

Cross-Border Alternative Dispute Resolution

by Civic Consulting
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Alternative dispute resolution (ADR)

Scope

- ADR is understood as a dispute resolution procedure that takes place *out of court* through the use of a *pre-established third-party mechanism*, i.e. an ADR scheme
- Focus of the study: B2C (disputes between *consumers and businesses*); within the EU

Overview of ADR schemes in the EU

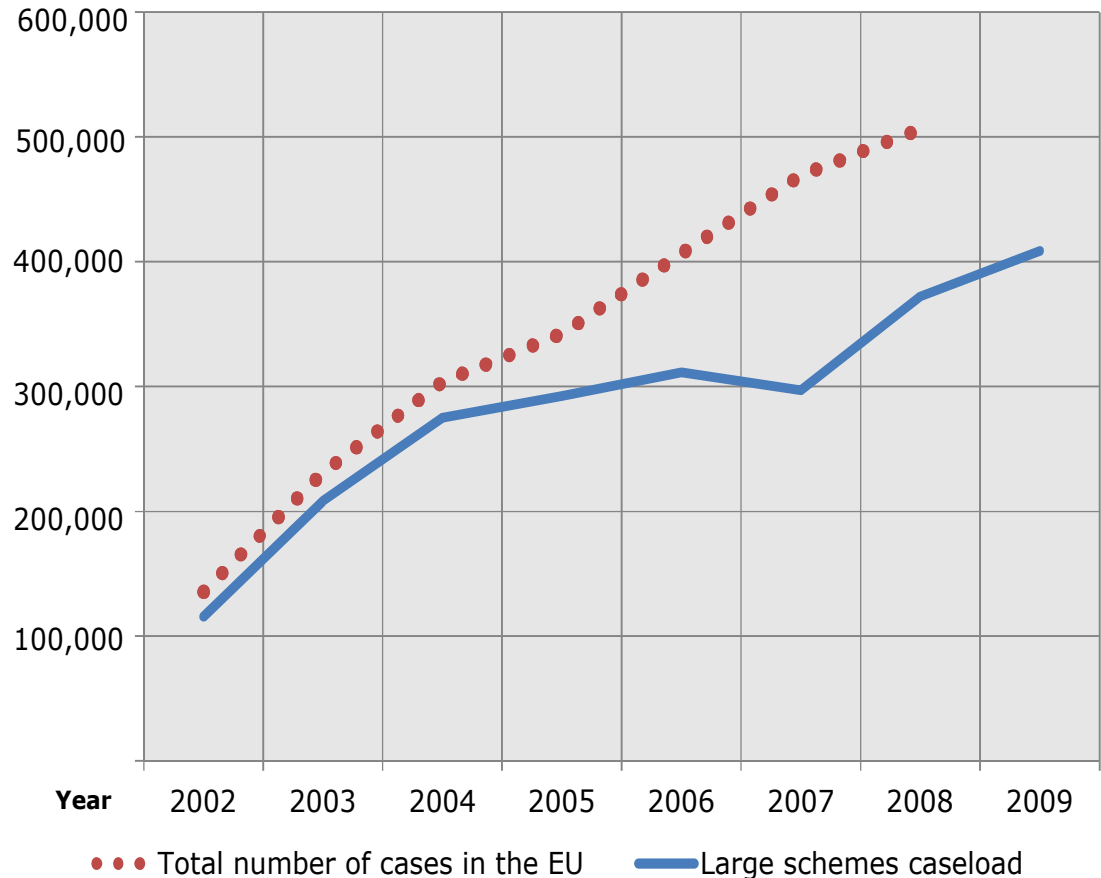
- The very diverse group of ADR schemes identified in the EU consists of 471 notified and 281 non-notified schemes
- For an ADR scheme to be notified, it must abide by Recommendation 98/257/EC on the principles applicable to the bodies responsible for the out-of-court settlement of consumer disputes; and/or Recommendation 2001/310/EC on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes

MS	Notified schemes	Non-notified schemes
AT	18	4
BE	25	14
BG	0	3
CY	1	0
CZ	20	5
DE	203	24
DK	19	2
EE	2	0
ES	75	1
FI	4	1
FR	19	16
GR	3	0
HU	18	2
IE	5	10
IT	4	125
LT	1	4
LU	5	1
LV	1	2
MT	6	1
NL	4	0
PL	4	20
PT	13	0
RO	1	1
SE	1	15
SK	0	3
SL	0	6
UK	18	21

