INT/148
Alternative dispute resolution

Brussels, 11 December 2002

OPINION

of the European Economic and Social Committee

on the

Green Paper on alternative dispute resolution in civil and commercial law
(COM(2002) 196 final)

On 19 April 2002, the Commission decided to consult the European Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the

Green Paper on alternative dispute resolution in civil and commercial law
(COM(2002)196 final).

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 6 November 2002. The rapporteur was **Mr Malosse**.

At its 395th plenary session (meeting of 11 December 2002), the European Economic and Social Committee adopted the following opinion by 91 votes to one with two abstentions.

0. Summary of the opinion

0.1 On the overall approach: Community action should take the form of a recommendation. Nevertheless, at the end of three years, the case for switching to a directive or continuing with the recommendation should be considered after evaluating the latter's impact.

0.2 On the scope of ADR clauses: referral to the courts should be declared inadmissible as long as the actual implementation of the ADR procedure has not gone ahead. However, this provision should not apply in the case of membership contracts and, more generally, consumer contracts.

0.3 On the suspension of the period of limitation for court action: this should be allowed when the initial contract makes no provision for an ADR clause, and also in the absence of such a clause, but only from the moment the ADR mechanism has been effectively implemented by the parties.

0.4 On minimum procedural guarantees: it is necessary to retain the principles of third-party impartiality, transparency, effectiveness, fairness and confidentiality.

0.5 On the outcome of the ADR procedure: the legal nature of the agreements should be harmonised throughout the Member States and it should be stipulated that an agreement which is enforceable under any one State's legislation would *ipso facto* be enforceable throughout the countries of the European Union. The "Brussels I" regulation should be amended accordingly.

0.6 On the status of those involved: initial practical training – supplemented by mandatory continuing training – should be provided for third parties; a European code of conduct should be drawn up to help third parties in their work; steps should be taken to form associations of third parties, which should be approved at European level.

0.7 On insurance for third parties: third parties should be encouraged to take out civil liability insurance, either personally or through the body (legal person) that has appointed them.

1. **State of play**

1.1 On 19 April 2002, the European Commission, at the request of the Ministers of Justice of the Member States, published a Green Paper in the context of Article 65 of the Treaty establishing the European Community, which states that measures in the field of judicial cooperation are to include improving and simplifying the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases. The Commission's objective is therefore to provide interested circles with better information on the existing rules and regulations and also to launch a debate on the possible need for common provisions at European level.

1.2 "Alternative Dispute Resolution" – ADR – is defined in the Green Paper as an out-of-court dispute resolution process, excluding arbitration proper[1]. It is an amicable process which, often through the offices of a neutral and independent third party, helps the parties to come to an agreement and reach a solution that settles their dispute. ADRs generally fall into one of two categories. When they are conducted directly by the court or entrusted by the court to a third party, they are "*ADRs in the context of judicial proceedings*". However, when an out-of-court procedure is used by the parties, they are "*conventional ADRs*". ADRs have several objectives: to re-establish dialogue between parties, maintain economic relations, help provide good justice and restore social harmony.

1.3 The Heads of State and Government of the Fifteen have demonstrated their enthusiasm for ADRs at a number of European summits: in Vienna in December 1998, the European Council, in its conclusions, endorsed the Council and Commission action plan on establishing an area of freedom, security and justice and urged the Council to start immediately with the implementation of priority measures to that end; similarly, in Tampere, on 15 and 16 October 1999, the European Council pointed to a new way forward in the field of justice and home affairs by calling for the greater use of extrajudicial procedures. The Lisbon European Council in March 2000 called on the Commission and the Council to consider how to promote consumer confidence in electronic commerce, in particular through alternative dispute resolution systems. And lastly, in Feira in June 2000, this objective was re-affirmed when the eEurope 2002 Action Plan was approved.

1.4 In more concrete terms, a number of sectoral measures on ADRs have been taken at European Union level.

1.5 These initiatives have been largest in number in the field of consumer law. This reflects the Commission's concern to offer consumers a uniform level of protection. See, for instance, the **Commission recommendations of 30 March 1998**[2] **and 4 April 2001**[3].

