

# ALTERNATIVE DISPUTE RESOLUTION

European Commission's Consultation

BEUC response

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## Summary

The European Consumers' Organisation (BEUC) welcomes the consultation paper by the European Commission on the use of Alternative Dispute Resolution.

ADR is one of the useful tools for consumer redress as long as ADR bodies comply with certain **principles and requirements**. To this end, we call on the Commission to include the principles for consumer ADR in a **binding instrument** and to introduce the **requirement of regular assessment** of ADR compliance with those principles.

In addition, **extensive information** about ADR should be available for consumers via ADR websites and other means so consumers could make an informed choice whether to turn to such schemes. Companies should also be required **to inform consumers about the alternative dispute settlement schemes that they are part of**, this information being provided to consumers both before the conclusion of the contract and in case of a complaint.

The **quality and transparency** of ADR schemes will serve as strong incentives for consumers to use Alternative Dispute Resolution.

ADR **must always remain a choice** for the consumer and can never be an obligation. If consumers are forced into ADR, no benefits will be reaped of this alternative.

The ADR result should **not be binding on a consumer** in the sense that it prevents the consumer from bringing the case before a court, once a decision is taken by an ADR body. However, to counterbalance the weaker position of the consumer, it could be binding on business.

What regards the collective ADR, we call on the Commission to adopt a consistent approach and to **advance the work on judicial collective redress**, as collective ADR without the 'back-up' of judicial action does not offer enough incentive for businesses to reach a fair settlement, besides its intrinsic limitations.

Regarding **ADR funding**, various options should remain valid, thereby allowing for differences among Member States, as long as the independence of the ADR body is not put at risk. Even if the scheme is privately funded, it is crucial to ensure that it **is independently run**, and various examples of how to achieve this can be found in Member States.

The European Consumers' Organisation (BEUC) welcomes the European Commission's consultation on the use of Alternative Dispute Resolution and the possibility to submit our views.

As ultimately consumers drive markets, consumer-focussed regulation should be viewed as setting the framework for well-functioning markets in which good businesses can thrive and bad businesses are suitably addressed. For this reason, even the most open markets should operate against a backdrop of common protections such as competition law, contract law or protection from unfair commercial practices. These protections should be supported by efficient and effective enforcement of these rights, including means for consumers to obtain redress.

### **Continuing the work on collective redress**

Only when effective and inexpensive systems of redress are provided can consumers actually make use of the rights granted to them. In this respect, BEUC deeply regrets that collective redress at European level is not yet available for consumers, thus leaving them empty-handed in a lot of group claim situations and allowing businesses to retain illegal profits. This reduces consumer confidence in the Internal Market and the value of the set of consumer rights. The situation cannot be remedied by improving the ADR system. Much work on collective redress has been done already and we call on the Commission to continue with legislative proposals for the benefit of European citizens.

### **Improving the ADR mechanisms in the EU**

With regard to individual complaints, as most consumers are discouraged from going to court over small or even medium value purchases<sup>1</sup>, they would often be left without a solution to their problem and/or without compensation if an amicable settlement with a trader proves impossible. Alternative Dispute Resolution mechanisms, leading to a settlement of a dispute through the intervention of a third party, can offer cheap and effective solutions to individual consumer disputes. As such, ADR is an important tool for consumer redress and its use should be promoted. BEUC members have many positive experiences to share and we would be prepared to discuss these with the Commission where helpful.

When considering EU action, a balanced approach has to be sought which pays tribute to both the creativity and flexibility of ADR systems on one hand and the need to ensure consumer protection and fair procedures on the other. Consumer interests should be protected in a way that does not deprive the ADR procedure of its major advantages in comparison to court proceedings: speed, low cost and flexibility (e.g. taking into account legal rules, equity, codes of conduct etc...), as well as search of creative solutions which would not be possible in a court action. The maintenance and promotion of these advantages must be borne in mind when considering any initiatives. As the notion of Alternative Dispute Resolution is very wide and encompasses various resolution means, including mediation, we call on the Commission to take into account the work already done in this field<sup>2</sup>.

