Consultation on the implementation of the EU Directive on Consumer Alternative Dispute Resolution (ADR) and the proposed EU Regulation on Online Dispute Resolution (ODR) – Response of the European Consumer Centre (ECC) Ireland

The European Consumer Centre in Ireland (ECC Ireland) offers information and advice to the public on their rights as consumers, as well as assistance in the resolution of cross-border consumer complaints through ECC-Net, a network present in 30 European countries. ECC-Net is co-funded by the European Commission and the Member States, which in Ireland is effected through the National Consumer Agency.

Promoting awareness of, and access to, ADR is an essential part of ECC-Net's objectives. It is hoped that enhanced out-of-court schemes providing for independent, impartial, transparent, effective, fast, low-cost and fair ADR procedures will strengthen consumer confidence and boost growth.

In our view, access to justice should not be restricted to court-based litigation only. 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 and this is particularly true in the field of consumer disputes, where consumers' needs and attitudes change constantly due to new products, trends, technological innovation and the presence of social media in the market place.

A well-functioning ADR system should not only bridge the gap between no action and litigation but also provide for a real alternative to litigation, for an alternative means of handling conflict in the marketplace, enhancing access to justice in its widest sense and also, as a result, improving consumer confidence and markets performance.

Against this background, ECC Ireland welcomes the opportunity to contribute to this consultation by responding to the questions specifically raised by the Department in the context of gathering views from different stakeholders and eventually giving effect to Directive 2013/11/EU on ADR and Regulation (EU) No. 524/2013 on ODR, which are set to be in operation by 9th July 2015 and 9th January 2016, respectively. It should also be noted in this respect that the ODR Regulation also requires Member States to communicate to the European Commission by 9th July 2015 the details of the designated ODR contact point, and also about whether or not their legislation allows for disputes initiated by a trader against a consumer to be resolved through ADR.

Q.1 Do you think significant gaps exist in the provision of ADR in the State to deal with any contractual dispute arising from the sale of goods or the provision of services between a consumer and a trader, if so, where do you think they exist?

Whilst awareness of ADR as a potential method of resolving disputes has increased exponentially in recent years in Ireland, there has, unfortunately, been no corresponding increased development of ADR entities. As a result, significant gaps in coverage exist in Ireland.

These gaps are so substantial as to perhaps not be capable of enumeration. However, some of the main gaps which ECC Ireland sees are:

- Clothing and footwear
- Dry cleaning and laundry services
- Home furnishing/furniture
- Construction supplies/materials
- Gardening
- Installation technicians
- Package travel[1]
- Public transport
- Air travel[2]
- Other travel
- Moving services
- Motor vehicles/parts[3]
- Electrical goods including household appliances
- Broadcasting services
- Leisure services including accommodation providers
- Crèches
- Driving schools
- Funeral services[4]
- Beauty industry/grooming
- Jewelers
- Legal services
- Real estate

Furthermore, even in those areas where consumer ADR exists, its provision is far from systematic or consistent, making it difficult for interested parties – consumers, traders and ADR providers alike – to engage in, and promote ADR schemes in the State. Likewise, the lack of regulation and public supervision may have also hampered the introduction and development of consumer ADR in Ireland, given that minimum standards and trust are paramount to provide for a credible alternative to the courts.

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[1] The Irish branch of the Chartered Institute of Arbitrators (CIArb) has administered in the past few years various ADR schemes negotiated with the Irish Travel Agents Association (ITAA) and Irish tour operators, based on an arbitration clause incorporated into the contract by the parties. At present, the Centre for Effective Dispute Resolution (CEDR) also provides for a two redress schemes for IATA, one based on telephone mediation and another one based on arbitration. http://www.cedr.com/docslib/itaa_scheme_details.pdf

[2] Whilst the Commission for Aviation Regulation (CAR) currently issues recommendations in its capacity as the National Enforcement Body (NEB) for EU Regulations 261/2004 (flight cancellations, delays and denied boarding) and 1107/2006 (reduced mobility), it does not cover a wide variety of other air travel-related disputes such as baggage complaints, issues related to airline's terms and conditions , bookings, etc. It may be the case that a public body such as the National Transport Authority may be better placed to become an ADR entity covering all modes of transport, with CAR remaining in its capacity as an enforcement body.

[3] The Society of the Motor Industry (SIMI) provides for a complaints service and an arbitration scheme run by the Irish branch of the Chartered Institute of Arbitrators (CIArb). However, even if SIMI membership is substantial in the sector, there is no full coverage as complaints relating to non-member companies are outside the scope of the scheme.

[4] Whilst there is currently no ADR body in the funeral sector in Ireland presently, the Irish Association of Funeral Directors aims to "work with our members to achieve excellence in funeral service and represent the funeral sector." The membership of the Association conducts 75% of all funerals in Ireland and members agree to a Code of Practice, as established by the Association, so as to guarantee clients a minimum service of competence and caring. For additional details see: http://www.iafd.ie/code_of_practice

Q.2 Can you identify ADR entities which cover disputes in specific sectors? If so, in your option are these entities in a position to comply with the requirements of the Directive?

In our report *The Implication of the Proposed ADR Directive for the Resolution of Consumer Disputes in Ireland* (hereinafter referred to as ECC Ireland's report),[5] ECC Ireland examined the five notified bodies currently in operation in Ireland, as well as five non-notified ADR bodies under the then criteria specified in the proposed Directive i.e. expertise, independence and impartiality, transparency, effectiveness and fairness.

