

European Civil  
Justice Systems

# Developments and Issues in Consumer ADR and Consumer Ombudsmen in Europe

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Policy Brief

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The Foundation for Law, Justice and Society

in association with **the Centre for Socio-Legal Studies**  
and **Wolfson College, University of Oxford**

### European Civil Justice Systems

The European Civil Justice Systems programme aims to evaluate all options for dispute resolution in a European state, and to propose new frameworks and solutions. It encompasses a comparative examination of civil justice systems, including alternative dispute resolution and regulatory redress systems, including aspects of system design, procedure funding and outputs. It aims to analyse the principles and procedures that should, or do apply, and to evaluate effectiveness, in terms of cost, duration and outcomes in redress and achieving desired behaviour.

The programme also involves research into substantive EU liability law, notably consumer and product liability law, harmonization of laws in the European Union, and in particular the changes taking place in the new Member States of central and Eastern Europe.



# Executive Summary

The principal findings are:

- There is considerable **evolution in the alternative dispute resolution (ADR) schemes** in some countries. A notable feature is that many of the ADR schemes are placing increased emphasis on integrating mediation into their pre-existing arbitration-style procedures.
- Many countries continue to find it a **challenge to get more businesses**, especially small and medium-sized businesses (SMEs) to adopt ADR schemes. Equally, many consumers are either unaware of ADR or imagine it to be an advisory service rather than an independent dispute resolution service.
- There is a clear **division between EU Member States** that have sophisticated CDR schemes — and, despite the differences between States, are improving their mechanisms — and those States that have very undeveloped Consumer Dispute Resolution (CDR provision).
- The **national landscapes** of ADR bodies continue to present problems, notably lack of full coverage (which is related to providing cheap dispute resolution services to SMEs and convincing them that CDR can help their businesses) and low consumer confidence in the current system (which is at risk of collapsing unless solutions emerge soon).
- **A fresh vision of Consumer Dispute Resolution** places CDR in the context of the functions that are needed to support an effective, vibrant market. These considerations support the fact that Ombudsmen are the leading model of CDR, since they typically operate as part of the system of market regulation as well as the national system of dispute resolution — they link to regulators as well as courts (and often have better links with regulators than with courts). There is increasing realization that ‘consumer ADR’ is something specific and should have its own architecture.

# Developments and Issues in Consumer ADR and Consumer Ombudsmen in Europe

This paper outlines major developments and issues in consumer dispute resolution systems in Europe that were highlighted at the conference 'CONSUMER ADR: Delivering Fairness and Justice for Consumers, Business and Markets' held at Wolfson College, Oxford on 18 and 19 March 2019.<sup>1</sup> The conference was attended by around ninety delegates from

eighteen countries, of whom over half work in consumer ADR (alternative dispute resolution) or consumer Ombudsmen schemes. This summary is a personal view by the organizer of the conference, drawing on the extensive factual information presented by forty speakers, who are listed at the end.

## Evolutions in Consumer ADR

Consumer ADR (CDR) continues to grow. 460 ADR entities are currently notified to the European

Commission by Member States plus Norway and Liechtenstein. The following numbers are reported for complaints received in 2017 in the following schemes:

Member State	Type of Scheme	Number of complaints
Belgium	Consumer Mediation Service	9,500 50% admissible
Denmark	all ADR schemes	8,300
France	around 100 ADRs	104,000 complaints, 40% admissible
Greece	Consumer Ombudsman Banking Ombudsman	10,843 6,261
Ireland	Financial Services Ombudsman	2,370
Italy	Arbitro Bancario Finanziario	30,644
Malta	Financial Arbiter	175
Netherlands	80 schemes of De Geschillencommissie	6,126 completed cases
UK	Financial Ombudsman Service Ombudsman Services: Energy Ombudsman Services: Communications Motor Ombudsman Legal Ombudsman	400,658 52,198 30,732 42,553 contacts 8,739