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<sup>1</sup> 48% of EU consumers will not go to court for harm below €200, 8% will never go to court no matter what the amount of their claim; figures from Eurobarometer No. 342 (unpublished), see para. 10 of the Commission Consultation.

<sup>2</sup> Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters, OJ L 136, 24.05.2008.

BEUC welcomes the Commission's efforts to find ways to improve the ADR mechanisms in the EU. We agree that the lack of consumer and business awareness of ADR or the gaps in the ADR coverage should be properly addressed. However, we think the list of difficulties related to the current functioning of ADRs identified in the consultation is incomplete: an EU action should also tackle the questions of regular surveillance of ADR schemes, interrupting prescription periods and clarifying ADR terminology.

## **I. Variety versus clarity**

It is clear from the extensive studies made on ADR<sup>3</sup> that a vast variety of Alternative Dispute Resolution schemes function in the EU. Whilst true that the notion of ADR is very wide and describes a variety of methods which parties can use to resolve disputes outside of court (including negotiation, conciliation, mediation, many types of arbitration and hybrid schemes), it is important that they all adhere to high standards and deliver to consumers. The common essential characteristics of all ADRs should be that they are faster, less formal, less expensive and often less adversarial than a court trial.

The variety of mechanisms available is reflected in the numerous denominations that exist in different EU Member States: there exist Complaints Boards and Commissions, Ombudsmen, Dispute Resolution Committees, Arbitration Centres, Mediation Services, Conciliation Bodies and Juries to name but a few.

The name of an ADR scheme and the method it uses for facilitating the settlement of disputes is of course not a determining factor in the scheme's effectiveness and largely depends on the culture and traditions in a given Member State. However, we fear that the lack of common terminology and definition also means less clarity for consumers when they are faced with various ADR schemes. This can be one of the reasons for low consumer awareness and trust in ADR, particularly if they are confused with internal complaints handling by businesses.

Therefore, with a view to the future legislative proposal on ADR, we suggest that the possibility to introduce more clarity is examined by the Commission. As a base line, the definition should not cover customer complaint handling mechanisms operated by businesses or direct negotiation between parties in order to achieve amicable settlement.

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<sup>3</sup> Study on the Use of Alternative Dispute Resolution in the European Union of 16 October 2009; An Analysis and Evaluation of Alternative Means of Consumer Redress Other than Redress through Ordinary Judicial Proceedings, Katholieke Universiteit Leuven, 2007.

## II. Commission Recommendations

In order to allow for a fair resolution of consumer disputes, an ADR body should comply with the principles of Commission Recommendation 98/257/EC or 2001/310/EC<sup>4</sup>.

BEUC is of the opinion that it is high time the principles set out in these two recommendations should be put into a binding instrument. Also, additional guidance might be necessary for Online Dispute Resolution (ODR), to take account of the specificities of a digital dispute resolution environment. However, our biggest concern relates to the lack of monitoring of ADR schemes, which we explain in detail below.

Some of our member organisations have been very concerned about the fact that in their respective countries the ADR body or bodies notified to the Commission were not meeting all of the principles of the Recommendations and therefore should not be on the list of notified bodies.

As it is noted in the Study on ADR<sup>5</sup>, most notifying authorities monitor compliance of ADR schemes with the Recommendations often only at the time of notification. A regular follow-up monitoring appears to be the exception, as well as evaluation by external independent evaluators.

The surveillance of ADR schemes as to whether they correspond to the principles is paramount with regard to protecting consumer interests, and a major condition if consumers are to be encouraged to make more use of alternative dispute resolution than they do now, **these initiatives can only be directed at ADRs which comply with the principles**. This is all the more relevant with regard to ODR, where consumers might not have the possibility to participate in the oral hearing and see the person taking the decision or contact someone for assistance or explanation etc. Therefore, we would like to see the requirement for compliance with the requirements of the Commission recommendations amongst ADR schemes **to be regularly assessed**. This could be done by: the notifying authority itself; a special panel comprised of consumers and business' representatives; or by an independent external evaluator. In addition, it is crucial to ensure that this monitoring is not a formality and one of the solutions would be to allow individual consumers and consumer associations make complaints to the panel or body evaluating ADRs about the shortcomings of procedures or other non-compliance.