Notified Bodies

Financial Services Ombudsman

Using those initial criteria it was submitted that the Financial Services Ombudsman (FSO) "*would, with little modification comply with the proposed Directive*."[6] At that time, however, the principle of liberty was not one of the suggested criteria. Under Article 10(2) of the Directive it is stated that:

Member States shall ensure that in ADR procedures which aim at resolving the dispute by imposing a solution the solution imposed may be binding on the parties only if they were informed of its binding nature in advance and specifically accepted this. Specific acceptance by the trader is not required if national rules provide that solutions are binding on traders.[7]

Decisions from the FSO are binding on the parties and are subject to a statutory appeal to the High Court.

On its website, under the section Complaints Process, the FSO states that "*[T]he finding of the Financial Services Ombudsman is legally binding on both parties, subject only to appeal by either party to the High Court. A party has 21 calendar days from the date of the Financial Services Ombudsman's Finding in which to appeal to the High Court*."

On a superficial level this does fulfill the criteria of the Directive. However, it is submitted that given the way case law in Ireland has developed in Ireland on this particular matter more information is required on this matter to allow consumers to make informed decisions as to which avenue of redress is more suitable i.e. the FSO or court.

In *Ulster Bank Investment Funds Limited v Financial Services Ombudsman*[8] the standard of review was stated as *"[T]he plaintiff must establish as a matter of probability that, taking the adjudicative process as a whole, the decision reached was vitiated by a serious and significant error or a series of such errors. In applying the test the Court will have regard to the degree of expertise and specialist knowledge of the defendant."*

[5] See: http://www.eccireland.ie/wp-content/uploads/2013/07/ECC_ADR_Research_Project_2012.pdf

[6] Ibid. p. 15.

[7] See: Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, Article 10(2). (Hereinafter referred to as the Directive).

[8] *Ulster Bank Investment Funds Limited v Financial* Services Ombudsman [2006] IEHC 323.

The High Court subsequently went on to outline additional guidance in the decision of *Molloy v Financial Services Ombudsman*[9] where it held that (i) the burden of proof is on the appellant (ii) the standard of proof is the civil standard (iii) the court should not consider complaints about process or merits in isolation, but rather should consider the adjudicative process as a whole (iv) the onus is on the appellant to show that the decision reached was vitiated by a serious and significant error or series of errors (v) in applying the test, the court may adopt what is known as a deferential stance and may have regard to the degree of expertise and specialist knowledge of the FSO.

Thus, in *O'Hara v ACC Bank Plc*[10], the Court held that the plaintiff, who had failed in a claim before the FSO, was estopped from proceeding with fresh High Court proceedings claiming misrepresentation from the same set of facts. In considering the limited nature of an appeal mechanism from the FSO the Court held that *"Absent a special reason of sufficient impact to nullify any potential abuse of process, it would be wrong for this Court to say that the complaint could be re-litigated all over again".*

It is submitted that this, together with the fact that if successful in the High Court, the normal order would be for the matter to be remitted back to the FSO for reconsideration, in circumstances where trust in that process could well be lost, means that additional information on the limited nature of the appeal mechanism available should be provided and the advantages versus the disadvantages of bringing a claim to the FSO as against Court should be very clearly outlined.[11]

Pensions Ombudsman

Similarly, in ECC Ireland's report it was found that the Pensions Ombudsman was a creature of statute, guaranteed to be independent and funded by an Oireachtas grant. In the circumstances, it was considered that *"compliance with the proposed Directive requirements is likely to be easier. The Pensions Ombudsman provides a dispute resolution mechanism which would fulfil all the principal criteria for an ADR body in compliance with the proposed Directive."*[12]

Similar concerns as with the FSO arise with the Pensions Ombudsman, concerning the liberty principle, given that appeal from the Pensions Ombudsman lies only to the High Court.

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[9] Unreported High Court, 15th April, 2011.

[10] *O'Hara v ACC Bank PLC* [2011] IEHC 367.

[11] For example, one factor in the decision is costs as there is no liability for the other sides' costs if the FSO claim is dismissed. In addition, the FSO can find for the claimant based on the overall fairness of the case in circumstances where there was no breach of contract, tort or statute. As against this there is no guarantee of an oral hearing (this is at the FSO's discretion) and it may be that parties consider the most effective mechanism for the discovery of the truth is via the legal route where there is the possibility of discovery and cross-examination of witnesses. FLAC's report Redressing the Imbalance: A study of legal protections available for consumers of credit and other financial services in Ireland (March 2014) is critical of the FSO's complaints handling process on a number of headings, including (i) the right of appeal to the High Court only, (ii) the decision of the FSO Council to broaden its definition of consumer to include companies, partnerships, clubs, charities and trusts whose turnover is below €3 million per annum, (iii) the low incidence of findings made in favour of the consumer, and (iv) the absence of a database of decisions, which may throw light on the FSO's decision making process and help consumers to frame complaints.

[12] Supra note 5, p. 18.

With regards the appeals mechanism itself, in the case of *Willis & Others v Pensions Ombudsman and Another*,[13] the President of the High Court, Mr Justice Kearns, observed the following:

1] A high threshold will be imposed on any person seeking to appeal a determination of the Pensions Ombudsman. The relevant test is the same as that set out in the case of *Ulster Bank v. Financial Services Ombudsman* i.e. the appellant must establish as a matter of probability that, taking the adjudicative process as a whole, the decision reached was vitiated by a serious and significant error or a series of such errors;

2] In applying the above test, the Court will have regard to the degree of expertise and specialist knowledge of the Ombudsman and will apply a deferential standard;

3] Any appeal against a determination of the Ombudsman is limited and is not a full de novo hearing; and

4] Only in exceptional circumstances will the Court be willing to allow the introduction of fresh evidence which was not originally before the Ombudsman.

