EJF Response to DG SANCO's 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 (the "Consultation Paper")

A. INTRODUCTION

European Justice Forum ("EJF)[1] welcomes the opportunity to respond to the Consultation paper. EJF has long advocated ADR as the basis of consumer redress and supports the broad approach taken by the Consultation Paper.

Voluntary dispute resolution ("ADR") has been positioned by the Commission as the preferred basis for redress. This is not only the assumption behind the present Consultation Paper, but it was anticipated by the tripartite Information Note on collective redress issued on 5th October 2010[2] by DGs COMP, SANCO, and Justice. Vice President Almunia also included a preference for ADR in the field of competition damages as one his five guiding principles for policy in DG Comp[3].

The European Justice Forum ("EJF") fully endorses this approach, and hopes that this response may assist in developing the Commission's policy. We do so on the basis that alternative dispute resolution procedures depend on the willing participation of both parties.

The evidence shows that, in combination with the role of the public authorities in seeking to remedy damage, voluntary dispute resolution is the principal means of obtaining redress where it is merited[4]. In fact, there are far more ADR schemes, and more disputes are resolved through them, than most people, or indeed governments, are aware of. People chose ADR systems because, in addition to being effective, they offer the speed, low risk and low cost that court-based procedures generally do not.

The wide spectrum of dispute resolution mechanisms extends from simple party to party negotiation, to problem solving techniques, to codes of practice and complaints handling systems – often established by or on behalf of companies or sectors of industry – to more

[1] European Justice Forum (EJF) is a not-for-profit organisation incorporated in Belgium. Its membership is a coalition of international companies and business organisations that wish to promote fair and balanced systems of civil justice in Europe. EJF seeks to ensure that those with a legitimate grievance have rapid and effective access to justice. By the same token, we are also concerned that claims lacking merit are rapidly dismissed and do not burden the courts or defendants with unnecessary costs. EJF's priority is to support independent legal research and to use the output of that research for as the basis for constructive proposals as to how consumer redress can be improved.

[2] Reference Joint information Note

[3] Reference Almunia's speech in November 2010 at the Belgian Presidency Competition Day

[4] See C Hodges, *The Reform of Class and Representative Actions in European Legal Systems. A New Approach to Collective Redress in Europe* (Hart Publishing, 2008).

formal mediation or arbitration systems. Frequently, these elements are combined, and mediation or arbitration may be available as options within an ADR scheme.

It is important to see voluntary dispute resolution in the context of the role of the public authorities. Those authorities include regulators responsible for particular industry sectors – for example regulators of transport or utility companies – and ombudsmen. The public authorities are in practice concerned to find means of remedying damage caused by breaches of the law as well as considering what if any sanctions should be applied. The prioritisation of remediation was first seen in environmental regulation, where restoration of the environment was clearly the first objective. In a number of countries, including the Netherlands, the UK and the Nordic countries, the public authorities increasingly focus on restoration of damage as the first priority, with consideration of appropriate sanctions coming next. This policy – which is referred to as "restorative justice" – is in our view to be encouraged. It ties in well with and encourages voluntary dispute resolution. So far as possible loss and damage are remedied and market balance is restored.

Regulators are not and must not be judge and jury in such matters and they must operate within the ambit of their authority and subject to oversight by the courts (see below). But in practice, a breach of regulation – for example, overcharging by utility companies - will often raise the question of whether the infringer should provide redress for any damage done. Moreover, if redress is provided and the infringer improves internal procedures to try to avoid the same breach happening again, the regulator will often (and rightly) moderate any sanctions in recognition of the infringer's behaviour. The regulator may also come to the conclusion that the public interest has been satisfied by putting right the damage done and that there is no need to pursue sanctions. Such an approach provides an incentive for voluntary redress.

Horizontal and sectoral ombudsmen are public (and sometimes private) authorities that have proved to be highly effective in helping parties to resolve disputes by agreement. They also filter out unmerited claims. Although no concrete statistics are kept by his office, the experience of the Danish consumer ombudsmen is that a high proportion of claims are dropped when, after consultation with his office, it is determined that the claims lack the necessary legal basis. Similarly, in the UK, the Financial Services Ombudsman deals with over 100,000 complaints each year and finds that around 40% are not justified. The consequent ability to focus resource on those complaints that are justified and to avoid the wasteful cost of unmerited actions is of considerable benefit to society[5].

[5] Report of the Financial Services Authority in London

If it has been finally established – after all appeal processes have been completed - that a breach of regulation has taken place, the question of market impact and third party loss may arise. It is desirable to try to determine these issues by voluntary agreement rather than by litigation. The infringer(s) may be willing to adopt this route if the alternative is a costly and lengthy judicial procedure, and third parties may equally favour a more rapid and less exhaustive process if it promises more rapid compensation than the court system. The attitude of the infringer(s) toward restitution should also be a factor taken into account in subsequently applying sanctions.

The above approach, using voluntary dispute resolution systems and a policy of restorative justice, is well adapted to resolving group or "collective" complaints. ADR schemes are rapid and are therefore able to deal with multiple claims on an individual basis without changing their underlying procedures. They may also apply a test case approach to the earlier cases that they handle in a series of similar complaints as a means of expediting agreed resolution of the remainder of those complaints. Ombudsmen and regulators frequently deal with claims involving large numbers of people. That they are well able to deal with such collective claims is demonstrated by the many such cases they have handled: for example, loss caused by utility companies to their customers, and the volume of complaints handled by the London Financial Services Ombudsman (over 100,000 per year).

Throughout our response to the Consultation Paper, we use the phrase *voluntary* dispute resolution, and we again stress that ADR must be understood as a voluntary process. There are obvious reasons for encouraging parties to seek voluntary solutions before either party invokes the Court, but the fact that they do so must always be a matter of choice for the parties involved. The Courts in many countries place incentives on the parties to settle matters by agreement before turning to the court, but they will not refuse access to the court and Article 6 of the European Convention on Human Rights prevents them from doing so.

