC ("Regulation on Consumer ODR") OJ L 165, 18.6.2013, pages 1–12.

10. The Mediation Directive was a justice instrument intended to encourage the use of mediation and was aimed at ensuring a balanced relationship between mediation

and judicial proceedings (article 1).[1] The Directive applies in cross-border disputes and requires member states to encourage voluntary codes of conducts for mediators (article 4), and allows courts to invite the parties to court proceedings to use mediation to settle their disputes (article 5), and to make the outcomes enforceable by agreement (article 6).

11. The Directive on Consumer ADR was an internal market instrument which aimed to ensure that consumers can, on a voluntary basis, submit complaints against traders to entities offering independent fast and fair ADR (see article 1).[2] Article 8 provides for the ADR procedures to be available to consumers both online and offline, without charge or at a nominal fee, and to provide an outcome within 90 days. Article 10 provides that an agreement between a consumer and a trader to submit complaints to an ADR entity shall not be binding if it is concluded before the dispute has materialised and has the effect of preventing the consumer of availing himself of the right to bring an action in a court. Article 9 provides that where the ADR procedure proposes a solution, the parties must be informed that they have a choice as to whether or not to agree that proposed solution (see also article 11).

12. The Regulation on Consumer ODR provides for the European Commission ("EC") to establish a user-friendly ODR platform as a non-obligatory single point of entry for consumers and traders seeking an out-of-court resolution of disputes by a competent ADR entity covered by the Regulation, especially in a cross-border dispute. It connects consumers who seek to use it with traders and national ADR entities listed under the Directive on Consumer ADR. The platform was launched in early 2016 in accordance with the provisions of the Commission Implementing Regulation (EU) 2015/1051.

13. In some, normally regulated, sectors (notably communications,[3] energy,[4] consumer credit,[5] payment services,[6] and for bus and coach passengers[7]) EU law requires all

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[1] The legal basis of the Mediation Directive was Article 61(c) and the second indent of Article 67(5) of the Treaty Establishing the European Community *viz*: The Community has set itself the objective of maintaining and developing an area of freedom, security and justice, in which the free movement of persons is ensured. To that end the Community has to adopt, inter alia, measures in the field of judicial cooperation in civil matters that are necessary for the proper functioning of the internal market.

[2] The legal basis of the Directive on Consumer ADR is Article 169(1) and point (a) of Article 169(2) of the Treaty on the Functioning of the European Union (TFEU) *viz*: that the Union is to contribute to the attainment of a high level of consumer protection through measures adopted pursuant to Article 114 TFEU. Article 38 of the Charter of Fundamental Rights of the European Union provides that Union policies are to ensure a high level of consumer protection.

[3] Directives No 2009/136/EC and No 2009/140/EC; OJ L337, 18.12.2009 p.11 & 37.
[4] Directives No 2009/72/EC and No 2009/73/EC; OJ L 211, 14.8.2009 p. 55 & 94.
[5] Directive No 2008/48/EC.
[6] Directive No 2007/64 /EC.
[7] Directive (EC) 2009/136 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services; Directive (EC) 2009/72 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, [2009] OJ L211/55; and Directive (EC)

traders to be subject to adequate and effective ADR schemes. In some other sectors, EU legislation encourages disputes to be resolved by ADR. In many of these regulated sectors, Member States have specific sectoral ADR facilities, such as financial ombudsmen or ADR sections within regulatory authorities.

Types of Dispute Resolution

14. There are numerous types of DRPs, and numerous variations of each type in use across EU Member States and the wider world. Having spent some time undertaking an analysis of these types of DRP, the project group concluded that repeating that analysis in this consultation paper would advance neither its intelligibility nor its utility. Annex 2 to this consultation paper seeks to list the most common kinds of DRP. The variety of their forms and usages have also undoubtedly given rise to risks and potential difficulties.

15. It is necessary at least to identify four particular distinctions that should be borne in mind throughout this debate:

(1) The distinction between court-based and non-court-based DRPs.

(2) The distinction between a DRP agreed *before* a dispute has arisen, and a DRP agreed only *after* a dispute has arisen.

(3) The distinction between a facilitative process that seeks to achieve a *consensual* solution and an adjudicated process that imposes a *non-consensual* solution. Some ADR schemes offer both types, often in sequence.

