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## **REPORT**

on the Commission Green Paper on alternative dispute resolution in civil and commercial law  
(COM(2002) 196 – C5-0284/2002 – 2002/2144(COS))

Committee on Legal Affairs and the Internal Market

Rapporteur: Diana Wallis



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## PROCEDURAL PAGE

By letter of 19 April 2002, the Commission forwarded to Parliament its Green Paper on alternative dispute resolution in civil and commercial law (COM(2002) 196 – 2002/2144(COS)).

At the sitting of 1 July 2002 the President of Parliament announced that he had referred the Green Paper to the Committee on Legal Affairs and the Internal Market as the committee responsible and the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, the Committee on Employment and Social Affairs, and the Committee on Environment, Public Health and Consumer Policy for their opinions (C5-0284/2002).

The Committee on Legal Affairs and the Internal Market had appointed Diana Wallis rapporteur at its meeting of 22 May 2002.

It considered the Commission Green Paper and the draft report at its meeting of 3 December 2002, 28 January 2003 and 20 February 2003.

At the last meeting it adopted the motion for a resolution unanimously.

The following were present for the vote: Willi Rothley, acting chairman; Diana Wallis, rapporteur; Paolo Bartolozzi, Michel J.M. Dary, Bert Doorn, Janelly Fourtou, Marie-Françoise Garaud, Fiorella Ghilardotti, Malcolm Harbour, The Lord Inglewood, Piia-Noora Kauppi (for José María Gil-Robles Gil-Delgado), Carlos Lage (for Carlos Candal pursuant to Rule 153(2)), Kurt Lechner, Klaus-Heiner Lehne, Neil MacCormick, Arlene McCarthy, Ria G.H.C. Oomen-Ruijten (for Giuseppe Gargani pursuant to Rule 153(2)), Manuel Medina Ortega, Marcelino Oreja Arburúa (for Rainer Wieland), Carlos Ripoll y Martínez de Bedoya (for Joachim Wuermeling), Anne-Marie Schaffner, Ioannis Souladakos (for Maria Berger pursuant to Rule 153(2)), Marianne L.P. Thyssen and Stefano Zappalà.

The opinion of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs is attached; the Committee on Employment and Social Affairs decided on 15 May 2002 not to deliver an opinion. The Committee on the Environment, Public Health and Consumer Policy decided on 10 July 2002 not to deliver an opinion.

The report was tabled on 21 February 2003..

## MOTION FOR A RESOLUTION

### **European Parliament resolution on the Commission Green Paper on alternative dispute resolution in civil and commercial law (COM(2002) 196 – C5-0284/2002 – 2002/2144(COS))**

*The European Parliament,*

- having regard to the Commission Green Paper on alternative dispute resolution in civil and commercial law (hereinafter referred to as ‘ADR’) of 19 April 2002 (COM(2002) 196 – C5-0284/2002),
- having regard, in particular, to Articles 65 and 155 of the Treaty,
- having regard to the Vienna Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice, in particular paragraph 41(b) - adopted by the Justice and Home Affairs Council on 3 December 1998<sup>1</sup>,
- having regard to the conclusions of the Tampere European Council calling for the creation of alternative extrajudicial procedures<sup>2</sup>;
- having regard to the conclusions of the Lisbon European Council of 23 and 24 March 2000, in particular paragraph 11 thereof,
- having regard to the conclusions of the Santa María de Feira European Council of 19 and 20 June 2000, in particular paragraph 22, in which it endorses the ‘eEurope 2002 Action Plan’,
- having regard to the conclusions of the Laeken European Council of 14 and 15 December 2001, in particular paragraph 25 thereof,
- having regard to the Commission recommendations on the principles applicable to the bodies responsible for out-of-court settlement of disputes<sup>3</sup> and on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes<sup>4</sup>,
- having regard to its resolution of 21 September 2000 on the proposal subsequently adopted as Council Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters<sup>5</sup>,
- having regard to European Extra-Judicial Network (EEJ-Net) launched on 16 October 2001,
- having regard to the e-commerce directive, in particular Article 17 thereof<sup>6</sup>,

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<sup>1</sup> OJ C 19, 23.1.1999, p.1.

