

Alternative dispute resolution in civil, commercial and family matters

European Parliament resolution of 25 October 2011 on alternative dispute resolution in civil, commercial and family matters (2011/2117(INI))

The European Parliament,

- having regard to Article 3(2) of the Treaty on European Union, as well as Articles 67 and 81(2)(g) of the Treaty on the Functioning of the European Union,
- having regard to the Commission’s consultation paper entitled ‘On the use of Alternative Dispute Resolution as a means to resolve disputes related to commercial transactions and practices in the European Union’ of 18 January 2011 and the document entitled ‘Summary of the responses received’ published in April 2011,
- having regard to the Commission’s consultation document entitled ‘Alternative dispute resolution in the area of financial services’ of 11 December 2008 and the document entitled ‘Summary of the responses to the public consultation on alternative dispute resolution in the area of financial services’ of 14 September 2009,
- having regard to the Green Paper on alternative dispute resolution in civil and commercial law of 19 April 2002 (COM(2002)0196),
- having regard to the Commission’s recommendations of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes¹ and of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes²,
- having regard to the Communication from the Commission of 13 April 2011 entitled ‘Single Market Act – Twelve levers to boost growth and strengthen confidence ‘Working together to create new growth’ (COM(2011)0206),
- having regard to the Council Resolution of 25 May 2000 on a Community-wide network of national bodies for the extra-judicial settlement of consumer disputes³ and to the European Extra-Judicial Network (EEJ-Net) launched on 16 October 2001,
- having regard to the Memorandum of Understanding on a Cross-Border Out-of-Court Complaints Network for Financial Services in the European Economic Area of 30 March 1998 and to FIN-NET,
- having regard to Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters⁴,
- having regard to the European Code of Conduct for Mediators (hereinafter: ‘Code of

¹ OJ L 115, 17.4.1998, p. 31.

² OJ L 109, 19.4.2001, p. 56.

³ OJ C 155, 6.6.2000, p. 1.

⁴ OJ L 174, 27.6.2001, p. 25.

Conduct') launched in 2004,

- having regard to 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 matters¹,
- having regard to the study entitled 'The Cost of Non ADR – Surveying and Showing the Actual Costs of Intra-Community Commercial Litigation', dated 9 June 2010, by the ADR Center, Rome, Italy,
- having regard to the findings of the European Business Test Panel (EBTP) on 'Alternative Dispute Resolution', covering the period from 17 December 2010 to 17 January 2011,
- having regard to its resolution of 12 March 2003 on the Commission's Green Paper on alternative dispute resolution in civil and commercial law²,
- having regard to its recommendation of 19 June 2007 based on the report of the Committee of Inquiry into the crisis of the Equitable Life Assurance Society³,
- having regard to its resolution of 25 November 2009 on the Communication from the Commission to the European Parliament and the Council – An area of freedom, security and justice serving the citizen – Stockholm programme⁴,
- having regard to its resolution of 6 April 2011 on governance and partnership in the single market⁵,
- having regard to its resolution of 13 September 2011 on the implementation of the directive on mediation in the Member States, its impact on mediation and its take-up by the courts⁶,
- having regard to Rule 48 of its Rules of Procedure,
- having regard to the report of the Committee on Legal Affairs and the opinion of the Committee on the Internal Market and Consumer Protection (A7-0343/2011),

- A. whereas access to justice is a fundamental right,
- B. whereas an area of freedom, security and justice, as laid down in the Treaties, must meet the needs of citizens and businesses, for example by creating simpler and clearer procedures, whilst enhancing access to justice,
- C. whereas the objectives of the judicial process and of alternative means of dispute settlement are closely linked and seek to swiftly restore legal peace between parties in dispute, suitably safeguard individuals' substantive rights and settle disputes between parties,
- D. whereas alternative dispute resolution (ADR), which helps parties avoid traditional adjudicative procedures, is capable of constituting a quick and cost-effective alternative to

¹ OJ L 136, 24.5.2008, p. 3.

² OJ C 61 E, 10.3.2004, p. 256.

³ OJ C 146 E, 12.6.2008, p. 110.

⁴ OJ C 285 E, 21.10.2010, p. 12.