(4) The distinctions between commercial disputes (B2B), private family civil or consumer disputes (C2B or C2C), and civil or administrative disputes between government and a citizen (G2C), and civil or administrative disputes between government and a business (G2B).

The thinking behind this project

16. Much work has been done by academics and others on topics that are relevant to the subject-matter of this project. The precise concerns that are raised in this consultation paper have not, however, been the subject of a great deal of European research. In these circumstances, it is not necessary to list the influential academic works, which form the background to this project.

17. It is not, however, our attention to re-invent the wheel. Instead, we want to make the maximum use of the coming together of Councils for the Judiciary, professional judges and experts in ADR.

2009/73 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC; Directive (EC) 2008/48 on credit agreements for consumers; Directive (EC) 2007/64 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC; Regulation (EU) No 181/2011 on bus and coach passenger rights (complaints function either in house or external; also complaints and enforcement authority).

18. A number of perceived or actual problems have arisen to which statements of best practice and a preferred model for access to DRPs could be addressed. The issues that most concern the project group are listed in the next 7 sub-sections.

A. The risk that persons will be denied an independent judicial determination

19. There are a number of situations in which ADR can lead to consumers and unrepresented litigants either being deprived of their right to an independent judicial determination or having the perception that they are being so deprived.

20. Whenever mediation or other ADR is promoted or encouraged by a court or by a more powerful party (e.g. a large corporation or state entity), there is always the risk that individual litigants will feel that they are required to settle their claim. Article 9 of the Directive on Consumer ADR makes clear that parties must be informed that this is not the case, but that does not mean that that message is always either properly delivered or properly understood.

21. This is a risk that is not easy to measure. Judicial authorities and governments are generally keen to see a reduction in the workload and the costs of the courts. As a result, they may regard the possibility that settlements are entered into without adequate safeguards as a risk worth taking.

22. The project group thinks that this risk requires more detailed consideration. It is a risk that is intimately connected with the question of available legal advice, to which we now turn.

B. The risk that persons will settle their claims without having first had access to independent legal advice

23. It is unrealistic to expect every citizen involved in every kind of dispute to receive independent legal advice. There are many reasons why they might not do so. First, they might not wish to seek advice, whether because they rightly regard the dispute as trivial or for other reasons. Secondly, they might make a rational decision to save the time and cost of legal advice, knowing they might benefit from it. Thirdly, they might genuinely be able themselves to evaluate their risks and legal prospects. Moreover, modern online DRPs are being developed with the deliberate objective of excluding legal representatives from the process.

24. None of this affects the very serious risk that some individuals will settle valid claims in an ADR process for too little because they have not had access to an adequate and independent legal evaluation of those claims. This risk is, perhaps, greatest in family cases where emotions can run high and the desire to settle can be seen (often wrongly) as urgent for a variety of reasons. But it applies in other fields too.

25. It is also probably unrealistic to expect free legal aid or legal assistance to be available for every type of claim in every Member State. What, at first sight, however, does seem to be important is (a) that those recommending, requiring or conducting ADR processes or mediations make sure that vulnerable parties do not settle a dispute without understanding their proper legal rights; (b) that parties do not use ADR procedures, including mediation, as a means of avoiding or delaying

their legal obligations; and (c) that there is a level playing field between powerful and vulnerable parties to all ADR processes.

C. The risk that decision-makers or those conducting ADR processes are inadequately qualified

26. Article 4 of the Mediation Directive makes provisions designed to ensure the quality of mediators and mediation. The ADR Directive too lays down minimum, but general, standards of registration and regulation. It is, however, difficult to enforce such quality requirements, although it may too early to assess accurately their impact and adequacy. Councils for the Judiciary in several countries have a reasonable fear that private mediators and ADR entities will not always protect the rights of citizens. Moreover, not all ADR entities will have the legal ability to apply the conflict of law requirements of Article 11. The project group has received reports from Councils for the Judiciary in some countries to the effect that there is widespread public suspicion of ADR in general and mediation in particular.

