

**Consultation on the implementation of the EU
Directive on Consumer Alternative Dispute Resolution
and the EU Regulation on Consumer Online Dispute
Resolution June 2014**

Submission to

Competition & Consumer Policy Section
Department of Jobs, Enterprise and Innovation

From

The Mediators' Institute of Ireland



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The Mediators Institute of Ireland
Pavillion House
31/32 Fitzwilliam Square South
Dublin 2

Introduction

The Mediators' Institute of Ireland (the MII) is the professional association for Mediators in the Republic of Ireland and Northern Ireland. Established in 1992, and with over 800 members, it promotes the use and practice of quality mediation as a process of dispute resolution.

The MII was established to promote the use of quality mediation as a process of dispute resolution in all areas by ensuring the highest standards of education, training and professional practice of mediation and by increasing public awareness of mediation. The MII has different categories of membership which include accredited Mediators, trainee Mediators, and individuals and organisations which have an interest in mediation. Only Practitioner and Certified Members who hold a current MII practising certificate are approved by the MII to mediate and are bound by the MII Code of Ethics to only mediate where they have the appropriate training, knowledge and competence to effectively mediate.

The MII welcomes the opportunity to make a submission to Competition & Consumer Policy Section of the Department of Jobs, Enterprise and Innovation on the EU Directive on Consumer Alternative Dispute Resolution and the EU Regulation on Consumer Online Dispute Resolution.

General Comments

The MII supports the principles of the EU Directive on Consumer Alternative Dispute Resolution (“the Directive”) and the EU Regulation on Consumer Online Dispute Resolution (“the Regulation”) Directive. In particular the MII is supportive of ensuring that disputes between consumers and traders can be submitted to out-of court entities offering impartial, transparent, effective and fair alternative dispute resolution procedures, without restricting consumer’s access to the court, thereby contributing to the functioning of the internal market.

In that regard the MII acknowledges that within the Directive the key principles of mediation are underpinned by confidentiality, impartiality, transparency, effectiveness and in the provision of a fair alternative dispute resolution procedure.

The MII is also supportive of the concept that that parties acting as **ADR entities** under the Directive and Regulations **meet certain quality criteria including independence, transparency, expertise, effectiveness and fairness etc.** In this regard we would suggest the State recognises in the supporting legislation that ADR entities and practitioners are required to meet certain standards and competency of practice, training, and certification/qualification. We strongly advocate that ADR entities under the legislation, and those that in particular provide a mediation service would at a minimum be Certified Mediators and be required to subscribe to a national code of standards, practice, and ethics. This we believe will ensure the State can be satisfied that those providing the ADR services are equipped and experienced to provide an independent, transparent, effective, and fair process.

BACKGROUND

In relation to the obligation for the State **to appoint a competent authority charged with the monitoring the functioning of ADR entities established on its territory**, we strongly recommend that those ADR entities that will provide a mediation service under the Directive be approved by a professional body such as the MII. The MII has an established Code of Ethics and Practice that addresses the monitoring of our members in the conduct and provision of mediation services, and to date this Code of Ethics and Practice has served the service user well and ensures MII Mediators provide a quality service.

With regard to the State's obligation that **qualified ADR entities resolve disputes within 90 days and ADR procedures should be free of charge or of moderate costs for consumers**, we acknowledge the desire to provide a timely ADR process, and in many instances mediation does provide this opportunity. However for the State to be assured of a quality and professional service the MII would be concerned that an expectation might exist for Mediators to provide their services free of charge. It may be that the State intends to establish a panel of ADR entities and provide funding for same. However, the MII suggests that the State gives due consideration to an existing model whereby the parties to a dispute be responsible for the costs of the dispute resolution process. Typically in mediation either or both parties agree to pay the costs equally, and subsequently agreements that emerge within a mediation process can enable the parties to agree who pays the costs. If the intention is that customers are not required to pay then it is possible that many claims that are not valid may be progressed at cost to some other party. This would not be a desirable practice. Therefore the State may wish to consider issues relating to this obligation before transposing the Directive into legislation.

