

European Civil  
Justice Systems

# Implementing the EU Consumer ADR Directive

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, 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

- Consumer ADR (CDR) systems offer enormous opportunities, not just for achieving rational resolution of consumer-to-business (C2B) disputes and increasing access to justice, but also for using the aggregated data to identify emerging and illegal activities for the purposes of innovation, raising market standards, and prompting enforcement — and thereby fuelling growth.
- If they are to achieve these goals, CDR systems need to have specific design features, in order to ensure quality and maintain high standards of independence, transparency, legal expertise, and fair decision-making.
- CDR is a distinctive European technique. But the spread of CDR systems across Europe is patchy, techniques employed are variable, and many systems need modernization.
- Directive 2013/11/EU aims to establish a pan-EU framework for CDR and to modernize the C2B dispute resolution structures and bodies of EU Member States. Many states face challenges of reforming existing systems before the implementation date of 2015. But if the wider regulatory and market benefits are to be achieved, imminent decisions on re-design of CDR systems need also to take on a wider vision.
- This policy brief reports on ideas that governments and CDR bodies should bear in mind in implementing the CDR Directive. It draws on extensive original research carried out by the team from the Centre for Socio-Legal Studies, Oxford University<sup>1</sup> and a conference held at Wolfson College, Oxford on 26–7 September 2013.<sup>2</sup>

# Implementing the EU Consumer ADR Directive

## The background to CDR

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Consumer Dispute Resolution (CDR) schemes in Europe are particular regulated arrangements for deciding consumer-to-business (C2B) disputes. There are various different types of CDR schemes across Europe, comprising public or private bodies or ombudsmen, which are based on the classic ADR techniques of mediation/conciliation, non-binding recommendations, arbitration, mediation-arbitration, or binding adjudication. There is no single model for CDR bodies in Europe, but a range of bodies, many of which are highly effective and more attractive to consumers than court alternatives.

Under the CDR Directive,<sup>3</sup> the EU is to build by 2015 a comprehensive network of CDR bodies that can decide every type of C2B breach of contract dispute, excluding, for the present, various disputes including health care, education,<sup>4</sup> and, by definition, public sector bodies. The Directive sets out a series of quality requirements that every CDR body must observe,<sup>5</sup> and a regulatory mechanism to control CDR bodies.<sup>6</sup> There will also be a single pan-EU online dispute resolution (ODR) platform, which will facilitate, in particular, cross-border CDR claims.<sup>7</sup>

Since there are differences in the national architectures for CDR bodies, and differences in the structures and modes of operation of individual bodies, reforms need to be made in nearly every country. Furthermore, the need to implement the Directive offers an opportunity for governments and CDR bodies to review their structures and modes of operation, and to modernize them. How should this be done, so as to derive maximum advantage from CDR systems?

## The objectives for CDR systems

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Extensive research into CDR systems by a team from the Centre for Socio-Legal Studies, Oxford, and consensus from a conference held in September 2013,<sup>8</sup> highlighted the following objectives of CDR arrangements:

- to resolve many small disputes more quickly and at lower cost than courts;
- to capture many more C2B claims than are attracted through existing systems (courts, small claims, collective actions) by providing more user-friendly, cheaper, and quicker pathways for C2B disputes;
- to achieve significant savings in public expenditure on courts by providing CDR facilities, which in some Member States may involve significant private funding;
- to provide effective and efficient mechanisms for collective redress by enabling mass issues to be identified and then resolved by applying generic solutions to multiple similar individual claims;
- to provide a source of expert advice to consumers, through a triage function prior to examination of any claim;
- to provide an enhanced market surveillance and feedback mechanism that can inform surveillance authorities, traders, and consumers about emerging trends and significant issues.

## Considerations in designing CDR systems

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In order to achieve these objectives, CDR systems need to be designed with appropriate functionality.



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It will be necessary to:

- Scrupulously observe the Directive's quality principles and maintain high standards of independence, transparency, legal expertise, and fair decision-making.<sup>9</sup> Compliance needs to be robust and visible, so as to guarantee constitutional fairness and attract respect and trust. On the regulatory side, there must be robust public oversight by national competent authorities, including collaboration amongst the network of national authorities, such as through joint training and inspections, and coordinated supervisory action. On the self-regulatory side, there will be a need amongst CDR bodies for sharing best practice,<sup>10</sup> coordinated training programmes, quality assurance and auditing, and full transparency of governance structures and achievement of performance criteria. If elements of funding come from the private sector, this is acceptable if appropriate governance, oversight, and transparency exist.<sup>11</sup> Consumers retain their fundamental right to access a court.<sup>12</sup>
- Ensure that traders are always the first stop in relation to every complaint, but that there are time limits for customer care departments to respond to complaints, and processes are not complex, nor involve multiple stages. The existence of mediators within some companies in preference to fully independent external ADR entities is undesirable, and should be replaced by the latter.<sup>13</sup>
- Provide a seamless, integrated complaint-handling function for consumers. This means that there needs to be operational inter-connectivity and collaboration between individual CDR entities, so that consumer contacts are passed on swiftly to the right CDR body, and there is an acceptable level of consistency in modes of operation, procedures, and performance, so that consumers and traders are not confused. A national system needs to be designed to have maximal simplicity, so that consumers and traders can easily remember what action to take if a problem arises, for example, 'Go to the

Ombudsman'. A national system that comprises too many individual CDR entities or individual mediators is unlikely to be remembered or trusted by consumers and so would not maximize the utility of the system.

- Design CDR systems so as to facilitate market surveillance and enforcement by public regulatory agencies where appropriate. CDR bodies should collect all data from inquiries and complaints. They should publish the aggregated data (without identifying an individual consumer) so as to enable feedback on market conditions, identifying emerging problems and traders who have high levels of complaints or serious issues. This may need data protection clearance in some countries.<sup>14</sup> It may be advisable for some CDR bodies to publish more frequent data and in greater detail than the annual activity reports required by the Directive on numbers of disputes and systematic or significant problems.<sup>15</sup> There should be both exchange of information between CDR entities and enforcement bodies,<sup>16</sup> but also close and regular cooperation.<sup>17</sup>
- Ensure that enforcement agencies have the capacity to review all surveillance data from all sources so as to give a full picture of the trading activities, especially where non-compliance is occurring. The need to ensure that a full picture is assembled suggests that there should not be too many individual CDR bodies. Surveillance authorities and traders need to have full access to a complete picture of data from all sources (e.g., an aggregated set of complaints to traders, CDRs, and regulators). The enforcement agencies also need appropriate powers to ensure that traders cease illegal activity, do not repeat it, and provide redress.
- Design CDR systems so as to provide mass/collective redress where multiple similar cases arise. This means that CDR bodies must be able to identify where several cases are similar, and have procedures to enable outcomes in similar cases to be consistent. There must be

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managerial oversight of the content of individual cases that arise, so as to identify similar issues. There should be a mechanism for referring unclear points of law to be decided by courts, regulators, or legislators. Consumer complaints that traders have not complied with redress schemes ordered by regulators or courts could be made to specified CDR bodies, which would apply the rules of the redress scheme rather than the law relating to the original infringement, thereby saving expense.

### Various possible evolutions in CDR schemes

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A number of possible evolutions might be considered by individual CDR schemes, such as the following:

- Introducing an initial triage stage, that can act as a consumer advice function and also weed out claims that are clearly without merit.
- Including mediation as a first stage in an existing arbitration-only scheme. This may resolve a significant number of problems at an earlier stage and hence lower overall cost, but the total cost implications would need to be considered, such as whether the cost of having two stages makes justice too expensive.
- Evolving from panels of three arbitrators to single decision-makers in relevant cases. The types of case in which this might be appropriate need further research. The rationale for this change would be to reduce the cost and time that it takes to decide small consumer cases, so as to make it more attractive for consumers to raise more issues that they would otherwise consider to be not cost-proportionate, but which might arise from a situation in which a trader might otherwise get away with a large illicit profit.
- Dropping any charge for consumers. The Oxford research found that many of the schemes in their sample were free to consumers. The Directive states that CDR should be 'free of charge or available at a nominal fee'.<sup>18</sup> The historical rationale for imposing a charge on both parties to arbitration may no longer apply in relation to contemporary ideas on encouraging consumers to raise problems with low values, especially if ill-founded claims are weeded out at an initial triage stage. A counter argument might be that requiring a modest change in some types of case is a rational barrier that assists some consumers to reduce inflated demands to reasonable levels.
- Moving from an arbitration-based system towards ombudsmen, with case handlers who triage cases, assign cases to 'tracks' depending on their complexity and need for expertise, employ mediation/conciliation techniques, and ultimately make decisions. The rationale might be that a large caseload may contain cases that can be resolved faster than others, so it is helpfully responsive to have a number of possible tracks.
- Evolution to out-sourcing particular types of cases, such as those involving technical expertise. An example might be that a small country might refer financial services, or telecom or airline disputes, to a CDR body in another country, where the latter has particular expertise in the sector and its regulatory law or practices.
- Increase the number of traders that accept CDR as binding, by persuading more traders to adhere voluntarily, especially as a prior general commitment, or supported by a trade association guarantee,<sup>19</sup> or by enacting a legal provision that CDR recommendations that are accepted by the consumer will be binding on the trader.<sup>20</sup>
- Integrating comprehensive national coverage of dispute resolution systems for all types of disputes, including health care,<sup>21</sup> education, and complaints against public bodies.
- Constructing CDR systems for disputes outside the EU, such as on particular types of specialist claims types in which a CDR body specializes, such as travel/tourism or e-commerce. An

