CONSULTATION PAPER ON THE ISE OF ALTERNATIVE DISPUTE RESOLUTION AS A MEANS TO RESOLVE DISPUTES RELATED TO COMMERCIAL TRANSACTIONS AND PRACTICES IN THE EUROPEAN UNION – COMMENTS FROM THE MINISTRY OF CHILDREN, EQUALITY AND SOCIAL INCLUSION, NORWAY

General remarks

We are happy to submit our comments to the questions of the consultation paper, which raises a number of issues and dilemmas of great importance to consumers and consumer policy. We note with satisfac tion that this also reflects the priority the Commission gives to the matter of efficient and simplified consumer complaint handling, and its significance for promoting trust among consumers to the internal market. We take a great interest in these issues and the consultation. The Commission document has been sent out for national consultation to pertinent stakeholders, and we have received a number of comments that have been taken in regard in our considerations below.

Our contribution reflects first and foremost our national experience, ADR system and also legal system– as to which the situation may vary a lot between countries. Nevertheless, we have tried to have this in mind and hope that our comments may be of interest. National experience can, all the same, be of general interest. Right now, a total survey of the Norwegian ADR system is taking place. In November last year, a government appointed committee presented its report. We believe that the issues and considerations in this report – as well as features of our system as it has developed and stands – could be of wider interest. For this purpose, we have elaborated a document in English on Alternative Dispute Resolution in Norway, which we take pleasure in enclosing.

We understand the consultation paper to the effect that the questions concerning ADR systems and ADR bodies refer mainly to national systems and solutions. However, the existence, geographical competence and functioning of ADR bodies at national level has an impact on the availability of ADR bodies in cross-border disputes.

We would like to underline that any possible future initiatives and procedures for out-of-court handling of complaints on the Community level should be in line with the principle of subsidiarity and pay respect to the freedom and competence of national authorities to organise their complaint handling system in the way they find appropriate.

Consumer and business awareness of ADR

(1) What are the most efficient ways to raise the awareness of national consumers and consumers from other Member States about ADR schemes?

In each state, the priority for national entities is obviously to inform national consumers, while the national member of the ECC-net should be the ”single contact point” for obtaining vital and pertinent information on consumer rights and schemes in other states when needed.

For one thing, this should be a major information task for consumer organisations and ECC-net offices, cf. point 2 below. For another, measures can be taken to make sellers’ company inform customers of options for complaint handling. Information on the possibility of ADR in case of a dispute could be included in written pre-contractual information, in contracts or even on standard invoice used. At any rate, information should be given – if and when the company rejects a complaint from the consumer. In particular, business that are formally part of an ADR scheme established by agreement between the business organisation and the authorities or consumer organisation should have an obvious duty to give such information.

Easily accessible information on the options for having a complaint handled should be available and easy to find for a consumer when needed, and certainly on the Internet. The ideal solution would be to

have a single information point/single contact point. A Norwegian government appointed committee, which has surveyed the Norwegian dispute solution system on a broad basis, has suggested that the Norwegian Consumer Council (NGO) be established formally as a general body for requests concerning complaint handling bodies and systems. It should have a duty to have complete overview over existing alternatives for solution of disputes, and thus be able in each case to give the consumer information of his or her options (elaborated in annex). In practice, the Consumer Council has much of this role already, but the proposal would mean a still more streamlined and professional function in this respect.

A useful approach would be to oblige business to include information on out-of-court procedures in contracts and/or other written documents. We have observed with satisfaction the Community policy in this respect, and that the obligation to inform the consumers is already in place in community legislation, e.g. through the Payment Services directive and the Consumer Credit directive. According to those directives, the payment service providers/lenders have to inform their customers in the contracts about out-of-court procedures.

(2) What should be the role of the European Consumer Centres Network, national authorities (including regulators) and NGOs in raising consumer and business awareness of ADR?