D. The risk that individual parties have an inadequate understanding of the available methods of dispute resolution

27. There are now a number of excellent online platforms providing information to individuals involved in disputes. But it might be thought that the very number of such online sites and ADR/ODR schemes itself creates the risk of information overload and confusion. In this regard the EC's online dispute resolution platform directing litigants to accredited dispute resolution entities, is potentially a great step forward. The outcomes will perhaps take some time to become apparent.

28. Where courts are concerned, however, it is important that they accept responsibility for explaining the ramifications of DRPs required or recommended by them. Where government or commercial entities are in a similar position, further regulation may well be required to ensure that a similar outcome is achieved.

29. The EC review of the Mediation Directive in July 2016 pointed to the failure of Member states adequately to publicise mediation as one form of ADR. But this can equally be said of many other available DRPs.

E. Risks of decision-making by an unidentified online or other decision-maker

30. In various ADR and ODR processes, possible solutions are suggested by an unidentified non-judicial decision-maker, whether online or offline. It is well-documented that some such processes are very successful in resolving relatively minor disputes, but also more major ones. The cybersettle system on ebay is well-known. In some cases, however, the possibility does arise that valid claims will be settled in ignorance of their true value and that individual parties will feel obliged to settle without having had access to legal advice or an independent judicial determination. In other cases, of course, claimants – particularly consumers - only really want an apology.

31. The voluntary nature of any compromise reached by these processes requires to be emphasised at every stage. This factor is reflected in article 9 of the Directive on

Consumer ADR, but again there is doubt that the choice available to individuals is always fully understood.

F. The risk that mediation or other ADR options are under-used, because of their voluntary nature and an absence of quality assurance

32. In many parts of Europe, private mediation is close to non-existent. This is probably because it is trusted by neither individuals nor businesses, since there is no adequate regulation on quality assurance. Whilst it is important to acknowledge the adverse consequences of some ADR processes, it is equally important to highlight the positive effect that they can have in terms of speedy, economical and effective dispute resolution.

33. An under-use of ADR generally and mediation in particular is a serious problem that contributes to the perpetuation of backlogs in the courts in many parts of Europe. More needs to be to be done to encourage reliable regulated suppliers of ADR services in these countries, and to promote public confidence in ADR and ODR systems. The EC's Justice Scoreboard (figure 27, page 23) specifically interrogates the promotion of and incentives for ADR processes.

The risk of abuses of the power of large governmental or commercial entities as the opposing party

34. This is a risk that is always very difficult to evaluate or control. The availability of accurate information advice and guidance is probably the key.

A preliminary consideration of the outcomes that the project might achieve

35. The risks outlined above could be reduced or ameliorated if courts and judges followed a defined procedure before considering, requiring or recommending that parties adopt an ADR process. Many of the problems are caused by the multiplicity of available DRPs, and a lack of understanding by disputants about their procedures and consequences.

36. The multiplicity of available processes is practically hard to avoid because of the sectoral ADR processes established in many Member States. These processes are often swift, cheap and easy to use and deal mostly with minor disputes without the involvement of lawyers. They are often established and managed by private providers procured by Ministries other than the Justice Ministry. Some ombudsmen refer disputes raising significant legal issues to the courts, but this generally occurs infrequently. Thus, consumers of telecoms may be able to resolve a dispute with their telecoms provider through a telecommunications ombudsman or other ADR service established by the Communications Ministry. The same may apply in disputes arising in health, employment, energy, retail, and many other sectors.

37. In some countries, ombudsmen or ADR entities can be accessed through a central governmental portal (e.g. the Belmed online site initiated by the Belgium Economy Ministry). In other countries, ombudsmen DRPs are in their infancy or hardly exist,

partly because of a lack of consumer confidence in any non-court-based DRP, and partly because of government inertia.

38. The citizens' lack of understanding about DRPs is widespread in many Member States, but not all. It applies as much to the ombudsmen DRPs just described as it does to court-based DRPs and mediation. The lack of understanding may be partially because people simply do not read or comprehend the information they are given. But often, it is hard to deliver a proper understanding in writing, online or without human intervention. A serious problem arises, however, where courts and judges try to offload cases to private ADR providers without first ensuring that the parameters of the ADR process are fully understood and agreed.

39. It may be hoped that this project can deliver real outcomes by providing statements of best practice where courts and ADR processes interact. This interaction will become far more frequent.