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All the leading CDR schemes operate on digital files. But some are already reviewing their modes of operation to move to improved processes. There is a clear consensus that although artificial intelligence (AI) may be more accurate in some tasks than humans, it should be controlled by humans in the achievement of their goals rather than becoming an end in itself. However, issues arise over who owns data and how to identify and eradicate biases in technology.<sup>2</sup>

A consumer survey for UK Government found that:<sup>3</sup>

*Results from the survey of consumers indicate that the ADR process is quicker than the court process and cheaper for consumers. 44% of ADR cases lasted less than three months, compared to 34% of court cases. In addition, 81% of consumers who used ADR reported a direct cost of under £50 whereas 59% of consumers who used the courts reported a cost of over £100.*

In some States, Consumer ADR has a long way to go. As an example of many CEE States, the introduction of the Consumer ADR Directive into Croatia made no difference in the number or mode of operation of pre-existing ADR bodies and no new body. No specialist sectoral bodies have been created. The empirical evidence confirms the lack of focus on CDR: 368 initiated cases, 297 accepted, 136 cases successfully concluded. There are no statistics on individual providers or general trends. There is even a lack of clarity — which confused consumers and traders — on whether the process is binding or not!

## Mediation

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A notable and possibly unexpected trend is that existing arbitration-style CDR mechanisms in a number of States have been introducing better means of facilitating communication between the parties to promote settlement between them — in short, mediation.

This communication/mediation function has long been standard practice in the UK amongst all Consumer Ombudsmen: mediation is merely an automatic stage in the complaint processing pathway. Indeed, the process of investigating the

facts and allegations in many cases inherently gives rise to the opportunity to facilitate communication between the two sides. The Ombudsman's case officer would typically say: 'They say this; what do you say?'

There have been notable changes in a number of States. The Irish Financial Services Ombudsman made mediation the default option in 2018 following a review. Previously, providers refused mediation in 99 per cent of cases. They gave three reasons. First, they said that they were right in the decision they had made, but it was pointed out that that was not always true. Second, they claimed that they didn't have the manpower to engage in mediation, but (inconsistently) they still spent great time in processing formal cases. Third, they were worried about making formal admissions. However, almost all users said that they wanted a faster, less formal, simpler dispute resolution service. After the change, there was a clear and sustained increase in cases resolved through mediation. Many cases arose from poor communication or understanding between the parties, and the new approach has been able to address this. It was found that people and organizations will only engage in mediation when the fear and misunderstanding is removed.

The Geschillencommissie body in the Netherlands is making a major switch in procedure in 2019/20 to introduce more emphasis on emotions and behaviour (because most cases involve miscommunications), and increased focusing on providing earlier solutions (settlement and mediation). A review in 2017 found that the arbitration model took too long (2.9 months) compared with most people's expectations and the amount in dispute. In 2018, 43 per cent (1,247) of new cases were settled by the parties.

In Denmark, mediation was introduced into the public (residual, and formerly entirely arbitration-style) CDR scheme. The various private schemes have yet to follow this lead.

In Italy, mediation and 'assisted negotiation' (*conziazione paritetico*) is appearing in various

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imaginative formats as a response to the very slow court system. The Arbitro Bancario Finanziario, along with similar schemes, is prevented from introducing mediation by case officers into its process (because the case officers are officials of the Central Bank and therefore not without potential conflict of interests) but instead a new procedure empowers the independent Chair of the Regional Panels to make a settlement proposal.

In Malta, the whole emphasis of the Financial Arbitrator is on mediation: it is a legal requirement for the Arbitrator to mediate, investigate, and adjudicate complaints, although mediation is voluntary for the parties. The Arbitrator's office has established a very effective practice (not foreseen in the Law) of Consumer Relations Officers who are the first line of contact with all customers and who address queries and solve minor cases (over 200 in the first two years).

The Hellenic Financial Ombudsman took a strategic decision to broaden its ADR service provision, including mediation, and in 2018 created the Hellenic Financial ADR Center, which has established a high-quality accreditation programme in financial and consumer law and mediation that has accredited seventy experts. It is assisted by an independent Scientific Council, comprising eminent High Court Judges, university professors, and professional experts in ADR.