⁵ Texts adopted, P7_TA(2011)0144.

⁶ Texts adopted, P7_TA(2011)0361.

litigation,

- E. whereas ADR is a mechanism for reaching out-of-court settlements by helping consumers and traders to resolve conflicts through the intervention of a third party (mediator or arbitrator),
- F. whereas in many countries the public authorities – including ombudsmen and regulatory authorities – play an important role in encouraging the resolution of disputes,
- G. whereas by strengthening citizens' confidence in the internal market, trust in the enforcement of rights in cross-border disputes can make a contribution towards stimulating the EU economy,
- H. whereas the EU citizen's knowledge and understanding of ADR schemes throughout Europe is low and confused, with only a small percentage of citizens knowing how to file a claim with an ADR body,
- I. whereas it is important to assure better publicising of the existence of ADR mechanisms and to do more to encourage consumers and professionals to use them as an alternative to court proceedings, in order to make it possible to avoid a confrontational approach and offer the prospect of a win-win situation,
- J. whereas a balanced approach has to be sought which takes into consideration both the flexibility of ADR systems on the one hand and the need to ensure consumer protection and fair procedures on the other,
- K. whereas Parliament has repeatedly called for further efforts to develop ADR; whereas it has called on the Commission in its resolution of 6 April 2011 on governance and partnership in the single market to submit a legislative proposal on the use of alternative dispute resolution in the EU by the end of 2011,
- L. whereas the Commission has included a legislative proposal on ADR, in its Work Programme 2011 as a strategic initiative and in its communication of 13 April 2011 on a 'Single Market Act', as one of the twelve levers to boost growth and strengthen confidence, with the aim of consumer empowerment,
- M. whereas the deadline for the implementation of Directive 2008/52/EC expired on 21 May 2011,

Horizontal approach to ADR

- 1. Welcomes the recent Commission consultation on ADR which, despite its wide-ranging title, is exclusively targeted at consumer transactions;
- 2. Believes, however, that ADR forms part of a general 'justice-for-growth' agenda across sectors; takes the view that any approach to ADR should go beyond consumer disputes so as to include business-to-business (B2B) civil and commercial transactions, irrespective of whether they are carried out between private or public undertakings, family disputes, defamation cases and other general interest disputes or ones involving parties with different legal statuses;
- 3. Welcomes the fact that Directive 2008/52/EC has harmonised some standards for

mediation; emphasises that common terms need to be defined and procedural guarantees maintained in all areas of ADR; feels the need to revisit the 1998 and 2001 Commission recommendations and the Code of Conduct;

4. Considers that, whilst self-regulation remains important, legislative action setting out minimum standards upon which ADR schemes may be based is necessary in order to provide a framework for ADR within Member States' legal orders, as shown by the example of Directive 2008/52/EC; stresses that any such framework should be careful not to limit diversity in the field of ADR as there is no 'one size fits all' solution that could tackle the variety of problems that arise in different legal sectors;
5. Emphasises the need for better understanding of the many different types of mechanisms and processes (including the activities of public authorities such as ombudsmen) that are often collectively referred to as ADR; considers that while there is considerable commonality among the techniques of negotiation and dispute facilitation that are commonly to be found in ADR systems, nevertheless the structure and architecture of ADR differs considerably between Member States;
6. Considers that legislative measures adopted at EU level will facilitate the implementation of ADR and encourage natural and legal persons to use it more often, especially in relation to cross-border disputes, bearing in mind that judicial procedures for resolving such disputes are more complex, expensive and lengthy;
7. In this context, calls on the Commission to submit a legislative proposal on the use of alternative dispute resolution for consumer matters in the EU by the end of 2011 and emphasises the importance of its swift adoption;

