ADR in Collective Disputes

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Good morning. It is an honour to be asked to address this hearing.

1. Three points by way of introduction:
   - First, European Justice Forum is committed to rapid and effective redress for justified complaints: we were founded precisely to identify better means of individual and collective redress.
   - Second, **no single** EU 'instrument' will achieve this objective. Instead, we should adopt a new approach to redress (based on what is actually happening in Europe) that can be adapted by each Member State in the way that best suits its national civil justice system.
   - Third, that approach should be based on:
     (i) **ADR;**
     (ii) supported by the consumer protection role of the **public authorities;** with
     (iii) the **court** assuring **due process and fairness** as well as the **finality** of the ADR process.

2. 'Collective redress' is **not the same** as 'collective litigation'. The debate about redress is sometimes distorted by assuming collective litigation is the only real basis for collective redress.

   '**Redress'** is the compensation of **justified grievances**, and 'collective redress' is compensation of groups of individuals with the same justified complaint. To obtain redress it should not be necessary to incur the prodigious cost, time and risk of litigation, which should be used only in the last resort.

3. There is no single form of 'ADR'. **'Alternative dispute resolution'** covers a **wide range of voluntary, non court-based mechanisms** whereby disputes can be resolved in accordance with the normal desire of parties to reach agreement and to avoid litigation.

   The **techniques** of ADR are essentially the same everywhere, ranging from simple party to party negotiation, to various conciliation mechanisms, to formal mediation processes. But the **structure of ADR differs from country to country**. No one-size-fits-all system of ADR can be applied across Europe. Instead, outcomes and the general principles should be agreed, and each country should implement them as best suits its national civil justice systems.

4. **Formal mediation is not typical of ADR**. Often conducted in the context of a court claim, and usually involving trained (and often expensive) mediators, mediation actually occupies

only a small part of the spectrum of ADR. Lawyers may emphasise mediation because that is where they can become professionally involved. But typical ADR mechanisms are usually much simpler and of very low cost to consumers.

5. How does **ADR work in practice**:
   - In-house company customer-care procedures handle great volumes of complaints without their becoming litigious.
   - Dispute resolution boards exist in many countries including the Nordics, the Netherlands, and the UK. Such boards are often organised on industry sectoral lines and supported by consumer organisations as well as business associations.
   - The Netherlands has highly developed ADR structures. Virtually all business is covered by 49 sectoral 'Boards' to which companies are obliged to belong if they wish to protect their reputation. An overarching body called the Dispute Resolution Committee (Geschillencommissie) assures high standards and proper process. A separate body (KIFID) covers the financial services industry. This structure provides Dutch consumers of a high degree of protection (over 11,000 cases per year are handled in this way), and it gives transparency. The Dispute Resolution Committee informs consumers where to lodge complaints. The system is funded 80% by industry and 20% by government.
   - Sectoral or horizontal ombudsmen are common in Europe. They promote dispute resolution, and they are often government agencies. Nordic consumer ombudsmen have high reputations for fairness and proper procedure and are approached by both claimants and defendants to intervene in disputes. They process very large volumes of complaints and are effective in weeding out undeserving claims. An estimated one third of complaints are withdrawn because they have no legal basis, saving much public time and money.
   - The London Financial Ombudsman Service deals with over 160,000 claims per year, and here some 40% of cases are withdrawn when the ombudsman finds they have no legal basis.
   - Government-established schemes deal with particular problems. All Member States have government-run compensation schemes for damage caused by vaccines. The Swedish state insurance scheme (financed by both government and industry) deals with side effects of medicines. Medical negligence claims are managed in a similar way. The UK has a compensation scheme for lung disease contracted by coal miners. Such schemes avoid confrontational litigation, with consequent significant savings of public money.

6. These examples illustrate that:
   - **ADR mechanisms deal not just with individual but also with collective complaints**. They can do so because their mechanisms are quick, flexible, and frequently accessed on-line. Claimants agree to handle cases in a way that expedites results. The results of test cases are extrapolated to other claims of the same kind. Similar complaints are simply grouped together. Issues that create real and complex problems in formal legal processes are dealt with by the agreement of the parties in a relatively informal manner, which may not be as exhaustive as a court procedure, but which instead satisfies the parties by providing reasonable dispute resolution without the considerable time, cost and risk of litigation.

   - **ADR processes are complemented and encouraged by consumer protection authorities.** Alongside ombudsmen, regulators cover utility, telecommunications, travel,

transport and many other industries. If a breach of regulation causes loss to consumers, the question of compensation will arise. A regulator must not dictate compensation, but he will want to encourage it. And if an infringer in fact provides compensation, this should be recognised by the regulator moderating any penalty to be applied. Such an approach encourages compensation, removing the need for consumers themselves to take action, and it promotes improved future behaviour.

7. What then is the **role of the Courts**? There will be occasions when parties cannot compromise their positions and need to establish in court their strict legal rights and obligations. They must be free to do so. But by developing ADR and encouraging its use, we should be able to minimise the need for litigation.

   Instead, when the parties so request, the **court should support ADR** by ensuring that it is fairly conducted and abuse is prevented. If public authorities are involved, the court should ensure that they do not abuse or exceed their remits. Regulators cannot become judge and jury.

   Parties should also be able to ask the court to endorse an agreement that has been reached voluntarily, thus make it legally **enforceable and final**. No party can renege on the agreement and the same matter cannot be raised again. Finality is achieved.

   The court plays such roles in the Netherlands and has helped achieve major settlements.

8. It is sometimes said that ADR is excellent but that it will not work without the threat of collective litigation in the background.

   Is this really so? Companies that value reputation embrace ADR as a means of building customer satisfaction. But if legitimate complaints are rejected, should governments not first look at enforcement of **consumer protection regulations** rather than expect consumers to start collective litigation?

   Moreover, just as ADR mechanisms should be implemented at national level, any last resort to the courts should also be at national level and not through a new EU legal instrument. Fourteen Member States already allow collective litigation for damages. Those laws are all different, and they are all embedded in different national legal traditions and rules. It would be impossible to harmonise those fourteen existing laws without imposing serious disruption on the legal systems of those countries. How much more difficult to introduce an EU-wide collective litigation instrument applicable to all Member States, including those such as the Netherlands that have objections in principle to collective litigation for damages?

   No one wants the US class action experience in Europe. But how confident can we really be that, if we create a single EU legal market for collective litigation among 400 million consumers, we will be able to shield it from abuse? Europe's different legal traditions will not be enough. Abuse has already been experienced at national level – for example in group actions started in the UK in the 1980s and 1990s. There, the court recognised the weakness of the claims and they were dismissed, but not without causing tens of millions of pounds of cost to both the government's legal aid budget and to the individual defendants.

9. **In conclusion**, let us rather use a new European model of individual and collective redress based on ADR, complemented by the public authorities and overseen by the court to assure fairness and finality. Let us enunciate principles at EU level and allow each Member State to adapt that model without disruption in the way that best fits with its national civil justice system.

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