A new law in France as part of a reform programme of the Justice System (Projet de loi de programmation 2019–2022 et de réforme pour la justice) includes:

- mandatory preliminary mediation/conciliation for certain types of disputes (e.g. disputes repayments of sums below a certain threshold). Articulation with CDR still needs to be clarified.
- a new certification scheme for ODR platforms.

### National landscapes

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The EU's 2013 consumer ADR legislation was unable to go so far as mandating one (or more) model(s) for the national architecture of CDR in view of the pre-

existing diversity in them — ranging from almost nothing to some arbitration-style ADR, to sophisticated Ombudsman models. It is unfair to criticize the EU for not going further at that stage.

**But it is now imperative that further steps are taken to harmonize CDR architectures on the ground, for the improvement of both national and cross-border dispute resolution and markets.**

There are two main and connected problems:

- (a) *Consumer confusion*. The diversity of models of ADR, leading to differences in how they operate, and especially whether traders are required to join or observe processes and outcomes, together with gaps in coverage, all contribute to both consumer confusion and lack of trust. In some countries, this confusion threatens to undermine levels of consumer trust in those good quality CDR schemes that exist. The diversity problem takes on an extra significance in cross-border situations.
- (b) *Lack of business coverage*. There remains an unsolved problem of how to attract many small and medium-sized businesses (SMEs) to join the existing ADR bodies, in other words, national ADR structures lack residual ADR coverage. The problems are the failure of SMEs to see that they have a need to join a CDR scheme, and the level of cost: these constitute a Catch-22 situation.

By way of example of how these issues are interconnected, a 2018 UK Government Green Paper identified key problems to be a lack of take-up in non-regulated sectors where ADR is not mandatory, low consumer awareness, and difficulties in making complaints.<sup>4</sup> It noted that having more than one provider per sector is not beneficial.<sup>5</sup> These issues were echoed in a subsequent Parliamentary Report, which noted: 'respondents agreed that the present ombudsman system has developed in a piecemeal, ad-hoc fashion over many years and showed little evidence of planning.'<sup>6</sup>

### *Confusion and ease of identification*

Belgium has the advantage of a single national portal. The website of the Consumer Mediation Service (CMS) has replaced that of BelMed as the

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single national website to which consumers can find information and access a CDR scheme; the CMS refers many cases to other CDR bodies. Separately, in the civil procedure system, more power is being given to courts to persuade parties to mediate, and some are experimenting in sending parties to external accredited mediators.

The Resolver platform in the UK has proved to be an outstanding success with consumers and traders. Since going live on 22 April 2014, it has assisted 20 million consumers with the free recovery of £2 billion. The platform sends messages between consumers and traders and can transfer files into an Ombudsman or CDR scheme. It separately advises businesses on how to improve, giving feedback on benchmarking against their peers and on what they ought to do.

#### ***The SME and residual problem***

Nordic states have satisfactory provisions for CDR in place, as their national architectures feature primary CDR bodies that are funded by the State and well-established, with some sectoral CDR bodies acting separately where sectors have established them. France has not established any residual CDR scheme, but has made membership of any of a large number of ADR schemes mandatory by law, and there is some reliance on *conseillers de justice*.

Although the Netherlands has a strong CDR architecture involving four main CDR bodies, the central one of which (DGS) covers many trade sectors, its structure gives rise to an inherent weakness in the creation of residual ADR that can cover many SMEs which are not members of the trade associations that are already members of DGS. The weakness turns on the fact that individual traders could be offered either a commercial rate to join DGS (the current membership fee is €495, which is too high) or a low rate to attract them. The former would be unacceptable to the SMEs and the latter would be unacceptable to many existing trade associations, who have threatened to leave DGS, which would make the whole system collapse.