Following this decision, any party considering appealing a determination of the Ombudsman will need to ensure that they can show that the Ombudsman made a clear and serious legal error in his determination if they are to stand any chance of overturning the Ombudsman's determination.

Direct Selling Association Ireland (DSAI)

ECC Ireland noted in its report that whilst it was considered that the foundations of an ADR body were in place at the Direct Selling Association, it was noted that *"no actual knowledge of consumers' practical experience with the scheme could be obtained at the time of writing."*[14] It was also noted that, no annual reports were published, enquiries submitted to the email address provided on the DSAI website were being returned as having "*failed permanently*" and links to members' pages were no longer operational.[15] These issues would lead to difficulties in meeting the criteria under the Directive, principally transparency and efficiency. However, currently, the DSAI is in a state of flux – with a potential merger with DSA UK – and these issues could potentially be overcome in the future.

Chartered Institute of Arbitrators (CIArb) – Irish Branch – Arbitration Scheme for Tour Operators[16]

At the time of compilation of ECC Ireland's report, it was concluded that CIArb's arbitration scheme for tour operators was *"of a different composition to those envisaged by the proposed Directive in that it does not form part of an integrated dispute resolution procedure"*, and that it, "*exist(s) beyond the scope of the proposed Directive as an ad hoc basis for a single dispute between a consumer and a trader*".[17]

[13] *Willis & Others v Pensions Ombudsman and Another* [2013] IEHC 352.

[14] Supra note 5, p. 22.

[15] Ibid.

[16] Supra note 1

[17] Ibid. p. 26.

In addition, given that arbitration results in a binding decision on both parties, and bearing in mind the principle of liberty, it was recommended that the Guidance Notes for the scheme[18] should clearly outline that there is no appeal against the arbitrator's award, save in very limited circumstances.[19]

Advertising Standards Authority of Ireland (ASAI)

As one of the few notified bodies in Ireland, the ASAI acts as a self-regulatory body set up by and financed by the advertising industry whose function is to ensure that all commercial marketing communications conform to the principles set out in the ASAI's Code of Standards for Advertising, Promotional and Direct Marketing in Ireland.[20]

As per Article 2(1) the Directive applies to, *"procedures for the out-of- court resolution of domestic and cross-border disputes concerning contractual obligations stemming from sales contracts or service contracts."*[21] As such the complaints handled by the ASAI may generally fall outside the scope of the Directive if there is no contractual relationship between the parties.

Non-Notified Bodies

In addition to those ADR bodies operating in Ireland which are notified, several non-notified bodies also exist and provide invaluable assistance to consumers.

Commission for Aviation Regulation (CAR)

Currently, CAR's primary function is the area of passenger and air traffic control charges. CAR has also responsibility for licensing of air carriers, as well as travel agents and tour operators. In addition, CAR also has an overseeing role for the enforcement of EU Regulation 261/2004 on compensation and assistance to passengers in the event of denied boarding, cancellation or long delays of flights, and EU Regulation 1107/2006 on reduced mobility.

As noted in ECC Ireland's report, CAR's role as the NEB may distinguish it from other ADR entitles presently operating in Ireland, in that it has the capacity to bring enforcement action if deemed necessary.[22] As such, CAR's procedure could be viewed as the exercising of quasi-judicial power which would fall outside the scope of the Directive.[23]

It should be noted that of the complaint areas dealt with by ECC Ireland, air travel represents the biggest category and, within it, complaints arising under EU Regulation 261/2004 are the most problematic subcategory, not only in terms of numbers but also in terms of the actual handling and outcomes, where consumers' frustration over a negative experience is often exacerbated by the difficulties met in contacting the air carrier or in obtaining a meaningful response.

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[18] See: www.arbitration.ie/userfiles/file/Holiday%20Arbitration%20Scheme%20Guidance%20Notes_Rules.pdf

[19] Supra note 5, p. 26

[20] ASAI, *Manual of Advertising Self-Regulation with the Codes of Standards for Advertising, Promotional and Direct Marketing in Ireland* (6th Ed.) Available online at: http://www.asai.ie/code.asp

[21] Supra note –Article 2(1).

[22] Supra note 5, p. 33.

[23] Ibid.

With two of Europe's biggest low-cost airlines established in Ireland, it is undoubtedly the case that this sector is in need of an ADR entity. However, whether CAR could form the basis of such an entity remains to be seen.[24] In fact, CAR does not deal with a wide variety of other air travel-related disputes, such as baggage complaints, terms and conditions, bookings issues, etc. It may be the case that a public body, such as the National Transport Authority, may be better placed to become an ADR entity covering all modes of transport – having regard to Regulations 1371/2007 (rail passengers), 1073/2009 (road passengers) and 1177/2010 (water passengers) – with CAR retaining its enforcement role.

Car Rental Council of Ireland (CRC)

Operating as a trade organisation representing the Irish car rental industry, the CRC requires members to adhere to its Code of Practice which aims to ensure *"that the customer who rents a car from a company subscribing to the code /.../ receives a level of service of the highest possible standard and integrity".*[25]

In terms of adhering to the requirements of the Directive, ECC Ireland's report noted that a particularly problematic issue for the CRC would be trying to fulfil the impartiality requirement given that Council members are elected from within the car rental industry itself.[26] In addition, it was noted that there was a lack of information about the CRC's procedure on their website resulting in a lack of transparency.[27]

Finally, and perhaps most importantly, it may be noted that the Report concluded that *"the CRC expressed no desire in attaining the status of an ADR entity for the sector in the manner envisaged by the proposed Directive, as compliance would inevitably require the provision of greater resources which may not be forthcoming from the industry in these economically challenging times for tourism dependent sectors".*[28] Since the publication of the Report, ECC Ireland has received no information to indicate that this position has changed.