Main features of ADR schemes	Main variations
Notification	Notified
	Non-notified
Nature of scheme	Public
	Private
	Mixed
Nature of funding	Public
	Private
	Mixed
Participation of industry	Voluntary
	Mandatory
Outcomes of procedures	Non-binding decision
	Decision binding on both parties
	Decision binding on the trader
	Amicable settlement (in mediation)
Geographical coverage	Cross-border
	National
	Sub-national
Sectoral	Cross-sectoral (Multiple sectors)

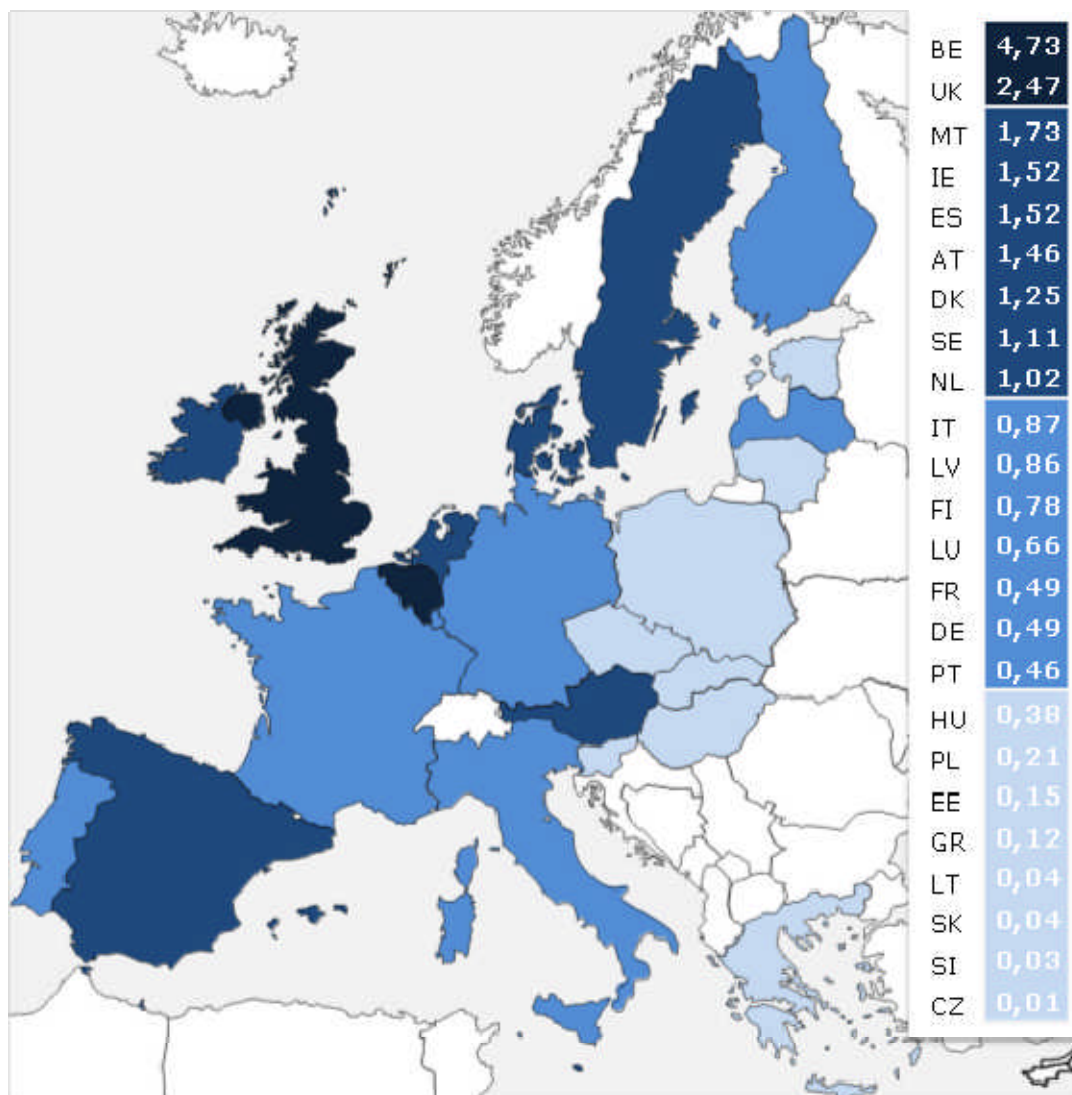
Increasing trend in the use of ADR

- In total, about 410,000 cases were reported in the EU in 2006, about 473,000 in 2007, and more than 500,000 in 2008
- It is not possible to determine exactly why the number of ADR cases has been rising, but it is likely that the increased availability of ADR schemes combined with higher consumer awareness have played a role