It is also critical to recognise that there are cases that are not appropriate for voluntary dispute resolution and which one or more parties need their rights and obligations to be established by the court. It is their right to do so, and they should not be stigmatized or rebuked for refusing ADR in those circumstances.

This voluntary nature of dispute resolution processes is important also from a long term societal viewpoint. Moving society where relevant from a confrontational, litigious approach to one of voluntary dispute resolution is a matter of consensus and not diktat. The use of ADR will increase the more that its benefits are understood and the wider is the recognition of its effectiveness in providing redress where it is deserved – not because it is imposed from above. Incentives should also be provided for the use of ADR rather

than litigation, and the courts in many Member States already have a policy of encouraging dispute resolution and providing incentives to do so. At the same time, as indicated above, it must be recognized that there will be cases in which for good reason are not appropriate for ADR and where the parties' desire to establish their rights and obligations in court must be respected. By maintaining a voluntary approach, such rights will be respected.

There is no single recipe for ADR. The Consultation Paper recognizes the considerable variety and flexibility of the different systems available. Such variety is to be expected from the different cultures of Member States and the different stage of evolution of ADR systems. With all this variety, the current extent and of ADR and its success (in combination with a restorative justice approach of public authorities) in resolving disputes are remarkable.

Accordingly, in developing an EU policy on ADR, there should be no desire to adopt a monolithic EU approach. Rather than seeking to enforce the same systems on all Member states, the EU should identify the underlying principles of ADR and expect Member States to develop their own systems that embody those principles and provides an overall framework for dispute resolution. An holistic approach should be adopted, in which Member States combine ADR mechanisms and the role of their national public authorities to provide comprehensive dispute resolution procedures. In doing so Member States should take account of the best practices already established in the Member States. The adoption of best practice should, in our view, also lead to the adoption of restorative justice as an underlying enforcement policy for public authorities.

In taking such an holistic approach, the underlying voluntary nature of ADR must be respected. The court should be used in this context not as a forum for litigation, but as a means of ensuring fair and balanced procedures and for ensuring that pubic authorities do not exceed their remit or place undue pressure on parties (see below).

As noted above, many traders or sectors of industry provide their own dispute resolution schemes. Industry Sector or Trade Association schemes may be run by sector councils (as in the Netherlands) or by Associations set up by traders is a particular business area (as often in the UK and Portugal). These schemes should be certified or endorsed by a reputable accreditation scheme. In the Netherlands, this is done by the central Dispute Resolution Committee (Geschillen Commissie). In the UK, it is done by the OFT. In Portugal, it requires government approval. Member States should be encouraged to establish or encourage the establishment of equivalent systems in their countries in order such sectoral dispute resolution mechanisms gain credibility and reputation.

The fact that ADR schemes may be organised and administered by or on behalf of industry should not in itself be an issue. What matters in any and all ADR schemes are independence, impartiality, confidentiality, quality and effectiveness in helping to resolve genuine complaints (as well as filtering out unmerited claims).

There can be considerable advantage in voluntary dispute resolution mechanisms being certified against objective criteria by independent, qualified bodies that are properly accredited to provide such certification. Such bodies may be governmental, as in Portugal or the OFT's approval system in the UK, or they may be private as in Holland's Dispute Resolution Committee (below).

General criteria against which certification is given may include: speed; cost-effectiveness; fair process and proportionality. They also include the principles of independence, transparency, ability to challenge, effectiveness, legality, liberty, and representation that are already incorporated in two existing Commission Recommendations[6].

There is obvious advantage in developing more concrete criteria and these are likely to vary from mechanism to mechanism depending on their scope and field of activity. However, one condition that should be applied to all ADR schemes is that in demonstrating their independence, they show that their decision making process is independent of any financial sponsorship. In order to keep costs to consumers low, ADR schemes are likely to require sponsorship and that is unobjectionable and often desirable. But the governing rules of the scheme must ensure that decision making is impartial.

The Dutch system of forty-nine Business Sector Dispute Resolution Boards provides an example of best practice. The Boards cover almost all industrial and commercial activities (and there is a separate Board covering financial services). There are strong incentives on traders to join the dispute resolution procedures offered by the Boards, and by doing so they protect their reputations. Each Board establishes a panel of experts on whom it can call to adjudicate particular complaints. The panel includes three categories of expert: those who have past judicial experience (often retired judges); representatives of industry or commerce; and consumer representatives. Each dispute submitted to the Board is considered by three people – one from each of those three categories. The parties to the dispute accept the relevant procedures and elect whether or not their case should be referred to binding arbitration if they are unable to resolve the matter by agreement.

[6] Regulations 98/257/EC on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes; and Regulation 2001/310/EC on the Principles for Out-of-Court Bodies involved in the Consensual Resolution of Consumer Disputes.

All of the Boards are under the governance of the Dispute Resolution Committee which ensures that they operate to appropriate rules and procedures and that they meet objective criteria of competence and independence. The Committee also provides on-going monitoring of the performance and independence of the Boards.

It is not, of course, easy to ensure that certification and accreditation schemes are established in different Member States to similar standards and that they thereby provide a level playing field, and the Dutch system is an example rather than a template that all must adopt. But the establishment of objective criteria and the means to provide assurance that ADR operates to appropriate standards should be an important policy objective in the field of voluntary dispute resolution and restorative justice.

Information and understanding of ADR processes are essential if they are to be used in appropriate situations. While participation must always be voluntary, consumers will not even know of the opportunity to chose ADR if they have little or no information about it. We recommend that each Member State should establish and maintain a list of all the dispute resolution systems available to consumers in their country, with a central information point. The Commission's established networks, ECC Network and FinNet, can then use these information points to obtain information for their own data bases and thus disseminate information throughout the EU.

The adoption of an information programmes at national an EU levels is obviously important. If such national and international campaigns are to achieve their objectives, it is essential that they are organised and executed by impartial bodies.