<sup>2</sup> Conclusions, point 30.

<sup>3</sup> OJ L 115, 17.4.1998.

<sup>4</sup> OJ L 109, 19.4.2001.

<sup>5</sup> OJ L 12, 16.1.2001.

<sup>6</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of

- having regard to the Communication from the Commission to the Council and the European Parliament on the biannual update of the scoreboard to review progress on the creation of an area of ‘freedom, security and justice’ in the European Union, in particular chapter 3.1, of 16 December 2002 (COM(2002) 738),
  - having regard to the Opinion of the European Economic and Social Committee,
  - having regard to Rule 47(1) of its Rules of Procedure,
  - having regard to the report of the Committee on Legal Affairs and the Internal Market and the opinion of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (A5-0058/2003),
- A. Whereas access to justice is a fundamental right sanctioned in Article 6 of the European Convention on Human Rights and Fundamental Freedoms and proclaimed in Article 47 of the Charter of Fundamental Rights of the European Union,
  - B. Whereas the Union should guarantee that its citizens may enjoy the right of freedom of movement throughout the Union in conditions of safety and justice accessible to all,
  - C. Whereas a true European area of justice must enable European citizens and businesses access to the courts and to the authorities of all the Member States as easily as in their own country, without the incompatibility or complexity of the legal and administrative systems of the Member States preventing or discouraging them from exercising their rights,
  - D. Whereas European citizens in certain Member States find it difficult to gain access to justice, since disputes before the courts have increased in number and procedures have tended to become longer and, in consequence, more expensive,
  - E. Whereas European citizens are increasingly encountering a growing volume of legislative texts, the complexity and technical nature of which make their access to justice difficult,
  - F. Whereas ADR (particularly on-line) is part of the whole access-to-justice agenda, especially in the context of cross-border disputes and e-commerce, where it is seen as having the potential to cut through difficult issues of differing law and jurisdiction,
  - G. Whereas, however, 'justice' as delivered by the traditional, formal court system is normally regarded as a public good - very much a part of the order, values and culture of each society and hence covered by the principle of subsidiarity,
  - H. Whereas, although cross-border disputes are increasing in importance, ADR should not be seen as detracting from the traditional judicial system or from the sacrosanct principle of access to justice as enshrined especially in Article 6 of the European Convention on Human Rights, and must not constitute a means of depriving citizens of access to the traditional judicial system,

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information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 8.7.2000.

- I. Whereas, notwithstanding this caveat, as far as cross-border disputes are concerned ADR affords the same advantages as it does for the settlement of disputes located within a single Member State, namely it is potentially a cheaper option than traditional legal services and takes some cases out of the mainstream system, thereby reducing pressure on waiting time in courts and securing earlier access to other litigants and, as far as litigants are concerned, it is potentially cheaper, quicker and less stressful and may also afford them a remedy in that the cost and anxiety of proceedings brought in the judicial system may dissuade consumers from asserting claims,
- J. Whereas ADR is in a period of expansion, experimentation and innovation across Europe and this should not be needlessly hampered by the imposition of burdensome legislation,
- K. Whereas, however, in keeping with the principle of legal certainty, the enforceability of ADR decisions should either depend on approval by the courts or be constituted in a notarial act,
- L. Whereas the advantage of ADR lies in its flexibility, and this should not be compromised by regulation; whereas, nonetheless, there is a need for coherence, common procedural guarantees and common quality standards in order to protect consumers and avoid a proliferation of differing systems as between the Member States, and this could be secured through soft-law solutions, including the issuance of guidelines and codes of conduct, and through the promotion of best practice,
- M. Whereas dispute settlement in the public courts based on laws introduced by parliaments is one of the constitutional State's contributions to civilisation, and ADR serves only to complement this process,

