

Response to the consultation on the use of Alternative Dispute Resolution as a means to resolve disputes related to commercial transactions and practises in the European Union

The European Consumer Centre in Ireland (ECC Ireland) offers information and advice on both domestic and European consumer legislation and assistance in the resolution of cross border consumer complaints.

ECC Ireland is part of ECC-Net, a network present in 29 European countries which is also engaged in the promotion of fair and efficient dispute-resolution mechanisms in Europe in order to increase consumer confidence in the internal market without compromising consumer's health, safety and economic interests. Efficient and effective means of dispute resolution are key to this goal and it is for this reason that we are happy to participate in this consultation.

1. What are the most efficient ways to raise the awareness of national consumers and consumers from other Member States about ADR schemes?

According to DG SANCO's *Study on the use of Alternative Dispute Resolution in the European Union*¹, published last year, there are 750 ADR schemes in the field of business-to-consumer disputes, of which approximately 60% are notified to the European Commission. On the consumer side, the most significant barrier is the lack of awareness about these schemes, which is an essential pre-requisite for access to redress.² Whilst it is not realistic to expect the general public to be fully aware of all ADR schemes, it goes without saying that an ADR scheme that is not known or accessible to the consumer can hardly offer an alternative.

The Irish Law Reform Commission (hereinafter the LRC) in its report *Alternative Dispute Resolution: Mediation and Conciliation* recommends that the more commonly used ADR terminology such as mediation and arbitration should be clearly and consistently set out in legislative format.³ As Ashtor and Chinkin⁴ noted definitions are important in that they have particular utility in an actively evolving area and provide clarity and consistency. Whilst this may appear obvious, the lack of a clear and consistent set of unambiguous terminology has led to some confusion.

To this end, in its Consultation Paper, the LRC defined ADR as:

“a broad spectrum of structured processes, including mediation and conciliation, which does not include litigation though it may be linked to or integrated with litigation, and which involves the assistance of a neutral third party, and which empowers parties to resolve their own disputes.”⁵

¹ Study on the Use of Alternative Dispute Resolution in the European Union of 16 October 2009. Available at: http://ec.europa.eu/consumers/redress_cons/adr_study.pdf

² Ibid

³ Law Reform Commission Report, LRC 98-2010, *Alternative Dispute Resolution: Mediation and Conciliation* (Dublin: Law Reform Commission 2010). Available at: <http://www.lawreform.ie/fileupload/Reports/r98ADR.pdf>

⁴ H. Astor and C. Chinkin, *Dispute Resolution in Australia* (2nd ed), (Sydney: Butterworths, 2002) at 77

⁵ Law Reform Commission Consultation Paper, LRC 50-2008, *Alternative Dispute Resolution*, (Dublin Law Reform Commission) at 2.12

On a national level, it is worrying that neither the Bar Council of Ireland nor the Law Society contains an ADR module within their programmes. This is in contrast to countries like Austria which have introduced quality standards in its Mediation Act 2004 and Belgium which has introduced a mandatory ADR course to the Brussels Bar. If Ireland wishes to raise awareness of ADR schemes to national consumers it is vital that the legal profession be familiarised and in a position to advise consumers as to the possibility of ADR and the options available there under as many disputants may not be aware of the full spectrum of dispute resolution processes which are available to them. Otherwise, access to justice is prevented and it is well recognised that:

“An effective justice system must be accessible in all its parts. Without this, the system risks losing its relevance to, and the respect of, the community it serves. Accessibility is about more than ease of access to sandstone buildings or getting legal advice. It involves an appreciation and understanding of the needs of those who require the assistance of the legal system.”⁶

In recognising the important role that the legal profession plays in the public’s awareness of ADR processes, the LRC report contained a draft Mediation and Conciliation Bill in the appendices.⁷ Of particular note is the fact that the Bill actively promotes the use of ADR processes as an alternative to litigation by providing that a solicitor has a duty to advise a client, prior to initiating any civil or commercial proceedings, to consider mediation or conciliation,⁸ and further requiring a person, when commencing civil or commercial proceedings, to sign a certificate confirming that mediation or conciliation (or both), have been considered as processes for settling the dispute.⁹

On a European level, Recital 25 of Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters also requires Member States to encourage legal practitioners to inform their clients of the possibility of mediation. The same Recital refers to the provision of information to the general public on how to contact mediators and organisations providing mediation services.