There should also be an obligation on professional advisers – particularly lawyers but potentially also other professions including accountants - to advise clients of the opportunities for dispute resolution before any litigation process is begun.

Information and advice about ADR should also be given in conjunction with information about any potential role that the public authorities may be able to play in dispute resolution, particularly the role of any relevant ombudsman service. For example, consumer or sectoral ombudsmen play an important role in helping parties to resolve disputes.

The role of the Court in facilitating and overseeing voluntary dispute resolution is also of considerable importance in the overall architecture of ADR. The Court is often perceived as being simply the forum for litigation, and litigation is seen by some as the only (or at least the principal) means of obtaining justice. But litigation is lengthy and expensive, and it imposes further demands on Court systems that, in almost all Member States, are overloaded.

The Court's is in a position to make a wider contribution to ADR. The parties to a dispute may agree to refer points of law to the court for a ruling. Clarification of such points will often help parties to resolve a dispute by agreement. The court should also play a role – at the request of both parties – to oversee the negotiation process to ensure that it is fair and impartial manner and no party places unfair pressure on another. As noted above, this may be of particular importance if public authorities are involved in the process.

A third way in which the Court can help dispute resolution is – again at the joint request of all parties - to endorse the agreement that has been voluntarily reached. In doing so, the court would make the agreement binding, so that neither party may walk away from it. The willingness one or other party to engage in ADR may be dependent on the process providing a final resolution of the matter. If there is a risk that after all the negotiation a party may reject to decision reached, there may be little attraction in engaging in ADR in the first place. Consequently, when they agree on the use of ADR, the parties must also understand and agree to the rules of the procedure ad whether the result is to be binding or not.

The Court is also in a position to endorse the outcome of their negotiations and thereby not only give legal force to the agreement reached, but to make it final and thus prevent any other person from raising the same complaint again. Such finality is for the benefit of all concerned and is also in the interests of society as a whole in preventing multiplication of dispute procedures or litigation about the same matter.

The court's role in ensuring due process and fair play; in preventing any party from placing undue pressure on another or – in the case of public authorities - abusing in endorsing agreements and giving finality by preventing the same issue being the subject of new disputes is crucial.

B. EJF RESPONSE TO THE CONSULTATION

SECTION 1: Consumer and Business Awareness

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

1.1 Increased awareness is partly a matter of increased information and partly a matter of the context in which that information is given. Member State governments, the EU, and key stakeholders should present the wide range of ADR opportunities in a positive light, as options which may be chosen by willing parties in order to resolve disputes simply, efficiently, in confidence, and without the delay and cost of other alternatives, particularly litigation. The overall architecture of ADR in a particular country and the main features of it should be explained. It should be made clear that voluntary dispute resolution encompasses a range of mechanisms designed to resolve disputes in a more expedited and pragmatic manner than is generally possible in court[7]. If, as may well be the case, they need to determine legal rights and obligations with the certainty of a court's decision, they will chose litigation rather than voluntary dispute resolution.

Participation in alternative dispute resolution must always be voluntary. All of the parties must willingly engage in the process because they see benefit in doing so – not because they are forced to do so.

It must also be made clear that if all parties do agree to engage in ADR they should also agree on the particular mechanism to be used. For example, it will be up to all the parties to agree (or not) that the outcome of the ADR is to be binding on them. It may often be the case that one or other party will only engage in ADR in the first place if it is a way of resolving a dispute once and for all, and not something from which a the other party can walk away.

1.2 ADR mechanisms are already widely established. They range from simple party to party negotiation, through complaint resolution procedures organised by companies or industry associations, to more formal adjudication, mediation and arbitration. Often an ADR mechanism will include a mixture of these techniques, using more sophisticated methods if a simpler approach fails. For example, ADR organised by industry may start with straightforward dialogue and move to adjudication, mediation or arbitration as the need arises.

[7] In this context, we regard Small Claims Procedures as analogous to ADR. Although it lacks the voluntary element in that one party may bring a case without the other party's agreement, it is in practice a simple, quick and often in reality a rough and ready means of obtaining justice.

1.3 DG SANCO has identified some 750 ADR schemes through out the EU[8], and this is probably an underestimate. ADR mechanisms are much more common than most people realise. Many Member States do not yet have a complete list of their own national schemes[9]. Accordingly, Member States should establish and maintain a register of their national dispute resolution schemes together with basic data about those schemes.

They should publish a road map of the ADR schemes in their countries, together with information about the role of dispute resolution; the range of mechanisms available; an outline of their scope; and how the schemes can be accessed.

All relevant stakeholders should be involved in such information campaigns. Information must be presented in an impartial manner without prejudice for or against any particular interest group.

1.4 Confidence and awareness in ADR will be enhanced if there is an opportunity for ADR schemes to be certified by properly accredited independent bodies according to objective criteria. Again, this should be done on a voluntary basis: many highly useful ADR schemes will not have the resource to undergo certification and will continue to provide valuable services without doing so. But certification offers advantages and has proved successful in countries where this opportunity exists. For example, such certification is provided, in the UK by the Office of Fair Trading; in the Netherlands by the Dispute Resolution Committee; and in Portugal by the government.

1.5 Member States should also publicise the extent (if any) to which their public authorities may play a role in voluntary dispute resolution and should be encouraged to adopt the principles of restorative justice in their enforcement policies.

1.6 The wide range of those public entities includes regulators responsible for specific areas of commerce; ombudsmen covering sectors of commercial activity (for example, financial services) or for horizontal fields of activity such as consumer protection; and state-sponsored insurance schemes. Examples of the latter include the compensation schemes run by all European governments for those adversely affected

[8] 16 October 2009, DG SANCO Study on the Use of Alternative Dispute Resolution in the European Union. The fact that he Oxford study identified 130 schemes in England and Wales alone – see next footnote - suggests that the SANCO study may underestimate the number of schemes in the EU as a whole.