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1 Arbitration is closer in practice to a quasi-judicial procedure than to an ADR as arbitrators' awards replace judicial decisions. Arbitration is already highly regulated in both the Members States and internationally.

2 On the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, OJ L 115 of 17 April 1998.

3 On the principles for out-of-court bodies involved in the consensual resolution of consumer disputes, OJ L 109 of 19 April 2001.

1.6 In parallel, the Council and the Commission, at the time of adoption of the **"Brussels I" Regulation**[4] on jurisdiction and the recognition and enforcement of decisions in civil and commercial matters, reiterated, albeit not in the regulation itself, but in a joint declaration[5], how important it was for work on alternative methods of dispute resolution in commercial and civil matters to continue in the Member States, thereby stressing the **complementary** role that these alternative methods could play in relation to conventional court proceedings, particularly in the area of electronic commerce.

1.7 The **Directive of 8 June 2000**[6] expressly included provisions (Article 17) calling on Member States to encourage out-of-court bodies to operate in the context of consumer disputes[7].

1.8 Lastly, in order to facilitate consumer access to the amicable settlement of cross-border disputes, two European networks of national bodies have been set up by the European Commission. The "FIN-Net" network was launched on 1 February 2001 in the financial services sector, while the "EEJ-Net" network, which has existed as a pilot project since 16 October 2001, covers all fields.

1.9 Moreover, the need to take account of the human dimension of family disputes has led the Council and the Commission to take parallel initiatives in family law. In this respect, the possibility of mediation as a means of solving such disputes is clearly one of the objectives of the proposal for a Brussels II bis Regulation[8].

1.10 In the field of labour law, ADRs (often in the form of mediation) are a mandatory preliminary to any court case in many countries of the European Union, and, in some cases, the first stage in the court proceedings. Their usefulness in industrial disputes was stressed back in 1989 in the European Social Charter[9]; in its Communication of 28 June 2000 entitled, *Agenda for Social Policy*[10], the Commission also stressed the importance of ADRs in the context of modernising the European

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4 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12 of 16 January 2001.

5 Joint Declaration of the Council and the Commission concerning Articles 15 and 73 of the Regulation in the minutes of the meeting of the Council of 22 December 2000 which adopted this Regulation.

6 Directive 2000/31/EC of 8 June 2000, OJ L 178 of 17 July 2000.

7 Incidentally, for any dispute concerning electronic commerce – and not just consumer disputes – the Member States must ensure that their legislation does not hamper the use of ADR mechanisms by electronic means.

8 COM(2001) 505 final, OJ C, November 2001. This proposal for a regulation supplements Regulation (EC) No 1347/2000 of 29 May 2000, OJ L 160 of 30 June 2000, p. 19 – called "Brussels II" – on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility.

9 Article 13.

10 COM(2000) 379 of 28 June 2000.

social model. It subsequently instructed a high level group on *industrial relations and managing change* to issue concrete recommendations in this respect.

1.11 Although ADRs are therefore to be found in a number of fields, this does not mean that they are always understood in the same way, either between or within EU Member States. ADR is a general term for which very different, and in some cases imprecise, terminology is used. These differences which are certainly one of their features, could nevertheless prejudice their proper development. It is therefore desirable to provide a framework in which ADRs can flourish in complete safety, and for this purpose to pinpoint certain principles in terms of minimum procedural guarantees, third party impartiality and fairness and confidentiality.

1.12 For this purpose action has been taken in the context of the Grotius programme[11], involving several mediation centres from Member States[12]. The MARC 2000 programme on *European cooperation for the development of amicable methods of settling enterprises' civil and commercial disputes* has also been implemented and has led to the formulation of a list of recommendations intended to promote a minimum level of harmonisation for ADRs in Europe.

1.13 Accordingly, the Green Paper under consideration contains twenty-one questions concerning the establishment of basic principles common to the Member States. The methods and content of these principles need to be examined.