Commission for Energy Regulation (CER)

The CER is Ireland's energy and public water regulator. As such it is perhaps not surprising that, *"CER's consumer dispute procedure reflects its primary role as an industry regulator rather than a sectoral ADR entity"*[29]. However, ECC Ireland's report concluded that the CER may *"with the appropriate provision of resources, provide a solid foundation upon which to build an industry specific ADR entity".*[30]

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[24] Concerns include the fact that CAR's procedure does not feature a defined structure allowing for an exchange and examination of views by both parties and that given the duration of the process, which may be well in excess of 90 days, could not be considered to meet the efficiency requirements.

[25] See: http://www.carrentalcouncil.ie/Code+of+Practice.html

[26] Supra note 5, p. 34.

[27] Ibid.

[28] Ibid, p. 35.

[29] Supra note 5, p. 37.

[30] Ibid.

Commission for Communications Regulation (ComReg)

Responsible for the regulation of the electronic communications, postal and premium rate services in Ireland, ComReg is charged with the investigation of complaints from undertakings and consumers regarding the supply of and access to electronic communications services, networks, associated facilities and the transmission of such services on networks.

Facilitative in nature, ComReg's dispute resolution procedure was deemed to meet the majority of the requirements specified in the Directive including the impartiality of staff, the publication of annual reports, efficiency of process (with the conclusion of the process well within 90 days) and offering the service free of charge to consumers.[31]

However, as noted in the Report, "*ComReg will only intervene in issues that have a direct regulatory bearing, such as contravention of a regulatory obligation, and [they] will not act directly on a consumer's behalf regarding issues relating to the supply of products or services which do not fall within the definition of "electronic communication services".*[32] As such, *"ComReg's ADR procedures reflect its primary function as a regulator as opposed to a sectoral ADR body"*.[33] Given the ever-increasing role of the communication sector in everyday life, it is ECC Ireland's submission that a sectoral ADR body which would accept all disputes of merit is justified.

The Dental Complaints Resolution Service (DCRS)

A recently launched initiative, the DCRS offers dental patients the opportunity to resolve their complaints if the dentist is a member of the Irish Dental Association (IDA) or has subscribed to the service, without having to contact the Dental Council or initiate court proceedings.[34] The DCRS website states that it handled 130 complaints in 2013, its first year of operation.[35]

In its findings ECC Ireland's report concluded that whilst the procedure was new, and time would be required to see how the service operated in practice, there was a strong likelihood of compliance.[36] Since this time, it is to be noted that "healthcare services", as defined by Article 3(a) of Directive 2011/24/EU on the application of patients' rights in cross-border healthcare, are exempt from the Directive and so the DCRS would fall outside the remit of the Directive.

Q.3 In your view, is there an existing body which could fill the lacuna in ADR coverage?

To some extent, the Small Claims Procedure has provided for a quick and affordable dispute resolution service since 1991. However, the procedure has its limitations (monetary claims only, up to €2,000, and subject to a non-refundable fee of €25); although registrars use their best endeavours to settle the dispute between the parties before referring the matter to the District Court judge, this is indeed an adversarial process within the Courts Service, i.e. not ADR.

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[31] Ibid. p. 38-40.

[32] Ibid. p. 40.

[33] Ibid.

[34] For additional information see: http://www.dentalcomplaints.ie/

[35] See Press Release: http://www.dentalcomplaints.ie/PR-may2014.html

[36] Supra note 5, p. 43.

Furthermore, it has been suggested[37] that small claims procedures may produce arbitrary judgments, as the judge in small claims may have minimal experience in, or understanding of, the requirements of certain sectors. Decisions may vary between individual judges and, in some cases the financial and time costs of defending small claims may exceed the cost of paying the claim. Such cases demonstrate the need for a viable alternative to court action, yet, at present, the potential of consumer ADR in Ireland continues to be, for the most part, untapped.

Given the substantial gaps in ADR coverage in Ireland, in order to fill the lacuna currently present some form of residual ADR entity will be required. Of those bodies currently in existence ECC Ireland is of the opinion that none could fill the lacuna in ADR coverage.

Three possible solutions could be:

1] The creation of a brand-new residual entity;

2] The transfer of such functions to the soon-to-be newly created Competition and Consumer Protection Commission under the Competition and Consumer Protection Bill 2014; or,

3] The creation of an entity under the provisions of the Mediation Bill 2012.

In those instances where the residual ADR entity, being a public body, allegedly fails to fulfill its role under Chapter II of the Directive[38], ECC Ireland submits that the Office of the Ombudsman should be competent to examine complaints from the public. The same approach could be used for ADR entities linked to public services commissioned by State or local authorities to be provided by private sector undertakings which have a high level of interface with the general public and whose decisions, if taken improperly, have the capacity to adversely affect significant numbers of members of the public.[39]

Q.4 Can you propose a specific model that the State may use to implement the Directive?