[9] For example, in the UK, the extent of dispute resolution schemes in England and Wales was not known until they were identified by a research project carried out by the CMS Research Programme for Civil Justice in the Law Faculty of Oxford University. This study identified some 130 schemes in England and Wales alone – see http://www.csls.ox.ac.uk/european_civil_justice_systems.php.

by vaccines used in government-sponsored health campaigns; and the medical negligence/pharmaceutical compensation schemes operated by certain Nordic governments.

1.7 In a number of countries, ombudsman's offices have been established either on a horizontal basis (such as the consumer ombudsmen in the Nordic Countries) or in particular sectors of commerce, such as financial services[10]. Such public authorities have often proved effective not just in helping willing parties voluntarily to resolve complaints, but also in discouraging unmerited complaints. Where they find a lack of legal entitlement to redress, they will not process the complaint further, and this filter mechanism is of great value to society as a whole. Ultimately, the cost of compensation becomes a societal cost, and it is as important effectively to filter out unmerited claims as it is to achieve effective redress of deserving complaints[11].

QUESTION 2: What should be the Role of the European Consumer Centres Network, National Authorities (including regulators) and NGOs in raising Consumer and Business Awareness of ADR?

2.1 The ECC Network and FinNet are the natural central points at which to provide information points above about Member States or EU-wide ADR schemes. The development of national information as outlined in answer to Question 1 above should be of considerable value in this respect. We repeat the point that information must be given in an impartial manner and that all stakeholders should be consulted in the way information is structured and disseminated.

2.2 The role of National Authorities in raising awareness about ADR will vary depending on the extent to which they encourage voluntary ADR or are themselves involved in dispute resolution. Europe has a culture of enforcing private rights through the activities of public authorities[12].

2.3 Public authorities should provide information explaining their enforcement policies and how the extent of their responsibility for assisting the resolution of disputes,

[10] For example, in Germany members of the German Insurance Industry Association (GDV) can be members of the "Verein Versicherungsombudsmann e.V." which provides for an ADR Scheme (Insurance Ombudsman). The Insurance Ombudsman in Germany is fully financed by the member companies. The dispute resolution before the Insurance Ombudsman is cost-free for consumers and decisions of the Insurance Ombudsman are binding only for the insurance company if case the amount in dispute is below EUR 10'000.

[11] Although statistics are not kept, the indication from the Danish ombudsman is that a significant proportion of complaints are dismissed as lacking legal basis. In London, the Financial Services Ombudsman processes over 100,000 complaints per year and finds up to 40% to be unjustified.

[12] This contrasts with the USA where private enforcement of private rights is encouraged. This in turn has lead to the prevalence of class actions, in which the plaintiffs are encouraged to act as "private attorneys" in enforcing the law.

emphasising that parties' participation in such procedures is voluntary; describing the policies and procedures involved, and demonstrating that those procedures conform to principles of due process.

2.4 The role of NGO's will similarly depend on the extent to which they are involved in ADR. What is important is that any NGO should operate in an impartial manner and be disinterested and impartial. Their involvement should not be such as to give the organisation a personal benefit from the result of the ADR process. It is also important that they meet objective criteria (see below) that suit them for their role, and that they act in accordance with the principles of due process. These matters should be made clear in any information they publish in relation to ADR.

Question 3: Should Businesses be required to inform Consumers when they are part of an ADR Scheme? If yes, what would be the most efficient ways?

3.1 There will be situations in which business may not be prepared to engage in ADR, for example in circumstances in which legal rights and obligations need to authoritatively established and where a court hearing is therefore the right way of resolving the dispute. The same considerations may apply to consumers. ADR is voluntary and it will not always be the best way of resolving matters.

3.2 However, to the extent that organisations are ready to engage in ADR, it would be helpful for them to publish their approach, the conditions under which they may be willing to participate, and any particular scheme that they operate or belong to. This might be a company scheme or one organised by a trade association – see above

3.3 Such information about dispute resolution could be made available on their website. When appropriate, companies' information, service and complaints departments may supply information about dispute resolution.

Question 4: How should ADR Schemes inform their Users about their main Features?

4.1 All ADR schemes should be transparent as to their procedures[13]. They should make clear that their use depends on the willing participation of the parties involved. They should make sure the parties understand the process that will apply once the parties have agreed to participate and the choices to be made by participants - for example, whether the results of ADR are to be binding.

4.2 Information should be clear, accurate and jargon-free. It should explain how the scheme operates and in so doing show how the procedures conform to principles of

[13] This does not mean that the cases handled by those ADR schemes should be public knowledge. Such cases are normally confidential.

good process. The potential involvement of third parties – such as adjudicators, mediators or arbitration should be made clear. Accurate information should be given as to the likely costs. They should state whether the scheme has been independently certified and – if so – by what organisation.

4.3 The extent of such information and the way in which it is disseminated will depend on resources available, but at the least it should be available on a web site or in response to a written or verbal enquiry. It is axiomatic that all such information must be fair and balanced and not create any false impressions.

4.4 Basic information should be freely available, but it should be permitted to make reasonable charges to cover the cost of providing more detailed or complete information or for consultations.