In this regard, and coming back to the question raised, ECC Ireland strongly believes that the most efficient way to promote consumer awareness about ADR schemes in each Member State is by the introduction (or consolidation of existing forms) of national ADR boards or pyramidal / umbrella bodies which can deal directly with disputes or refer these to sector-specific ADR schemes under their supervision.

At present, a typical feature of ADR, where available, is its limited scope of activities, which can be quite narrow in some cases. Furthermore, there are sectors where ADR is rarely used or not used at all. Cross-sectoral schemes also present many limitations, such as reduced geographical scope, rendering cross-border disputes particularly problematic. Time limits within which a complaint can be lodged or minimum and maximum values for the claims may also restrict accessibility. The effectiveness of these schemes is also a critical aspect. All in all, limited reach, diversity and fragmentation make it difficult to increase consumer awareness and confidence in ADR schemes. ECC Ireland is therefore of the opinion that a single point of contact in each Member State would ease access to and use of ADR. In our view, the national ADR board –whatever its denomination– should not only refer disputes to relevant schemes but also supervise the performance of the schemes in question (e.g. quality standards, effectiveness) and promote the use of ADR in sectors with limited coverage.

⁶ Report by the Access to Justice Taskforce - *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (Department of the Attorney General of Australia, 2009). See: www.ag.gov.au.

⁷ LRC, *supra* note 3, pg. 197

⁸ See Draft Mediation and Conciliation Bill 2010, Part 3, s14

⁹ *Ibid*, at s15

In order to improve the current situation, the European Commission has encouraged the notification of ADR schemes that comply with Recommendations 98/257/EC and 2001/310/EC. For this purpose, a database is maintained with the names and contact details of ADR bodies notified by Member States. However, the existence of this database alone is not sufficient to raise awareness. ECC-Net's involvement in the promotion and use of ADR is also undermined given the current fragmentation, uneven coverage and lack of supervision.

ECC Ireland thus believes that coordination and supervision within an integrated board or umbrella body would enormously improve awareness, access and quality of existing ADR schemes, also at cross-border level. An initiative from the European Commission in this regard would be welcome and would also represent a good opportunity to review the current principles and criteria for notification of ADR bodies.

2. What should be the role of the European Consumer Centres Network, national authorities (including regulators) and NGO's in raising business and consumer awareness of ADR?

As highlighted in the ECC-Net Fifth Anniversary Report¹⁰, ECC-Net assisted more than 60,000 consumers in 2009, 20% more than in 2007 and 40% more than in 2005. This substantial increase, in line with the EU Consumer Policy Strategy 2007-2013¹¹, suggests that ECC-Net has consolidated its role as a unique direct channel of communication with consumers, contributing to boost consumer confidence in the European single market.

It is therefore clear that ECC-Net can play a key role in connecting Europe and national governments with their citizens and can also, together with national authorities (including regulators) and NGO's, raise business and consumer awareness of ADR.

It must be noted, however, that according to ECC-Net report on Cross-Border dispute resolution mechanisms in Europe –Practical reflections on the need and availability¹²–, ADR was a possibility in less than 5% of the complaints submitted to ECC's and existing ADR schemes only cover half of the top five areas of complaints in each country. This clearly shows that ADR promotion is not only a matter of awareness but also a matter requiring further development.

In this regard, whilst ECC-Net may continue to bridge the gaps that are frequently observed at cross-border level (e.g. language, fragmentation of systems), better coordination between the relevant stakeholders should be encouraged to develop synergies between them, so ECC-Net could then play a much more pro-active role and deliver added value and tangible results in the effective use of ADR.

3. Should business be required to inform consumers when they are part of an ADR scheme? If so what would be the most efficient ways?

Whilst participation in ADR is generally voluntarily, ECC Ireland considers that businesses should be required to inform consumers where they are part of an ADR scheme or signatory of a code of practice which refers to an ADR scheme. Such a requirement should not be viewed as a burden on a business, but rather a benefit as it ensures that potential consumers are aware that the trader has a detailed procedure in place to deal with complaints.