2. The main principles to be promoted

2.1 Previous ESC positions

2.1.1 A pioneer in this respect, the ESC was quick to indicate its interest in ADRs as a complementary way of resolving disputes which calls on the responsibility of economic and social players from organised civil society (so-called "functional subsidiarity"). Mention can be made in particular of the opinion on the *Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*[13], the opinion on the *Initiative of the Federal Republic of Germany with a view to adopting a Council Regulation on cooperation between the courts of the Member States in the taking of evidence in civil and commercial matters*[14], the opinion on the *Proposal for a Council Decision establishing a European Judicial*

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11 This programme helps through the provision of grants to facilitate judicial and extrajudicial cooperation by fostering mutual knowledge of legal and judicial systems.

12 The Brussels Business Mediation Centre (BBMC, Belgium), the Centre for Effective Dispute Resolution (CEDR, United Kingdom), the Netherlands Mediation Institute (NMI, Netherlands), Unioncamere (Italy) and the Centre de médiation et d'arbitrage de Paris (CMAP), leader of the MARC 2000 programme.

13 OJ C 117 of 26 April 2000.

14 OJ C 139 of 11 May 2001.

Network in civil and commercial matters[15], and the opinion on the *Proposal for a European Parliament and Council Regulation concerning sales promotions in the Internal Market*[16].

2.2 **Needs**

2.2.1 On the one hand, dispute settlement is increasingly faced with lengthening procedures and costs that are in some cases disproportionate to the issue at stake. Over and above these classic problems, one of the features of cross-border disputes is that they often involve complex issues relating to conflicts of law or jurisdiction. It is therefore chiefly to remedy the problems of access to justice that ADRs have been developed as they can play a *fully complementary* role to court proceedings. In other words, promoting these methods of out-of-court settlement seems to offer a solution to the proliferation of cross-border disputes resulting from increasing trade, in particular electronic commerce, and citizens' greater mobility.

2.2.2 On the other hand, it should be borne in mind that ADRs have been developed first and foremost as a priority for consumers and also for the world of work and industrial disputes. They are, however, just as useful in settling disagreements between enterprises: for instance trading partners are keen, even before a dispute develops, to find neutral ground where it is possible to examine and discuss their respective interests in the presence of a third party. Appropriate solutions, which it would very often not have been possible to adopt otherwise, may well enable them to continue their commercial relations.

2.2.3 **At all events, ADRs must not be a way of evading national judicial systems**, as the EESC has pointed out every time that it has spoken on this issue. ADRs must continue to be an option, agreed by each of the parties. This concern has to underpin all the replies given to the Green Paper's questions. ADRs have the advantage, however, of proposing an alternative procedure to the parties. The latter still retain their fundamental right to seek redress through the courts, even though we know that this generally functions in an unsatisfactory way (delays, bulky dossiers, slow procedures). Lastly, promoting ADRs also reflects the desire to support a model of civil society based on the principle of conciliation, in which civil society players and organisations occupy an important place.

2.2.4 The question of the pertinence of action at European level with regard to ADRs rests on the principles of proportionality and subsidiarity. It is necessary, on the one hand, not to set models in stone and to leave it to the local, regional or national level to develop the most appropriate methods. On the other hand, it has to be borne in mind that potential disputes are increasingly cross-border in nature in a Europe which is increasingly part and parcel of the daily life of economic players (single market, single currency) and citizens (travel, work mobility, family ties, etc.). It is therefore necessary to promote, in a measured way, an appropriate framework for the development of ADRs at European level. With this in mind, the Committee tends to favour a flexible approach, advocating a resolution in

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15 OJ C 139 of 11 May 2001.

16 CES 689/2002.

order to provide a reliable reference framework, measures to promote and exchange good practice[17] and lastly encouragement for the creation of networks of European ADR operators. The adoption of a European code of conduct seems in this respect to be an illustrative of the potential role of the European Union in offering support by disseminating good practice.