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<sup>4</sup> Commission Recommendation No 98/257/EC on the principles applicable to the bodies responsible for the out-of-court settlement of consumer disputes, OJ L 115, 17.04.1998, p.31.  
Commission Recommendation No 2001/310/EC on the principles for out-of-court bodies involved in the consensual resolution of consumer ADR, OJ L 109, 19.04.2001, p.56.

<sup>5</sup> See Study on the Use of Alternative Dispute Resolution in the European Union of 16 October 2009, p.123.

### III. Consumer and business awareness of ADR

BEUC agrees with the European Commission that consumer awareness and knowledge about the existence of ADR schemes and what they can do, is essential to increasing the use of ADR mechanisms. To foster this awareness, many actors could play a role:

- *Consumer associations:* As an important and reliable reference point for consumers when facing inconveniences and problems in their purchases, consumer associations can assist consumers explaining in greater detail the features of the ADR and advising when it could be better to solve the dispute via the complaint handling of the trader, application to the ADR system or going to court<sup>6</sup>.
- *National authorities* can also play a relevant role, especially regulators, in informing consumers about the existence of an ADR procedure applicable to their specific sector (i.e. telecommunications, energy).
- *European Consumer Centres Network:* The ECC-net should continue to play an important role in directing consumers to the competent authorities or concerned bodies that could assist them in the solution of disputes in cross-border cases. In addition, they can be used to display information related to various ADR available in their country and other Member States, as well as explaining to consumers the main features of a central ODR scheme (if such a scheme is to be established) accompanied by the list of decision-making bodies in each Member State.

More fundamentally, **companies should be required to inform consumers** about the alternative dispute settlement schemes which they are part of, this information being provided to consumers at the time of need:

- **Firstly**, an obligation to inform consumers as to the alternative dispute settlement schemes the trader is part of should be included in the pre-contractual information that the trader has to provide to the consumer before the conclusion of the contract<sup>7</sup>. This information would allow the consumer to make a more informed choice when purchasing products or services, as they will be aware at the time of the conclusion of the contract that it is possible to count on an alternative dispute settlement in case things go wrong.
- **Secondly**, the information about the ADR should be available on trader's websites and included in the information provided to consumers.

<sup>6</sup> For example, our Spanish member OCU (Organización de Consumidores y Usuarios) explained the different alternatives to court litigation highlighting the advantages of each system. Available at: <http://www.ocu.org/compras-de-productos/la-ocu-recomienda-los-procedimientos-extrajudiciales-para-la-resolucion-de-conflictos-de-consumo-s43521.htm>

<sup>7</sup> The Council in its first reading of the Commission's proposal for a Directive on consumer rights (COM(2008) 614 final) has recently included in Article 5 the obligation to inform the consumers about "the possibility for out-of-court dispute resolution".

- **Thirdly**, it could be envisaged that if someone makes a complaint, the company explicitly explains the options available to them including their right to take the case to the ADR if the consumer is not satisfied with the internal handling of the complaint in the company.

However, there is a need for information to consumers on the possibilities of out-of-court dispute resolution to clearly distinguish between businesses who are part of an ADR scheme notified to the Commission (and complies with the principles of Commission Recommendations noted above) and other possibilities to resolve the complaint (for instance, turning to the customer relations department of a company or to an in-house mediator).

### Extensive information on ADR

The information on ADR schemes and their concrete features should also be available on schemes' websites and distributed in other places where complainants can gather or seek information. ADR schemes should inform consumers in a clear and prominent way of the main features of the procedure.