¹⁰ *The European Consumer Centres' Network – Fifth Anniversary Report*. Available at: http://ec.europa.eu/consumers/ecc/docs/5th_anniversary_report_2005-2009_en.pdf

¹¹ EU Consumer Policy Strategy 2007- 2013, *Empowering consumers, enhancing their welfare, effectively protecting them*, COM 13.3.2007

¹² Available at: <http://dokumenter.forbrug.dk/forbrugereuropa/crossborder-dispute-resolution/helepubl.htm>

As regards the most efficient manner by which to provide consumers with this information, it is likely that the most beneficial time is either at the pre-contractual or contractual phase. This allows consumers to take this factor into consideration and hopefully give them additional confidence before entering into the transaction. If a dispute then arises, it would then be useful to inform the consumer again of the scheme and the possibility of using it to resolve the dispute.

ECC Ireland also considers that if an integrated board or umbrella body is set up in each Member State, business should inform such board accordingly, directly or through their professional bodies / trade associations. This way, it would also be possible for the board in question to publish a list of businesses adhered to each scheme.

4. How should ADR schemes inform their users about their main features?

ADR schemes typically give information about their competence and proceedings on their websites, providing consumers with contact details, brochures indicating the characteristics of the scheme, case studies, etc. Referral systems through consumer organisations are also used.

A very effective way of communication for sectoral industry schemes is the possibility of targeting the relevant audience by placing promotional materials in places where potential complainants are most likely to seek information. In Ireland, this could be done quite effectively with the assistance of Citizens Information centres which have branches nationally and in the first half of 2010 received almost half a million queries from members of the public.

5. What means could be effective in persuading consumer and traders to use ADR for individual or multiple claims and to comply with ADR decisions?

Often disputants may be reluctant to enter into an ADR processes, such as mediation for example, for fear that this may be perceived as a sign of weakness. This perception is compounded by the fact that for 41% of ADR schemes, neither consumers nor authorities have access to information about the use of, past performance or number of cases being processed by such schemes.¹³ Indeed, only 9% of European retailers have used ADR schemes.¹⁴ It is clear, therefore, that knowledge and transparency is crucial in order for consumers and traders to familiarise themselves with ADR schemes.

Given the current economic climate, the most likely way to persuade both consumers and traders to use individual or multiple claims is by emphasising the many benefits of the scheme, in particular its cost effectiveness. This approach has proved particularly successful in the building sector, with an increasing number of building disputes being sent to arbitration. As consumer disputes are often over relatively small amounts of money, it is to be hoped that such an approach would encourage both traders and consumers alike to participate in various types of ADR schemes.

As well as cost effectiveness of ADR and the risks of litigation, there are other built-in added value features to be highlighted: ADR saves time and stress, provides the parties with greater control over the dispute process, more privacy and it can help to preserve an ongoing relationship, leading to more satisfaction. Overall, consumers may feel better equipped in the event of dispute and this may translate to greater business opportunities for participating traders, especially if consumers progressively deposit their trust in traders linked to ADR schemes.

¹³ The ADR Study and the ECC Report *Cross-border Dispute Resolution Mechanisms in Europe – Practical Reflections on the Need and Availability*. See: <http://dokumenter.forbrug.dk/forbrugereuropa/crossborder-dispute-resolution>

¹⁴ Flash Eurobarometer 300, *Retailers' attitudes across cross-border trade and consumer protection*

6. Should adherence by an industry to an ADR scheme be made mandatory? If so, under what conditions? In which sectors?

One of the main problems faced by ADR schemes is that given its voluntary nature, often industries do not wish to engage in the process. Indeed, currently 64% of ADR's are voluntary and only 6% of traders are members of any scheme¹⁵. This then raises the issue as to whether participation in an ADR scheme should be mandatory.

The orthodox rule has always been that participation in ADR should be voluntary. The reasoning behind such an approach was perhaps best summarised by Lord Woolf, architect of the Civil Procedure Rules in England, who stated in his report, entitled *Access to Justice*, that:

"I also remain of the view, though with less certainty than before, that it would not be right for the court to compel parties to use ADR and to take away or postpone their right to seek a remedy from the courts, although this approach is being successfully adopted in a number of other jurisdictions."¹⁶

In fact, access to justice, in its widest sense of the effective resolution of disputes, should not be restricted to court-based litigation. While the role of the courts remains pivotal, a modern civil justice system should offer a variety of approaches and options to dispute resolution. Indeed, court-based processes cannot be expected to provide an optimal solution to all conflicts in society.