3. The Green Paper's questions: initial points for discussion[18]

3.1 On the European Union institutions' overall approach to ADRs (questions 1-2-3-4)

3.1.1 In general, as regards the ADR procedure itself, recourse to a regulation or a directive might well run the risk of impeding the development of ADRs, whereas a recommendation would seem better geared towards retaining the flexibility of ADRs: it would make it possible to sketch out a legal framework while advocating compliance with common principles with regard to the conduct and training of the impartial "third party"[19]. Nonetheless, given the lessons drawn from an appraisal of this recommendation over a period of three years, the case for a directive that provides minimum procedural guarantees should be studied. As regards the particular point of the interference between the ADR procedure and court proceedings (lack of jurisdiction of the courts in the case of ADR clauses, suspension of periods of limitation[20]), the introduction of binding measures to cover these aspects will probably need to be envisaged when the "Brussels I" regulation is being revised.

3.1.2 A further question asks whether the scope of ADRs should be extended to all fields. If such an option were to be adopted, it would be necessary, however, to specify that each State could exclude what it considers to be issues of public order over which national courts therefore have jurisdiction. Making ADRs generally applicable would nevertheless make it easier to pinpoint common rules of conduct and general principles.

3.1.3 The principles applied to traditional methods of dispute resolution should also be applied to online dispute resolution– which is to be encouraged, especially in consumer law. These principles should be adapted to the technical specifications relating, for example, to the security of data exchanged on the Internet.

3.1.4 ADR practices in family law, which have already proved their worth in a number of countries, must be developed as an absolute necessity. It would be helpful if the proposal for a "Brussels II bis" regulation, which is more favourable to such practices, were to be enacted. There is

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17 A number of Member States have taken sectoral initiatives to promote ADR by establishing consultative authorities for ADR (France), financing ADR structures (Scandinavian countries), setting up vocational training programmes (Portugal) or publicising information about ADR.

18 Questions appended.

19 The term used in the Green Paper to denote the third party – conciliator, mediator, etc. – involved in an ADR procedure.

20 See points 3.2 and 3.3.

also a need to set up a network of the family mediation bodies in Europe which are recognised by the competent national authorities, Ministries of Justice or national courts responsible for family matters.

3.2 **On the value and scope of ADR clauses included in contracts (questions 5-7-8)**

The parties to a contract may make provision, when signing the contract, for recourse to ADRs; the question is whether their scope needs to be made uniform in all countries.

3.2.1 In the first place, analysis shows that a mediation or conciliation clause of this type entails an *obligation to produce a result*, but solely *as regards the actual implementation of the procedure*. Such a clause should therefore oblige the parties to try to find a negotiated solution, pursuant, moreover, to the general rules governing any contract: parties that fail so to do might then be deemed contractually liable and could run the risk of being ordered to pay damages. On the other hand, once the mediation or conciliation procedure has been launched, the only *obligation* incumbent on the parties *would be to try to reach an agreement in good faith*: in no case could it be mandatory to *reach a negotiated settlement of the dispute*. Therefore, each of the parties should remain free to end the negotiation process and could be deemed liable only if there were evidence of bad faith.

3.2.2 Secondly, it results from the above that the existence of such a clause could merely lead to the referral to the courts being declared inadmissible as long as the actual implementation of the ADR procedure has not gone ahead. At all events this solution should not be acceptable for membership contracts, consumer contracts and employment contracts. The particular features of some matters show that ADRs clauses could be *dangerous* when one of the parties is in a *position of weakness*.

3.3 **On the suspension of court proceedings in the case of recourse to an ADR mechanism (questions 9-10)**

3.3.1 If such a rule were to be adopted by the Member States, there would need to be a differentiation between two cases: contracts comprising an ADR clause at the time of conclusion or contracts with no such clause.

3.3.1.1 In the first case, each party could invoke the ADR clause before the court, which would be enough to bring about the suspension of the court proceedings. The mediator should ensure that the mediation process does not go on unduly long without producing a result so that the suspension is as short as possible.