This should include:

- Name and contact details of the scheme;
- Scope - to which cases the scheme is applicable;
- Different steps of the procedure (how to introduce complaint, will there be a hearing, etc.);
- Possible costs<sup>8</sup>,
- Value limits of the product subject to complaint, where relevant;
- Timelines<sup>9</sup>;
- What can be used as evidence (documents that the consumer should attach to the complaint)<sup>10</sup>;
- Languages in which the complaint can be made and the decision can be issued;
- Specify the need of external assistance i.e. lawyer;
- Body which will issue the decision (as well as its composition);
- Nature of the decision and the possibility to enforce it in case of failure to execute by the trader<sup>11</sup>;
- Compliance rate by businesses (ideally this would also imply keeping the statistics in a harmonised way);
- Possibility of further access to justice if the consumer is dissatisfied with the decision, etc...

<sup>8</sup> For example, in the section question and answers of the Austrian internet ombudsman is specified that since the scheme is funded by public funds the procedure is free of charge (<http://www.ombudsmann.at/>).

<sup>9</sup> In the website of the Lisbon Arbitration Centre for Consumer Conflicts is indicated that the procedure might last between 30 and 40 days: (<http://www.centroarbitragemlisboa.pt/sections/apresentacao/virtualidades>)

<sup>10</sup> For example, the National Board for Consumer Complaints (Allmänna reklamationsnämnden, ARN) in Sweden explains what the consumer needs to prove (if he or she has the burden of proof) and through which means this must be done (<http://www.arn.se/>).

<sup>11</sup> The Portuguese scheme mentioned in footnote 4 points out that the decision has the same value as a ruling of a first instance court.

Such information will help consumers to make an informed choice when deciding to submit their complaint to an ADR scheme and would at the same time increase consumer confidence in out-of-court procedures.

### **Consumer awareness in cross-border situations**

In addition, a bigger effort should be made for consumer awareness in cross-border situations. The most efficient way to raise awareness among consumers while promoting the use of ADR procedures could result from the **combination of**:

- *Information on the existence and features of the ADR procedures available included in the information about the products/services on the website of a trader (especially trading online) and the contract terms:* The consumer when purchasing a product should be informed beforehand about the possibility to access to an alternative dispute settlement as well as the features of such a system.
- *Coordinated awareness campaigns:* In order to inform consumers about the advantages of an alternative dispute settlement applicable to cross-border disputes it is important to develop campaigns (through national authorities, the ECC-net and consumer associations) which inform about the existence of such systems and the conditions of access among all Member States.

### **Business awareness**

Trader awareness is an additional challenge in order to improve the current functioning of ADR, as both consumers and businesses should benefit from the wider use of cheaper, simpler and quicker solutions that the ADR may offer.

## **IV. Involvement of consumers and traders**

### **Incentives**

With regard to consumers turning to ADR in cases of individual claims we consider consumer **awareness and the trust** in a particular ADR body to be the main preconditions. As indicated in the Qualitative Study on Consumer Redress in the EU<sup>12</sup>, the major barrier to seeking redress cited by consumers across all Member States is a lack of sufficient knowledge of how to access or begin the redress process. In many cases, consumers cite the internet as the expected source of such information<sup>13</sup>.

Therefore consumers must be able to easily find information about the different ADRs available and once a suitable ADR has been identified, there has to be sufficient information about this ADR for the consumer to understand the procedure and to be able to trust in the fairness of the outcome. Detailed information on procedural steps and documents which must be filed should be available to the consumer. Statistics of past cases and the rate of compliance by businesses are

<sup>12</sup> TNS, Consumer redress in the European Union: Experience, perceptions and choices, p.8.

<sup>13</sup> Idem, p.9.

also important and have to be available for consumers so that they can make informed decisions about whether to proceed and also about which businesses they should avoid in the future.

While businesses might not consider it advantageous to have documentation of cases and might feel this can be detrimental to their reputation on the market, we think the principle of **transparency**, particularly in relation to the outcomes of ADR is of high importance in order to secure consumer trust and must not be restricted by confidentiality demands.

The quality and transparency of ADR schemes will therefore serve as strong incentives for consumers to use Alternative Dispute Resolution.