40. As regards the ideal model for Member States to aspire to, the watchwords would seem to be user-friendliness, affordability and speed, alongside quality control, simplicity and ease of comprehension.

Output 1: A statement of European best practice in relation to the approach that courts and judges should adopt in interacting with all types of ADR processes. This will include guidelines as to the preliminaries and procedures that should be adopted in considering ADR and in referring cases to mediation or other ADR processes, and how risks of injustice can be reduced or eliminated

41. A statement of best practice might address the following aspects of the processes adopted when litigants approach a court, whether it is a conventional court, an online court, or a so-called "multi-door court-house":-

(1) The factors that should be taken into account when Member States consider making mediation or ADR a compulsory pre-requisite to court-based DRP.

(2) The factors that courts and judges should take into account when considering whether to require or recommend an ADR process in a particular case.

(3) The information that should be made available to disputants before they are required or recommended to take their case to ADR or mediation.

(4) The ways in which such information should be made available to disputants, and by whom.

(5) The methods that courts and judges should employ in seeking to obtain the consent of the parties to an ADR process.

42. Each of these processes requires that regard be had to the risks set out above, and in particular the possibility that one party will be vulnerable and/or unaware of their legal rights.

43. The statement of best practice suggested by Output 1 might achieve a status similar to the European Code of Conduct for Mediators referred to in recital 17 to the Mediation Directive.

Output 2: A statement of European best practice in relation to the approach that those responsible for all types of ADR processes should adopt in interacting with courts and judges. This will include guidelines as to the preliminaries and procedures that should be adopted in considering and referring cases which are the subject of an ADR process to a court, and how risks of injustice can be reduced or eliminated

44. There are many ADR processes that take place entirely without court intervention. Ombudsmen or consumer ADR processes solve thousands of small sectoral C2B disputes in some Member States. Other ADR processes begin and end online without any reference to any court. Within these processes, there ought always to be some consideration given to whether the process itself is appropriate bearing in mind the risk factors previously enumerated, particularly where there is an obvious power imbalance between the disputants.

45. A further problem arises in a minority of such cases when one or other party is dissatisfied or considers that they wish to escalate or move the dispute into a court-based DRP. In such cases, the court-based DRPs can appear to be remote and inaccessible.

46. The project group thinks that this problem too could be the subject of a statement of best practice applicable in effect to the providers of ADR processes. The intention would not be to disrupt the excellent work that many ADR providers are able to do, but to ensure that an escape route to a court-based DRP is available where a party feels that the ADR process has not achieved its objective.

47. The statement of best practice suggested by Output 2 might acquire a status similar to the European Code of Conduct for Mediators.

Output 3: Recommendations as to the best European models that can be developed and applied for coherent access to DRPs in respect of different types of dispute, and towards which Member States may wish to progress

48. This aspect of the project requires (at least in theory) an examination of the way in which available DRPs can be combined, utilised or made to function effectively alongside one another. In reality, however, the possibilities are not limitless. They are constrained by culture and technology. Disputants will not take a dispute to any provider they do not trust, and they will only use technology that is made user-friendly enough to be accessible.

49. Some Member States are developing ODR platforms that will aim to solve disputes that arrive on their portal by any available means including ombudsmen suggested solutions, mediation and court determination. This is known in some quarters as the

(online) “multi-door court-house model” where any disputant can arrive at the portal or the court-house and expect to be directed to the appropriate DRP provider after a triage process that determines the most effective approach to the solution of the complaint.

50. Other Member States have adopted purely private web-based solutions that have the same effect, save that they potentially (at least) exclude ultimate judicial DRP, even if other DRPs fail.

51. It will be hard to identify a best solution for all Member States and all cultural backgrounds, but a series of possible best practice approaches may be possible. The likely candidates for best practice are:

(1) The multi-door court house model.

(2) The online multi-door court model.

(3) The Belmed style non-court-based ADR and ombudsman model.

(4) A network of regulated private ADR providers.

52. It may be that this output 3 is unachievable in the near term, but the project thought it desirable to ask stakeholders whether such an exercise would be worthwhile.

Points for consultation with stakeholders

53. The project group would much appreciate any comments that stakeholders would like to make in the following areas:-

(1) What are your experiences as to the risks identified in this consultation paper?

