Sieps
Swedish Institute for European Policy Studies

European Policy Analysis

APRIL · ISSUE 2013:6epa

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Alternative Dispute Resolution for Consumers in the Financial Services Sector: A Comparative Perspective

Abstract

Alternative Dispute Resolution (ADR) has become a topical issue in the attempt to facilitate consumer access to justice, and it has developed extensively in the financial services sector. Out-of-court mechanisms are often viewed as a cheap and expeditious alternative to court dispute resolution in consumer matters. A comparison of consumer ADR schemes in Member States shows a wide range of different approaches, including arbitration, ombudsmen, mediation and conciliation schemes. Furthermore, persistent challenges, in terms of the availability and the quality of financial services schemes, remain. This paper will provide a comparative perspective on key consumer ADR measures that apply to financial services dispute resolution in the EU and in three Member States. It will focus particularly on the insurance sector, where the number of complaints has grown in some countries and where a complex system of specialized schemes has been developed. Finally, this paper will outline the recent proposals by the European Commission on Consumer ADR and on Online Dispute Resolution (ODR), assessing their possible implications for dispute resolution in the financial services sector.

1 Introduction: access to justice and consumer ADR in Europe

In an enlarged European market, consumers have an increasing choice of financial services providers.[1] Helped by the internet, consumers now undertake a higher number of financial transactions in foreign Member States, and this sometimes results in cross-border complaints. However, if a complaint cannot be resolved directly with a financial services provider, consumers are often reluctant to pursue a case in court, due to litigation costs and other barriers such as complex and lengthy procedures. In this context, out-of-court mechanisms are regarded as important alternatives to courts, providing fast and cheap redress in consumer disputes.[2] These mechanisms, commonly called ADR, cover out-of-court schemes that lead to the settling of a dispute through the intervention of a third party, such as an arbitrator, a mediator or an ombudsman. This third party can propose or impose a solution, or, in other cases, can merely bring the parties together and assist them in finding a solution.[3]

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1 See e.g. European Commission's Consultation Document, Alternative Dispute Resolution in the Area of Financial Services (2008), 3, Internal Market and Services DG, Brussels, 11.12.2008 MARKT/H3/JS D(2008).

2 See OECD, *Recommendation on Consumer Dispute Resolution and Redress* (OECD, Paris, 2007).

3 See the ADR definition applied in the European Commission's Consultation Paper, On the Use of Alternative Dispute Resolution as a Means to Resolve Disputes Related to Commercial Transactions and Practices in the European Union (2011), para. 6.

ADR schemes aim to settle disputes in an amicable way, and are more flexible than ordinary court procedures. The importance of ADR procedures was previously highlighted by the global access to justice movement in the late 1970s. One of the leading scholars in this field, Mauro Cappelletti, helped to broaden the concept of access to justice beyond the courts, including alternative dispute resolution as a significant part of civil procedure.[4] According to Cappelletti, alternative dispute resolution mechanisms are essential for making justice accessible to a wider group of citizens and helping preserve an amicable relationship between the parties.[5]

In the last decade, the debate on ADR as a means to facilitate access to justice has become more widespread in the EU and in the Member States, as these mechanisms have proved to be particularly useful for consumer-related disputes involving small monetary claims.[6] Moreover, the recent financial crisis placed a renewed focus on consumer protection and on effective enforcement in the financial sector,[7] resulting in the adoption of new guidelines for complaint-handling in the insurance field, and stronger supervision of the financial market.[8]

The European Commission has been active in promoting the development of out-of-court settlement procedures, which has led to the adoption of a number of key measures in the consumer domain.[9] These are described in the following section.

2 EU measures

2.1 Quality requirements and ADR provisions in financial services measures

Since 1998 the European Commission has adopted two Recommendations to promote consumer ADR. They establish a number of minimum guarantees, such as independence and effectiveness, which should be granted by ADR schemes.

Recommendation 98/257/EC on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes was adopted in 1998.[10] It applies to consumer ADR schemes which either propose or impose a solution to resolve a dispute. This Recommendation sets seven minimum guarantees for ADR proceedings: independence, transparency, adversarial procedures, effectiveness, legality, liberty, and representation.[11]

Recommendation 2001/310/EC,[12] adopted in 2001, applies to ADR schemes which involve a more consensual resolution of disputes. It targets out-of-court mechanisms where third party bodies who are responsible for consumer dispute resolution procedures attempt to resolve a dispute by bringing the parties together to convince them to find a solution by common consent.[13] However, the recommendation does not cover customer complaints services.[14] Part II of the Recommendation sets four minimum guarantees that should be met by such

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4 M. Cappelletti, 'Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement' (1993), 3 *The Modern Law Review* 56, 287 ff.