Many other States, which have refrained from making ADR compulsory, have difficulty in attracting SMEs to join any ADR scheme. Small traders fail to see the need and hence balk at paying for membership. However, some research indicates that traders are attracted by business support, so such packages might include a CDR element.

#### **Adverse impact on cross-border dispute resolution and trading confidence**

This gap in CDR coverage is the major potential Achilles heel to fulfilling the promise of ADR for consumers, and also to making cross-border dispute resolution effective.

The ODR platform started in 2016, with some positive aspects: 108,000 complaints submitted, 8 million visits, and the number of cross-border cases is rising. However, the second Report confirmed that a low number of complaints were processed through the platform to an ADR entity (about 2 per cent). The position is more complex, however, since exit surveys show that 41 per cent of parties reach a direct settlement. So the platform is not being used as conceived by the legislator, although it is still contributing to communication between the parties and settlement of cases. Nevertheless, there remains considerable potential to raise the number of claims made and resolved across borders. The members of the EU's Network of European Consumer Centres (ECC-NET) point to various barriers: visibility, findability, language, lack of trader participation (possibly linked to traders having to take too many steps), and different admissibility criteria.<sup>7</sup> It is argued that the platform can overcome these barriers: It provides for visibility, a single entry point, an automatic translation tool, consumer information, etc.

The European Commission is aware of these issues, but somewhat constrained by the model mandated in the legislation. However, it has improved the platform's homepage, and 80 per cent of users say they are satisfied. There is an intention to capitalize

on the strengths of high consumer visits, to provide more information on consumer rights. The platform will be further developed in a series of measures, including: enabling direct settling of disputes; provision to enable users to directly address an ADR entity without there being a prior agreement; moves to make the information more targeted; a study on the IT sustainability of the platform and proposals for IT technology to assist and signpost appropriate solutions. The Commission is consulting with academics and State stakeholders.

### Different forms of ADR: The Ombudsman model

Various new Ombudsmen have been created:

- In Malta the Financial Arbitrator was created by a 2016 Law.
- Germany has recently introduced a number of new bodies, notably Schlichtungsstelle Energie and Schlichtungsstelle der Rechtsanwaltschaft.
- In the UK, the Motor Ombudsman was created by the trade in 2017 and the Rail Ombudsman was approved in late 2018. In the property sector, the government announced in 2017 an intention to establish a single Housing Ombudsman,<sup>9</sup> and in January 2019 issued a general vision for a new integrated 'service to cover all housing consumers including tenants and leaseholders of social and private rented housing as well as purchasers of new build homes and users of all residential property agents.'<sup>9</sup>

Also in the UK, a major extension has been announced to the Financial Ombudsman Service that will benefit consumers and SMEs by increasing the award limit from £150,000 to £350,000 and making the limit index-linked in future years.<sup>10</sup> The finance industry has agreed to a recommendation to create a separate new Ombudsman-type mechanism for higher value claims by SMEs.<sup>11</sup> The Ombudsman model was preferred over a court or tribunal for claims against SMEs. This is a highly significant move, as it involves extension of not only one form of dispute resolution but also the proliferation of the criterion of what is 'fair and

reasonable' as the basis of making decisions, instead of formal legal requirements. Thus, banks and lenders have to treat SMEs carefully and fairly and cannot automatically rely on contractual provisions.

### Specialism

There is an increased need for specialist CDR bodies. This is self-evident in all of the regulated sectors. Communication between specialist CDRs across boundaries is particularly important. Various bodies still exist, but there is a need to extend and deepen these:

Sector	CDR Body
Financial services	FIN-NET
Energy	NEON
Transport	EEC-NET Travel has recently been created
Communications	It was decided at this conference to form a network