1. Welcomes the fact that the Commission, exercising its right of initiative, has submitted a Green Paper on alternative dispute resolution in civil and commercial law;
2. Notes that the Member States of the Union do not have detailed framework legislation on ADRs, and their legal systems differ greatly in this area;
3. Takes the view that ADR should be permitted as a non-binding option to be encouraged, although Member States may propose ADR to both parties as a preliminary option to access courts, whilst not undermining parties' rights to take action through the courts if necessary;
4. Advises the Commission that, whereas some degree of coherence and coordination in the provision of cross - border ADR is desirable, it should be cautious and undertake in-depth studies and wide-ranging consultations before considering proposing any legislative initiatives ; it should promote self-regulatory initiatives and avoid any approach which would reduce flexibility and party autonomy or create new trade barriers *vis-à-vis* non-member countries; however, the Commission might consider the further development of the principles for out-of-court bodies involved in the consensual resolution of consumer disputes in the light of the follow-up given to the present recommendation; in the first

instance the Commission should prepare a follow-up Green Paper concentrating on the goal of building capacity in ADR, the development of standards for ADR, improving quality and benchmarking so as to achieve both coherence and consumer confidence in the use of ADR;

5. Considers that there is a need to have a common definition of terms and that differing approaches and principles will have to be adopted in respect of ADR depending on the area of law (commercial law, family law, labour law), its users (businesses/consumers, business to business) , whether it is court-induced or conventional, on-line or off-line and whether it is appropriate and relevant in the light, *inter alia*, of national practices and procedures;
6. Proposes that a follow-up Green Paper should consider a future Europe-wide model code encompassing at least the following minimum procedural guarantees:
  - (a) The use of ADR in cross-border disputes should not prejudice access to justice in any way;
  - (b) Both parties, in particular where they come from different Member States, should recognise the dispute-settlement procedure;
  - (c) The third party conciliator or mediator should be independent and impartial; it should be established that the third party neutral has a duty to assist parties where necessary, while maintaining his or her impartiality;
  - (d) There should be a duty of confidentiality in so far as matters disclosed by party A to the dispute to the mediator/conciliator should be disclosed to party B or a third party only with party A's consent;
  - (e) The principle of fairness (principles of natural justice) must be sacrosanct;
  - (f) ADR should be consensual and parties should be fully informed of the scope of the ADR and of the enforceability of decisions; in certain cases, parties should be guaranteed a minimum cooling-off or reflection period before agreeing to the results of mediation; expiry of a time-limit for recourse to ADR should not result in a denial of access to the courts;
  - (g) In general, consumers should always be able to go to court if they are dissatisfied with the result of, even mandatory, ADR, even if only to have the legality of the ADR clause reviewed in accordance with the *ratio decidendi* of the judgment of the Court of Justice of 27 June 2000 in Joined Cases C-240/98 to C-244/98 Océano Grupo Editorial SA;
  - (h) Formalities should be kept to the minimum and legal jargon eschewed;
  - (i) Records should be kept of ADR decisions and, in principle, published, provided that the parties agree and having due regard to the protection of personal data;
  - (j) There should be no penalties in the form of costs orders for parties reasonably refusing to have recourse to ADR;
7. Calls on the Commission to encourage the development of a pan-European network of practitioners, professional bodies and other interested parties, involving meetings and the exchange of best practice;



8. Urges the Commission and the Member States to raise public awareness and promote the use of ADR through information campaigns and by involving consumer organisations ;
9. Recommends the Commission to improve and reinforce the EEJ Net so as to encourage Member States to make proper provision for good quality ADR and fill the gaps in existing ADR provision;
10. Believes that the Union's approach to ADR should be globally oriented and take account of solutions such as the UNICITRAL model law;
11. Calls on the Commission to keep the whole sector under review and envisage launching an action programme involving funding for research, monitoring pilot projects and holding conferences;
12. Instructs its President to forward this resolution to the Council and Commission and the parliaments of the Member States.