The ECC centres have a crucial role in cross-border complaint handling – as concerns provision of information on options available, as well as the handling itself. The network has an advantage of being more familiar with the language and culture of the countries involved in a c/b complaint than ”normal” national ADR bodies. Therefore, any strengthening of the Network and in particular information activities, would be a most efficient means to promote knowledge and use of the Network. However, the overall performance of the ECC Network is dependant on well-functioning national systems for dispute solution. Information on ADR schemes should also be easily available on their websites.

It seems difficult to give a recipe for the role of national authorities. Usually, they do not usually themselves deal with information. But they should support information activities and encourage in different ways establishment and operation of high quality ADR bodies. Please also cfr. the annex in this respect.

As to consumer organisations – which by us first and foremost means The Norwegian Consumer Council - cfr our answer under question 1

Attention should be paid to the fact that business awareness of ADR is not satisfactory, cfr para 18 of the consultation document. ECC-net offices as well as consumer organisations should take targeted information actions directed at branches of business where such a problem appears.

(3) Should businesses be required to inform consumers when they are part of an ADR scheme? If so, what would be the most efficient ways?

Absolutely, cfr our considerations under questions 1 and 2. Specific information in contracts is already foreseen by community legislation, i.a. for the banking sector. Such information is in most of the cases available for the customer in the point of sale and on the businesses' websites.

4) How should ADR schemes inform their users about their main features?

Cfr our response to questions 1 and 5.

Involvement of traders/suppliers

(5) **What means could be effective in persuading consumers and traders to use ADR for individual or multiple claims and to comply with ADR decisions?**

The use of ADR has en economic side that is important to both parties, not least the consumer. The obvious way to persuade consumers and traders to use ADR schemes is to make it cheaper, simpler and faster than going to court, and to ensure that the ADR scheme has a good standing, with highly qualifies members and decisions which are respected.

From a consumer point of view, and in order to lower barriers to use the ADR system, the ideal is that it should be free of charge for the consumer, or with a low fee. To reduce costs, it is important that the consumer can be assisted in clarifying whether he has a good case at an early phase. This can be attended to by impartial secretariat that provides information on legal rights, evaluate and prepare the cases.

Of particular importance is that the quality of the ADR body as concerns handling of cases and performance in general is of a standard that gives consumers as well as business the necessary confidence in the body.

Finally, it should be underlined that the positive work of an ADR risks losing its positive effect if business fails to comply with the decisions. Our experience is that participation in ADR schemes established by agreement between the business organisation and consumer organisation or public authorities contributes to raising loyalty among members. Some associations also require that their members respect the decisions of complaint boards to which they are partners.

Transparency – as concerns decisions as well as respect for decisions – can represent a vital instrument in itself. Various forms for information on companies that do not respect decisions, up to ”black-listing”. However, it should be noted that non-compliance by business can be due to a legitimate interest for a company to appeal decisions to the ordinary court system. To have clarified the state of the law by court in cases of high principal interest, will often also be in the interest of consumers.

(6) Should adherence by the industry to an ADR scheme be made mandatory? If so, under what conditions? In which sectors?

This is a difficult as well as a sensitive issue. For sectors with a very large number of small enterprises, which to a high degree pop up and disappear quickly, it will be unrealistic.

Some Norwegian complaint boards have a basis in law. For some of these, there is a requirement that traders shall be part of an ADR system or in other ways provide customers with an offer for complaint handling.

As a general rule, it will be more appropriate to consider mandatory adherence to public ADR schemes than for private/voluntary schemes, just for the reason that the latter are voluntary. However, there are strong arguments for an obligatory ADR system in branches that are subject to concession, or authorization. Furthermore, some sectors have characteristics that in themselves make an argument for obligatory ADR to secure a low-cost alternative of dispute solution for consumers. The obvious

example is financial services with their particular challenges for consumers: information gap between the parties, decisions of high economic significance, hardly any room for a "trial-and-error" approach, In Norway, legislation on this is currently being prepared for the financial sector.

(7) Should an attempt to resolve a dispute via individual or collective ADR be a mandatory first step before going to court? If so, under what conditions? In which sectors?