The MII further notes a concern regarding the following statement in the consultation document "*ADR entities can take the form of procedures where the ADR entity brings the parties together with the aim of facilitating an amicable solution (conciliation), or procedures where the ADR entity proposes a solution (mediation) or procedures where the ADR entity imposes a solution (arbitration). They can also take the form of a combination of two or more such procedures. The Directive is a minimum harmonisation instrument and Member States may maintain or introduce rules that go beyond those established in the Directive in order to ensure a higher level of consumer protection*". The MII wishes the State to consider its interpretation of mediation, and indeed how the definition above is at variance to the **Draft General Scheme of Mediation Bill 2012**. Mediators do not propose a solution rather, in accordance with the Draft General Scheme of Mediation Bill the following definitions need to be considered:

- "*mediator*" means a person who assists parties to reach a voluntary agreement to resolve their dispute whilst acting at all times in accordance with the principles of impartiality, integrity, fairness and confidentiality, with respect for all parties involved in the mediation".

and

- “mediation” means a facilitative and confidential process in which a mediator assists parties to a dispute to attempt by themselves, on a voluntary basis, to reach a mutually acceptable and voluntary agreement to resolve their dispute.
- In addition the MII defines mediation as a process in which an impartial and independent third party facilitates communication and negotiation and promotes voluntary decision making by the parties to a dispute to assist them to reach a mutually acceptable solution.

Whilst it is in the interests of all parties to have a dispute resolved within the ADR process, the MII expresses a concern regarding either a Mediator imposing a solution, or where the concept that mediation may involve “the form of a combination of two or more such procedures”.

In light of the Draft Bill and the accepted definition of mediation, the MII suggests the State carefully consider the definition of the processes to be used under the transposing legislation.

We welcome the concept that the *Directive is a minimum harmonisation instrument and Member States may maintain or introduce rules that go beyond those established in the Directive in order to ensure a higher level of consumer protection*. In this regard the MII suggests the parties to a dispute should be provided with clear alternatives of what mediation, conciliation and arbitration are, as each of these ADR practices are unique and may in their own right be a suitable process under a given set of circumstances. It should however be noted that unlike mediation, conciliation and arbitration may be asking the parties to forgo their statutory rights, or may incur further costs on the disputants or the State in relation to the right to appeal decisions or recommendations made by a third party (the ADR entity) under conciliation or arbitration. (Mediation does not raise issues of appeal).

ADR LANDSCAPE IN IRELAND

The MII notes in the consultation document that reference is made as follows “*In the State, there are only a limited number of sectors where ADR procedures currently exist to deal with any contractual dispute arising from the sale of goods or the provision of services between a consumer and a business and as a result there are significant gaps in coverage*”. The MII therefore strongly endorses that the State now progresses with publication and enactment of a Mediation Bill. In this regard it is noted that Section 2 of the **Draft General Scheme of Mediation Bill 2012** provides for the following interpretation “*civil proceedings*” include commercial proceedings. Therefore enactment of the Mediation Bill will address the current gap that exists under consumer ADR, and ensure the State meets its obligation under the EU Directive on Consumer Alternative Dispute Resolution.

The MII notes the poor public awareness of ADR procedures as reported by the National Consumer Agency (NCA) – 56% of Irish consumers being unaware of out of court procedures as a means of settling consumer disputes-, and an EC survey reporting that in

Ireland only 7% of retailers have used an ADR mechanism. The MII has set within our own mission an obligation to provide a public service awareness of mediation. Whilst the MII has limited financial resources (based on membership subscription) we have continued to promote Mediation and are embarking on a public awareness campaign in the Autumn of 2014. We would be happy to discuss opportunities of partnering with State agencies (such as the NCA) to raise further awareness of the benefits of mediation in resolving consumer disputes. Indeed we are aware of the substantial savings in costs reported by the Courts Services in relation to a pilot programme in offering mediation as an opportunity to disputants that were progressing their dispute in the District courts.