### **Mandatory ADR and the binding nature of the decisions**

The 1998 Recommendation allows for mandatory ADR, which obliges the consumer to have recourse to ADR before going to court, as long as the consumer is not bound by the result of the ADR procedure and could still go to court after the ADR settlement<sup>14</sup>. There is also a strong demand from industry to impose ADR through contractual clauses on consumers.

Imposing a mandatory ADR procedure on the consumer by making ADR a prerequisite for court-proceedings is **contrary to granting access to justice**. It hinders the quick and effective solution of the dispute where the consumer has chosen not to make use of the alleviation offered to him, but instead prefers for reasons of his own<sup>15</sup>, potentially lengthy and expensive, but possibly more effective court procedure. In such cases, the ADR procedure, the success of which strongly depends on the consumer's cooperation and consent, is destined to fail in the first place.

In addition, ADR schemes might have a financial limit<sup>16</sup> and so if the issue is more substantial, then there will need to be an alternative from the start.

Such a procedure would moreover be harmful to the settlement of disputes in the long run. First of all, it could lengthen disputes in which the consumer has made up his mind in favour of a court procedure, as he would have to undergo the ADR process first, for purely formal reasons, before being able to resort to the means he wanted to make use of in any event, i.e. the court procedure. This not only postpones the settlement of the dispute, but also entails a waste of time and personnel, thus resulting in a futile exhaustion of capacities – to the benefit of neither party. In such cases, mandatory ADR not only renders the respective ADR procedure meaningless, but it may even prevent settlement. Viewed from the consumer's perspective, such a restriction of rights does not enhance confidence in ADR, but rather makes it less attractive. In addition, with rogue traders mandatory ADR also increases the risk that such a trader may use the ADR period to disappear or to get rid of his assets so that the eventual decision will not be possible to be executed.

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<sup>14</sup> Recommendation No 98/257/EC, VI, para 2.

<sup>15</sup> E.g. distrust in the trader or in the ADR scheme.

<sup>16</sup> For example, Polish Banking Ombudsman will take cases up to 8000 Zlotys or €1800, the Danish Consumer Complaints Board – 100000 Danish crowns or around €13,500.

Also, if a particular ADR scheme that a consumer is bound to turn to is not seen as effective, this mandatory step would discourage consumers from seeking redress at all and would not reach the aim foreseen. In contrast, we believe that if consumers are aware of the ADR mechanisms available to them and view them as efficient, they would try to resolve their dispute via the means of ADR without being bound by a contract.

Regarding the question on the **binding nature of the decisions**, the Commission's first Recommendation 98/257/EC concerning ADR bodies intervening actively by proposing or imposing a solution, allows the parties to agree on the binding effect of the ADR-outcome. The second Recommendation, the scope of which is restricted to Mediation (resolution of disputes by "bringing the parties together to convince them to find a solution"), does not mention the principle of liberty and possible restrictions to it. However, in the case of mediation schemes, the effect of binding solutions would be even graver for the consumer: as they are already in a weaker position to industry, the mediation scheme leaves him without the assistance of an intervening and thus strong third party.

BEUC is in principle **against ADR which is binding on the consumer** in the sense that it does not allow the consumer to bring the case before a court, once a decision was taken by an ADR body. We think that the restriction of the recommendations in this respect, namely that only prior commitments regarding binding ADR are considered invalid, is not enough.

Therefore, we believe that an ADR outcome, i.e. the decision taken by ADR body, the agreement set up in the course of ADR procedure, a referee's decision, settlement by the parties or other scenarios, should in principle always be non-binding in that it does not hinder recourse to court. In order to compensate the structural imbalance of forces between consumers and industry, we would however favour a solution where the outcome of the ADR procedure is unilaterally binding on the consumer's contracting partner, as this would provide a means of counterbalance for the weaker position the consumer generally finds themselves in.

Enforceability of ADR results against companies could be achieved either by making the trade association of which the company is a member liable (which would be a good solution for example in cases of a code of practice or a label, granted by a trade association to their members) or it could be done by rendering such a decision enforceable via the conventional means of courts.