5 M. Cappelletti, 'Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement' (1993), 3 *The Modern Law Review* 56, 287 ff.

6 H.W. Micklitz, N. Reich & P. Rott, *Understanding EU Consumer Law* (Intersentia, Antwerp, 2009) 341.

7 At the international level the World Bank issued a document, *Good Practices for Financial Consumer Protection*, June 2012.

8 In the EU, see the Guidelines on Complaints-Handling by Insurance Undertakings, issued by the European Insurance and Occupational Pensions Authority (EIOPA) in 2012. In the UK see, for instance: www.fsa.gov.uk/pages/Library/Communication/Speeches/2010/0624_sn.shtml. On the new EU financial supervisory framework see: http://ec.europa.eu/internal_market/finances/committees/index_en.htm
A new approach to financial regulation: securing stability, protecting consumers, Cm.8268 (HM Treasury, London, January 2012), available at: www.hm-treasury.gov.uk/d/fin_fs_bill_policy_document_jan2012.pdf.

9 See also I. Benöhr, Alternative Dispute Resolution in the EU, in C. Hodges, I. Benöhr & N. Creutzfeld-Banda, *Consumer ADR in Europe* (Hart Publishing, Oxford, 2012) 7-18.

10 Commission Recommendation (EC) 98/257/EC on the principles applicable to the bodies responsible for the out-of-court settlement of consumer disputes, [1998] OJ L 115/31.

11 See Articles I-VII of the Commission Recommendation (EC) 98/257/EC on the principles applicable to the bodies responsible for the out-of-court settlement of consumer disputes, [1998] OJ L 115/31.

12 Commission Recommendation (EC) 2001/310 on the principles for out-of-court bodies involved in the consensual resolution of consumer ADR, [2001] OJ L 109/56.

13 Part I (1) of the Commission Recommendation (EC) 2001/310 on the principles for out-of-court bodies involved in the consensual resolution of consumer ADR, [2001] OJ L 109/56.

14 Part I (2) of the Commission Recommendation (EC) 2001/310 on the principles for out-of-court bodies involved in the consensual resolution of consumer ADR, [2001] OJ L 109/56.

ADR schemes: impartiality, transparency, effectiveness and fairness.[15]

Both Recommendations have positively influenced consumer ADR schemes in the Member States, which have often adopted the minimum quality guarantees in their procedures. The Commission has developed a database of more than 500 ADR schemes which, according to the Member States, meet the Commission's quality criteria by complying with the Recommendations.[16]

Furthermore, a number of Directives in specific sectors *encourage* or *require* Member States to establish adequate and effective out-of court dispute resolution procedures. In the area of financial services, measures that *encourage* Member States to establish ADR schemes are, for example, the Distance Marketing of Financial Services Directive,[17] the Insurance Mediation Directive[18] and the Markets in Financial Instruments Directive (MiFID).[19] In turn, EU measures *requiring* that adequate and effective ADR schemes are put in place include the Consumer Credit Directive[20] and the Payment Services Directive.[21]

These Directives show that there is an increasing trend in EU law to include provisions regarding alternative redress mechanisms in financial services measures. While the older consumer Directives rarely mentioned out-of-court dispute resolution, in the new Directives Member States are often encouraged to promote such schemes.

2.2 Mediation in civil and commercial matters

Mediation, as yet another type of ADR, has also been receiving increased attention in the EU. A Code of Conduct for Mediators was promoted by the European Commission and developed in conjunction with a large group of practitioners and mediation experts. This Code was adopted in 2004 and sets out a number of principles to which individual mediators in civil and commercial matters can voluntarily decide to commit themselves.[22] Mediation organizations can also adhere to the Code and promote the respect of its principles through information, training and monitoring of mediators.[23]

More recently, in 2008 the EU adopted a Directive on certain aspects of mediation in civil and commercial matters (the EU Mediation Directive).[24] According to Article 1, the Directive aims to 'promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings'.

The Directive harmonises national rules concerning mediation and some elements of national civil procedures in a relatively limited manner, and is confined to cross-border mediation only. However, Member States can also extend the application of the provisions implementing the Directive to purely national mediation procedures.[25]

The Directive places an obligation on the Member States to provide the general public with information on how to contact mediators and organisations offering mediation services. Furthermore, it aims to provide a harmonised approach to mediation, by requiring appropriate training for mediators and providing common definitions for both mediators and mediation.

