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25th July 2014

Kieran Grace,
Principal officer,
Competition & Consumer Policy Section,
Department of Jobs, Enterprise and Innovation

Email conspol@djei.ie

Re: EU Directive on Consumer Alternative Dispute Resolution and The EU Regulation on Consumer Online Dispute Resolution

Dear Sirs,

Thank you for the opportunity to comment on the proposal regarding the implementation of the above Directives. As we understand it, the intention of the proposed new legislation is that consumers will have access to alternative dispute resolution which meet certain quality criteria, which include independence, transparency, expertise effectiveness and fairness.

From an ESB perspective, both ESB Networks and Electric Ireland have customer charters setting out how complaints and disputes will be dealt with. If the dispute cannot be resolved by ESB Networks/Electric Ireland internally, or the customer is not satisfied with the ESB Networks/Electric Ireland complaints procedures, then the complaint can be referred to the Commission for Energy Regulation (CER) for independent adjudication. This procedure is straightforward, easy to comprehend and sets out a very clear basis in which the matter can be dealt with in an independent and transparent way, without limiting the rights of the consumer.

The consultation document furnished by the Department poses a number of questions and we will only reply to the questions that we can meaningfully comment on.

Question 1

Is there a significant gap in the provision of ADR in the State to deal with contractual disputes arising from the sale of goods or the provision of services between a consumer and a trader?

As highlighted by the NCA survey, there is limited consumer awareness of ADR. There is a clear

need to publicise and incentivise ADR within the State to promote its greater use. The proposed Mediation Bill published in March 2012, which is designed to encourage mediation in commercial, civil and family disputes may go some way to broaden public awareness of ADR. Consideration can also be given as to whether ADR procedures in low value cases will be paper based assessment similar to the Injuries Board, or an oral hearing.

A far more significant gap in ADR procedures exists in cases where there is no contract between the parties. There are certain areas where costly disputes regularly occur and where structured ADR would be of huge benefit in terms of saving costs and time, particularly in areas such as planning, exercise of statutory powers by a statutory body, land access issues and boundary disputes.

Question 2

Can you identify ADR entities which cover disputes in specific sectors? If so, are they in a position to comply with the requirements of the Directive?

The Commission for Energy Regulation (CER) could continue to act as an ADR entity in disputes within the Utilities sector. In order to comply with the quality criteria, the CER would need to be in a position to commit to dealing with disputes within 90 days to comply with the directive. It may be challenging for proposed ADR entities to be fully compliant with the directive by July 2015.

Question 3

Are there existing bodies which could fill the lacuna in ADR coverage?

See answer to Q2.

Question 4

Is there a specific model that the State may use to implement the Directive?

The sector specific ADR entity model proves effective as it is independent and has the understanding and expertise in the area. Oversight by a central authority will be necessary to comply with the directive. The central authority could provide information to consumers re ADR and act as a routing service to the appropriate sector specific ADR entity.

Question 5

How would the model proposed under Q.4 be funded?

In lower value cases, a combination of application fees, state funding and a case fee levied on the trader would be an appropriate way to fund ADR. If the dispute is of above a certain value and between parties of relatively equal bargaining power, then the costs should be shared as agreed, or left to the discretion of the Mediator/Arbitrator.

Question 7

Should implementing legislation provide for ADR procedures where the person in charge of such procedures are employed or remunerated exclusively by the individual trader to be covered by the Directive provided they meet specific requirements?

We believe the implementing legislation should be flexible and allow for agreement of the parties to appoint an Arbitrator/Mediator provided in all cases that they are suitably qualified to do so and that commercial relationships are fully disclosed.

Question 9

Should the implementing legislation use all, some, or none of the exemptions in its procedural rules as provided for in the Directive?

The exemptions all seem to comply with the basic rules of common sense and should be

implemented.

Question 10

Should the State prescribe minimum and maximum claim thresholds?

We do not think there should be minimum or maximum thresholds for referral to ADR. The small claims Court deals with small claims up to a value of €2000, consideration could be given to expanding its scope, function and jurisdiction. However, when the complaint value exceeds the jurisdiction of the small claims court, they generally become more complex and in order to resolve them in an independent, professional and transparent basis, it will be necessary to have accessible, reasonably funded and flexible ADR structures in place.

Question 11

Should ADR procedures be free of charge to the consumer or should a nominal fee be charged?

As stated earlier in answer to Q5, there should be a combination of state funding of the ADR entity, standard referral or application fee by the complaining party, reasonable case management fees paid by the trader. In higher value cases the legislation could allow the parties the flexibility to agree sharing of the costs of Mediation and Arbitration in accordance with Section 21 of the Arbitration Act 2010.

Question 12

Should the implementing legislation provide that the decisions of notified ADR entities, which aim at resolving a dispute by imposing a solution, are binding on traders?

It would be unfair to have the decision binding on the trader only. In our view the decision of the ADR entity should not be binding on either party unless they both specifically agree from the outset that the Arbitrator/Mediator's decision is binding. Otherwise both parties retain their right of Appeal.

Question 13

Should the implementing legislation requiring traders to become involved in ADR procedures become mandatory?

Initially it should be optional only, but highly incentivised by making it a cost effective and speedy method of resolving disputes for both consumer and trader. The structures for the ADR procedure needs to be put in place and publicised and become industry practice before any consideration should be given to making it mandatory.

Question 14 & 15 – Limitation Periods

It is intended to provide for a stay of the limitation period whilst the ADR procedure is ongoing and for 30 days post-ADR process. This makes sense, as otherwise the claiming party could be forced into issuing court proceedings to stop the Statute of Limitations clock.

Question 16 – Designation of competent authorities

The Directive requires that the state designate a competent public authority whose role will be receive information from ADR entities, assess this information and produce a list of ADR entities who are qualified to act within the state and notify the European Commission. It would appear to be common sense to have one central authority to have this coordinating role. ESB welcomes the opportunity created by the competent authority to set and enforce high standards in ADR provision in the State.

Question 17

Should disputes initiated by trader against a consumer be included in the legislation giving effect to the Regulation?

It should be made optional, as otherwise the standards of equality and fairness may not be met.

Should you require any further comments on same, please contact us at your convenience.

Yours faithfully,



Annelie Walsh
Litigation Manager
ESB Group.