Recommendations with regard to Section 1

In relation to the above questions, it is recommended that the Commission:

A. *Adopt a clear EU-wide policy that participation in ADR requires the willing participation of all parties;*
B. *Require Member States to establish and maintain factual data bases on ADR schemes in their countries that are intended for the resolution of consumer complaints, and to provide a central link to those data bases so that the information in the data bases is accessible to interested parties and in particular to Fin-Net and the ECC Network.*
C. *Require Member States to engage in impartial information campaigns about ADR in which the interests of all relevant stakeholders are respected and in the design of which such stakeholders have been consulted.*
D. *Require legal and other advisers of consumers to inform them of the opportunities of voluntary dispute resolution and the policy of the relevant courts before any litigation process is considered.*
E. *Require Member States to identify any public authorities that have a role in providing voluntary redress and if so how.*
F. *Encourage Member States to adopt the principles of restorative justice in their enforcement policies, and the use of ADR as means – where relevant and where the parties are willing – of establishing the market impact of a breach of regulations and the extent (if any)to which third party loss was caused and should be redressed.*
G. *Require ADR organisations to make clear that they will only become engaged in disputes with the will agreement of all parties; to ensure their procedures accord with the principles of due process; and to publish accurate information about their schemes.*

H. *Encourage certification of ADR schemes against objective criteria – in particular of independence and impartiality.*
I. *Ensure that while the procedures used by ADR systems are transparent, confidentiality is maintained in the application of those procedures to particular cases and the agreements reached as a result of the dispute resolution. There should be transparency about the existence of ADR schemes and how they work, but the way in which each case are handled and the outcome is confidential.*

SECTION 2: Involvement of Traders and Suppliers:

Question 5: What Means could be effective in persuading Consumers and Traders to use ADR for individual and multiple Claims and to comply with ADR decisions?

5.1 Consumers and traders use ADR because they see benefits in doing so. Accordingly, the approach should be to explain that although ADR is voluntary in nature, in the right circumstances it provides more rapid and cost-effective redress than litigation. Rather than waiting years for a result, compensation can be obtained in a matter of weeks or months. The information systems recommended above will help by publicising the existence and benefits of ADR. The more recognition there is of the potential benefits, the more ADR is likely to be used.

5.2 The credibility of ADR schemes will depend on their reputation for fairness, due process and confidentiality. Additional incentives will be ease of access; speed in resolving disputes; and low cost compared to alternatives.

5.3 Independent certification by properly accredited independent organisations should be encouraged to enhance the reputation of ADR (see above). Reputation will also be enhanced if ADR schemes can show how they filter out unmerited claims – see above the success of certain ombudsmen in achieving this. Conversely, if ADR becomes seen as a means of effectively blackmailing organisations into paying compensation regardless of the merit of the claim, dispute resolution will be discredited and will not be used.

5.4 Traders have customer service departments that in practice resolve the great majority of problems in a largely informal manner. A high proportion of "complaints" received by companies are in fact enquiries about products or services. By answering these enquiries potential complaints are avoided.

5.5 Among the factors that are likely to persuade parties to engage in voluntary dispute resolution are:

(i) Making dispute resolution readily available; independent; fair; speedy; cost effective; and as simple as possible[14].

(ii) Enabling parties to agree (if they are prepared to do so) that the decision reached in an ADR process will be binding – see below comments on the role of the Court in assisting ADR at the parties joint request[15].

(iii) Enabling parties to choose a mechanism that will make the process of dispute resolution final. Provided all claimants identify themselves and are represented in the process, it should not be possible for the same matter to be raised again. (See comments on the Court's role below).

(iv) Providing an incentive to traders to engage in voluntary dispute resolution when regulations are broken by adjusting the regulator's sanctions (if any) according to the way in which voluntary restitution was made.

(v) Independent certification of ADR mechanisms against objective criteria of fairness and due process will increase credibility.

(vi) Parties may be persuaded to engage in dispute resolution simply because it is a more attractive course of action compared to the alternatives – particularly if the alternative is litigation.

5.6 Without becoming a forum for litigation, the Court can facilitate voluntary dispute resolution and make it more effective. This may include:

(i) Deciding points of law that the parties jointly refer to the Court in order to remove potential obstacle to resolving the dispute;

(ii) At the parties' joint request, overseeing the procedure to ensure that it is fair; that due process is followed; and that neither party use unfair influence.

(iii) At the parties' joint request endorsing the decision reached in the ADR process and thereby making it legally enforceable. Such endorsement can also be used to prevent the same dispute being reopened at a later date.

Although particular to the Netherlands, the Dutch Financial Settlement Act 2005 provides a useful precedent for these Court functions.

Question 6: Should Adherence by the Industry to an ADR Scheme be made mandatory? If so, under what conditions? In which sectors?

[14] In Portugal, since 2008, the Portuguese Civil Procedure Code foresees that claimants bear their own court fees, regardless of the outcome of the judicial action, when they decide using common judicial procedures for settling their disputes, instead of ADR structures already available.

[15] The evidence is that, in any case, once parties have engaged in an ADR mechanism a very high proportion will abide by the outcome. DG SANCO's 2009 study put this proportion at 90%.

6.1 Given that dispute resolution processes should be voluntary, no organisation should be forced to create or join an ADR scheme. The approach should be to encourage ADR as described above, provide balanced incentives to engage in ADR, and recognise that there will be cases in which parties should be legitimately free to decline ADR. The main drivers of the expansion of ADR will be success experienced in its use and the encouragement of best practice.

6.2 Companies may find it appropriate to establish their own dispute resolution systems or join in schemes organised by their industry sector. Such schemes are not necessarily appropriate to all companies but they are increasing in number. Where ADR is appropriate, expansion of company or industry sector schemes is an effective means of extending the overall coverage of ADR. They can become part of a corporation's approach to good governance.

6.3 It may well be that commercial organisations adopt particular form of dispute resolution as a preferred approach. But they must not be disadvantaged if they adopt a different approach in cases for which ADR is not appropriate.

Question 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?

7.1 Dispute resolution must always be voluntary, and consequently it cannot be a requirement that ADR always be used before being entitled to take a case to court. If ADR is not appropriate for a particular dispute, and the parties do not both wish to engage in such a process, it will be a waste of time and money. The approach should always be persuasive not mandatory.

7.2 However, it is obviously desirable to encourage ADR where it is appropriate. In many Member States, the courts already have a policy of encouraging parties to try to resolve their dispute voluntarily before the case is tried in Court, and as recommended above, legal advisers should at least advice their clients of the opportunities to use ADR. A balance must be maintained in order to not to force the use of ADR where it is pointless. But at the same time, where ADR is appropriate there should be clear incentives to use it.