As noted in the Department's consultation, in ECC Ireland's report a variety of models could be used to meet the requirements of the Directive. They included:

1] The establishment of a residual cross-sectoral entity accompanied by a number of specific sectoral schemes;

2] The establishment of sector specific ADR entities to ensure full consumer ADR coverage, and

3] The establishment of a residual cross-sectoral entity with determinative functions outsourced.[40]

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[37] Evaluation of Regulation 261/2004, Final Report (Steer Davies Gleave), Feb. 2010

[38] Access to and requirements applicable to ADR entities and ADR procedures.

[39] The Office of the Ombudsman has no jurisdiction over services covered by highly specialised regulatory bodies which are exempt by virtue of the Ombudsman (Amendment) Act 2012

[40] Supra note 5, p. 62-66

In concluding the report at that time, ECC Ireland was of the view that the establishment of a national consumer ADR structure similar to the model described in option one above provides an effective approach to continuing the growth of ADR in Ireland, whilst also representing the most efficient way of ensuring compliance with the proposed legislation, budgetary constraints permitting.[41] Since the conclusion of the report, ECC Ireland has not resiled from that opinion.

Based on the above, we consider that both traders and consumers should first be encouraged to resolve their disputes through the trader's customer services. If the matter is not resolved within a reasonable time, consumers should then be able to refer the matter to an ADR entity, whether public or private. To ensure that the service to consumers is seamless, there should be a minimum number of easily identifiable points of entry.

Last April Belgium adopted new legislation[42] with a view to establishing a model along these lines. Before the introduction of the new system –which will be in operation from January 2015 – Belgium had statutory ombudsmen for financial services, energy, telecoms, postal services, and rail transport. Apart from that, there were a few ADR entities notified under the 1998-2001 recommendations[43] but there was no full ADR coverage. The new legal framework creates a new statutory Ombudsman competent for receiving all consumer disputes. If there is a notified ADR entity competent to deal with the request, the request is transferred by the new Ombudsman to the ADR entity in question. Otherwise, if there is no notified ADR competent to deal with the complaint, the new Ombudsman will deal with it. This mixed approach, which ECC Ireland would suggest as a tangible model to consider in Ireland, (i) ensures full coverage, (ii) facilitates monitoring and (iii) simplifies the lodging of complaints by consumers, through a single point of entry.

Although the new Ombudsman will have a central role in registering and distributing complaints (signposting complaints, not people), it is hoped that new private ADR entities will be created in the near future, having regard to the peculiarities of each specific sector, so that the role of the new Ombudsman remains residual rather than dominant as regards the actual provision of ADR services. It should also be noted that the process of registering and distributing complaints arising from online transactions may be greatly assisted by the ODR platform developed by the European Commission.

ECC Ireland would also like to express in this instance its view that the term 'Ombudsman' should only be used by public bodies satisfying certain criteria, and its adoption by private ADR entities should either be restricted or, for the avoidance of any doubt, prohibited[44].

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[41] Ibid. p. 67

[42] Loi portant insertion du Livre XVI, "Règlement extrajudiciaire des litiges de consummation" dans le Code de droit économique, available on http://www.etaamb.be/fr/arrete-royal-du-10-avril-2014_n2014011286.html

[43] Recommendations 98/257/EC and 2001/310/EC

[44] The term 'Ombudsman' came into English with a very specific meaning. However, the proliferation of ombudsman offices around the world, and the (mis)use of the term 'ombudsman' for complaint departments in private firms have somehow distorted the original meaning and have the potential of tarnishing the respect and connotations that the term generally attracts. Since the term 'ombudsman' in Ireland still is – unlike in the UK, e.g. www.ombudsmanassociation.org – associated with the public sector, we are of the opinion that the term should be protected and its use restricted like in the Nordic countries, or even English-speaking countries, such as New Zealand. The latter states, in s. 28A of the Ombudsman Act 1975 (as amended in 1991), that "no person, other than an Ombudsman appointed under this Act, may use the name 'Ombudsman' in connection with any business, trade, or occupation or the provision of any service, whether for payment or otherwise, or hold himself, herself, or itself out to be an Ombudsman except pursuant to an Act or with the prior written consent of the Chief Ombudsman."

Q.5 How would the model proposed under Q.4 be funded (public funds, business, business organisations, case fees or a mixture)?

Before considering the various options available, we would like to point out that although we appreciate that the purpose of general taxation is to generate tax revenues for the Exchequer – where there is no direct connection between what is paid/collected and what is rendered by the government to the individual citizen – it should, however, be borne in mind that it is not unreasonable to pursue a policy that is responsive to consumers' legitimate interests (e.g. financial support to initiatives which will contribute to enhance consumer protection, welfare and empowerment) if regard is had to consumers' substantial contribution to the Exchequer when paying VAT, as in such instance their role as consumers is intrinsically linked to their role as tax payers. It should also be noted that if an efficient ADR system working better for consumers and the economy is established, the State may then further benefit financially if the number of cases which are resolved through ADR leads to savings in Court resources.

Notwithstanding the above, ECC Ireland opines that the majority of the funding required for the model proposed should come from traders. Public funding will be required to set up the model but the said model should ideally be self-financed as regards its running. Other than the funding of each specific ADR entity (e.g. levies, membership fees), the new residual ADR entity and the 'competent authority' under Chapter IV of the Directive may primarily be funded by a combination of fees.

The system may receive some State sponsorship initially and operate, once established, a fund made up of contributions from businesses (e.g. small levy collected by the Companies Registration Office and/or Revenue; fees/quotas from ADR entities who wish to be recognised as such under the Directive, subscriptions, participating traders). The "polluter pays" principle should apply, not only because they generate the complaint but also to encourage traders to better address complaints internally to avoid the costs associated with complaints going to ADR (fee-per-case). It is also worth noting that there may be certain traders that even if not generating complaints themselves, they may indirectly benefit from the existence of this ADR model due to increased consumer confidence and potential growth (e.g. couriers, payment intermediaries) and, therefore, it may not be unreasonable for such traders to contribute to the scheme too, on a more general basis (e.g. companies/business registration).