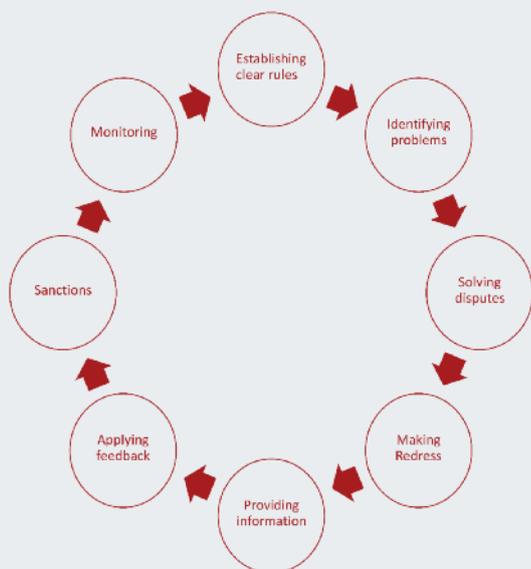
All of the bodies identify a need to raise the visibility of ADR<sup>12</sup> and to simplify the system in order to improve ease of identification and accessibility for consumers, especially vulnerable consumers. The overriding need for simplification has major implications for national structures and bodies.

### Functions

As court-based dispute resolution comes under its own pressures, and is subject to competition from other options such as various forms of ADR, it is increasingly being asked whether — and which — dispute resolution schemes deliver not only justice and fair outcomes but also various other functions, such as assistance to consumers (and SMEs) and data on market behaviour that can be fed back to change the behaviour, performance, and culture of businesses.

A simple sequence of functions necessary for vibrant markets is illustrated in Figure 1. States should ask, and provide convincing answers to, the question: Which bodies perform each of these functions?

Dispute resolution is only one function. Equally, courts or arbitration only deliver one function — that of dispute resolution. In this context, it is not difficult to see why Consumer Ombudsmen provide advantages over courts and arbitration-only ADR schemes.



**Figure 1. Functions of a Vibrant Market**

Some recent examples of how CDR bodies affect behaviour include:

- The health insurance ADR in the Netherlands<sup>13</sup> can address potential systemic issues directly with a provider. Failure by the provider to act within three weeks requires the ADR to refer the matter to the regulator.
- In Italy, in 99 per cent of cases, banks accept recommendations issued by the banking ADR.<sup>14</sup> If not, the ADR publishes a name and shame list on its website. A panel can also recommend a change in behaviour. Following a number of decisions issued by the panel of arbiters regarding cases involving bonds secured by one-fifth of salary, intermediaries agreed to be bound by a memorandum of understanding. The number of cases involving similar disputes has decreased as a result.
- In Greece, it is evident that changes to some rules made by the regulator were the result of feedback from various stakeholders, including the ADR.

- In Malta, a financial provider decided to reach settlement as a result of decisions issued by the Arbiter and judgments by the Court of Appeal (which confirmed the Arbiter's decisions).

### Next steps

As the EU approaches its review of the Consumer ADR Directive, a number of major changes will be necessary if CDR is to deliver its potential. CDR needs to be seen as not just 'alternative' but as *the* primary, mainstream means of identifying and resolving complaints and failures of communication between consumers and traders.

In some contexts, the state of debate is about the relationship between courts and ADR.<sup>15</sup> A different vision is that, since markets are now subject to extensive regulation and regulatory authorities, all consumer-trader disputes should be directed to their own pathway, rather than a court pathway that does not deliver enough functions to support a vibrant market for traders or consumers. In some States, consumers and traders have already shifted out of courts and into Ombudsmen pathways.

We should view delivering CDR as an essential aspect of a vibrant market. Hence, the mechanism of delivery cannot remain ineffective. It is increasingly seen that the delivery of justice by courts is simply ineffective for consumer-trader disputes — complaints that courts take too long, cost too much, and are not user-friendly are being supported by data that shows that consumers either shift to other pathways where they are available or simply do not raise their complaints. Consumer inactivity here signifies a dangerous lack of trust in traders and the market. Accordingly, States simply must ensure that effective CDR schemes exist and operate effectively in responding to consumer problems and delivering fair outcomes, which drive better trading practice. This is a major market issue, and leaving consumer dispute resolution solely to Ministries of Justice (on the basis that ADR is just about dispute resolution, and CDR is only an adjunct to the courts as a form of

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ADR) will not solve this problem. High-level ownership and oversight of such market issues within Governments is essential. CDR schemes need to be created in their own right.