7.3 The fact that a group of claimants may be involved is no reason why a dispute cannot be resolved by ADR. In reality, as pointed out above, ADR schemes already deal with collective complaints without having to establish new procedures. The precedent already exists. Similarly, public authorities often deal with groups of people claiming or deserving compensation. The principles remain the same. The

right to redress must be established and unmerited claims should be rejected. The parties must be willing to engage, and compensation should be measured against actual loss (if any). The experience is that properly run ADR schemes and regulators properly applying principles of restorative justice are able to manage collective disputes without allowing abuse to arise. See also our answers to Question 12 below.

Question 8: Should ADR Decisions be binding on the trader? Or on both Parties? If so, under what conditions? In which sectors?

8.1 Participation in ADR is voluntary. Where parties agree to engage in ADR, they need also to understand and agree to the procedures that will apply. Among the more important issues is whether any decision reached will be binding or not. Some parties may only engage in ADR if they know the process will lead to a final agreement and will be the end of the matter. They may reasonably decline to engage in a process that may simply be a prelude to further argument and potentially litigation. In other cases the converse will be true.

8.2 There are some who argue that – except for arbitration – a consumer must always be free to reject the decision of an ADR process. In our view, this is wrong. First, it ignores the evidence that on some 90% of cases in which an ADR process is completed, the parties abide by the decision reached. Second, Industry would be unlikely to engage in ADR if the consumer then simply walked away from the result. The aim should be to attract both parties to use ADR mechanisms to resolve disputes rather than simply to see them as a prelude to further litigation.

Recommendations with regard to section 2: involvement of traders/Suppliers

1. *Dispute resolution processes must always be voluntary.*
2. *The main driver for increased use of ADR will be increased awareness of the benefits and the success of ADR in providing fair resolution of disputes. At the same time, incentives to the use of ADR are already present in many Member States and – provided they are balanced and do not disadvantage parties who legitimately chose not to engage in ADR – such incentives are to be encouraged.*
3. *Traders who do want to resolve matters by agreement will need to be assured that they will not be drawn into litigation before voluntary procedures have been explored. The initial costs of dealing with a law suit can be considerable. If traders have to incur those costs anyway, they will be discouraged form the use of ADR.*
4. *Independent certification of ADR schemes against objective criteria on a voluntary basis will increase the credibility of ADR schemes to which certification has been given. The Dutch approach is an example of best practice.*

5. *The Court should offer parties the ability jointly to request its assistance in and facilitation of ADR the ways indicated in our answer to Question 5 above.*

SECTION 3: ADR Coverage:

Question 9: What are the most efficient ways of improving Consumer ADR coverage? Would it be feasible to run an ADR Scheme which is open for Consumer Disputes as well as for disputes of SMEs?

9.1 The measures recommended above will both encourage the use of ADR and encourage development and increased coverage of ADR mechanisms. If dispute resolution is organised in such a way that it is attractive to both sides and fairly addressed the needs of each party, the usage and coverage of ADR will increase.

9.2 There is no reason, in principle, why ADR schemes should not be used by SMEs as well as consumers. The same principles apply. Provided it remains voluntary and the procedure is appropriate to the matter in hand, the parties are likely increasingly to use ADR a means for resolving business to business disputes. The main difference between consumers and SMEs is that the latter are likely to have more resources to engage either in more sophisticated ADR or in litigation.

Question 10: How could ADR Coverage for E-commerce Transactions be improved? Do you think that a centralised ODR Scheme for cross-border E-commerce transactions would help consumers to resolve disputes?

10.1 A great part of E-commerce transactions takes place within Member States' borders. Retailers and many other businesses encourage their national customers to deal on the internet. Accordingly, there is no reason why the range of national dispute resolution schemes should not cover E-commerce within national borders.

We note that the Consultation Paper states that "only 62% of the existing ADR schemes deal with claims from consumers residing in another Member States." In our view, this is actually a rather high percentage, and it suggests that existing ADR schemes are already well adapted (or at least capable of adaptation) to resolving cross border disputes, whether relating to e-commerce or not.

ADR is not limited by national borders. It is up to the parties to decide whether the ADR mechanism in which they engage should include cross-border claims. Already there are many schemes that provide solutions to cross border disputes.

Moreover, many ADR systems are already set up to run "on line" – for example the Dutch Business Sector Boards and their overarching Dispute Resolution Committee, as well as many schemes in the UK and Portugal. Consequently, it would be straightforward to apply such schemes to cross border disputes whether relating to E-commerce or not[16].

10.2 The need for simple, jargon-free and easily accessible information is probably greater in E-commerce than other types of trading, because many consumers find the concept of e-commerce strange and confusing. The biggest deterrent to a greater use of e-commerce is uncertainty about how to use the system and the lack of face to face contact. Consequently, independent and accurate information is important. The same applies to the issue of compensation for when things go wrong. The more familiar consumers become with the system, and the more clear it is that there are straightforward means of redress, the more e-commerce will be trusted and used.

10.3 Because E-commerce can be operated from outside national boundaries, and because it may be less obvious who is providing the service, the need for regulation in this area of commerce is potentially greater than in conventional trading systems. Member States should be encouraged to consider whether regulators or ombudsmen are needed to enforce the rights of complainants in this field.

10.4 It should also be borne in mind that dispute resolution systems are intended for bona fide businesses that set out to operate within the law. They are not a means of preventing or fighting crime. This distinction may be more important in e-commerce than other systems of trading, since arguably fraud may be more easily perpetrated and less easy to control when it is on the internet. Crime must be handled by the police and other enforcement agencies, not by voluntary dispute resolution.

10.5 The issues involved in handling cross-border disputes are no different in principle from those affecting commerce within national boundaries, and consequently – provided the parties jointly agree to do so – there is no reason why disputes cannot be resolved by ADR. As noted above, many ADR schemes are already adapted to cross border matters and there is no reason why other existing or new dispute resolution mechanisms cannot be developed likewise. The practical difficulties to be addressed are likely to surround language and the identification of the terms and conditions applicable to particular transactions. Those difficulties would exist whatever approach was taken to dealing with disputes.