Whilst recognising the voluntary nature of ADR (e.g. agreement after the dispute has arisen), there are also instances in which ADR may be ordered by court or prescribed by the law of a Member State, as set out in 3(a) of Directive 2008/52/EC on mediation.

Although there are certain regulated professions and licensing schemes which impose adherence to a code or ADR mechanism, in most sectors participation remains voluntary. ECC Ireland considers that there are still a number of sectors (e.g. travel and accommodation providers, car rental) where adherence to an ADR scheme should be made mandatory, e.g. by requiring an operating license granted by the competent authority in order to allow an undertakings to run the business activity concerned, provided that the undertaking is adhered to an approved ADR scheme. Legislation on distance selling and electronic commerce could also be used to promote the effective use of ADR.

ECC Ireland submits that if an ADR scheme was to be mandatory in a given sector, this should be subject to certain conditions. An important prerequisite being that the dispute has been brought to the trader's attention before the complaint is brought to an ADR scheme so that the industry has had some notice of the issue and time to try and rectify the problem. The composition of the ADR schemes is also a critical aspect in order to guarantee independence, impartiality and fairness.

7. Should an attempt to resolve a dispute via individual or collective ADR be a mandatory first step before going to court? If so, under what conditions? In which sectors?

The nature of ADR schemes is that they are voluntary and the traditional view has been that the introduction of mandatory adherence to a scheme would not be appropriate, since ADR is meant as an alternative to the judicial process.

¹⁵ Consultation Paper on the Use of Alternative Dispute Resolution as a means to Resolve Disputes related to Commercial Transactions and Practices in the European Union

¹⁶ Lord Woolf, *Access to Justice*, published July 1996. Available at: <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/civil/final/contents.htm>

More recently, the view has been that voluntariness cannot be examined in isolation and has been inextricably linked to the possibility of the imposition of cost sanctions if parties refuse to consider the possibility of ADR. In *R Cowl V Portsmouth City Council*¹⁷ Lord Woolf, following on from his Access to Justice report, suggested that the court should, “make appropriate use of their ample powers under the CPR to ensure that the parties try to resolve the dispute with the minimum involvement of the courts”. To this end, it was held that the court may of its own initiative, fix a hearing at which the parties could be made to give an explanation as to what they had to do to resolve a dispute without recourse to the courts. Subsequently, in the influential decision of *Dunnett v Railway Track*¹⁸ the Court of Appeal refused to award costs against the unsuccessful claimant because the defendant had refused to consider ADR processes despite a recommendation to do so.

In the aftermath of *Dunnett*, Genn¹⁹ reported a significant increase in the uptake of mediation. However, there was also a relatively steady decline in its success rate.²⁰ This can most likely be attributed to the fact that, the fear of cost consequences propelled parties into mediation when in fact there was no desire to negotiate toward settlement.

With the publication of the new bill, it appears that Ireland is adopting a similar approach to that in *Dunnett*, as the bill provides that, in awarding costs, the Court may have regard to any unreasonable refusal of any party to consider using mediation or conciliation where such a process had, in the Court’s opinion, a reasonable prospect of success.

ECC Ireland welcomes this development and appreciates that a litigation culture may be harmful to consumers and legitimate business alike. On the other hand, whilst there are instances in which the value of the claim justifies a more relaxed approach in the taking of evidence, compared with ordinary civil proceedings, in order to reduce costs and unnecessary delays in the courts system, fundamental rights should always be safeguarded (e.g. Article 47 of the Charter of fundamental rights of the European Union). For this reason, it is ECC Ireland’s view that certain ADR schemes should be placed on a statutory footing.

8. Should ADR decisions be binding on the trader? On both parties? If so under what conditions? In which sectors?

ADR procedures often lead to non-binding recommendations, such that parties may face the situation that they are successful in ADR proceedings, but the other side decides, for some reason, not to comply with the decision.

In particular, such a situation may be very frustrating for consumers who after suffering some damage for which a business is responsible have invested time and energy, at least for some months, in a procedure, which turns out to lead to no tangible result. In such a situation, consumers may feel like their voice is not being heard and may question the value of the whole ADR mechanism. It is for this reason that ECC Ireland suggests that ADR decisions in the context of consumer contracts should be binding on the trader, subject to the right to appeal.