The use of ADR across the EU varies:

- Belgium emerges as the clear leader in the use of ADR schemes with 4.73 cases per 1,000 inhabitants, followed by the UK (2.47)
- Other countries above the average (0.99) are Malta, Ireland, Spain, Austria, Denmark, Sweden, and the Netherlands
- Greece stands out with the lowest figure among old MS (0.12), and in several new MS, fewer than 0.1 cases per 1,000 inhabitants were noted



Note: Based on data for 2007 (the most complete dataset available)

Cross-border ADR

- Case studies conducted:
 - seven national ADR schemes (NL, UK, FR, PL, PT, SE, DE)
 - three EU networks (ECC-Net, FIN-NET, Solvit)
- Examined ADR schemes:
 - *diverse*: sectoral (e.g. financial services) and cross-sectoral, mandatory and voluntary, issuing binding and non-binding decisions, etc.
 - *caseloads*: from 2,930 to 163,012 in 2010
 - *shares of cross-border cases*: 1-2% to around 30%
 - *networking*: four are members of FIN-NET, all co-operate with ECC-Net

Barriers to the use of ADR

- Overlapping barriers to the use of ADR at the national and cross-border level:
 - coverage gaps
 - low awareness among consumers and businesses
 - reluctance of businesses to engage in ADR
- Aggravating factors in cross-border ADR:
 - language barriers
 - physical absence of the consumer from the trader's country

National ADR schemes and cross-border B2C disputes

- ADR schemes typically do *not* accept complaints against traders in other Member States, with some exceptions
 - Main reasons:
 - lack of jurisdiction
 - knowledge of applicable law
 - enforceability of final decisions
 - Exceptions:
 - voluntary jurisdiction
 - case-by-case decisions (based on compliance expectation)

EU networks

- **Solvit**: different subject-matter and set-up, but offers some lessons (e.g. usefulness of a centralised IT-system)
- **FIN-NET**: positively valued by ADR schemes and consumers, but coverage gaps have been a problem
- **ECC-Net**: a fundamental role in cross-border ADR:
 - centralised and IT-supported complaints-handling system
 - bridging language gaps
 - directly intervening where no ADR scheme is available
 - providing information and assistance regarding other possibilities to pursue consumer redress

Assessment of selected legislation relevant for consumer redress

Examined legislative instruments

- „ESCP Regulation“
 - Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing an EU small claims procedure
- „Mediation Directive“
 - 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
- „Injunctions Directive“
 - Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests

ESCP Regulation

- Aims:
 - Simplification and speeding up of litigation concerning small civil and commercial cross-border cases, reduction of costs
 - Abolishment of intermediate measures to enable recognition and enforcement of a judgment in another Member State
- Different from traditional, private, international law rules:
 - Establishment of an autonomous EU procedure
 - Availability of the ESCP to litigants as an alternative to national procedures

Mediation Directive

- Aims:
 - Promotion of mediation (by obliging MS to allow courts to suggest mediation and to invite the parties to attend an information session on the use of mediation, if available)
 - Reinforcing the quality of mediation procedures, and thus enhancing consumers' confidence in mediation (a general framework and minimum requirements for the MS)
- Without prejudice to national legislation that makes the use of mediation compulsory or subject to incentives or sanctions

Injunctions Directive

- Aims:
 - Approximation of national provisions designed to enjoin the cessation of the unlawful practices infringing Directives on consumer matters and harmful to the collective interests of consumers, irrespective of the MS in which the unlawful practice has produced its effects
- Entails the principle of mutual recognition of entities which other MS have recognised as qualified to bring an action for an injunction