The Directive refers to mediation as a voluntary process, but national laws may impose sanctions or incentives related to participation in mediation. It applies 'to processes whereby two or more parties to a cross-border dispute attempt by themselves, on a voluntary basis, to reach an amicable agreement on the settlement of their dispute with the assistance of a mediator'. The Directive also covers cases in which the parties are referred to mediation by a judge and those for which mediation is

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15 See Part II (A-D) of the Commission Recommendation (EC) 2001/310 on the principles for out-of-court bodies involved in the consensual resolution of consumer ADR, [2001] OJ L 109/56.

16 This database can be accessed at: http://ec.europa.eu/consumers/redress_cons/schemes_en.htm.

17 Directive 2002/65/EC concerning the distance marketing of consumer financial services, [2002] OJ L 271, L 271/16, Article 14.

18 Directive 2002/92/EC on insurance mediation, [2003] OJ L 9/3, Article 11(1).

19 Directive (EC) 2004/39 on markets in financial instruments, [2004] OJ L 145/1.

20 Directive (EC) 2008/48 on credit agreements for consumers, [2008] OJ L 133/66.

21 Directive (EC) 2007/64 on payment services in the internal market, [2007] OJ L 319/1.

22 European Code of Conduct for Mediators promoted by the Commission and adopted by mediation experts in October 2004; see: http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.htm.

23 European Code of Conduct for Mediators promoted by the Commission and adopted by mediation experts in October 2004; see: http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.htm.

24 Directive (EC) 2008/52 on certain aspects of mediation in civil and commercial matters, [2008], OJ L 136/3.

25 See Directive (EC) 2008/52 on certain aspects of mediation in civil and commercial matters, Article 2, [2008], OJ L 136/3 for the definition of a cross-border dispute.

prescribed by law. Furthermore, it applies to mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question.

Importantly, the Directive requires Member States to strengthen the quality of mediation through control mechanisms, confidentiality requirements and the promotion of training of mediators, to ensure that the mediation process is conducted in an impartial and competent way. The Directive also regulates the enforcement of agreements resulting from mediation and the effect of mediation on limitation and prescription periods.

The Mediation Directive makes cross-border dispute resolution for civil and commercial matters more effective. It establishes a coherent EU framework, ensuring a balanced relationship between mediation and judicial proceedings.[26] The Directive also provides an incentive for Member States to go beyond the requirements in the Directive, by promoting mediation in a purely national context.

2.3 Cross-border Financial Dispute Resolution Network

For the financial services sector, the Commission has set up a specific dispute resolution network of national ADR bodies, called FIN-NET (Financial Dispute Resolution Network). This network was established in 2001 and deals with ADR cross-border disputes between consumers and financial services providers from the European Union, Norway, Iceland and Liechtenstein.[27]

The objective of FIN-NET is to provide consumers with easier access to ADR schemes in cross-border cases through the cooperation and assistance of national ADR bodies.[28] It also aims to improve the quality of ADR schemes and ensure that they operate under a common set of principles.[29]

If a consumer has a complaint against a financial service provider from another country, the FIN-NET member in the consumer's country will help to identify the relevant complaint scheme in the financial services provider's country. Furthermore, the member will provide information about the scheme and its complaint procedure.[30] If the consumer then decides to file a complaint, the FIN-NET member will transfer the complaint to the relevant scheme in the service provider's country or suggest that the consumer files a complaint directly with that cross-border scheme.

In order to be admitted as a member of FIN-NET, a scheme must provide out-of-court settlement of disputes between consumers and providers of financial services.[31] In addition, it has to comply with the quality requirements set out in Commission Recommendation 98/257/EC described above.[32] This means that a Member State authority has to certify to the Commission that the ADR scheme in question complies with each of the seven principles of the Recommendation (i.e. independence, transparency, adversarial procedure, effectiveness, legality, liberty and representation).[33]

A 2009 evaluation report commissioned by DG Internal Market and Services showed that FIN-NET can work well in specific cases.[34] However, the report also revealed significant gaps in the coverage of the network. For instance, some EU Member States had no ADR schemes for particular financial services sectors, and a number of schemes were not members of FIN-NET. Importantly, schemes were sometimes not members because they

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26 For the impact of the Directive in Germany, see J.-B. Hillig & M. Huhn, 'Impact of the EU Mediation Directive on the German Construction Sector' (2010), 162 *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction 2.*

27 See: http://ec.europa.eu/internal_market/fin-net/index_en.htm.

28 Centre for Strategy & Evaluation Services, *Report on the Evaluation of FIN-NET* (Commissioned by DG Internal Market and Services, 2009).

29 Centre for Strategy & Evaluation Services, *Report on the Evaluation of FIN-NET* (Commissioned by DG Internal Market and Services, 2009).