In order to maximise compliance, provision could be made by way of legislation to authorise approved ADR schemes to name traders who fail to comply with their decisions.

¹⁷ [2002] 1 WLR

¹⁸ [2002] 2 All E.R. 850

¹⁹ H. Genn, (1998), *Twisting Arms: Court Referred and Court Linked Mediation Under Judicial Pressure*. Available at: <http://www.justice.gov.uk/publications/docs/Twisting-arms-mediation-report-Genn-et-al.pdf>

²⁰ Ibid

9. What are the most efficient ways of improving ADR coverage? Would it be feasible to run an ADR scheme which is open for consumer disputes as well as for disputes with SME's?

Currently, ADR coverage is fragmented both geographically and sectorally. This is due in some part by the fact that a large amount of those ADR schemes in establishment have been initiated privately by industry, as opposed to on a more all encompassing public approach. As regards increasing the coverage of such privately operated ADR schemes, the key is to illustrate amongst businesses the advantages of such a scheme.

In this regard trustmarks will play an important role in that they help consumers identify web-traders and enable them to make a connection to a redress mechanism. It also induces the trader to comply with a decision given by an ADR process.

It is proposed that in order to increase ADR coverage on a cohesive pan-European level that a method similar to that adopted in the US should be followed. In 1995, the U.S. Attorney General, Janet Reno, issued an order promoting the use of ADR within the Department of Justice with the purpose of fostering a more efficient method of resolving disputes involving the U.S. Government.²¹ The Order made provision for the appointment of a "Senior Counsel for Alternative Dispute Resolution" to be responsible for, among other things:

1. assisting in the development of policies for the use of ADR in the Federal Courts;
2. assisting with the design and execution of ADR-related training;
3. providing advice and assistance to Department of Justice officials on selecting appropriate cases for using ADR and on the application of particular ADR techniques;
4. representing the Department of Justice in government-wide ADR activities, including ... the federal courts; and
5. serving as the Dispute Resolution Specialist for the Department of Justice.²²

It is submitted that such an idea could be implemented quite effectively on a European level, and would ensure that both the public and the legal sector alike see the benefits of an ADR system, such that ADR is no longer viewed with suspicion but rather is viewed as an alternative, yet vital way in which to gain access to justice.

There should be no reason why such an ADR process could not work as effectively for disputes between SME's, as well as for consumers.

10. How could ADR coverage for e-commerce transactions be improved? Do you think a centralised ODR scheme for cross border e-commerce transactions would help consumers to resolve disputes and obtain compensation?

Given both the language, distance and jurisdictional issues which may come into play in e-commerce transactions, ADR has many advantages over traditional litigation. In particular it involves lower cost, more flexibility, and greater speed; it is less adversarial and more informal; and fewer jurisdictional problems can arise. The easiest way to increase coverage for e-commerce transactions is to further develop online dispute resolution methods.

²¹ See: Morgan, J. *Commercial Dispute Resolution in Ireland – A Comparative Analysis*, (2002) CLP 9 (9) 200

²² Ibid

Online dispute resolution or ODR uses technology to facilitate the resolution of disputes. The principal types of dispute resolution mechanisms currently offered online are automated negotiation, assisted negotiation, mediation and arbitration.²³

The need for a European online consumer dispute resolution service was highlighted in December 1999 with the completion of the CyberTribunal project in Canada, an experimental project on online mediation and arbitration, managed by the Centre de Recherche de Droit Publique (CDRP) in Montreal, Canada.²⁴ In its final month over 90 per cent of the cases were filed by European parties. As a response to this Electronic Consumer Dispute Resolution Project or ECODIR as it is also known was established.²⁵

ECC Ireland strongly believes that a centralised ODR scheme for cross-border e-commerce transactions has the potential to assist consumers in resolving their disputes and obtaining compensation. However, several barriers still exist to the continued development of ODR. Brian Hutchison, project leader of ECODIR suggests that:

“ODR will not have any future unless it fits snugly into business processes. There must be a compelling need for a business to utilise ODR or else they will not engage, and unless they engage there is little point in having ODR – B2B or B2C. The compelling reason may be regulatory [for e.g. required by government] or economic [for e.g. savings in cost] – it doesn't matter”.²⁶

The second is the lack of consumer confidence in such methods. Often ADR is viewed as “soft justice” and that it adds nothing than an extra layer of costs and time to the process.²⁷ What is key then is that the public in general has some proof of the effectiveness of ADR and for this reason, none withstanding the difficult and important issues of confidentiality, most ODR providers have found it necessary to publish, to some degree at least, the aggregate data collected from the disputes.