Common standards for ADR

8. Believes that ADR standards should include: adherence to/agreement on ADR; independence, transparency, effectiveness, fairness, impartiality and confidentiality; effects on limitation and prescription; enforceability of agreements resulting from ADR; qualification of third parties;
9. Takes the view that ADR bodies should be monitored and assessed regularly by independent evaluators;
10. In order not to prejudice access to justice, rejects any wholesale imposition of a mandatory system of ADR at EU level, but suggests that a mandatory system of referral of the parties to consider possibilities of ADR could be examined;
11. Notes the example of Italian 'joint conciliation' as a possible best practice model based on a protocol agreed and signed by the company and the consumer associations requiring the company to agree in advance to ADR in order to resolve any disputes which arise in the area covered by the protocol;
12. Stresses that any ADR clause should not hamper access to justice, in particular on the part of the weaker party, which, in certain circumstances, may also be an SME, and therefore considers, to this extent, that ADR decisions may be binding only with the explicit agreement of the parties involved;

13. Takes the view that an obligation to disclose circumstances that affect the third party's independence or that give rise to a conflict of interests and a duty to serve all parties equally, as laid down in the Code of Conduct, should apply to ADR in general;
14. Calls for an obligation for the parties involved and, where appropriate, a third party, as contained in the Code of Conduct, to keep ADR information confidential; is also considering, where applicable, more far-reaching measures, such as creating a professional privilege, in parallel with that provided for in Article 7 of Directive 2008/52/EC;
15. Notes, however, that whilst respect for the confidentiality of personal data is important, there should also be a level of transparency guaranteed in the ADR process, allowing Member States and ADR bodies to identify and share best practices, and allowing independent regulators the opportunity to scrutinise the procedure in cases where complaints have been made;
16. Believes that not only mediation but ADR in general (Article 8 of Directive 2008/52/EC) should have an effect on limitation and prescription periods; acknowledges the risk posed by the many forms of ADR and the risk of abusive delay of court proceedings; notes that the feasibility study on European Contract Law¹ provides for a suspension of prescription in the case of arbitration and mediation proceedings, and in certain other ADR situations; calls upon the Commission to continue work on this;
17. Is convinced that speedy and inexpensive enforcement of agreements resulting from ADR is indispensable, including cross-border; calls for legislative measures to this end;
18. Recalls that specific training for third-party neutrals is essential; calls on the Commission to assemble data on the required type and extent of training, and to assist the sectors in developing training and quality-control schemes;

ADR in different areas

19. Supports the Commission's intention of encouraging the use of alternative means of dispute resolution that are accessible, swift, effective and cheap and apt to enable the establishment and maintenance of quality and trust-based commercial, economic, social and neighbourhood relations and to contribute to a high level of consumer protection in a 'win-win' situation, with benefits for both sides as compared to current judicial practice;
20. Stresses that, although there are numerous ADR systems operating effectively in Europe at present, one of the main obstacles to their use is the lack of even development of such systems throughout the EU, both in geographical and sectoral terms; suggests, therefore, that existing shortcomings with regard to the geographical coverage of ADR in Europe be rectified rapidly, deplores the major sectoral deficiencies that persist in most Member States, while promoting the improvement of a sector by sector coverage that would involve people who understand the way in which a given sector works; encourages the Member States to consider introducing single points of contact for each sector, to provide information on how to initiate ADR;
21. Recalls that ADR is of particular interest to SMEs; reiterates its call upon the Commission to consider synergies between ADR and an instrument in EU contract law; would also

¹ http://ec.europa.eu/justice/policies/consumer/docs/explanatory_note_results_feasibility_study_05_2011_en.pdf.

welcome guidance on ADR clauses in standard contracts;

22. Acknowledges the achievements of FIN-NET, ECC-Net and SOLVIT, but believes that, as regards information to parties and funding, there is still room for improvement, and calls on the Commission to support, strengthen and enhance the capabilities of, existing bodies such as these that have demonstrated their effectiveness and value;
23. Sees great potential for online ADR, in particular for smaller claims; notes that traditional ADR procedures exist online alongside others that seek to prevent disputes or to facilitate their resolution; emphasises that, where traditional ADR is carried out online, procedural standards should not be lowered, and that issues such as the enforceability of awards should also be resolved; sees a particular benefit in online trustmark systems; points to the work of the UNICTRAL Working Group on Online Dispute Resolution¹, intended for B2B and business-to-consumer (B2C) transactions;
24. Believes that a 'hierarchy' of settlement – comprising, firstly, an in-house complaint scheme, secondly, ADR and, only as last resort, litigation – will reduce time and cost; calls upon the Commission to assist the sectors in promoting such systems;
25. Emphasises the crucial role of types of ADR in family disputes, where it may reduce psychological harm, can help the parties to start talking again and thereby, in particular, help ensure the protection of children; sees potential in cross-border ADR in terms of its flexibility in particular; points also to the work of the European Parliament Mediator for International Parental Child Abduction;
26. Agrees with the Commission that appropriate access to reparation in the internal market requires both the possibility of easy recourse to ADR and the existence of an effective system for collective claims, the two being complementary and not mutually exclusive;
27. Sees potential for ADR within the ongoing discussion on collective redress, since ADR provides an effective means for dispute settlement that avoids redress action before the courts;
28. Sees a need at EU level for ADR in the area of freedom of the press and rights of personality, given that in cases of defamation and breaches of rights of personality in particular, costs of legal proceedings, especially in some Member States, can be ruinous, and that ADR could help to improve the existing situation;