30 Centre for Strategy & Evaluation Services, *Report on the Evaluation of FIN-NET* (Commissioned by DG Internal Market and Services, 2009).

31 A Memorandum of Understanding, including a declaration of intent on cross-border co-operation between the parties, links FIN-NET members. See: ec.europa.eu/internal_market/fin-net/members_en.htm.

32 Commission Recommendation (EC) 98/257 on the principles applicable to the bodies responsible for the out-of-court settlement of consumer disputes, [1998] OJ L 115/31.

33 www.fin-net.eu.

34 Centre for Strategy & Evaluation Services, *Report on the Evaluation of FIN-NET* (Commissioned by DG Internal Market and Services, 2009).

did not comply with the ADR quality standards set out in the Commission Recommendation 98/257/EC.[35] This indicated that consumers often still face barriers to settling financial services disputes out of court, due to the unavailability or poor quality of ADR schemes.

The new 2011 EU proposals on consumer ADR, which will be described in the last section of this paper, might provide a solution to some of these challenges.

3 Comparison of ADR schemes in the financial insurance sector

At the Member State level, important national reforms of civil procedure have encouraged the development of ADR schemes.[36] As a result, at least 750 national ADR schemes currently exist, according to a recent study commissioned by the EU.[37] Many of these schemes focus on sectors which present a high number of disputes, such as the financial services and telecommunication sectors.[38] Some of the ADR mechanisms show common characteristics, while others vary considerably in their procedures and functions, as the next section on ADR in the insurance sector will show. These mechanisms represent an important step in facilitating access to justice, but a number of shortcomings still prevail at national and cross-border level, and these will be described in the final section.[39]

3.1 Germany

Germany's civil litigation system is relatively inexpensive and efficient.[40] As a result, public out-of-court schemes for consumers have developed at a slower pace than, for example, in the UK. In the financial services sector, only a few public ADR facilities have been established,[41] as the majority of ADR schemes have been created by private business associations. A large number of financial services providers have voluntarily agreed to settle consumer disputes with the help of private conciliators or ombudsmen. These ADR units have been established as independent bodies within the industry associations of the respective companies. However, the ADR providers are fragmented, since they have arisen within the confines of the main historical sectors, notably private banks, co-operative banks and building societies.[42]

A major private consumer ADR scheme in Germany is the Insurance Ombudsman, which was established on 1 October 2001 on the initiative of the German Insurance Association (*Gesamtverband der Deutschen Versicherungswirtschaft* (GDV)).[43] The scheme covers complaints that are brought by a consumer[44] against an insurer if the latter is a member of the German Insurance Ombudsman Association. Approximately 95 per cent of private insurance companies are members of the Insurance Ombudsman Association (*Versicherungsombudsman e.V.*).

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35 Centre for Strategy & Evaluation Services, *Report on the Evaluation of FIN-NET* (Commissioned by DG Internal Market and Services, 2009), 19-20.

36 E. Blankenburg, 'The Infrastructure for Avoiding Civil Litigation: Comparing Culture of Legal Behaviour in The Netherlands and West Germany' (1994), 28 *Law & Society Review* 4, 789-808.

37 DG SANCO, *Study on the use of Alternative Dispute Resolution in the European Union* (Civil Consulting, Berlin, 2009) at: http://ec.europa.eu/consumers/redress_cons/adr_study.pdf.

38 For more information see C. Hodges, I. Benöhr & N. Creutzfeld-Banda, *Consumer ADR in Europe*, (Hart Publishing, Oxford, 2012).

39 A 2011 ADR consultation paper by the Commission highlighted the fact that the existing ADR procedures do not cover all consumer sectors and are often inconvenient in cross-border cases. See European Commission's Consultation Paper, *On the Use of Alternative Dispute Resolution as a Means to Resolve Disputes Related to Commercial Transactions and Practices in the European Union* (2011).

40 B. Hess & R. Hübner, Germany, in C. Hodges, S. Vogenauer & M. Tulibacka (eds.), *The Costs and Funding of Civil Litigation, A Comparative Perspective* (Hart Publishing, Oxford, 2010) 369.

41 ADR facilities were established by the German central bank (*Deutsche Bundesbank)* and only recently within the Federal Financial Supervisory Authority (*BaFin*). See also C. Hodges, I. Benöhr & N. Creutzfeld-Banda, *Consumer ADR in Europe* (Hart Publishing, Oxford, 2012), 90-94 and 100-108.