In any case, we submit that it is important that a number of revenue streams are maintained as this facilitates financial planning and organisational stability; otherwise, difficulties may arise due to workload/revenue fluctuations.

Q.6 What are your views on relying on an ADR entity/entities established in another Member State or regional, transnational or pan-European dispute resolution entities?

Although we appreciate that certain ADR entities may be serving multiple Member States –as this brings expertise and economies of scale, especially for smaller Member States– and that, in principle, there should not be a need for multiple registration in various Member States[45], this raises the issue of supervision and administrative co-operation between the different authorities in the various Member States.

[45] Directive 2006/123/EC on services in the internal market.

In any case, it is our view, and a strongly held one, that Ireland should first focus on encouraging traders to engage in ADR at a local level.

Also, even though the emphasis should undoubtedly be placed on developing the ADR landscape in the State (e.g. by encouraging SMEs progressively engaging in ADR schemes), it should also be borne in mind that as a modern, open economy, Ireland has succeeded in attracting some of the world's best-known traders and, accordingly, if there were to be transnational or pan-European ADR entities, Ireland should be in an ideal position to provide such services if ADR is finally developed in the coming years.

Q.7 In your view, should the implementing legislation provide for ADR procedures where the person(s) 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?

It is our view that 'single trader' or 'in-house' ADR procedures Ireland should not form part of Ireland's implementation of the Directive.

ECC Ireland appreciates that the Commission's objective is to build upon existing mechanisms and the provision in question has been included to encapsulate those forms of ADR already existing in Member States. Although there may be merit in retaining in-house ADR systems in countries where they are well established and effective, and have proven to respect quality guarantees, such schemes are not a feature of the current Irish redress landscape and we would submit that this is not the direction in which Ireland should go.

Traders should be encouraged to have robust and effective internal procedures for resolving consumer complaints but if this process does not resolve the dispute to the satisfaction of the consumer, recourse should be available to a separate and impartial third party for further adjudication. According to a European Commission study the most frequently cited benefit of using ADR amongst consumers is that it involves an 'unbiased' third party in the process and one which will lead to a fair and equitable outcome.[46]

It is axiomatic that an ADR scheme cannot be successful if it is perceived to be biased. We would have concerns that internal ADR systems may not be viewed by consumers as having the appropriate level of independence and objectivity. If ADR is to be widely trusted and utilised by consumers it is of upmost importance that the schemes are not just independent but are *perceived* as such by the public. We would be sceptical that in-house provision of ADR could meet this fundamental requirement.[47]

ADR mechanisms will only constitute attractive means for consumers seeking redress if they are regarded to be an actual alternative to courts proceedings. It is submitted that ADR

[46] Consumer Redress in the European Union: Consumer Experiences, Perceptions and Choices, available on http://ec.europa.eu/consumers/archive/redress_cons/docs/cons_redress_EU_qual_study_report_en.pdf

[47] Furthermore, it may even deter consumers from pursuing their rights before the courts. Consumer Focus in 2010 highlighted that consumers were often discouraged from going to courts after an unsuccessful mediation as they perceived the court as an additional hurdle to justice; instead opting to settle for less than the claim they had made. *Small Claims, big claims, Consumers' perceptions of the small claims process*, p. 39 http://www.consumerfocus.org.uk/files/2010/10/Small-claims-WEB-FILE.pdf

systems should be separate and distinct from in-house customer care departments, however professional and effective, and those involved in making a decision should be independent of all who may have an interest in the outcome.

Q.8 Can you identify any specific ADR procedures which may fall under this category?

We are unaware of any such schemes in Ireland at present. In France there is a long tradition of this type of ADR system, many of which are notified to the Commission as "meeting the Commission's quality requirements, according to the national authorities". Examples of such schemes include those run by GDF SUEZ and EDF (energy sector), La Poste (postal services), and SNCF (railway transport).

Q.9 Should the implementing legislation provide for ADR entities to use all, some or none of the exemptions in its procedural rules as provided for in the Directive? Please provide an explanation for your suggestions.

In our view, all the exceptions provided for in Article 5(4) are justified. However, we understand that these exceptions may be better explained by means of guidelines, so that ADR entities apply these exceptions, if any, correctly.

In any event, we also understand that even if the parties are provided with a reasoned explanation of the grounds for not considering the dispute, the possibility to appeal or review the ADR decision in this respect should be available, to avoid situations where access to ADR procedures may be significantly limited.

Q.10 Should the State prescribe minimum and maximum claim thresholds, if so, how much and the reason for the stated amounts.

In principle, if the submission to ADR is voluntary, there may not be minimum and maximum claim thresholds. However, the entities themselves may set certain monetary limits for a number of reasons. To avoid the proliferation of unnecessary thresholds the State may either set those by means of regulation, or restrict them.

ECC Ireland would support the adoption of a higher threshold once this is set at a sufficiently high level to ensure the vast majority of consumer disputes will fall within its scope. It is difficult to suggest an appropriate level without knowledge of the type of complaints that a residual ADR scheme would encompass but it is submitted that it should be no less than €25,000. Higher value claims are potentially more complex and therefore are arguably more suited to the detailed scrutiny of the courts. Such complex cases may also place undue demands on the resources of the ADR body to the detriment of other complainants.