Implementation in FR, PL, NL, UK and DE

- ESCP Regulation: available as of 1 January 2009
- Injunctions Directive: fully transposed into national law in all selected jurisdictions
- Mediation Directive: was only transposed in the UK at the time of analysis (transposition deadline: 21 May 2011)
- Where the EU instruments leave discretion to the Member States, implementation across jurisdictions differs

Use by consumers

- Limited amount of data is available
 - Available information:
 - Typically no distinction is made between different subjects of claims (not possible to determine the numbers of relevant B2C disputes)
 - Indicates a rather low number of cases (e.g. 36 ESCP applications in France in 2010)
- Main reasons for the limited use could be:
- gaps in the regulatory framework
 - low level of awareness by consumers

Gaps in the regulatory framework

- ESCP Regulation:
 - Practical relevance : low value of the claims + potential costs?
 - Claim Form: e.g. language, open questions, competent court, jurisdiction
 - Lack of clarity/legal certainty: e.g. costs/length of the ESCP procedure
- Mediation Directive:
 - Risk of the existence of different (national and cross-border) procedures
 - No obligatory standards as to the quality of mediators
 - Open practical questions : e.g. language, place, mediator's fees
- Injunctions Directive:
 - Limited impact of injunction: e.g. national nature, no individual redress
 - Procedural differences in MS: e.g. competent court/authority, sanctions
 - Uncertainty as to the costs involved (translation/travel/legal assistance)

Complementing or substituting cross-border ADR?

- Regardless of the scope of their usage in practice the ESCP Regulation, Mediation Directive and Injunctions Directive still presuppose court intervention
- ADR, on the other hand, by definition aims to offer an alternative to settling disputes through judicial litigation
 - The three EU legislative instruments:
 - could be considered as complementing cross-border ADR schemes
 - but they cannot serve as effective substitutes

Possibilities for improving cross-border ADR

ADR most accessible in sectors with legislative basis

- Absent a specific EU legislative instrument to facilitate or mandate cross-border ADR, it is up to national governments and stakeholders to improve access to ADR
- Self-regulation and co-regulation have developed in some MS, but this is more an exception than the rule
- Existing ADR mechanisms relying on self-/co-regulation typically do not encompass the full range of traders (involvement of smaller traders reported to be problematic).
- ADR is currently most accessible in more regulated sectors where there is a legislative basis

Specific legislative instrument?

- EU legislative instrument mandating cross-border ADR across sectors could build on previous (sectoral) legislative requirements
- Enhancing access to cross-border ADR without strengthening ADR for domestic cases not likely to be efficient and effective
- Multitude of ADR approaches in the EU to be taken into account (fears that harmonisation would interfere with operating principles of current schemes)
- Focus on outcomes rather than procedural aspects
- Complementary policy measures, e.g. issuing non-binding guidance on ADR best practices

Possibilities for improvements /1

Simplified access to ADR

- Existing good practices: national umbrella organisations for ADR schemes and/or signposting mechanisms
- Idea of a single entry point compelling: without interfering with the preference of a MS for certain type of dispute resolution, consumers would benefit in each jurisdiction
- Ideally, a single entry point would work as an independent ‘single desk’ where consumers could file any type of complaint (other than criminal complaints) in B2C matters
- Key function of the single entry point would be to channel dispute to most appropriate dispute resolution venue

Possibilities for improvements /2

Access to ADR in cross-border cases

- Single entry point would likely build on ECC experiences, or use them as ‘channel’ for cross-border complaints to:
 - Contact traders in other MS to informally reach solution
 - Provide access to ADR mechanisms in other MS
 - Support a consumer to use ESCP if ADR less likely to succeed (e.g. if trader is known not to adhere to ADR)
- A standard form could be used for cross-border cases and the ECC-Net’s IT-Tool could be further developed as a platform to forward cases from ECCs to ADR schemes

Possibilities for improvements /3

Awareness

- Taking into account fragmentation and gaps in coverage of existing ADR schemes, simply taking promotional measures is unlikely to increase awareness
- First, a cross-sectoral and coordinated ADR infrastructure has to be established in MS, possibly complemented by a single entry point
- ADR system will become known to consumers once it provides easy and effective dispute resolution
- Could be supported by requiring businesses to provide information on ADR to consumers, and promotional measures