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important example here would be to build EU–China links, since CDR is starting to emerge in China in a form that is not dissimilar to the EU approach, and the two could be connected.

### Arguments for business support of CDR

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If CDR systems are to expand successfully, businesses need to support both the principle and the structures of CDR. In a significant number of Member States, businesses support CDR completely, but in others the level of support is at best patchy. Some businesses are unaware of CDR, or sceptical of why they should support it, adhere to non-binding decisions, or fund CDR. The following are some of the arguments that have been expressed by *businesses* for supporting CDR.

- The cost of processing disputes is far lower under CDR systems than if lawyers and courts are involved. CDR systems are also quicker and more flexible than courts.
- The level of customer loyalty retention is higher if good CDR systems are used than if adversarial procedures are used. The culture of CDR is to enable customers to obtain a personal and swift response to their problems. Customer care departments and CDR bodies report that customers often just want to ask for advice or to be heard in airing a perceived grievance. CDR entities report that if they handle complaints well, customer loyalty to the trader is often stronger than before the complaint occurred.
- Good traders want to show that they adhere to independent assessment of how they do business.
- If effective in-house customer care exists, the demand for external CDR should be low, so the cost of maintaining external CDR infrastructure can be kept low.
- An external CDR provides a long-stop for customers who do not wish to settle a dispute on a reasonable basis in direct negotiation.

- CDR can be designed to act as a swift filter for unfounded claims.
- Making CDR apply to all traders can assist a level commercial playing field between businesses, by enabling swifter identification of and penalties for those who break the law, to the advantage of the law-abiding.
- The availability of effective CDR will process multiple similar claims and reduce the perceived need for class actions.

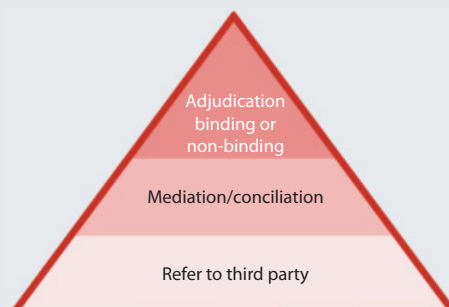
### National architectures of CDR: Providing full coverage

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Member States tend to have different national architectures and models of CDR. How can full coverage be provided? The following are some suggestions for how models might evolve to provide full coverage.

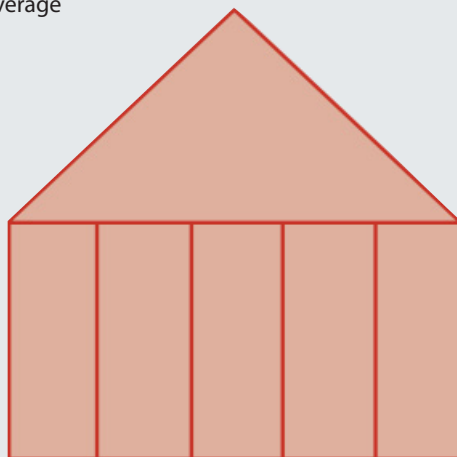
- The starting point for a country that does not currently have a particularly advanced CDR system, especially if the country has a comparatively small population, is whether the CDR system should be provided by a single integral national entity. This structure has the advantage of simplicity, so is easy for consumers to remember and access (Figure 1). As suggested above, a number of expert commentators believe that CDR bodies should be separate from state regulatory authorities, so as to demonstrate independence. Statutory CDR bodies also find it difficult to change and evolve.