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?

Yes significant gaps do exist, please see general observations as outlined above. In particular a marked absence of public awareness exists despite a recent MII Members survey which reported over 85% of cases are settled in mediation, and typically in a very short timeframe.

It should also be noted that at present, **mediation is available** through the **Equality Tribunal** to traders and consumers **under the Equal Status Acts** in relation to the provision of services but **ONLY** where the consumer claims to have been **discriminated against**.

As stated earlier the MII, in general, is supportive of the **Draft General Scheme of Mediation Bill 2012** and welcomes the fact that the text of the Bill is due to be published in late 2014. The MII is confident that the legislators will address the areas of concern within the Draft Heads of the Bill as expressed and submitted by the MII. Indeed the MII is available to assist the legislators and the Department in progressing the Bill as required.

ACCESS TO ADR PROCEDURES AND REQUIREMENTS APPLICABLE TO ADR ENTITIES AND PROCEDURES

The MII is of the view that its Certified Members providing mediation as an ADR process can provide ADR services within the requirements for ADR entities and procedures and the quality principles applicable to ADR entities, particularly under ***Expertise, independence and impartiality***: (Article 6), ***Transparency***: (Article 7), ***Effectiveness***: (Article 8), ***Fairness***: (Article 9), and ***Liberty***: (Article 10).

The issue of ***Legality***: (Article 11) (*procedures which aim at resolving a dispute by imposing a solution, the solution imposed must not result in the consumer being deprived of the protection afforded to him by the law governing the circumstances*) may however present

a challenge to mediation in that Mediators (in accordance with the interpretation of mediation in the **Draft General Scheme of Mediation Bill 2012**) do not impose a solution.

Q.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?

Yes. The MII, through its wide membership base across multiple sectors (e.g. Commercial, Family, Workplace, Elder, Community, Agriculture, Restorative Justice etc...), would be in a position to comply with the requirements of the Directive, with consideration required in relation to Article 11.

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

Yes. The MII provides access to qualified mediators across a wide range of sectors including Civil and Commercial

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

The process could very easily be modelled on the Equality Tribunal model of mediation where complaints are assessed at the intake/registration stage and the case then allocated to a suitably qualified professional Mediator/or other ADR entity (e.g. conciliator or arbitrator).

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

The Directive clearly states that “ADR procedures should be free of charge or of moderate costs for consumers”. Accordingly, the model proposed will need to be predominantly publicly funded.

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?

This proposal would not be favoured. There already exists sufficient mediation/arbitration expertise in Ireland. Notwithstanding if the dispute is of a cross border nature then the parties themselves should decide on the appropriate ADR entity.

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?

Direct engagement or employment by one or other of the two parties would conflict with the notion of impartiality in mediation and, therefore, would not be advisable.

However the issue of remuneration is different and under the MII Mediators are, in certain circumstances, remunerated for their services by either one or other of the parties. On the basis the Mediator is not employed by either party the Mediator can act impartially and in a neutral manner. It may be advisable for the parties to be offered a choice of three Mediators and to choose one, or in the event of non-agreement of a Mediator, by default the non-chosen Mediator provides the service.

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

Workplace mediation often sees the employer paying the Mediators fees.

Grounds for refusing to deal with a dispute

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.

All of the exemptions outlined in the Directive are considered valid and should be included. Although some discussion will need to take place first around monetary threshold, levels, and deadlines.

Award thresholds for claims

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

Whilst the MII does not hold a strong view on whether thresholds should apply, a minimum threshold may be reasonable on the basis of setting time limits for agreement; and a broad upper threshold should apply on the basis that all disputes, regardless of monetary value, have the potential to be resolved by mediation, and as such would be cheaper than

the costs of a court settlement. It may be appropriate that a monetary limit be set for those cases where arbitration is the last option

Cost to the Consumer

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 MII supports the concept of a nominal (refundable) fee being sought from the consumer, to discourage frivolous claims, on the understanding that the fee will be refunded in the event of a settlement where the Consumer is found to be genuine. The MII suggests that the fee be set at a maximum fee of €200.