42 BaFin provides information about the ADR schemes at www.bafin.de.

43 See also J. Basedow, Small Claims Enforcement in a High Cost Country: The German Insurance Ombudsman in P. Wahlgren, U. Bernitz, S. Mahmoudi, & P. Seipel (eds.), *What is Scandinavian Law? Social Private Law* (Stockholm Institute for Scandinavian Law, Stockholm, 2007), 54.

44 A natural person who concludes an insurance contract for a purpose that is outside his or her trade, business or profession may lodge a complaint. However, the Ombudsman is not competent, inter alia, in cases regarding healthcare insurance or if a case is already pending in a court or arbitration tribunal.

The objective of the founders was to promote out-of-court dispute resolution between insurance companies and consumers, and to overcome the 'structural asymmetry' between the parties.[45] Insurance contracts are often complex and difficult to understand for consumers, and providers have more legal expertise and financial resources to enforce their rights. The Ombudsman procedure was specifically intended to demonstrate the commitment of insurance providers to take consumer issues seriously, and hence to support confidence in the sector. Insurers have an obligation to inform customers of the Ombudsman procedure in every contract and in any relevant discussion.

The Ombudsman scheme is funded by an annual contribution paid by the companies that are members of the Insurance Ombudsman Association, and by case fees.[46] For consumers the dispute resolution scheme is free of charge, and they retain the option to file a claim either with a state court or with the Insurance Ombudsman.

While this facilitates consumers' access to the dispute resolution scheme, the full funding of the scheme by insurance businesses might, in principle, jeopardize the neutrality of this institution. To address this issue, several safeguarding measures have been put in place to preserve the Ombudsman's independence and impartiality. First, candidates to the office have to demonstrate particular expertise in insurance matters, and impartiality. In particular, they cannot hold appointments in the insurance sector that may cause a conflict of interest with their Ombudsman function.[47] As a further guarantee of impartiality, the Ombudsman is appointed by the Advisory Council of the Ombudsman Association, in which insurers and consumer organisations are equally represented. The duration of office is for five years, and dismissal is only possible for obvious gross misconduct by the Ombudsman.[48] Finally, the Ombudsman is free in his or her decision-making, provided that the law is observed.

The Ombudsman scheme offers a flexible dispute resolution mechanism for simple issues that can be decided expeditiously. The intervention of lawyers is not required, and lawyers are not normally appointed by the parties. A complaint can be made orally, in writing or in other forms, and the respondent usually has to reply within a month.[49] Before lodging a complaint the consumer is obliged to contact the insurer, giving a period of at least six weeks for a reply.

In exceptional circumstances, if a complaint would use excessive scheme resources it can be refused. Furthermore, if a complaint deals with a question of 'legal principle' the case must be referred to the court, which would then decide. The Insurance Ombudsman investigates the facts of cases ex officio, and can take a legally binding decision up to a sum of €10,000.[50] Above that threshold, in disputes about claims of up to €100,000 he or she may pronounce a non-binding recommendation.[51]

The Ombudsman usually performs a conciliation function as a first step, prior to making a decision, and this is often successful. If the Ombudsman is likely to decide against an enterprise, the company might be informed about the potential outcome, which provides it with the option to settle the case directly with the customer in an amicable way. If the Ombudsman decides in favour of the insurer, he or she pays particular attention to providing the consumer with an explanation of the decision.

The Ombudsman procedures have become more efficient with time and are shorter than the usual court procedures. The majority of cases are decided within three months. The decision by the Ombudsman is legally binding for the insurance companies, while the recommendations are

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45 http://www.versicherungsombudsmann.de/Navigationsbaum/WirUeberUns/AufgabenUndZweck/index.html.

46 The annual contribution by the companies varies depending on their gross premium income.

47 J. Basedow, Small Claims Enforcement in a High Cost Country: The German Insurance Ombudsman in P. Wahlgren, U. Bernitz, S. Mahmoudi, & P. Seipel (eds.), *What is Scandinavian Law? Social Private Law* (Stockholm Institute for Scandinavian Law, Stockholm, 2007) 55.

48 www.versicherungsombudsmann.de/Navigationsbaum/WirUeberUns/StellungUndKompetenz/index.html.

49 J. Basedow, Small Claims Enforcement in a High Cost Country: The German Insurance Ombudsman in P. Wahlgren, U. Bernitz, S. Mahmoudi, & P. Seipel (eds.), *What is Scandinavian Law? Social Private Law* (Stockholm Institute for Scandinavian Law, Stockholm, 2007) 56.

50 J. Basedow, Small Claims Enforcement in a High Cost Country: The German Insurance Ombudsman in P. Wahlgren, U. Bernitz, S. Mahmoudi, & P. Seipel (eds.), *What is Scandinavian Law? Social Private Law* (Stockholm Institute for Scandinavian Law, Stockholm, 2007) 58.