11. Do you think the existence of a “single entry point” or “umbrella organisation” could improve consumers’ access to ADR? Should their role be limited to providing information or should they also deal with disputes when no specific ADR scheme exists?

Given the fragmentation of ADR schemes and the lack of knowledge surrounding whether an appropriate ADR schemes are available, consumer’s access to ADR could be immensely improved through the existence of a “single entry point”, which could then advise consumers as to the appropriate avenue, if any, available.

Ideally, this “single entry point” would have a team of case handlers which could deal with disputes when no specific scheme exists, on a practical level this may be difficult particularly if the issues are very sector-specific and complex. A possible solution therefore may be to have the “single entry point” act as an “umbrella organisation” with sector-specific commissions under its supervision, to ensure access to and quality of existing ADR schemes.

As indicated in Question 1, ECC Ireland strongly believes that the most efficient way to promote consumer awareness about ADR schemes in each Member State is by introducing (or consolidating existing forms) of national ADR boards or umbrella bodies which can deal directly with disputes or refer these to sector-specific ADR schemes under their supervision.

²³ For a more detailed discussion of these concepts see: Chaplin, L., *Resolving Consumer Disputes Online: A Review of Consumer ODR*, (2003)10 (8) C.L.P. 207

²⁴ Ibid

²⁵ See: <http://www.ecodir.org>

²⁶ Cited in Chaplin, supra note 23

²⁷ LRC, supra note 3, pg 10

A successful ADR mechanism has to be able to show a track record of successful cases to demonstrate capacity, capability and credibility towards consumers as well as towards business. A good example of a privately funded ADR scheme is the Dutch Foundation for Consumer Complaints Boards (*De Geschillencommissie*), which acts as a gatekeeper for the 44 individual sector-specific complaints boards or commissions established by the trade associations of each sector of industry. At cross-border level, ECC-Net facilitates access to this scheme by assisting consumers to overcome certain difficulties such as language barriers: consumers are requested to contact the ECC in their own country, which will, in turn, contact the Dutch ECC, who acts as a liaison between consumer and the ADR body.

There are also good examples of public forms of ADR, such as Greek Consumer Ombudsman (*Synigoros Katanaloti*), an independent statutory body which supervises 57 committees for the out-of-court settlement of disputes. The consumer boards in the Nordic countries (*Forbrugerklagenævnet* in Denmark, *Kuluttajariitalautakunta* in Finland, *Forbrukertvistutvalge* in Norway, *Allmänna Reklamationsnämnden-ARN* in Sweden, *Tarbijakaitseamet* in Estonia) can also be cited as examples of best practice.

ECC Ireland considers that these boards, set out by statute, are ideally placed to coordinate and supervise approved forms of ADR and to supplement private sector ADR schemes in areas where ADR has not been developed. In parallel, initiatives to develop ADR in those areas can be addressed more efficiently, as the industry may be incentivised to bring a more reliable appraisal of each case and an adequate range of technical expertise.

12. Which particular features should ADR schemes include to deal with collective claims?

There are instances where the same event or practice may similarly affect a considerable number of consumers. Trying to give an individual response to each affected consumer would render ADR schemes (or the courts) ineffective, as these would be drowned under a flood of claims. In such instances, the obvious solution is the introduction of a collective claims mechanism, yet one of the main challenges is assessing the merits and circumstances of each claim, as consumers' detriment may not always be comparable. Ensuring proportionality and preventing abusive claims is therefore paramount.

In any case, the possibility of dealing with disputes collectively is, at present, rather limited, especially at cross-border level. The issue is still under consideration and the European Commission has recently launched a public consultation on the topic which will run until 30th April.²⁸

ECC Ireland considers that the existence of effective collective redress mechanisms through the courts would present an incentive for business to engage more effectively in ADR, which can also be used in the context of collective claims.

For the same reasons raised in Question 7, it is ECC Ireland's view that ADR schemes dealing with collective claims may be more effective if placed on a statutory footing.