## EXPLANATORY STATEMENT

### Content of the Green Paper

The Green Paper is concerned with alternative dispute resolution defined as an out-of-court dispute resolution process, excluding arbitration properly so called. Arbitration is highly regulated nationally and internationally and is more akin to a quasi-judicial procedure. The Commission asserts that there is growing interest in ADR in the EU for three main reasons:

- (a) increasing awareness of ADR as a means of improving access to justice;
- (b) ADR has received close attention from the Member States, many of which have passed legislation encouraging it;
- (c) ADR as a political priority particularly in the context of e-commerce (on-line dispute resolution).

The Green Paper was produced at the Council's request in order to take stock of the current situation and launch broad consultations on the possible need for common European provisions. It has also constituted an opportunity to familiarise a broader public with the existing rules and regulations and to make the initiatives taken by Member States and the Community more highly visible.

The questions put in the Green Paper are primarily legal, and concern matters such as ADR clauses in contracts, limitation periods, confidentiality, the validity of consent, effectiveness of agreements generated by ADR processes, training of third parties, their accreditation and rules on liability and insurance. The Green Paper also asks whether any initiatives taken should be confined to defining principles applicable in individual areas of law (commercial law, family law, etc) or whether general principles should be drawn up for ADR in the civil and commercial field. Initiatives already taken in the fields of consumer protection and family law are examined with a view to possibly developing them further.

The Green Paper also considers whether the development of ADR in labour relations should be boosted by creating European mechanisms. Finally, the Commission asks whether Member States' legislation in areas such as family law should be harmonised with a view to achieving some degree of communality with regard to procedural guarantees.

### The rapporteur's approach

The rapporteur is sympathetic to the idea of ADR as a cheaper, less confrontational and more consensual approach than that afforded by the judicial system. However, she is anxious that it should not deprive citizens of their right to their day in court. She appreciates that it affords a solution to a number of the jurisdictional problems raised by cross-border disputes, particularly on-line, but considers that, in order to safeguard consumers, certain procedural guarantees should be respected.

The rapporteur is conscious that ADR may be used in many different areas of law, for which different requirements will have to apply, and in different contexts (on-line and off-line; court-induced and voluntary ADR). She feels that, in some respects, the Commission's Green

Paper fails to distinguish sufficiently between the different types of ADR and depending on the type of user (consumers/businesses).

This having been said, the rapporteur feels that there is at present little need for legislation in this area, but rather for recommendations, codes of conduct and exchanges of best practice. She would also like to see the Commission raising public awareness of the existence and advantages of quality ADR, among other things by improving and strengthening the EEJ Net.

18 February 2003

## **OPINION OF THE COMMITTEE ON CITIZENS' FREEDOMS AND RIGHTS, JUSTICE AND HOME AFFAIRS**

for the Committee on Legal Affairs and the Internal Market

on the Commission Green Paper on alternative dispute resolution in civil and commercial law  
(COM(2002)196 – C5-0284/2002 – 2002/2144 (COS))

Draftsman: Luís Marinho

### **PROCEDURE**

The Committee on Citizens' Freedoms and Rights, Justice and Home Affairs appointed Luís Marinho draftsman at its meeting of 2 October 2002.

The committee considered the draft opinion at its meetings of 10 December 2002, 20 January 2003 and 18 February 2003.

At the last meeting it adopted the following conclusions unanimously.