51 See section 2 of the Insurance Ombudsman procedural rules. Prior to November 2010 the limit was €80,000; see also: http://www.versicherungsombudsmann.de/Navigationsbaum/Verfahrensordnung.html.

voluntary for both consumers and companies. Even after the decision by the Insurance Ombudsman, the consumer can still lodge a claim with the ordinary court.

To conclude, the Insurance Ombudsman has increasingly been recognized by both public bodies and private actors as an effective dispute resolution provider. This ADR model was copied by the German transport sector Ombudsman and may inspire wider areas of consumer dispute resolution.[52] Insurers have applied this dispute resolution mechanism as a marketing advantage. The costs are lower than in court proceedings, and there is less potential for adverse publicity. Consumers, in turn, have an additional option of filing a complaint without the financial risks that court proceedings would entail.

3.2 France

In France, mediation plays a major role in consumer ADR. French mediators function in a similar fashion to ombudsmen in other Member States. There is also a strong system of local conciliation through a court-annexed justice conciliator, who is highly accessible to those involved in litigation.[53]

Mediators began to appear within some larger companies in France around the early 1990s. They constitute what, in other countries, would be considered to be the top of the internal customer complaint department, but they have adopted an additional aura of independence from the company, whilst remaining part of it. Examples can be seen in AXA France (1993), and BNP Paribas (2002) (in the wake of the adoption of the so-called *loi Murcef*, passed in 2001).[54] Sectoral mediators also appeared, notably in insurance (*Fédération Française des Sociétés d'Assurance* (FFSA), 1993) and banking (*L'Association Française des Sociétés Financières* (ASF), 1995).

The emergence of mediators was partly due to the wishes of major businesses. They had a number of objectives: to maintain better and closer relationships with their customers, to avoid the costs, negative publicity and divisiveness of court proceedings, and to respond to the national debate on whether to introduce class actions to resolve mass consumer issues.

The position of mediation crystallised in 2011 with the adoption of a national charter for consumer disputes, which sets out important principles. It holds that mediation should not be binding on either party, and neither should it involve binding recommendations. Mediation should, however, be free of charge to consumers.

Implementation of the EU Mediation Directive in 2011 introduced a definition of mediation in French law and some criteria for a 'good' mediator, namely that the mediator must accomplish the mission with impartiality, competence and diligence.[55] It is debatable whether the omission of a requirement for independence is significant, given the number of in-house mediators in French companies.

In the insurance sector, there are several mediators to deal with insurance complaints. The majority of these schemes have not been notified to the European Commission and have not become members of FIN-NET.[56] This makes it more difficult to identify competent ADR schemes in the insurance sector or to check their quality standards, particularly in cases of cross-border complaints.

The mediator of the French Federation of Insurance Companies (*Fédération Française des Sociétés d'Assurance,* FFSA)[57] is the only notified insurance mediator scheme in France, and is a member of FIN-NET. The FFSA is

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52 J. Basedow, Small Claims Enforcement in a High Cost Country: The German Insurance Ombudsman in P. Wahlgren, U. Bernitz, S. Mahmoudi, & P. Seipel (eds.), *What is Scandinavian Law? Social Private Law* (Stockholm Institute for Scandinavian Law, Stockholm, 2007).

53 See also C. Hodges, I. Benöhr & N. Creutzfeld-Banda, *Consumer ADR in Europe* (Hart Publishing, Oxford, 2012), 46-56.

54 Loi n 2001-1168 du 11 décembre 2001 portant mesures urgentes de réformes à caractère économique et financier (MURCEF) was an Act adopted relating to urgent economical and financial reforms in France.

55 www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000025179010&fastPos=1&fastReqId=1554304886&categorieLien=id&oldAction=rechTexte. The amendment to the civil procedure code is: Livre V: La résolution amiable des différends, in which Arts 1542 and 1543 add an ADR procedure between parties in litigation with their lawyers.

56 See for instance: médiateur du GEMA and médiateur du CTIP; other insurance mediators are : médiateur de la Chambre Syndicale des Courtiers d'Assurances (CSCA) and médiateur de la Fédérale Mutualiste (www.mutualite.fr); for more information regarding these schemes see: www.acam-france.fr/mediateurs.

57 www.ffsa.fr.

the leading trade organisation in the insurance sector, and represents 90 per cent of the insurance market. In 1993 the members of the FFSA established the insurance mediator as a private and voluntary ADR scheme, which decides on disputes involving FFSA members who have signed its charter. This charter is intended to provide a framework whereby consumers and third parties can settle their disputes without resorting to litigation. Under the charter, the insurer and the insured can seek advice from the in-house mediator or refer the matter to the FFSA-appointed mediator.