10.6 With regard to centralised "ODR" (online dispute resolution) there is no reason why such an approach should not be a useful tool in ADR in general. As noted

[16] Insert Hodges evidence

above, there is already a cross border ADR scheme for domain name disputes that operates largely "on-line" and therefore is virtually an ODR. It may have particular attractions in helpful in cross-border disputes, and it may be that there are advantages to a centralised ODR scheme for e-commerce. The opportunity for such a scheme should be explored. Any central ODR scheme should obviously not conflict with national ADR mechanisms.

Question 11: Do you think the Existence of a "single entry point" or "umbrella organisations" 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?

11.1 A central point of access to information about ADR is clearly attractive, and the ECC Network and Fin-Net are the obvious vehicles to provide this. Beyond that, we are not convinced that new EU organisation should be set up. It is better simply to provide the information that facilitates use of existing networks. Any such central information point should not go further than supplying accurate information either at national or at EU level.

11.2 We do not support creation of a "single EU entry point" for access to the actual ADR process. Dispute resolution schemes will succeed only if they are voluntary and if they have evolved as a result of particular market demand rather than being imposed from above. Gaps in national dispute resolution schemes are best filled nationally in response to local need, rather than by imposition of a central EU system. How would conflict be avoided between national and EU dispute resolution? What would be the demarcation between the two? How truly accessible would an EU scheme be to consumers in 27 different countries with many language variants?

11.3 The guiding principle should be that any dispute resolution scheme evolves in response to particular needs and in a form that meets that demand.

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

12.1 Those who run an ADR scheme must be left to decide whether they wish to accept collective claims. As noted above, a large number of schemes already do so and do not find the need to devise new procedures. They are able to cope with collective claims within their normal rules.

12.2 If a scheme is to cover collective disputes, the basic principles will be the same as in party to party dispute resolution. In particular, this means that each of those

involved in a collective claim, as well as the defendant(s), must positively agree both to participate in the ADR and the terms on which that ADR is conducted. Accordingly, the only acceptable process is "opt-in" whereby all parties are identified and the fact that they participate willingly can be verified. "Opt-out" claims – whereby a claim is *nominally* brought on behalf of people who may not even know they are involved – are unacceptable. The fact that participation is by identified individuals who have given their consent enables the parties to determine that all complainants have proper standing in the matter.

12.3 Voluntary participation also ensures that the claim is of a kind that can be properly handled on a collective basis. Parties will be in a position to decline to participate if the matter is of a kind in which individual differences between the individual complainants must be considered and consequently the matter cannot be properly dealt with on a collective basis. If ADR is not appropriate to resolve a collective complaint, one or more parties will not agree to proceed and the voluntary basis of ADR is no longer satisfied.

Question 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?

13.1 We refer to our answers to Question 10 above. In our view, there is no essential difference between the principles of dealing with cross border disputes whether or not they arise from E-commerce or conventional trading. Those responsible for an ADR scheme must be free to decide whether they wish to adapt it to deal with cross border matters.

13.2 If they chose to do so, they will need to cope with the added difficulties of language and different legal systems. It would be helpful for the national registers of ADR schemes referred to in Section 1 above to include details of whether particular schemes do or do not offer to handle cross-border disputes, and for the central European information point (referred to in Section 3 above) to provide details of cross-border schemes and how they may be accessed.

13.3 Because participation in ADR is voluntary, a great many of the possible problems of cross border disputes are resolved. Rather than needing to ensure equivalent procedures and standards in all Member States, it can be left to the parties to decide whether in their view the procedure of the particular scheme they choose is satisfactory.

Recommendations Regarding Section 3: Coverage

1. *Member States should identify any significant gaps in ADR coverage in their country. In doing so, they should include a review of their existing regulatory and public authority systems and the role those play in dispute resolution and redress.*
2. *Discussion should take place between government, Industry and other relevant parties as to how such gaps may best be filled.*
3. *Industry and Trade Association dispute resolution systems are to be encouraged. Ombudsmen can play an essential role either horizontally (in relation to consumer protection in general) or in particular sectors.*
4. *There should be realism in the levels of expectation. Organisations that have a low cost business model should not be expected to provide the same level of service and quality as full cost or full service operations.*
5. *Pan-European information should be improved in order to ensure consumers have access to information about relevant ADR schemes. But there should be no overlap at pan-European level of schemes that should operate at national level.*
6. *ADR schemes may chose to handle claims for collective redress provided they have the resources to do so and provided the matter is appropriate for handling on a collective basis.*

SECTION 4: Funding

Question 14: What is the most efficient way to fund an ADR Scheme?

14.1 There is no single "right way" to fund ADR schemes, and a mixture of funding sources will be common. Clearly, government funding will be helpful, and it is noteworthy that the Dutch Business Sector Boards and the overarching Dispute Resolution Committee are 20% financed by government grant and 80% by industry contributions. The most important consideration is that while funding must adequate to maintain the scheme, the funding must not impair the independence of the scheme. It is also desirable that the cost to the consumer is as reasonable as possible.

14.2 There is obvious advantage in keeping the costs of using ADR as low as practical, and there is likely to be a preference for ADR schemes that are run on a not-for-profit basis. It is clearly acceptable for an ADR scheme to levy charges to recover the reasonable costs of using its services. However, if it is intended that the scheme generate a profit or to subsidise other areas of its current or intended operations this should be clearly disclosed and may be one of the factors in a party's decision whether or not to agree to use that scheme for dispute resolution. These principles will apply equally to stand-alone schemes and to schemes run by organisations engaged in a wider ambit of activity. An organisation may overall be run on a not-

for-profit basis but still generate surpluses from its ADR scheme as a means of subsidising its other activities. This should not be allowed.