Although the resolution of disputes through ADR mechanisms can generally be achieved at a much lower cost that via court action, it is important to recognise that ADR procedures can still generate significant costs. While it could be argued that it is uneconomic to defend financial claims of low value, we nonetheless believe that a lower threshold should not be imposed. Consumers should not be discouraged from seeking redress simply because the amount at stake is nominal. They will already be excluded in a practical sense from redress via the courts and we do not believe that another avenue should be closed to such consumers.

If a minimum threshold was to be introduced, €50 is greatly in excess of what ECC Ireland would consider appropriate. A significant number of consumer purchases do not exceed €50, e.g. books, clothing, leisure services. Setting a minimum claim threshold at this level may potentially deprive a substantial number of consumers from availing of a redress mechanism. Indeed, in many cases the consumer's complaint may not have any monetary value at all, for example when they are seeking a change of business practices or policies. Additionally, in our experience, consumers often simply seek an apology or an explanation as to why they have been treated a particular way. We strongly believe that ADR is the appropriate platform for securing this type of redress given the flexible range of remedies available and are of the opinion that there should be no lower limit imposed.

Q.11 Should ADR procedures be free of charge to the consumer or should a nominal fee be charged, if so, how much and why?

The cost of access to justice for citizens is an important issue to consider. The 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"*[48]:

Each claim attracts some cost to resolve. However, by their very nature, most consumer complaints are likely to be for relatively small sums of money and, therefore, consumers are unlikely 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.[49]

ECC Ireland submits that a free ADR scheme for consumers, or – in complex cases or to deter malicious or unfounded claims – one where the fees are kept to a minimum and are not disproportionate to the value of the claim, would be ideal to enhance consumer participation.

Q.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?

Although most ADR procedures involve voluntary participation and non-binding outcomes, this may be frustrating for consumers in those instances where they suffer detriment and then, after investing some time and energy in an ADR procedure, this may fail to produce any tangible result. In such cases, consumers may question the value of the whole ADR procedure. It is for this reason that ECC Ireland suggests that ADR decisions in the context of consumer contracts should be binding on the trader if not appealed within a given timeframe.

In addition, 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.

[48] *Study of Competition in Legal Services: Preliminary Report* (The Competition Authority, February 2005)

[49] Eurobarometer No 342

Q.13 What are your views on the mandatory participation of traders in notified ADR procedures, which fulfil the requirements of the Directive, in other areas which are not already mandatorily required (eg. financial services)?

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, car rental, accommodation) where adherence to an ADR scheme should be made mandatory by means of regulation, e.g. by requiring an operating license granted by the relevant regulator in order to allow an undertaking to run the business activity concerned, which would be subject to the adherence to and compliance with an approved ADR scheme. In addition, ECC Ireland submits that provision could be made in future e-commerce and distance selling legislation to both increase awareness of and perhaps mandate usage of ADR.

Bearing in mind that the voluntariness of party participation has long been a cornerstone of all ADR processes, 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.

There may be a case for requiring traders that are not committed to use a specific ADR entity to compulsorily participate in the residual ADR scheme. The reasons are as follows:

1] Traders who commit to use ADR entities to resolve disputes with consumers are required to inform consumers of the ADR entity or entities by which they are covered. By failing to do so, it would be easy to identify which traders would then be automatically covered by the residual ADR entity, and required to use it.

2] According to the Directive, participation should be "*without prejudice to any national rules making the participation of traders in such procedures mandatory or subject to incentives or sanctions or making their outcome binding on traders, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system as provided for in Article 47 of the Charter of Fundamental Rights of the European Union"*.[50]

3] The residual ADR entity should always be in a position to guarantee compliance with all the principles, quality standards and safeguards contained in the Directive.

4] Mandatory use of the residual ADR entity in absence of adherence to other approved ADR schemes should, in principle, encourage a sizeable number of traders to develop relevant ADR schemes or engage in existing ones, if these are voluntary or better fit to their needs.

5] By establishing a compulsory residual ADR entity, there would be a simplification of the statutory ADR schemes in Ireland, given the existence of other statutory ADR schemes where participation is also mandatory (e.g. financial services), i.e. voluntary participation would be available to traders who voluntarily choose to participate in private forms of ADR which meet the criteria set in the Directive.

[50] Recital 49.

6] By establishing a compulsory residual ADR entity, the potential for a systemic failure is limited as, otherwise, trust in the scheme could be severely compromised if traders were to choose not to engage in the residual ADR scheme more frequently than not, if participation was voluntary.

In addition to the above, the mandatory residual model described would help to both fund the establishment of the scheme, given its broad base of traders, and better understand the real demand for ADR services in the State. Furthermore, it would contribute to rapidly increase awareness of ADR and to develop private schemes with minimum funding.

As regards the impact that the proposed model would have on competition, we are not aware of any negative effects in countries where public ADR may be mandatory (e.g. Nordic countries) or widely available through a significant number of private entities (e.g. the Netherlands). On the contrary, it would appear that their economies are among the most dynamic ones in the world.

Q.14 Is the period beginning on the day on which the relevant dispute is referred to an ADR procedure and ending on the day which is 30 days after the ADR procedure has concluded sufficient time to extend the limitation period for extending judicial proceedings? If not, why?