The FFSA mediator is appointed unanimously, for a renewable 2-year term, by a board comprising representatives from the National Consumer Institute (*Institut National de la Consommation*), the Advisory Committee of the National Insurance Council (*Commission Consultative du Conseil National des Assurances*) and the FFSA. The mediator calculates his own budget, and the funding for the scheme is provided by the insurance industry under the mediation charter. Consumers thus do not contribute financially, and can bring a complaint free of charge.

Insurers must specify, in the information documents made available to prospective policy-holders, the conditions under which complaints will be processed. These documents should also inform the policy-holder about dispute resolution mechanisms within the company, and provide the contact details of a mediator.

A request for mediation can only be accepted after all the internal, contractual or other means of redress made available by the insurance company in question have been exhausted. The FFSA mediator scheme should deliver its opinion within three months. In practice, the time taken to handle a complaint varies according to the individual file. Article 8 of the charter provides that the mediator's opinion should take into account elements of law and equity. If mediation does not give rise to an agreement, the mediator issues a non-binding written opinion, and the parties remain free to bring the matter before the courts.

3.3 United Kingdom

Out-of-court resolution mechanisms have flourished in the UK and are now generally highly developed, as they were recognized comparatively early on to be an expeditious and necessary alternative to costly court litigation procedures.[58] Another characteristic of the UK schemes is that they operate on a sectoral basis and that they differ significantly in models and visibility across the sectors.

Ombudsmen have been established in the UK in an increasing number of sectors since the 1960s, often being created as an integral part of a new regulatory structure, operating alongside public regulators of privatised or opened markets. The UK also has a strong national policy and culture of self-regulation, complementing a robust cadre of public regulatory authorities.[59]

The Financial Ombudsman Service (FOS) was established in 2001 by Parliament, under the Financial Services and Markets Act 2000, as an independent body to resolve disputes between consumers and financial firms quickly and with minimum formality.[60] It incorporated the former ombudsmen for banking, insurance, building societies and investment into a single body. It was designed to function in close cooperation with two other key regulatory authorities: the Financial Services Authority (FSA)[61] and the Office of Fair Trading (OFT), which, among other things, is responsible for consumer credit licensing.[62] The FOS was thus an integral part of a large project aimed at simplifying the regulatory landscape while embracing a self-regulatory philosophy.[63] One of the advantages of

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58 See more on the litigation costs in J. Peysner, England and Wales, in C. Hodges, S. Vogenauer & M. Tulibacka (eds.), *The Costs and Funding of Civil Litigation, A Comparative Perspective,* (Hart Publishing, Oxford, 2010), 289-302.

59 See C. Hodges, I. Benöhr & N. Creutzfeld-Banda, *Consumer ADR in Europe* (Hart Publishing, Oxford, 2012), 272-283.

60 The FOS also received further powers under the Consumer Credit Act 2006.

61 Under the Financial Services and Markets Act (FSMA) 2000, the objectives of the FSA were: maintaining market confidence, promoting public understanding of the financial system, providing consumer protection and fighting financial crime.

62 See in general R. James & P. Morris, The New Financial Ombudsman Service in the United Kingdom: Has the Second Generation Got it Right? in C. Rickett & T. Telfer (eds.), *International Perspectives on Consumers' Access to Justice* (Cambridge University Press, Cambridge, 2003), 167.

63 FSMA ss 226, 226A and 227, as amended by the Consumer Credit Act 2006. See HM Treasury, Financial Services and Markets Bill: A Consultation Document. Part One. Overview of Financial Regulatory Reform (HM Treasury, London, 1998), 8.

the new system was to create a single point of contact for consumers' enquiries and complaints, and to draw clear lines of accountability.[64]

Part of the function of the FOS is to balance the bargaining power of consumers against that of companies.[65] Its recommendations are binding on providers, and the service is free to consumers. The FOS is funded by an annual levy paid by the financial businesses it covers, and by case fees charged to businesses for settling disputes.[66] The budget is proposed by the chief Ombudsman and then adopted by the board of the FOS, and requires a final approval by the FSA. A significant difference between the FOS and other ADR schemes funded by private firms is that firms covered by the FOS are obliged by law to contribute.[67] This strengthens the independence of the FOS.

The board members of the FOS are appointed by the FSA,[68] but they are independent from the latter. The public interest board of the FOS in turn appoints the Ombudsmen. The FOS assists in the application of the law and rules and, despite not being a regulator itself, can influence the regulatory process in an indirect way, through cooperation with the FSA.