ADR bodies and ADR schemes are established in order to allow for cheaper, faster and more efficient processes for both parties. Where a well-functioning ADR system is in operation, the main rule should be that the parties, in particular the consumer should have the possibility to make use of this system before going to court. Obvious exceptions occur when a case is too complex or for other reasons not fit for the simplified procedures. Anyway, it is a complicated issue to make it obligatory, and, in any case, this must be up to each state to decide from its legal traditions.

(8) Should ADR decisions be binding on the trader? On both parties? If so, under what conditions? In which sectors?

A complicated matter, and a central issue in the ongoing public consultation on the proposals from the government committee that has surveyed the system of complaint handling in Norway (cfr. Annex). It is too early for us to draw conclusions or take a firm position in this matter at this stage of the legislative procedure.

ADR coverage

(9) a) What are the most efficient ways of improving consumer ADR coverage?
b) Would it be feasible to run an ADR scheme which is open for consumer disputes as well as for disputes of SMEs?

a) Cfr the annexed overview of Alternative dispute resolution in Norway for a description of our dual system – a public Consumer Complaint Commission, supplemented by voluntary consumer complaint boards, usually negotiated between business/trade and the Consumer Council.
In a way, the ideal would be to have a publicly financed complaint board dealing with complaints on all goods and services, for a low cost or free of charge for the consumer.
The costs for running such a scheme would for most states make this a completely unrealistic option. Furthermore, there are advantages linked to the voluntary complaint boards, based on cooperation between business and consumer organisations, not least for the positive effect of this cooperation.

As to ambitions and priorities for coverage, we would refer to the Annex (pt. 3.2) and the criteria for identifying areas where ADR should exist developed by the government appointed committee, and its identification of the most important gaps to fill as concerns goods and services that are, at present, not sufficiently covered by an ADR system.

As concerns acceptance for new voluntary boards: From our experience, it is vital to establish, and to have established - a constructive dialogue with the pertinent trade or business in general, and confidence between the parties. It is important to have business and trade recognise the common interest in avoiding complaints, and having them solved in a simplified way. While there are, of course, examples of failure, most attempts have succeeded, and even to the degree that business usually cover all costs for running the schemes.

b) It may be true that many small enterprises – and sole enterprises – often are in a position which can be compared to that of a consumer when confronted with a big business adversary with a complaint. We have examples of simplified complaint handling for "non-consumers" in the EU legislation (on passenger rights – not discerning between consumers and business travellers) as well as in one of our voluntary complaint boards (the Norwegian complaint board for electronic communication handles complaints from companies with less than 10 employees.) In general, however, we do believe that there would be major complications in extending the system to cover SMEs, inter alia in deciding criteria for which enterprises should be included. It would take resources at the cost of handling cases for consumers. And, at the end of the day, even the smallest SMEs are – or should be – professionals.

(**10) How could ADR coverage for e-commerce transactions be improved? Do you think that a centralised ODR (Online Dispute Resolution) scheme for cross-border e-commerce transactions would help consumers to resolve disputes and obtain compensation?**

It seems somewhat unclear what is envisaged in this respect. If it is meant to be a centralised cross-border system, it does not seem very realistic or appropriate. For one thing, it is hard to see how it should function with the numerous and often rather anonymous actors in a fast changing market. Our ECC-net office maintains that the challenges and consumer problems linked to e-trade are more or less the same as for other sales forms. Furthermore, it seems inefficient with a system attending only to c/b complaints, in contrast to what is the case for existing bodies. It would be complicated to operate on the basis of a number of differing legislative system, and the approach seems to presuppose a larger degree of harmonisation than what is the case as per today. This would be even more difficult as the handling of cases would imply questions of contract law.

(11) Do you think that the existence of a "single entry point" or "umbrella organisations" could improve consumers' ' access to ADR? Should their role be limited to providing information or should they also deal with disputes when no specific ADR scheme exists?