**Figure 1:** An escalating pyramid technique



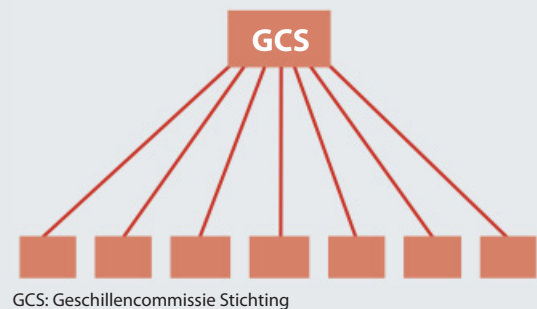
- Countries should remember that they may need CDR expertise in specialist areas, and that they are permitted to outsource CDR functions to bodies located in other Member States. Thus, the UK Financial Ombudsman or Telecom Ombudsman; or the Energy Ombudsmen in Belgium or Catalonia; or the Insurance or Transport Ombudsmen in Germany; or the Geschillencommissie Stichting in the Netherlands; or ARN in Sweden (to name only a few) might be candidates for providing outsourced services.
- The creation of ODR platforms covering each Member State, whether through the EU-level ODR platform itself or nationally, would increase accessibility and functionality.
- Some Member States may already have a structure in which there is a national residual CDR body and also a number of sectoral CDR bodies that cover the main specialist areas (financial services, telecoms, energy, utilities, etc.). In this case, full coverage already exists. This is the case in the Nordic states (see Figure 2).

**Figure 2:** National residual CDR body plus sector coverage



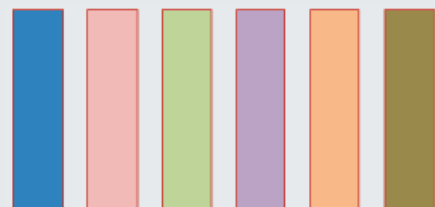
- The model in the Netherlands and Bulgaria has the existing advantage of wide but not yet full coverage, so the issue is how to add on those sectors that have not joined the system or those traders who are not members of trade associations (see Figure 3).

**Figure 3:** The Netherlands model



- In states such as the UK, Germany, Ireland, and France, there exist some sectoral CDR bodies, but they are not joined up into a coherent single national structure, and there is not full coverage (Figure 4). Various options are possible here. One option may be to merge a number of smaller CDR bodies. A second would be to create a general consumer ADR body, whether it stands 'above' or alongside other CDR bodies.

**Figure 4:** Several distinct sectoral CDR bodies providing partial coverage



## Funding

Some Member States, such as Nordic states and the Netherlands, believe that some or all of the cost of residual CDR entities should be funded by the state as a matter of social policy. This is consistent with the fact that states provide much of the funding for courts. Funding consensual and speedy CDR systems has social and economic benefits. However, not every government is prepared to spend public money on CDR.

If fees are to be paid by individual traders, how do non-statutory bodies have the authority to compel non-members to join, or to pay the CDR body's costs? There are three possible options on how that might be achieved:



1. The CDR body might submit the bill after the case is over. That is not a satisfactory solution, since traders who lose or small independent traders might simply not pay. If many did that, the CDR body might risk financial collapse, and it would not be fair for the honest to subsidize the wrongdoers. This would be a classic economic ‘moral hazard’ problem.
2. Legislation could provide that the fees of approved CDR bodies would be recoverable as a debt, perhaps on a fast-track basis, and the trader would be ‘named and shamed’. That would be an improvement on the first option, but might still involve an unacceptable level of non-compliance and debt collection costs for CDR entities. A variation on this approach would be that a Minister would be granted power to approve the named CDR bodies to levy charges in certain sectors: this might work well in the UK.
3. The CDR body could demand a deposit from a trader before processing every case. If it were not paid, the CDR body would refuse to process the case and might cancel any pre-existing registration with it by the trader. This approach might work well in the Netherlands.

- After a dispute has arisen, a consumer and a trader may agree to enter arbitration, the outcome of which will be legally binding on each of them. That is a familiar technique, although it is somewhat old-fashioned and may be increasingly unattractive to contemporary consumers.
- Recommendations by CDR bodies are not legally binding, but the culture is that adherence is strong. This is largely the position in Nordic states. Adherence can be increased where non-adhering traders are ‘named and shamed’ in public media, such as in Sweden, where the publisher informs a trader in advance that his name is about to be published; this incentivizes many traders to implement the CDR entity’s decision.
- Recommendations by CDR bodies are not legally binding, but traders agree in advance that they will accept the CDR entity’s decision.
- Trade associations guarantee any non-payment by their trader members, such as in the Netherlands. That is attractive since it provides full confidence to consumers and also a self-regulatory mechanism for compliance by businesses, with strong peer pressure.

### Should CDR decisions be binding?

As is well known, citizens’ access to the courts cannot be denied.<sup>22</sup> The principle is enshrined in the CDR Directive.<sup>23</sup> This means that the US approach of permitting consumers to be bound to arbitration (or any other non-court ADR process) when they make purchases is contrary to European fundamental and human rights. The ethical and policy rationales for this position lie in protecting the fundamental asymmetry of power between individuals and larger concentrations of power.