However, in conventional court proceedings, the rather far-reaching consequence of enforceability finds its counterpart in the procedural guarantees legitimising the court's decision. We are aware that this solution however might be difficult to achieve for ADR, as the informal nature of ADR which we hold to be one of its main advantages, and the need on the other hand to provide legal certainty and procedural guarantees, might prove to be difficult to combine.

## Prescription periods

As an additional improvement to the principles (which would also act as an incentive for consumers to recourse to an ADR), it is necessary to provide rules preventing the loss of consumers' rights as a consequence of entering an ADR procedure prior to court proceedings. If such protection is not introduced, in some cases consumers might have to resort to court proceedings in order to be sure not to be precluded from upholding their rights due to an expiration of the prescription period.

We also point out the need to consider the impact which prescription periods may have if coupled with mandatory ADR. The two, taken together, could result in depriving consumers of the right to seize the court where, due to the taking up of an ADR procedure, prescription periods have expired. If, in such cases, the consumer is dissatisfied with the outcome of an ADR procedure, they will find the option of going to court cut off.

Therefore, there is a strong need for harmonising measures on the European level to the extent that:

- a) prescription periods do not run for the period where the ADR scheme is used and,
- b) prescription periods start anew at the end of the ADR procedure.

## V. ADR coverage

In order to improve ADR coverage, we submit that general ADR schemes applicable to any sector could help to reduce the gaps/shortcomings outlined in the consultation. This could be a central scheme responsible for all the complaints not covered by sector-specific ADRs<sup>17</sup> or schemes with broad coverage operating at regional or local level.

With a view to improving ADR coverage for e-commerce and especially cross border e-commerce transactions, the possibility of using **Online Alternative Dispute Resolution (ODR)** could be explored. Access to traditional ADR in such cases can be burdensome with regard to language barriers<sup>18</sup>, unfamiliar procedural obligations or consumers can simply find it difficult to access the information on the ADR available in their particular case.

ODR may have the potential to avoid those difficulties. However, more reflection has to be done in order to identify main advantages and challenges of using the ODR from consumer point of view. As the preliminary contributions, the following conditions for success of ODR could be considered:

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<sup>17</sup> For example, in Lithuania the Complaints Commission within the National Consumer Rights Protection Authority would examine all those complaints not within the remit of other ADR bodies.

<sup>18</sup> When considering the possibility of seeking redress in a cross-border context, the key perceived barrier, identified by the majority of consumers, was the "language barrier"- TNS, Consumer redress in the European Union: Experience, perceptions and choices, p.13.

- The information about the features of the ODR scheme must be very clearly explained.
- There is a high participation rate among businesses engaging into e-commerce.
- With the view of making it simple and accessible to consumers, such a scheme could have a standard entry website in all EU languages, with all the necessary information and an online complaint form, which, once filled in and sent by a consumer, would be directed to the secretariat and a decision body of consumer's place of residence. This would in most cases allow the ODR scheme to communicate with a consumer in his/her language if there is a need to clarify the circumstances of the complaint and potentially could also raise the consumer's trust in the ODR procedure.
- Once a decision is issued, it is important to make sure that this is communicated to the business and the compliance monitored by the ODR scheme, so that the consumers do not have to try to contact businesses located in other member states themselves in order to find out if the decision will be complied with. Such a situation would greatly reduce the attractiveness of the scheme from consumer's perspective.

With regards to the type of this ODR scheme, in principle the preferred option for the consumer should be the **arbitration type ODR**. In the arbitration type ODR/ADR, the ADR body intervenes actively by proposing or imposing a solution and such active involvement of a third party helps to counterbalance the economic imbalance between the parties.

However, even if ODR mechanisms possess a number of features that could allow the parties to solve their dispute faster, cheaper and in a more convenient way than their offline counterparts, without direct, interpersonal contact it can be more difficult for consumers to convey their arguments and find a solution to a dispute. 'In writing only' procedures may also raise pressure on consumers to use lawyers, taking into account the fact that their abilities to translate factual circumstances to legal concepts will be limited. Therefore, we submit that any ODR scheme should also provide consumers with a telephone number they could call for clarification or assistance.