It is significant that various Member States are expanding their vision of CDR from one that responds to consumer problems to one which includes responses to the problems of SMEs. Greece is thinking about this issue, and the UK is developing services to assist SMEs in improving their business practices, based on market and complaints data.

The coverage and confidence issues are linked and can be solved together. Making CDR mandatory for all businesses does not solve the supply side problem of the effectiveness of CDR bodies. Hence, it is necessary to gain business support for CDR and to

provide the best systems. Since the Ombudsman model can provide business support, that is another reason why it qualifies as the preferred model.

## Recommendations

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1. Review the market functions and identify which bodies currently perform each function, and whether a different approach might deliver more functions more effectively and efficiently.
2. Assess objectively the national CDR landscape and models of any form of ADR that exist. Modernize the relationship between courts and ADR in general, and the approach to CDR in particular.
3. Adopt a Consumer Ombudsman model based on providing business support through data from complaints.

## Notes

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<sup>1</sup> For a note of the conference see <https://www.law.ox.ac.uk/content/delivering-fairness-and-justice-consumers-business-and-markets-18-19-march-2019>

<sup>2</sup> Points made by professor Riikka Koulu of Helsinki University.

<sup>3</sup> *Resolving Consumer Disputes. Alternative Dispute Resolution and the Court Systems. Final Report* (Department for Business, Energy & Industrial Strategy, 2018).

<sup>4</sup> *Modernising consumer markets: Green paper* (Department for Business, Energy & Industrial Strategy, 2017), paras 144–52.

<sup>5</sup> *Ibid.*, para 152.

<sup>6</sup> *Report from the Ombudsman Inquiry. Volume I: Report* (All Party Parliamentary Group on Consumer Protection, 2019).

<sup>7</sup> ECC-NET criticizes the design of the platform against the concept of 'usability' in *ISO 9241-11 Ergonomics of human-system interaction – Part 11: Usability* (updated March 2018).

<sup>8</sup> 'Building the homes we deserve', speech by the Rt Hon Sajid Javid MP, Secretary of State, 29 November 2017.

<sup>9</sup> *Strengthening Consumer Redress in the Housing Market. Summary of responses to the consultation and the Government's response* (Ministry of Housing, Communities & Local Government, 2019).

<sup>10</sup> *Increasing the award limit for the Financial Ombudsman Service* (Financial Conduct Authority, March 2019), PS19/8.

<sup>11</sup> S. Walker, *Review into the complaints and alternative dispute resolution (ADR) landscape for the UK's SME market (2018)*, available at:

<http://www.ukfinance.org.uk/review-into-the-complaints-and-alternative-dispute-resolution-adr-landscape-for-the-uks-sme-market/>

<sup>12</sup> See summary by Marine Cornelis (NextEnergyConsumer) for ESCR Just Energy, available at:

<https://escrjustenergy.wordpress.com/2019/03/22/consumer-adr-delivering-fairness-justice-for-consumers-businesses-markets/>

<sup>13</sup> *Stichting Klachten en Geschillen Zorgverzekeringen*, available at: <https://www.skgz.nl/>

<sup>14</sup> *Arbitro Bancario Finanziario*, available at: <https://www.arbitrobancariofinanziario.it>

<sup>15</sup> *The Relationship between Formal and Informal Justice: the Courts and Alternative Dispute Resolution* (European Network of Councils of the Judiciary and the European Law Institute, 2018), available at: [http://pgwrk-websitemedia.s3.eu-west-1.amazonaws.com/production/pwk-web-encj2017-p/GA%2018/ELI-ENCJ\\_ADR\\_Statement.pdf](http://pgwrk-websitemedia.s3.eu-west-1.amazonaws.com/production/pwk-web-encj2017-p/GA%2018/ELI-ENCJ_ADR_Statement.pdf)

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**With thanks to Speakers at the Conference:**

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