14.3 It should not be acceptable for an ADR scheme to be run on the basis that the organisers of the scheme stand to benefit from any payments that may be made to claimants as a result of compensation being awarded under the ADR process. Direct financial incentives of this kind should be forbidden.

14.4 It may be necessary for complainants to be supported by finance from other parties in order to cover the cost of ADR. This may apply particularly with more expensive stand-alone mediation or arbitration. If this is the case, the parties should know exactly what the arrangements are and particularly of any financial interest of third parties in the outcome of the ADR process. Any ability of third parties to influence the course of ADR and any profit that may potentially be made by third parties may well affect the decision of one or more parties as to whether they are willing voluntarily to take part in the ADR process.

14.5 Schemes established by or on behalf of Industry may offer free access or low costs for consumers, but it should not be assumed that this will necessarily be the case. There may be good reason to levy reasonable charges if only as a means of deterring frivolous or ill-founded complaints.

14.6 It should be noted that many ADR Schemes are financed by the companies engaged in the particular commercial sector in question. The set-up and maintenance of such ADR schemes requires substantial funding and organizational efforts from that industry sector to establish a well functioning dispute resolution tool. The Industry engaged in such ADR schemes will need to be flexible regarding the details of the set-up and structure of such ADR schemes providing quality and effectiveness are maintained and participation remains voluntary. Otherwise, the effective functioning of some existing ADR Schemes could be at risk.

14.7 If direct government funding is available, it should be provided only to schemes that can demonstrate that they meet objective criteria of independence, impartiality and proper rules of procedure.

14.8 To the extent that public authorities themselves are involved on dispute resolution schemes the cost should, of course, be met by government.

14.9 The cost of any involvement of the Court in ADR – as proposed above – should be met from normal Court fees or by government finance.

Question 15: How best to maintain Independence when the ADR is totally or partially funded by Industry?

15.1 This question should be addressed not just to industry but to all organisers of ADR schemes. Whether ADR is sponsored by or embedded within any particular organisation, questions of independence, impartiality, due process and credibility arise and should be answered.

15.2 Industry is not the only interest group that is likely to fund or have an interest in running a dispute resolution scheme. The same issue of independence, impartiality and due process arise whether the funding comes from Industry or government or consumer groups or others. Some mediation and arbitration schemes are run by large organisations that employ mediators or arbitrators who enjoy substantial fees. See our comments above about the not-for-profit basis of ADR.

15.3 The existence of such particular interests within the overall field of dispute resolution does not of itself destroy the independence and fairness of the scheme. But if any ADR scheme is to be successful it must be recognised as being independent, fair and balanced. A scheme will be worthless (and its funding therefore pointless) if its credibility is undermined by the way it is funded. Consequently, the scheme should be able to demonstrate that it is run independently of the interests of any funders, and certification against appropriate objective criteria – as recommended above – is likely be of importance. The need for transparency on such matters is clear.

15.4 It can be expected that schemes established by or on behalf of Industry will have substantial Industry funding. In itself, this should not cause concern. There should be no assumption that because Industry is providing fund, the scheme thereby lacks independence or credibility.

- As indicated above, from Industry's point of view, it would be counterproductive if their schemes lacked credibility:
- If the scheme is accredited, accreditation should include a review of the source of funding and evidence that it does not adversely affect the independence of the scheme.
- In the current economic climate, little if any direct government funding for ADR schemes may be available. Accordingly if the cost of access to ADR is to be kept low, some funding from industry is inevitable.

Question 16: What should be the Cost of ADR?

16.1 There is no absolute measure of what ADR should cost. Schemes have different levels of resource and cost bases. ADR will almost always be cheaper than litigation, but governments should not seek to mandate the level of cost. If they wish to set limits to the cost of ADR, governments should be prepared to provide financial subsidies.

16.2 As proposed above, it is sensible for ADR schemes to levy reasonable charges to discourage frivolous or unmerited claims. However, if dispute resolution in general is to be successful, there should not be a financial barrier between it and legitimate claimants.

Some Industry schemes are currently low-cost or cost free to the consumer. For example, in the UK, the Motor Trades Association and the Travel Agents Association (to name but two industry organisations) provide largely free complaints assessment schemes to customers of their members. However, it would be unreasonable to expect all Industry schemes necessarily to act in the same way. To do so could make it impossible for smaller schemes to operate and thus actually discourage the availability of ADR.

16.3 In more formal dispute resolution systems, such as mediation or arbitration, it is normal for both parties to carry their own costs. This has not prevented their becoming useful means of resolving disputes that merit such expenditure.

The range of cost can be considerable. Mediation often involves the use of an experienced professional who will charge fees. Large scale formal arbitration can involve costs approaching those of litigation, with lawyers acting on both sides.

But this is the higher end of the scale. Many arbitration processes are much simpler and less costly.

16.4 Clearly, the cost of regulatory or public authority schemes should be borne by government. Similarly, any role of the court in monitoring or endorsing dispute resolution should involve payment of normal court fees.

16.5 From the overall viewpoint of Society, encouragement of independent, high quality and cost-effective ADR systems is attractive. They promote a better means of achieving redress where justified; considerable savings are made in the Court system; and legitimate consumer expectations are met.

Recommendations for Section 4: Funding

1. *It should be recognised that a mixture of funding – including private funding – is both normal and acceptable and that funding from a particular interest group (be it Industry, Consumer or other) does not in itself undermine independence.*
2. *Government subsidies are desirable for certified schemes of proven value.*
3. *There should be a strong preference for ADR that is on a not-for-profit basis.*
4. *Whatever the funding, ADR schemes must be able to demonstrate independence, impartiality, and proper procedures. As recommended above certification of ADR schemes by preparedly accredited organisations against objective criteria should be encouraged.*
5. *There should be no mandatory control of costs.*
6. *Transparency of funding and costs should be required.*

15th March 2011

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