The following were present for the vote: Jorge Salvador Hernández Mollar (chairman), Robert J.E. Evans (vice-chairman), Johanna L.A. Boogerd-Quaak (vice-chairman), Giacomo Santini (vice-chairman), Luís Marinho (draftsman of the opinion, for Carmen Cerdeira Morterero), Kathalijne Maria Buitenweg (for Alima Boumediene-Thiery), Michael Cashman, Ozan Ceyhun, Carlos Coelho, Gérard M.J. Deprez, Adeline Hazan, Timothy Kirkhope, Eva Klamt, Ole Krarup, Alain Krivine (for Giuseppe Di Lello Finuoli), Baroness Sarah Ludford, Luís Marinho, Hartmut Nassauer, Bill Newton Dunn, Marcelino Oreja Arburúa, Hubert Pirker, Bernd Posselt, Martine Roure, Gerhard Schmid, Ilka Schröder, Joke Swiebel, Anna Terrón i Cusí, Maurizio Turco, Christian Ulrik von Boetticher, Olga Zrihen Zaari (for Walter Veltroni).

## SHORT JUSTIFICATION

In a number of countries such as the United Kingdom and the United States new methods of settling disputes outside the strictly judicial sphere have been developed in the last few years. These methods have proved effective, swift and cheap and have thus been extremely successful.

These alternative dispute resolution methods in the areas of commercial and civil law are being used increasingly in the Member States of the Union, since using private justice procedures is a practical way of settling disputes as a response to the problem of access to justice encountered by European citizens in many of the Member States, owing to the slowness and costliness of court procedures, as well as the volume, complexity and technical nature of legislative texts.

In the Commission's Green Paper the concept of alternative dispute resolution (hereinafter referred to by the acronym 'ADR') refers to extra-judicial procedures for resolving disputes implemented by an impartial third party, the mediator, from which actual arbitration is excluded.

Mediation may be defined as a voluntary procedure in which an impartial, neutral and independent third party helps the parties in a dispute to exchange their points of view and to find a solution to their differences of opinion.

Similarly, the Green Paper extends its scope to the field of civil and commercial law, including labour law and consumer law.

However, in this field there are profound differences between the Member States of the European Union, as regards both the specific legislative provisions adopted in the field of mediation, and the training required of mediators or the ethical rules they must respect:

- (a) in Sweden, Portugal, Greece, Spain and Finland mediation is not highly developed, except in certain specific fields such as labour law;
- (b) Germany, France, Austria, Italy, the United Kingdom and the Netherlands have substantially developed the structures favouring mediation.

Your draftsman therefore welcomes the Commission's Green Paper, both because it has highlighted the crisis in the efficiency of existing judicial systems and because it mentions the achievements made and initiatives adopted in the area of ADR by the Member States and at Community level.

Your draftsman considers that the European Union should harmonise the legislation of the Member States in this new field and establish the decisive elements of ADRs, especially as regards family law, since this will benefit European citizens and will considerably improve their access to justice.

## CONCLUSIONS

The Committee on Citizens' Freedoms and Rights, Justice and Home Affairs calls on the Committee on Legal Affairs and the Internal Market, as the committee responsible, to

incorporate the following points in its motion for a resolution:

- having regard to the Commission Green Paper on alternative dispute resolution in civil and commercial law (hereinafter referred to as ‘ADR’) of 19 April 2002 (COM(2002) 196 – C5-0284/2002),
  - having regard to the Vienna Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice, in particular paragraph 41(b) - adopted by the Justice and Home Affairs Council on 3 December 1998<sup>1</sup>,
  - having regard to the conclusions of the Tampere European Council of 15 and 16 October 1999, in particular paragraph 30 thereof,
  - having regard to the conclusions of the Lisbon European Council of 23 and 24 March 2000, in particular paragraph 11 thereof,
  - having regard to the conclusions of the Santa María de Feira European Council of 19 and 20 June 2000, in particular paragraph 22, in which it endorses the ‘eEurope 2002 Action Plan’,
  - having regard to the conclusions of the Laeken European Council of 14 and 15 December 2001, in particular paragraph 25 thereof,
  - having regard to the Communication from the Commission to the Council and the European Parliament on the biannual update of the scoreboard to review progress on the creation of an area of ‘freedom, security and justice’ in the European Union, in particular chapter 3.1, of 16 December 2002 (COM(2002) 738),
- F. whereas access to justice is a fundamental right sanctioned in Article 6 of the European Convention on Human Rights and Fundamental Freedoms and proclaimed in Article 47 of the Charter of Fundamental Rights of the European Union,
- G. whereas the Union should guarantee that its citizens may enjoy the right of freedom of movement throughout the Union in conditions of safety and justice accessible to all,
- H. whereas a true European area of justice must enable European citizens and businesses access to the courts and to the authorities of all the Member States as easily as in their own country, without the incompatibility or complexity of the legal and administrative systems of the Member States preventing or discouraging them from exercising their rights,
- I. whereas European citizens in certain Member States find it difficult to gain access to justice, since disputes before the courts have increased in number and procedures have tended to become longer and, in consequence, more expensive,
- J. whereas European citizens are increasingly encountering a growing volume of