(2) Are there any other important risks thrown up by the wide availability of different ADR processes?

(3) What would you like to see included in a statement of best practice relating to the approach that courts and judges should adopt in interacting with all types of ADR processes?

(4) What would you like to see included in a statement of best practice relating to the approach that those responsible for all types of ADR processes should adopt in interacting with courts and judges?

(5) What (more) in your experience can courts and judges do to promote or encourage the use of voluntary ADR processes?

(6) How successful in your experience are ADR processes that are made compulsory rather than voluntary?

(7) What in your experience are the best models for access to DRPs whether online or offline?

(8) How can available DRPs best be combined, utilised or made to function effectively alongside one another?

The way forward

54. The project group welcomes the views of any stakeholders interested in the problems that this consultation paper mentions. It would also be grateful for views on other problems that may be thrown up by the prevalence of growing numbers of ADR and ODR processes.

55. This consultation paper is being provided to a wide range of stakeholders, but we encourage individual and collective responses by Monday 13th March 2017. It will then be the aim of the project group to produce its final report by the end of 2017.

7th January 2017

Annex 1

List of members of the joint project team

European Law Institute:

Ms Diana Wallis (England & Wales)

Mr John Sorabji (England & Wales)

Mr Ales Zalar, President of ECDR (Slovenia)

Justice Paul Gilligan (Ireland)

Professor Dr Stefaan Voet (Belgium)

Professor Dr Fabrizzio Cafaggi (Italy)

Professor Agnes Camilla Bernt (Norway)

Professor Christopher Hodges (England & Wales)

Mr Dadi Olafsson (ELI project officer)

European Network of Councils for the Judiciary:

Sir Geoffrey Vos, Chancellor of the High Court (England & Wales) (Chair)

Judge Lourdes Arastey Sahún (CGPJ Spain)

Judge Stanislav Georgiev (VSS Bulgaria)

Justice John Hedigan (Courts Service Ireland)

Professor Alessio Zacharia (CSM Italy)

Mr David Simone (CSM Italy)

Ms Monique van der Goes, Director ENCJ

Annex 2

Main types of DRP

The project group has identified the following main categories of dispute resolution procedures that are in common usage in EU countries as follows. The list is by no means exhaustive:-

(1) Court-based adjudicative dispute resolution, where one party can force the other party to participate in the process or to be subjected to adverse court orders.

(2) Contractually pre-agreed court-style adjudicative private dispute resolution, where either party can force the other to participate, and where the process can ultimately be enforced by adverse court orders, generally known as contractually agreed arbitration.

(3) Post-dispute contractually agreed court-style private dispute resolution, where the process can ultimately be enforced by adverse court orders (post-dispute agreed arbitration).

(4) Contractual pre-agreed or statutory or trade association recommended online dispute resolution between a consumer and (normally) a utility or business, where the utility or business can require the consumer to present his complaint online and have it resolved by the speedy online process (mandatory consumer ODR).

(5) Post-dispute consumer DRPs, which might be required for traders or parties by statute, contract or membership of a trade association, where the outcome might be binding on the trader, and might be binding on the consumer if that consumer agrees to a proposed solution.

(6) Post-dispute ombudsman style dispute resolution processes, which might be compulsory for traders to join in but are not compulsory for consumers, where resolution might or might not be imposed on the parties but disputes are often escalated in a series of stages, starting with triage and mediation and culminating in an ombudsman's proposals (ombudsman DR). This process can be undertaken by publicly appointed and self-appointed ombudsmen.

(7) Pre-dispute contractually agreed non-binding mediation, where the parties agree to mediation as a precursor to other kinds of dispute resolution, and the parties are required to participate in the process before initiating arbitration or court DRPs.

(8) Post-dispute contractually agreed non-binding mediation, where the parties agree (at the behest of a court or without encouragement) to mediation as a precursor to other kinds of dispute resolution.

(9) Post-dispute voluntary mediation, where the parties agree to attempt to use the services of a mediator, but are not legally bound to continue with the process.

(10) Early Neutral Evaluation by a judge in court or by a private mediator.

(11) Other hybrid DRPs or a progression or escalation through various DRPs.