3.3.1.2 The answer is somewhat more problematic when there is no such clause as there are two conflicting arguments. On the one hand, the automatic suspension of the period of limitation could be used as a delaying tactic by one of the parties[21]. On the other hand, as the concern is to promote ADRs, would it be logical to penalise parties who decide to have recourse to them in good

21 In the case of an ADR clause, however, there is less of a risk as the parties have, from the initial contract, demonstrated a genuine desire to have recourse to mediation.

faith? It is for this reason that it could be decided, as a "safeguard", to use the "actual"[22] implementation of an ADR as the criterion, the effect of which would be to suspend the period of limitation.

On this basis, and in both these cases, if the parties fail to reach an agreement settling their dispute, the period of limitation would resume from the day in which the mediator announces that his role has come to an end.

3.4 **On minimum procedural guarantees (questions 11-12-13-15-16)**

3.4.1 After analysis, the principles set out in the two Commission recommendations[23] of 1998 and 2001, with regard to consumer law could provide a sound starting point.

3.4.2 More generally, for civil and commercial matters, the minimum guarantees connected with the ADR procedure – which should be included in a recommendation (see 3.1.1) – would be as follows:

– the principle of the **impartiality** of the *third party* (conciliator, mediator, etc.) with respect to the parties: the "third party" must have no conflict of interest with the parties and must inform them of his impartiality and independence prior to the commencement of the ADR procedure;

– the principle of **transparency**; the parties must have access to the necessary information at all stages of the ADR procedure (general arrangements – languages, timetable – proceedings, cost, value of and agreement reached).

– the principle of **effectiveness**, through ease of access[24] and affordable cost for the parties;

– the principle of **fairness,** reflected in particular by the "equal" treatment of each of the parties by the *third party*, in particular as regards information on the conduct of the procedure, the right of withdrawal at any time in order to instigate court proceedings or other out-of-court means of obtaining redress; ensuring balanced speaking time for the parties at separate interviews with the *third party*, etc.

– the principle of **confidentiality**; arguments exchanged by the parties in an ADR procedure, and any other information, should be kept confidential – unless the parties have expressly stated otherwise. This same principle of **confidentiality** should apply to the outcome of the ADR procedure.

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22 It is the task of the courts to determine if this is the case. For this purpose, they could, for instance, consider the determining criterion to be the parties' first meeting with the third party.

23 As mentioned above.

24 Electronic methods in particular are to be encouraged.

3.5 **On the outcome of the ADR procedure (questions 17 and 18)**

3.5.1 Including a period of reflection before or after the signing of an ADR agreement, to allow time for further thought, is not desirable. In practice, this runs the risk of perverting the ADR procedure and the action in good faith of the parties. In any case, the principle of **fairness**[25] means that the *third party* must ensure that a balance is kept between the parties throughout the procedure.

3.5.2 The legal force of the agreements should be harmonised throughout the Member States. Such agreements are "transactions", whatever name is given to them in the different countries, but the term "transaction" does not, have the same meaning everywhere.

To the extent that this question goes beyond the actual scope of ADRs, a harmonisation strategy of this type should be examined in a binding and more far-reaching European text concerning contract law[26].

3.5.3 It should be stipulated here and now than an agreement which is enforceable under any one State's legislation, would *ipso facto* be enforceable throughout the countries of the European Union. When the "Brussels I" regulation is revised, it should therefore also be amended on this point.

3.6 **On the status of those involved (questions 14-19-20)**

It is necessary to call on *third parties* with recognised qualifications and negotiating skills. Recommendations to this effect could in particular cover the following points:

3.6.1 It is necessary to provide adequate training which is sufficiently comprehensive to enable *third parties* to provide a useful and efficient service. This training should be supplemented by *mandatory continuing training*.

It would undoubtedly be useful to provide these *third parties* with on-the-job training so that they can learn about the various techniques and about the conduct and the outcome of ADR procedures from actual cases.