ADR as a mechanism to settle consumer disputes

29. Stresses the need to ensure that European consumers can access ADR systems for transnational as well as national disputes, especially on the on-line market, which is growing rapidly in the EU; notes that the use of ADR systems affords a higher level of consumer rights protection and boosts consumer confidence in the market, businesses and consumer rights protection institutions by making them more attractive, as well as promoting cross-border trade and increasing the prosperity of all operators in the EU market;
30. Calls for an effective out-of-court dispute settlement system for consumer matters which is

¹ http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html.

operational across the EU;

31. Suggests that the Commission's future legislative proposal on the use of ADR for consumers in the EU incorporate the guidelines to be followed in relation to ADR systems established in Europe, these being the following:

- *independence, impartiality and confidentiality*: when mediators are being designated, the possibility of conflicts of interest arising should be avoided; the principle of joint participation by members of consumer associations and organisations representing companies could serve as a useful basis for ensuring the impartiality of the outcome;
- *competence*: the professionals in charge must have the specialist ability, training and experience to perform their role and must be impartial, independent and competent;
- *efficiency and speed*: mediators must have adequate means at their disposal (appropriate human, material and financial resources) and be able to meet the short deadlines between referral and decision;
- *equity* between consumers and professionals, in terms of information as well as conceptually and procedurally, and two-way exchanges, i.e. the two parties being able to express their position and to familiarise themselves with the position and the facts stated by the other;
- *funding*: the issue of the cost of ADR should be resolved in order to ensure that such an option is attractive to the parties concerned; with this in mind, the system should be free, if a case is won, or offered at a very moderate cost to the consumer;
- *freedom of choice and out-of-court nature*: ADR must be optional and based on respect for the parties' freedom of choice throughout the process, allowing them the possibility of choosing, at any time, to settle their dispute before the courts; at the same time, guarantees must be provided that genuine efforts are being made to achieve successful mediation; it must not under any circumstances constitute an initial compulsory step prior to the initiation of legal proceedings, and the decision stemming from it can be binding only if the parties have been informed to that effect beforehand and expressly agree to it; despite such a decision, it must still be possible for the parties to opt for a court hearing;
- *proportionality* of the procedures, decisions and costs, to avoid their impact exceeding the objective and content of the dispute; the costs borne must be in proportion to the damage incurred;
- *transparency*: besides providing general information (types of lawsuit, rules on referral, decision-taking arrangements, etc.), any person acting as a mediator must be obliged to publish an annual report;

32. Calls on the Commission to make provision for coordination in respect of transnational consumer disputes in order to facilitate access to, and the coordination of, national and business-led ADR systems;

33. Calls on the Commission, in the context of cross-border e-commerce consumer disputes, to make arrangements for the rapid introduction of a multilingual platform enabling consumers

to resolve their disputes entirely on line, bearing in mind that this platform must meet quality standards and be based on existing ADR systems in the Member States;