For c/b cases, the ECC-Net seems the appropriate solution to the question of a "single point of entry". It seems an obviously better – more efficient and cheaper - solution to strengthen this role rather than establishing an alternative SPE. For the national scene, cfr our comments under question 1.

It does not seem possible to give a general answer to whether the same body that gives information should deal with cases not covered by existing ADR bodies. It would mean that they would undertake a kind of role – and rather a huge and resource demanding one – as a complaint handling body for all "left-over" goods and services. This would not necessary always be a feasible – nor optimal solution.

(**12) Which particular features should ADR schemes include to deal with collective claims?**

As a main rule, and with the same arguments as for individual claims, also disputes involving collective claims should be solved outside ordinary courts when appropriate. There are obvious arguments that identical, or close to identical, claims from a large number of consumers are dealt with this way. It makes the handling more efficient and less expensive for both parties and the business party may be more inclined to find amicable solutions. Furthermore, large amounts of money may be at stake in total though each individual claim may be rather small, and forming a collective claim may be the only appropriate course to pursue.

On the other side, there are particular challenges linked to simplified handling of collective claims. In theses cases, the handler will often have to deal with a massive amount of documents and complex legal issues. Furthermore, the cases will often be too complex and expensive for this kind of fast

track procedures, as the resources of most ADR schemes are limited. In any case, high competence will be required of the bodies and persons handling the cases. It must be carefully considered, in general and/or on a case-to-case basis, whether the national ADR system and the body in question have adequate resources and competence.

We have noted that this issue is also raised in the public consultation on collective redress (document SEC (2011) final of 4 February 2011) and Norway may revert to the matter in its comments to this document.

(13) What are the most efficient ways to improve the resolution of cross-border disputes via ADR? Are there any particular forms of ADR that are more suitable for cross-border disputes?

Improving and strengthening the ECC-Network, actions to improve coverage of ADR bodies, filling the large gaps that exist and which undermine the efficiency and potential of the network, are obvious answers. But how to have this goal implemented is another matter, which merits further examination.

In this, and also in other relations in this document, we would like to remind of the work and activities of the FIN-NET, in many ways a parallel to the ECC-Net.

The FIN-NET network was originally established with the intention of extra-judicial settlement of disputes regarding cross border financial services within the European Union, bringing together all relevant ADR institutions dissolving disputes between businesses and their customers in the financial services sector. For effective and efficient settlement of cross-border disputes, it could be considered to create similar networks like the FIN-NET in other sectors.

Funding

(**14) What is the most efficient way to fund an ADR scheme?**

It seems that some degree of public funding is necessary as a basis for a system with ambitions to cover the major types of goods and services. This must, in its turn, be supplemented by other forms of bodies finding other forms of financing.

From our experience, we believe (as touched upon above) that having business cover the costs for voluntary complaint boards, based on a constructive cooperation and trust between the parties, are key issues in this respect. As a main rule, the view that business should pay the costs is shared by Norwegian business and industry. We refer once more to the annexed document, and to comments under the answers above, as to the Norwegian experience and philosophy in this area.

(15) How best to maintain independence, when the ADR scheme is totally or partially funded by the industry?

Established trust and cooperation from business and between the parties is a key word, in this respect, transparency (handling and decisions) another.

In fact, our experience is that trade/industry/business financing has never been a problem for ensuring confidence and maintaining independence. Agreements between the consumer organisation and the business to establish ADRs adhere to a number of requirements ensuring impartiality, legal certainty, right to reply etc.

(**16) What should be the cost of ADR for consumers?**

In general, there are obvious reasons that the handling should be free of charge, or at a low cost – to avoid creating barriers for low-income consumers, to secure redress, to have problems in the market uncovered, to give appropriate signals to trade and business etc.
There is also the risk that the company in question is tempted to exploit the fact that the consumer, whose claim is rejected, can not afford a complaint handling procedure.

In real life, however, these principles may crash with reality if there is a lack of will for public funding or business meeting the costs. If so, there is no easy answer, but encouraging and working for development of a climate where business sees the advantages of contributing to a well functioning ADR system, is one way to go.