Possibilities for improvements /4

Financial resources

- Any EU legal instrument needs to require MS to ensure sufficient funding for their ADR system to operate effectively, especially in cross-border situations that have higher transaction costs due to translation services
- Infrastructures of financially sustainable ADR schemes are often financed by the government, by businesses through their association and/or through a levy on industry; this can be complemented by a case fee imposed on businesses (paid regardless of the outcome of the procedure)
- A key consideration: independence must not be curtailed by the source of funding

Additional information

ADR

ADR CASE STUDIES (selected features)	NL	UK	FR	PL	PT	SE	DE
	Foundation Consumer Complaints Boards	Financial Ombudsman Service	Internet Mediator	Insurance Ombudsman	Lisbon Arbitration Centre	National Board for Consumer Disputes	Conciliation Body for Public Transport
Established	1970	2001	2003	1995	1989	1968	2009
Sectors covered	multiple (50 ADR boards)	financial services (all)	all	insurance	all	all	transport
Cases (2010)	7,826	163,012	not available	11,947	2,930	7,216	3,424
Nature of scheme (founders)	private (consumers' & traders' org.)	public	non-profit association	public	public	public	private (service providers)
Funding	mixed (public and traders)	industry (levy & case fees)	mixed (public & industry)	industry	public	public	industry
Adherence	mandatory for members	mandatory (by law)	voluntary	mandatory (by law)	voluntary	voluntary	voluntary
Bindingness of decisions	yes (for members)	yes (with legal basis)	consensual agreements	no	yes	no	no
ODR	yes	no (upcoming)	yes	no	partially	no (upcoming)	yes
Language capacities	NL	large (outsourced)	FR, EN	PL, EN, DE, FR	PT, ES, EN, FR	SE, EN	DE, EN, FR
Type(s) of cross-border (CB) complaints accepted	only against NL traders with a few exceptions	against UK providers & non-UK within voluntary jurisdiction	all cases (including non-EU countries)	all cases	only against traders based in PT	against SE traders & against non-SE on case-by-case basis	against DE companies & against non-DE (voluntary jurisdiction)
Share of CB cases	about 1-2%	about 2%	9.5% (2009)	around 4%	about 3%	not available	about 30%
Most frequent CB cases	travel, leisure & recreation, legal services, energy, telecomm.	banking, investment, insurance	e-commerce, travel, electronic comm.	insurance	travel/air transport, car rental	air travel, timeshare/holiday clubs, car rental, e-commerce	air travel, rail
Cooperation with networks	ECC-Net	FIN-NET & ECC-Net	ECC-Net	FIN-NET & ECC-Net	FIN-NET & ECC-Net	FIN-NET & ECC-Net	ECC-Net

Implementation of selected legislation relevant for consumer redress

	ESCP Regulation	FR	PL	NL	UK	DE
Lodging the claim	by post and other means acceptable in MS	by post or electronic means	by post or personally in the court's secretariats	by post or with clerk's office; electronically at some local courts	by post or in person	possible electronically; regional exceptions
Oral hearing	may be requested by the parties; may be decided for or refused by court; may be provided for through comm. tech.	court can decide to hold a hearing (common civil procedural rules apply)	may be held; hearings via communication technology not available	no oral hearing	in principal no oral hearing; if held, normally via communication technology	litigation via video conference may be allowed by the court
Appeal	choice of MS	none available; ordinary appeal in certain cases; extraordinary appeal for both parties	available in conformity with simplified procedure rules	none available; decision can be attacked before the High Court	available; permission required	available
Accepted languages	at least the official language(s) of MS	FR, EN, DE, IT, ES	PL	NL	EN	DE
National small claims procedure	left to the discretion of MS	for claims not exceeding 4,000 Euro	for claims up to 10,000 PLN (approx. 2,500 Euro) or if the claim concerns a rent for housing	up to 5,000 Euro	for claims (normally) up to 5,000 Euro	none available
Costs related to the ESCP	costs of proceedings (determined by nat. law) borne by unsuccessful party	court proceedings free in general; the cost of notification by bailiff supported by public budget	100 PLN	claimant pays the clerk's duties: 71 Euro (claims up to 500 Euro); 142 (above 500 Euro)	issue fees: 30 Pound (cases up to 300 Pound); 45 (300-500); 65 (500-1,000); 75 (1,000-1,500) 85 (above 1,500 Pound)	data not available