Participation by Traders

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?

Firstly, the fact that the Directive does not require the participation of traders in ADR procedures to be mandatory raises serious concerns over the potential success of the scheme. Experience has shown that businesses are unlikely to sign up to schemes that they know will eventually cost them money. Requirement by traders to at least meet with an ADR entity **should be mandatory** in national legislation while still permitting them their right of access to the judicial system

Mediation agreements should be deemed to be binding in the legislation (after an agreed “cooling off” period to allow for consideration).

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)?

The MII is not entirely clear of what is being asked here. Notwithstanding the MII would consider it beneficial to have a mandatory requirement for the parties to meet with an ADR entity before progressing their dispute to the Courts.

Effect of ADR procedures on limitation and prescription periods

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 taking judicial proceedings? If not, why?

The MII would favour a 60 day limit to allow ample time for settlement payments to be made or for appeals to be lodged in arbitration cases

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?

INFORMATION AND COOPERATION

The MII is wholly supportive of the concept of ADR entities in Member States to cooperate in the resolution of cross-border disputes and the conduct of regular exchanges of best practices as regards the settlement of both cross-border and domestic disputes. In this regard the MII holds an annual conference that is well attended by Mediators and typically runs workshops focussed on developing practices in other jurisdictions globally. The MII would therefore be happy to support initiatives related to regular exchanges under the Directive.

DESIGNATION OF COMPETENT AUTHORITY

The MII is supportive of a Competent Authority at national level. The MII is further supportive of the Competent Authority having a quality function to oversee compliance issues relating to listed ADR entities.

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)?

The MII interprets the Directive as requiring the State to nominate a Government Department or a Public Body to be the Competent Authority. As such the MII recommends either the Department of Jobs Enterprise and Innovation, the Department of Justice and Equality, or the National Consumer Agency to be the Competent Authority. Regarding sector knowledge and the application of ADR principles, the MII recommends the Competent Authority include representatives of the various ADR approaches (e.g. mediation, conciliation and arbitration) be appointed to a governing body of the Competent Authority to advise on best practice requirements and compliance issues, and to support the State fulfil its functions under the Directive.

REGULATION ON CONSUMER ONLINE DISPUTE RESOLUTION

ODR PLATFORM

The MII supports the concept of online dispute resolution (ODR) and the development of an ODR platform. Notwithstanding the integration of the ODR platform would require access to a Mediator's database and a single point of contact to ensure disputes suitable for mediation are processed in a timely manner. The MII would be in a position to support this process and as an ADR entity the MII is currently investing in a substantial upgrade of our IT capability and members' database. Part of this development is to enable members of the public access and process mediation cases on line to a chosen MII Certified Mediator. As such the MII can act as a single point of contact for Mediators under the Directive.

In addition the MII acknowledges there is scope to provide for online mediation, but as this is an emerging concept it would require development before being integrated into the process. The MII would be happy to assist the State in developing an online approach to mediation for certain disputes.

APPLICATION OF THE REGULATION

The MII understands that the Regulation provides that the ODR platform may be used for the resolution of disputes initiated by a trader against consumer. However the Directive does not provide for disputes initiated by a trader against a consumer.

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.

The MII is of the view that such a right may appear to be contrary to the Directive's intention of promoting consumers' rights. However it also recognises that in some consumer disputes traders may also have contractual rights that can be abused. On that basis, and in the interests of fairness and to reflect the principles of ADR, the MII is of the opinion that the State should consider an option for Traders to have certain issues to be processed under the Directive.

ANY OTHER VIEWS

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

The MII has submitted its views within the body of this submission; however the MII requests an oral consultation in relation to the practice of Mediation within the ADR continuum to discuss the practical aspects and benefits of Mediation under the Directive and vis a vis the States plans to introduce legislation on Mediation.

Submitted on behalf of the MII.



Gerry Rooney
President, Mediators' Institute of Ireland

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