3.6.2 *A European code of conduct* should be drawn up to help *third parties* in their work. This code – which would be attached to the recommendation – would set out principles such as independence, neutrality, impartiality, confidentiality and the qualification of *third parties*.

3.6.3 Other paths could be envisaged, such as the formation of associations of *third parties*, which could be approved at European level and would operate with financial support from the European Commission.

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25 See 3.4.2.

26 Maybe eventually as a result of the Commission's current work on contract law.

3.7 **On insurance for "third parties" (question 21)**

Special rules on the liability of third parties seem inadvisable as matters stand. In practice, it is common civil liability law that is applicable. There is therefore a strong case for third parties taking out civil liability insurance, either personally, or through the body (legal person) that has appointed them.

This last point, which is essential, should be included in the European code of conduct.

Brussels, 11 November 2002

The President of the European Economic and Social Committee	The Secretary-General of the European Economic and Social Committee
Roger Briesch	**Patrick Venturini**

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N.B.: Appendix overleaf.

APPENDIX

Summary of questions

Question 1: Are there problems such as to warrant Community action on ADR? If so, what are they? What is your opinion on the general approach to ADR that should be followed by the institutions of the European Union, and what might be the scope of such initiatives?

Question 2: Should the initiatives to be taken be confined to defining the principles applicable to one single field (such as commercial law or family law) – field by field – and in this way discriminate between these different fields, or should they as far as possible extend to all the fields governed by civil and commercial law?

Question 3: Should the initiatives to be undertaken deal separately with the methods of online dispute resolution (ODR) (an emerging sector which stands out because of its high rate of innovation and the rapid pace of development of new technologies) and the traditional methods, or on the contrary should they cover these methods without making any differentiation?

Question 4: How might recourse to ADR practices be developed in the field of family law?

Question 5: Should the legislation of the Member States be harmonised so that in each Member State ADR clauses have the same legal value?

Question 6: If so, should the validity of such clauses be generally accepted or should such validity be limited where these clauses appear in membership contracts in general or in contracts with consumers in particular?

Question 7: What in any case should be the scope of such clauses?

Question 8: Should we go as far as to consider that their violation would imply that the court has no jurisdiction to hear the dispute, for the time being at least?

Question 9: Should the legislation of the Member States be harmonised so that in each Member State recourse to an ADR mechanism entails suspension of the limitation periods for the seising of courts?

Question 10: What has been the experience of applying the Commission recommendations of 1998 and 2001?

Question 11: Could the principles set out in the two recommendations apply indiscriminately to fields other than consumer protection law and in particular be extended to civil and commercial law?

Question 12: Of the principles enshrined in the recommendations, which in your view could be incorporated in the legislation of all the Member States?

Question 13: In your opinion, should the legislation of the Member States in regulated areas such as family law be harmonised so that common principles may be laid down with regard to procedural guarantees?

Question 14: What initiative do you think the institutions of the European Union should take, in close cooperation with interested circles, as regards the ethical rules which would be binding on third parties?

Question 15: Should the legislation of the Member States be harmonised so that the confidentiality of ADRs is guaranteed in each Member State?

Question 16: If so, how and to what extent should such confidentiality be guaranteed? To what extent should guarantees of confidentiality apply also to publication of the results of ADRs?

Question 17: In your opinion, should there be a Community rule to the effect that there is a period of reflection following ADR procedures before the agreement is signed or a period for withdrawal after the signing of the agreement? Should this question be instead handled within the framework of the ethical rules to which the third parties are subject?

Question 18: Is there a need to make ADR agreements more effective in the Member States? What is the best solution to the question of the recognition and enforcement of ADR agreements in other Member States of the European Union? Should specific rules be adopted to render ADR agreements enforceable? If so, subject to what guarantees?

Question 19: What initiatives in your view should the Community institutions take to support the training of third parties?

Question 20: Should support be given to initiatives to establish minimum training criteria with a view to the accreditation of third parties?

Question 21: Should special rules be adopted with regard to the liability of third parties? If so, which rules? What role should ethical codes play in this field?