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<sup>1</sup> OJ C 19, 23.01.1999, p.1.

legislative texts, the complexity and technical nature of which make their access to justice difficult,

- K. whereas, with the completion of the internal market, the intensification of trade, the mobility of European citizens and the growth of electronic commerce, disputes between nationals of different Member States have increased exponentially and with them the number of cross-border disputes reaching the courts,
- L. whereas alternative dispute resolution methods in the field of civil and commercial law (ADRs) in the context of policies to improve access to justice are an instrument serving social justice and a political priority for the institutions of the European Union,
1. Welcomes the fact that the Commission, exercising its right of initiative, has submitted a Green Paper on alternative dispute resolution in civil and commercial law, with a view to consulting the public concerned and to preparing tangible measures to be adopted on the subject and hence to fulfilling the political mandate laid down by the Tampere European Council inter alia;
  2. Notes that the Member States of the Union do not have detailed framework legislation on ADRs, and their legal systems differ greatly in this area;
  3. Notes that the measures adopted by the European Union in the sphere of ADR have been merely symbolic, mainly dealing with consumer law, family law and labour law;
  4. Takes the view that the Union should adopt legislative measures at European level to establish a number of minimum rules on ADRs, in order to limit the unfair consequences of the great differences between the legal systems of the Member States;
  5. Advocates that the initiatives to be adopted should not define the principles applicable to all spheres of civil and commercial law globally, but separately and specifically, at least those applicable to disputes in the spheres of consumer law, family law and labour law;
  6. Advocates that the European Union should adopt specific Community legislative measures to promote dispute resolution in the sphere of cross-border family law by using ADRs, whether the disputes concern custody and visiting rights for children, the sharing of family assets or the allocation of alimony;
  7. Considers that the structure of procedures is similar in both on-line dispute resolution methods (ODRs) (recently developed in the sphere of electronic commerce) and in the traditional methods (ADRs), and hence the initiatives adopted by the European Union should refer to both methods indiscriminately;
  8. Takes the view that the European Union should adopt the measures necessary to harmonise the legal systems of the Member States to ensure that clauses concerning recourse to ADRs inserted in contracts have equivalent legal force;
  9. Takes the view that the legislation of the Member States should be harmonised by the European Union with the aim of modifying the laws governing civil proceedings as far

as statutory time-limits are concerned, establishing that these limits can be suspended when the alternative dispute resolution procedure (ADR) begins and be reinstated if the procedure fails to resolve the matter;

10. Maintains that the European Union should harmonise the legislation of the Member States in order to define the legal concept of "mediation";
11. Considers it desirable for the European Union to set the minimum criteria for the training of mediators as third parties responsible for the ADR process, as well as their status, accreditation and liability;
12. Is in favour of the European Union, in close collaboration with the organisations and institutions concerned, establishing a "European Charter of ethical rules or of good ethical conduct for mediators", applicable in all Member States, to guarantee that the ADR offer the parties concerned minimum guarantees and apply the principles of independence or impartiality, transparency, efficiency and respect for the law, as well as confidentiality.