13. What are the most efficient ways to improve the resolution of cross-border disputes via ADR? Are there any particular forms of ADR that are more suitable for cross border disputes?

Of all the types of ADR available, ECC Ireland strongly believes that ODR has all the traditional advantages of typical ADR, but is more suited for the international arena. This is

²⁸ *Towards a more coherent European approach to collective redress.* Available at: http://ec.europa.eu/dgs/health_consumer/dgs_consultations/ca/docs/cr_consultation_paper_en.pdf

because the very nature of cross-border disputes and the geographical distances involved render in person to person meetings too expensive, both time wise and financially. In this regard, ODR will often be cheaper, more convenient, and fast.

Importantly, developments in asynchronous communications mean that the two parties need not be online at the same time and that the parties have continuous access to the forum. Similarly, the range of languages available is crucial for an international service. Language difficulties can be overcome through the possibility of multiple language fora.

As indicated in Questions 1 and 11, national ADR boards or umbrella bodies which act as a "single entry point" would enormously improve awareness, access and quality of existing ADR schemes, also at cross-border level. This would also, in line with the answer to Question 2, facilitate ECC-Net's involvement in the effective use of ADR.

14. What is the most efficient way to fund an ADR scheme?

There is no doubt that if ADR is to overcome its current geographical and sectoral limitations that funding will be required. ADR schemes are funded in a multitude of different ways, but in general the majority of those schemes are created by a trade association and operate in one field only. Alternatively, public schemes may wholly or partially be funded by public funds – although in highly regulated markets ADR bodies which are established by public law may also be entirely financed by industry.

The reason to justify public funding and industry contributions is the benefit that society at large and individual business organisations receive.

ECC Ireland considers that an ideal ADR scheme, even if publically established (including necessary start-up funding), should be self-contained as regards its running, so participating businesses should proportionally contribute to its maintenance, perhaps taking into account their annual turnover and the number of customers. Applicable fees could also be collected from individual businesses by the ADR scheme having regard to the number of cases from that business dealt with by the ADR scheme. Another option is to also require a fee from traders that may indirectly benefit from the existence of the ADR scheme in question (e.g. couriers, payment intermediaries).

15. How best to maintain independence, when the ADR scheme is totally or partially funded by the industry?

The principles of independence and impartiality are fundamental to the success of ADR processes and all the key players in the decision making process should ensure that the principle of equality of arms be respected. When the scheme is totally or partially funded by the industry, one of the ways through which independence is maintained is through the appointment of an independent panel that would assess the case. These parties could be picked according to their qualification and competence in a specific field, but what is crucial is that the selection procedure takes place in a transparent manner. This is to ensure that irrespective of the outcome, the ADR scheme is not viewed as a punitive system designed to simply collect fees. As evidenced in Professor Geist's study on the Uniform Domain Name Dispute Resolution System (UDRP) a lack of transparency in this process can lead to serious concerns about the independence, impartiality and credibility of a scheme.²⁹

Alongside this, procedural rules ensuring impartiality would be crucial, so that both parties know that they have to comply with the same set of rules and standards.

²⁹ Geist, M. *Fair.com? An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP* (2002) J Int'l L 903.

16. What should be the cost of ADR for consumers?

The cost of access to justice for citizens is an important issue to consider. The Irish Competition Authority in its 2005 *Study of Competition in Legal Services* noted that:

“Access to justice requires not only that the legal advice given is sound but also that it is provided in a cost effective and client responsive manner. High quality legal services are important to society, but of limited value if available only to the very rich or those paid for by the State”.³⁰

By their very nature, most consumer complaints are likely to be for relatively small sums of money and therefore, consumers are unlikely to want to spend large amounts of money in an attempt to resolve them. Indeed, 48% of EU Consumers will not go to court for harm below €200, while 8% will never go to court.³¹

ECC Ireland submits that a free ADR scheme or one where the cost is moderate and not disproportionate to the value of the claim would be ideal to enhance consumer participation. With this in mind, ODR in particular, may open many possibilities in the future in the resolution of consumer disputes.

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³⁰ *Study of Competition in Legal Service: Preliminary Report* (The Competition Authority, February 2005). Available at www.tca.ie

³¹ Eurobarometer No 343, referred to in the Consultation Paper.