It depends on the nature of the ADR process. More flexibility may be required where a non-binding method is used. In the same way Regulation 6(2) of the European Communities (Mediation) Regulations 2011 (S.I. No. 209 of 2011), which transposes Directive 2008/52/EC into Irish law, states that *"a mediator shall inform the parties in writing of the date on which a mediation concludes"*, it would be useful that the ADR entity establishes the date of receipt of the complete complaint file, as this date may be used for *"reckoning any period of time for the purposes of any limitation period specified by the Statute of Limitations 1957 (No. 6 of 1957) or the Statute of Limitations (Amendment) Act 1991 (No. 18 of 1991)"*.

The 30 day period referred to in the S.I. can also be aligned with what is provided in Article 9(8) of the ODR Regulation: *"where the parties fail to agree within 30 calendar days after submission of the complaint form on an ADR entity, or the ADR entity refuses to deal with the dispute, the complaint shall not be processed further"*. In this respect, proviso could be made for the extension of time to stop running at that point.

Q.15 Are you aware of any other Irish legislation where the limitation periods may require amendment in order to meet the requirements of the Directive?

In product liability cases, where there is also a personal injury segment to the claim, it may be that consumers may wish to bring a civil action[51] under the PIAB Act. Section 50 of the PIAB Act allows for the suspension of the limitation period during the Personal Injuries Board procedure i.e. from the period beginning on the date after the making of an application for an assessment and ending six months after the issuance of an authorisation.

[51] Section 4 defines a ''civil action'' as an action intended to be pursued for the purpose of recovering damages, in respect of a wrong, for (*a*) personal injuries, or (*b*) both such injuries and damage to property (but only if both have been caused by the same wrong). However, it does not include - (i) an action intended to be pursued in which, in addition to damages for the foregoing matters, it is *bona fide* intended, and not for the purpose of circumventing the operation of *section 3*, to claim damages or other relief in respect of any other cause of action.

Q. 16 Do you have any views, on the designation of competent authorities? Should the State designate one competent authority or more (sectoral regulators responsible for particular areas)?

Without prejudice to the appointment of as many public sector-specific ADR entities as deemed fit, we understand that, for the purposes of designating the 'competent authority' (or authorities) required by Chapter IV of the Directive, each Member State may designate more than one competent authority (e.g. national, regional or local level), yet a single point of contact for the communication with the European Commission must be determined.[52] Having regard to the degree of development of ADR in Ireland and the institutional and regulatory structures in the State, ECC Ireland submits that it would be desirable that only one public body is entrusted with the statutory powers to carry out the functions set out in Articles 18, 19 and 20 (i.e. one competent authority = one single point of contact). The same body may act as the residual ADR entity referred to in Article 5(3).

It should be noted that the Directive requires, by definition, that the 'competent authority'[53] for the purposes of the Directive is a *public* authority.

The Directive also covers certain modalities of cooperation between the different actors engaged in the development, provision and supervision of ADR services, such as training (Article 6) or enforcement (Article 17). In our opinion, it is clear that such cooperation between ADR entities, professional bodies, regulators and relevant authorities is necessary for the smooth implementation of the Directive, yet it should not be used to offload or bypass the State's obligations under the Directive to ensure that quality requirements are met. If the State plays an active role in order to give full effect to the Directive, consumer ADR may eventually become an effective means of settling complaints (and also of addressing market failures, as aggregated market information should facilitate the identification of problems which give rise to complaints and the adoption of corrective actions). Otherwise, without State leadership, the model is unlikely to attract the level of trust required to render the system successful.

Q. 17 In your view should disputes initiated by a trader against a consumer be included in the legislation giving effect to the Regulation. If so, why.

While there may be some merit in extending the ODR/ADR schemes to include SME's or 'micro-traders' given that they may also lack the means to engage in litigation, and the ODR Regulation provides for the functionality of disputes initiated by a trader against a consumer, we do not believe that this is the right time to do so.

One of the key rationales for effective consumer redresses schemes stems from the power imbalance inherent in consumer contracts; businesses generally have the resources to pursue legal avenues to resolve disputes with consumers whilst consumers typically do not. However, it should also be noted that ADR is not just about affordability, as it also represents a change in culture, an alternative means of handling conflict out-of-court and, thus, ADR disputes initiated by a trader against a consumer may actually benefit consumers too, as opposed to the prospect of defending a claim from a trader through the courts.

[52] Article 18(1)

[53] Article 4(1)(i)

However, traders can currently avail of a number of mechanisms to address disputes with their customers, from debt collection to court action (including small claims and payment orders), as well as termination of the business relationship. Furthermore, in light of the current state of (under)development, we are of the opinion that priority should be given to facilitating consumer access to effective, low-cost redress mechanisms to increase consumer confidence in both the market and proposed ADR system. Once the said ADR system is more consolidated, other options could then be explored.

Q.18 The Department would welcome any other views on issues relating to the Directive and the Regulation which you may wish to provide.

ECC Ireland's response to this consultation has solely focused on the ADR Directive, in accordance with the questions asked by the Department. However, as the Department is aware, ECC Ireland's staff have been active in assisting the Department and the European Commission in giving effect to the provisions of the ODR Regulation[54]. Should the Department wish to further discuss any of the issues raised in this paper or in connection with either the transposition of the ADR Directive or the ODR Regulation, please do not hesitate to contact us.

Thank you for your consideration

European Consumer Centre Ireland (ECC Ireland)
MACRO Centre, 1 Green Street, Dublin 7
t. +353 (0) 1 879 620
e. info@eccireland.ie
w. www.eccireland.ie

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[54] ECC Ireland's Legal Adviser is a member of the ODR Expert Group, where he represents both Ireland and ECC-Net. He is also a member of the ODR Committee tasked with adopting implementing acts in relation to Articles 5, 7 and 8 of the ODR Regulation.