



Submission to the Consultation on:

EU Directive on Consumer Alternative Dispute Resolution & the EU Regulation on Consumer Online Dispute Resolution

Department of Jobs, Enterprise and Innovation
August 2014



INTRODUCTION

The EU Directive on Consumer Alternative Dispute Resolution (“the Directive”) and the EU Regulation on Consumer Online Dispute Resolution (“the Regulation”) came into force in July 2013. The Directive must be transposed into national law by Member States by the 9th July 2015 and the Regulation is directly applicable in Member States from the 9th January 2016

The Law Society of Ireland commends the Department of Jobs, Enterprise and Innovation on its practical consultation in advance of its transposition. In that regard, the Society, as a key stakeholder in this matter, is available and interested to assist the Department as its policy develops further.

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REPLIES TO CONSULTATION QUESTIONS

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 provision of services between a consumer and a trader, if so, where do you think they exist?

- 1.1. Consumers' capacity to pursue claims via ADR against traders is quite limited in this jurisdiction. The small claims court is the main forum used to resolve such disputes, which by definition, is not a form of ADR. Further, the jurisdiction level of the small claims court is €2,000 which in many and increasing instances is inadequate, depending on the type of goods or service or the volume purchased (see reply to Q 10 below).
- 1.2. The lack of a cost effective mechanism may curtail consumers' ability to assert their rights as may arise out of the European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995.

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

- 2.1. The Chartered Institute of Arbitrators (CI Arb.) has a specific scheme for the Motor Industry, termed 'SIMI' (Society for the Irish Motor Industry), which is funded by that industry and has been operating successfully for some years. CI Arb also has a specific scheme to resolve package holiday disputes.
- 2.2. It is submitted that the CI Arb would comply with the requirements of the Directive. Other entities would include the Mediators Institute of Ireland (MII), Friarylaw and the Centre for Effective Dispute Resolution (CEDR). However, both the CI Arb and CEDR provide dispute resolution procedures that cater for both imposed solutions (arbitration) and non-imposed solutions (mediation).

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

- 3.1. In terms of a single body the CI Arb may be able to fill the lacuna, as a body that provides for both arbitration and mediation and has been established for a long time in Ireland. As stated above, the CI Arb already has established schemes for both the motor industry (termed the 'SIMI' scheme) and regarding package holidays.

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

- 4.1. The SIMI or package holiday schemes as established under the umbrella of the CI Arb may provide useful guidance in that regard.

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

- 5.1. It is understood that the CIArb scheme for the motor industry, SIMI, is funded by the motor industry itself and has worked well. Within certain sectors,, similar structure could be considered.
- 5.2. However, given the great range of consumer sales and service contracts that are the subject of the Directive it may be appropriate to consult with relevant stakeholders in specific branches of the consumer marketplace to explore whether separate ADR mechanisms for certain of sales and services contracts may be appropriate.

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?

- 6.1. Irish ADR entities should be considered in the first instance, where the dispute involves matters in which there is sufficient expertise to deal with the matter that is in dispute (see paragraph 6.2 below). Such an approach would also be consistent with the EU subsidiarity principle that decisions be taken at the lowest effective level closest to the citizen.
- 6.2. Furthermore, Irish ADR entities should be considered on the basis that:
 - The quality of ADR professionals in Ireland represents a valuable resource in sustaining commercial and consumer activity.
 - There may be certain sectors which, due to their specificity to Ireland, would better serve the consumer if retained (in the first instance) in Ireland
- 6.3. Recourse to specialist ADR entities in other Member States may be justifiable in sectors where there is a lack of expertise in this jurisdiction, due to an infrequent or insufficient volume of trade in Ireland. Further, it is noted that the Directive is intended to also cover online purchases, which may involve products or service types that are not available in Ireland.

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 trade to be covered by the Directive provided they meet specific requirements?

- 7.1. Once the dispute resolution procedure is independent and that there is no conflict of interest involved there would be no reason why the implementing legislation should not provide for same. It is understood that the CIArb Motor industry scheme, SIMI, as discussed above, is funded by the motor industry.

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

- 8.1. See reply to Q 7 above.

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.

- 9.1. All of the grounds for refusing to deal with a dispute (a) to (f) are appropriate in principle. However, ground (c) that 'the dispute is being or has previously been considered by another ADR entity or by a court' (emphasis added) may, without qualification as to what this means, have the effect of depriving the consumer of access to an appropriate ADR mechanism in circumstances where the trader has taken a court action against the consumer. (See also reply to Q. 17 below).

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

- 10.1. Given the wide range of goods and services that are supplied to consumers, thresholds may depend greatly on the specific category. Relevant stakeholders should be consulted in that regard.
- 10.2. In particular, any configuration of claim thresholds should take into account volume and unit price: a claim involving a high volume of low priced goods may exceed a given threshold. Similarly, the purchase of a small number of units of high value might exceed the threshold. Notwithstanding the value of the claims, these claims may be more suitably dealt with through the ADR mechanism.

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

- 11.1. Subject to further research and investigation, we are of the view that the ADR mechanism should not be free of charge: leaving aside funding difficulties which may result, having a free service could also give rise to a risk of frivolous or vexatious claims.
- 11.2. Fees should however be set a low level to ensure that they do not act as a deterrent to consumers defending their rights.

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?

- 12.1. A balance must be struck between the consumer being able to pursue an effective and cost efficient means of dispute resolution as against the trader's right to pursue the matter through the courts.
- 12.2. On balance, in order for the dispute resolution mechanism to be truly efficient, those decisions of notified ADR entities that aim to resolve a dispute by imposing a solution, such as arbitration, should be binding on traders.

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 (e.g. financial services)?

- 13.1. It is submitted that financial services is an area where access to effective ADR for consumers is lacking.
- 13.2. There is a perception that the language in some financial services and terms and conditions is opaque and lacks the requisite clarity for consumers. It is understood that the Financial Services Ombudsman has been inundated with complaints.
- 13.3. An effective and low cost ADR mechanism may benefit both the financial services sector and the consumer in the long term: the consumer is likely to have greater confidence in availing of financial services where there is effective recourse to low cost ADR.

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 taking judicial proceedings

- 14.1. A 30 day period is rather short and does not allow sufficient time for reflection, particularly in circumstances where one of the parties is a consumer.
- 14.2. Accordingly, consideration might be given to a 40 day period.

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?

- 15.1. The area of consumer hire agreements may need to be examined.

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)?

- 16.1. We suggest that a body such as the Chartered Institute of Arbitrators, as a long established body would be a competent authority. Further, its members include a broad range of professionals in a range of disciplines. The Centre for Effective Dispute Resolution (CEDR) may also be a competent authority.
- 16.2. As regards a preference for one competent authority or more, it is submitted that a single point of contact be established (as required under the Directive) but that several competent authorities be authorised to administer ADR in sector specific areas.

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?

- 17.1. The overarching scheme of the Directive is to facilitate efficient and cost effective access to ADR mechanisms for consumers.
- 17.2. Consumers may be deterred from availing of the ADR mechanism in circumstances where the trader is also entitled to place a claim against the consumer. Further, the independence of the ADR provider may be undermined if the funders of the ADR scheme are also entitled to pursue claims against the consumer. See replies to Q 5 and Q 7 above.

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

- 18.1. Given that the Directive may bring some challenges to the business sector it is suggested that the relevant stakeholders be encouraged to view the Directive in a broader context as a means of instilling greater consumer confidence in the long term.

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