So how can CDR decisions be made binding in Europe? The general options are as follows:

- A decision by a CDR body may be made binding on both parties by law if the consumer accepts it. This is the position for UK statutory ombudsmen, such as those for financial services, pensions, and lawyers. Legal challenges on the grounds that companies’ human rights have thereby been compromised have failed.<sup>24</sup>

### Implementation: the way forward

In summary, implementation of the directive in some countries may have to evolve in stages. For example, a first stage might create a network of interconnected CDR bodies that formally satisfy the requirements of the Directive. The merging or rationalization of individual CDR bodies into a

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structure that is tighter, more coherent, and easy for consumers to remember could be done at the same time or later. A later stage may be to revise the law or practice on the arrangements under which final recommendations are *de facto* or *de jure* binding on traders.

### Changing culture

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Some dispute resolution systems operate on an adversarial mode, such as American adversarial

legalism.<sup>25</sup> That approach can generate an individualist, argumentative, and divided society. In contrast, systems based on ADR techniques are designed to bring parties together to resolve their differences quickly, amicably, cooperatively; to foster redress; and to heal divisions. That approach lies at the heart of the EU's preference for CDR, and the philosophy has strong links with European ideals of social solidarity within a market economy.

### Notes

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- <sup>1</sup> Christopher Hodges, Iris Benöhr, and Naomi Creutzfeldt-Banda, *Consumer ADR in Europe*. Oxford: Hart Publishing, 2012.
- <sup>2</sup> See papers at <<http://www.fljs.org/content/ec-head-representation-outlines-new-vision-consumer-dispute-resolution-across-europe>>.
- <sup>3</sup> Directive 2013/11 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR).
- <sup>4</sup> CDR Directive, art 2.2.
- <sup>5</sup> CDR Directive, arts 6-11.
- <sup>6</sup> CDR Directive, arts 18-20.
- <sup>7</sup> Regulation (EC) No 534/2013 on online dispute resolution for consumer disputes (Regulation on consumer ODR).
- <sup>8</sup> The views noted here should not be taken to be those of any individual save the authors of this policy brief, and in particular not those of officials from the European Commission and various governments or public bodies who attended the conference, but can be taken to be a general reflection of the broad mood of most participants.
- <sup>9</sup> CDR Directive, art 6.
- <sup>10</sup> CDR Directive, art 16.1.
- <sup>11</sup> CDR Directive, arts 6, 7, 19.
- <sup>12</sup> CDR Directive, art 10: an agreement to submit complaints to an ADR entity shall not be binding if it was concluded before the dispute has materialized and if it has the effect of depriving the consumer of his right to bring an action before the courts. Further, art 12 provides: where the outcome of an ADR is not binding, Member States are to ensure that consumers are not subsequently prevented from initiating judicial proceedings.
- <sup>13</sup> Even though CDR Directive art 2.4 permits Member States to permit in-company mediators, this is not acceptable in almost all Member States, and the power should be exercised with restraint.
- <sup>14</sup> CDR Directive, art 5.2(f) specifies that the processing of personal data by CDR entities shall comply with national legislation implementing Directive 95/46/EC.
- <sup>15</sup> Directive on consumer ADR, art 17.
- <sup>16</sup> Directive on consumer ADR, art 8(b) and (c). This provision should be included in the ODR Regulation: J. Hoernle, 'Encouraging online alternative dispute resolution (ADR) in the EU and beyond', *European Law Review*, 38/2 (2013), 187-208.
- <sup>17</sup> Directive on consumer ADR, art 17.
- <sup>18</sup> CDR Directive, art 8(c).
- <sup>19</sup> As is the arrangement under the Geschillencommissie system in the Netherlands.
- <sup>20</sup> As is provided in UK legislation for various statutory ombudsmen.
- <sup>21</sup> Possible approaches could build on inquisitorial compensation schemes for medicines, medical, and road traffic injuries, and the French ONIAM system.
- <sup>22</sup> ECHR, art 6; EU CFR, art 47.
- <sup>23</sup> CDR Directive, arts 11 and 12.
- <sup>24</sup> *Heather Moor & Edgcomb Ltd v United Kingdom* 1550/09 [2011] ECHR 1019.
- <sup>25</sup> R. A. Kagan, *Adversarial Legalism*. Cambridge, MA: Harvard University Press, 2001.



## The Foundation

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