34. Takes the view that the provision of information to consumers is a responsibility shared by public authorities, information and advisory networks, regulators and consumer groups, and recommends that they each, at their respective level, conduct awareness-raising campaigns and pilot projects on the subject;
35. Criticises the confusing nature of the Commission's current ADR database; suggests that the Commission create a multilingual European internet ADR portal, where any consumer may access information on how ADR works, what it involves and about their rights and obligations, building on existing databases and networks; emphasises that, in the interests of consumers, emphasis must be placed on the user-friendliness and clarity of the on-line portal;
36. Emphasises that consumers must be able to obtain all relevant on-line information about ADR, properly translated into their own languages, by using readily accessible, user-friendly on-line translation machines;
37. Emphasises that it is crucial to raise consumer awareness of the existence and benefits of ADR prior to the initiation of a consumer dispute; insists on the necessity to reinforce the sense of responsibility of businesses and business organisations in this regard; considers that businesses and businesses federations have a duty to inform consumers on available ADR mechanisms; proposes that this 'upstream' information should include a reference in all contractual documents drawn up by professionals to the possibility of recourse to ADR, along with contact details and referral procedures for the relevant ADR systems; however, this requirement should avoid extra costs and bureaucracy;
38. Recommends, as a potential incentive for enterprises, that a quality label for mediation be introduced in relation to mediation in consumer disputes, which would be associated with guidelines recognising best practices, so that consumers can rapidly identify businesses that have opted into ADR systems; takes the view that a cost-benefit analysis should be carried out first on this proposal; stresses that the Commission should ensure that the label is properly used and enforced;

Next steps

39. Notes that there needs to be an improvement in general information about rights and their enforcement and specific information on ADR schemes, including their existence, functioning and location; takes the view that information programmes should also point to the main advantages of choosing ADR, such as the cost in comparison to litigation, success rates and time efficiency in comparison to litigation; takes the view that such programmes should be targeted in particular at citizens and SMEs; believes that ADR is most effectively provided in a network close to citizens and on the basis of joint work with Member States;
40. Calls on the Commission, at the same time, to take immediate steps to ensure that consumers and businesses are made more aware of existing legislative instruments, such as Regulation (EC) No 861/2007 establishing a European Small Claims Procedure, Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters and Regulation (EC) No 805/2004 creating a European Enforcement Order for uncontested claims; with that aim in view, proposes that national authorities, courts, bar associations and chambers of

commerce, consumer advice bureaux, legal expenses insurers and other competent organisations should be involved in a comprehensive information campaign; calls for financial support to be provided for European and national campaigns of this kind;

41. Notes that the usage of small claims tribunals in some Member States remains significantly low and that more needs to be done in terms of legal certainty, language barriers and transparency of proceedings; calls on the Commission to devote particular attention to these legal bodies when formulating its legislative proposal on the use of ADR for consumer matters in the EU;
42. Notes that the conciliatory nature of ADR means that the resolution is more likely to be considered a 'win-win' result and points to the fact that compliance with resolutions reached via ADR is generally high; believes, therefore, that up-to-date statistics regarding this should be published alongside public information on ADR;
43. Calls on the Commission, in cooperation with the Member States, to undertake information campaigns aimed at educating, and raising the awareness of, both consumers and businesses with regard to the benefits of using this institution;
44. Considers that ADR information campaigns should be run in cooperation with chambers of commerce, consumer groups and offices of fair trading (or equivalent) in order to ensure a well coordinated and effective campaign;
45. Takes the view that the provision of information to businesses is a responsibility shared by public authorities and representative organisations, and recommends that they each, at their respective level, conduct awareness-raising campaigns and pilot projects on the subject;
46. Acknowledges that one of the main obstacles to the use of ADR systems is the reluctance of businesses to engage in such mechanisms; proposes that chambers of commerce, umbrella organisations at both national and EU level, and other professional bodies be required to inform enterprises of the existence of ADR and of the potential benefits of its use, not least in terms of: pre-empting lawsuits; corporate image; and, lastly, the possibilities offered by ADR, unlike an arbitration or court ruling, for the re-establishment of trust-based commercial relations between the parties;
47. Calls on the Commission, on the basis of the data collected and a solid impact assessment in compliance with the better regulation rules, to explore the setting out of minimum standards of ADR across sectors, while developing existing schemes and encouraging Member States and sectors covered by schemes to increase funding, bearing in mind that ADR, while providing parties with a low-cost alternative, must not be 'justice on the cheap';

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48. Instructs its President to forward this resolution to the Council and the Commission.