## VI. Collective claims

With regards collective claims, we urge the Commission to take account of their specific nature - possibly very large numbers of consumers, complicated evaluation of the case, aggregate assessment of damages etc. BEUC is strongly convinced that not every ADR body can be expected to have the capacity to provide proceedings for group claims, as is illustrated by the fact that currently there are very few schemes that do that<sup>19</sup>. We also want to underline that for collective ADR to be efficient and allow a fair settlement for consumers, there must be a 'back-up' option of a judicial collective redress mechanism. The ADR alone is insufficient and does not provide enough incentive for businesses to participate.<sup>20</sup> Also, even where

<sup>19</sup> Spanish Arbitration System, Swedish and Finnish Consumer Complaint Boards.

<sup>20</sup> For example, in Italy a new bill on collective redress was supposed to enter into force in late 2008. While a telecom company was first willing to settle with its clients following an illegal

it exists, it can have serious limitations – the procedure is available only in respect of companies who are located in the same country<sup>21</sup>, there is no way to order interim/provisional measures (e.g. block the company's assets)<sup>22</sup>. Therefore, for multiple claim situations ADRs could be part of the "consumer toolkit", but never the only mechanism available.

## VII. Independence and funding

As regards the **principle of independence** of the ADR body, we are concerned that the only restriction imposed by the Commission's 1st Recommendation is a three year break between a possible affiliation of a member of the ADR body and the remuneration or taking up of the present function. In other words, as long as they comply with the imposed intermediate period of three years, enterprises or associations as parties to the ADR procedure may appoint the organ directly. This does indeed seem problematic with a view to the impartiality of the organ. Impartiality should also be furthered by increasing the representation of consumer organisations in ADR bodies, either at the operational or at board level, in the latter case by ensuring participation in the general policy setting or the appointment of decision takers.

With regard to the **question of funding** of ADR, various options should remain valid allowing differences in Member States. It is important though that costs for consumers remain low and preferably ADR should be free.

As far as remuneration is concerned, funding of the body by one of the parties does not necessarily in our view imply dependence of the organ on one of the parties. Experiences with partial or even total funding of ADR bodies, such as complaints panels by industry sectors, have been positive in some Member States. In Belgium and the Netherlands for instance, there has been a practice of co-funding complaints boards and in Belgium specifically, travel complaints boards are being co-funded by public authorities, consumers' organisations and industry sectors by 1/3 each. Partial or even total remuneration by industry sectors has not transpired to have a decisive impact on the level of impartiality of the organ. Even in Denmark, where private complaints boards are wholly funded by the business in question, no problem results from this fact, as the Danish Consumer Council and the business in question share decision-making and co-operate in setting up complaints boards and selecting judges as well as in all organisational questions involved, such as the hiring of the Secretariat. As such, it is important that even if the scheme is privately funded, **it is independently run**.

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behaviour, it withdrew from the negotiations when it learnt that the entry into force of the bill was postponed from January until July 2009.

<sup>21</sup> A collective arbitration procedure is organised in Spain since 2008 (Real Decreto 231/2008). The main problem relates to the fact that the competent authority is based in Madrid. For small or medium consumers associations not established in Madrid or near Madrid access to this ADR body means a high cost (i.e. transport, employing temporarily solicitors/procurators there etc). Furthermore, arbitration is only possible when the dispute affects Spanish professionals. It cannot be used when the professional or company is registered in another EU country.

<sup>22</sup> Our Portuguese member DECO was faced with a situation in which the defendant used the time of negotiations to "disappear". Even though DECO won the procedure, there were no assets left for the consumers when DECO seized the court.

Some ADR schemes have developed the criteria to follow in order to ensure the independence of the decision maker, including requiring the persons who appoint the organ to be independent of those subject to investigation by the said ADR and requiring the jurisdiction, the powers and the method of his appointment to be publicly available<sup>23</sup>.

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<sup>23</sup> For more information see The criteria for recognition by British and Irish Ombudsman Association, <http://www.bioa.org.uk/criteria.php>