	Mediation Directive	FR (proposal)	PL (proposal)	NL (proposal)	UK	DE (proposal)
Recourse	voluntary; court may suggest mediation	in national judicial mediation (NJM): optional	voluntary; court may direct once during proceeding, parties may decline	voluntary	voluntary; court may take into account parties' attitude to a reasonable offer of mediation	voluntary; court may suggest mediation
Scope	cross-border disputes	domestic & cross-border disputes	domestic & cross-border disputes	domestic & cross-border disputes	cross-border disputes	domestic & cross-border disputes
Quality	MS are to encourage training and effective control mechanisms (self-regulatory processes)	in NJM: conditions apply but no <i>a priori</i> control; the mediator can be sued by parties if not meeting conditions	self-regulation; NGOs & universities may create mediation centres & (non-compulsory) lists of mediators	self-regulation	self-regulation through accreditation system developed by the CMC	no standardised control mechanisms; no training requirements; title 'mediator' not protected
Confidentiality	subject to exceptions, no evidence can be given arising out of the mediation procedure	in NJM: principle of confidentiality of declarations arisen out of mediation; in national non-judicial mediation (NNJM): self-regulation	required; mediator may be authorised by parties to reveal facts learnt during mediation; invoking any statements from mediation process before the court: legally ineffective	parties allowed to <i>not</i> give evidence if confidentiality of mediation was explicitly agreed; exceptions apply	respected as to obtaining mediation evidence (ME) by witnesses and depositions, and disclosing or inspecting ME under control of a mediator	universal obligation of secrecy levelled by reservation of statutory powers; overriding obligation to press criminal charges
Prescription & limitation period (PLP)	judicial proceedings or arbitration possible after mediation	in NJM: PLP suspended as soon as parties agree to settle dispute by mediation	judicial proceedings possible after mediation <i>not</i> resulting in an agreement	PLP interrupted as soon as parties decide to settle dispute by mediation	PLP suspension not provided for; in domestic mediation, possible if parties agree or if request is lodged with court	suspension of prescription periods during mediation
Costs	nothing provided for	in NJM: fee determined by court at the end; in NNJM: determined by parties	remuneration depends on the subject-matter of the case	fee determined by the mediator & agreed upon before the mediation begins	depending on the value of the claim, from 50 to 95 Pound per hour	med. by a judge without decision-making power: cost-neutral; otherwise: negotiated

	Injunctions Directive	FR	PL	NL	UK	DE
Competent body / civil or admin. jurisdiction	court or administrative authority	civil jurisdiction	President of the Office of Competition and Cons. Protection	civil courts ('s <i>Gravenhage</i>)	High Court or County Court	<i>Landgericht</i> (higher regional court)
Infringements envisaged	infringements of Directives on consumer protection listed in Annex I; MS may grant more extensive rights to bring action at national level	infringements of Directives listed in Annex I	infringements of Directives listed in Annex I; any practice harming the collective interests of consumers	infringements of Directives listed in Annex I; any practice harming the collective interests of consumers	infringements of Directives listed in Annex I; infringements of domestic consumer legislation	infringements of Dir. in Annex I and of provisions on unfair competition; non-German entities: also actions for infringements of Dir. listed in the Regulation on Cons. Protection Coop.
Sanctions	cessation or prohibition of the infringement; possible: publication of the decision and/or corrective statement and/or an order of payment to ensure compliance with the decision	cessation or prohibition; exclusion of any illegal or abusive clause; payment of penalty	cessation of the infringement; the issuance by the business of a declaration of the content of the decision; publication of the decision; possibility of commitments; fine (share of revenue)	cessation or prohibition; a declaration that a clause imposes an unreasonable burden; publication of the decision; prohibition of use of certain general conditions; revocation of a recommendation to use those general conditions	cessation or prohibition of the infringement	cessation or prohibition; publication of the decision and/or a corrective statement; in case of noncompliance: fine not exceeding 250,000 Euro or a max. of two years imprisonment; in case of fraud: skimming of profits
Prior consultation	possibility to provide prior consultation with the defendant and/or the qualified entity	no prior consultation provided for	no prior consultation provided for; conciliation is possible under certain circumstances	prior consultation with the defendant is obligatory	obligation to consult with the OFT and (except in very urgent circumstances) with the defendant	infringements of consumer law: no prior consultation; unfair competition: a cease-and-desist letter to be sent prior to commencement of proceedings