The FOS deals with complaints about most financial products and services (including banking and insurance services), the way firms make their business decisions, and investment performance evaluations. Although the FOS cannot give personal advice about financial matters or debt problems, it plays an important role in sharing knowledge and experience, helping consumers and businesses settle problems, and helping to eliminate causes of complaints.

A consumer first has to complain to the financial service company in order to give it a chance to evaluate the problem.[69] If the response to the complaint by the firm is not satisfactory or no solution is found within eight weeks, the complaint can be referred to the FOS. The consumer must do this within six months of the firm's final response letter. As a result of the referral, an adjudicator is assigned to the case. The adjudicator will contact both parties and attempt to mediate a solution. If the case is not settled, the adjudicator will make a finding. Either party may then appeal against this finding to one of around 90 Ombudsmen for a review and final determination.

The FOS has extensive discretion, as it should base its decisions on what is 'fair and reasonable' on a case-by-case basis. This has been criticised by firms since the FOS can, at least in theory, depart from the legal requirements, which may lead to confusion. The FSA Handbook, however, requires the FOS, in considering what is fair and reasonable, to take into account relevant laws and regulations, regulators' rules and codes of practice.[70] In practice, most cases only revolve around factual situations and are also of low value. The 'fair and reasonable' test is intended to avoid the disproportionate cost of a full judicial-style inquiry, in order to facilitate access to justice and an equalisation of power between firms and consumers. The FOS has the power to dismiss a case if the case would be better dealt with in court – for instance, if there is an important question of law. The Ombudsman can award up to £150,000.[71]

If a consumer does not agree with the Ombudsman's decision, he or she can file a civil legal action in court.[72] However, in practice, courts often agree with the FOS. If a consumer accepts an Ombudsman's decision, this

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64 A. Georgosouli, *The FSA Regulatory Policy of Rule-Use: A Move Towards More Effective Regulation?* (WP University of London - Centre for Commercial Law Studies, London, 2006), 2.

65 I. MacNeil, 'The Future for Financial Regulation: The Financial Services and Markets Bill' (1999), 62 *Modern Law Review* 725.

66 The FSA collects the levy for the FOS at the same time that it collects its own regulatory fees. See the information guide provided by FOS to funding and case fees, which can be accessed at: http://www.financial-ombudsman.org.uk/faq/answers/research_a5.html.

67 See information provided by the FOS on funding and case fees, at: http://www.financialombudsman.org.uk/.

68 Following the merger of the FSA into the Bank of England in 2013, the consumer protection functions of the FSA will be subsumed into the FCA (Financial Conduct Authority), which is itself a spin-off of the FSA.

69 www.financial-ombudsman.org.uk/consumer/complaints.htm#1.

70 FSA Handbook, Dispute Resolution: Complaints (DISP) 3.6, Complaint handling procedures of the Financial Ombudsman Service.

71 This was increased from £100,000 in 2011.

72 FSMA, s 228.

decision is binding on both the consumer and the business. If a consumer rejects an Ombudsman's decision, neither party is bound.

In addition to resolving individual complaints, an essential objective of the FOS is to inform firms how to improve the handling of their complaints and to promote market transparency. Under FSA rules, individual financial services firms are required to publish their own complaints data,[73] and the FOS also publishes complaints data relating to individual financial businesses on its website, in order to show how these firms handled their customer complaints.[74]

In conclusion, ADR mechanisms in the UK, France and Germany share a number of important characteristics including their source of funding. However, they also differ in many other regards, as they vary in size, in nature (public versus private) and in coverage. The next section will extend the analysis from a country-specific to a cross-border perspective; it will show that, at the European level, the existing system of ADR mechanisms faces important challenges.

4 New EU initiatives

The EU recently commissioned a number of studies on the effectiveness of ADR mechanisms in the EU and in the Member States. These studies showed that, while ADR has developed considerably, there are still various shortcomings: among them, a lack of information about available schemes, wide diversity across Member States and a lack of general coverage.[75] Furthermore, in the specific field of financial services, the European Commission issued a consultation document in 2008 on 'Alternative Dispute Resolution in the Area of Financial Services', which seeks to find new ways to improve consumer redress by filling persistent gaps in the coverage of ADR schemes in this sector.[76] The need to address ADR mechanisms was also highlighted in a Green Paper on retail financial services in June 2008 in which the European Parliament stressed that consumers should have easy access to ADR schemes, and requested the Commission to promote best practice for ADR.[77]

As a result of the above ADR studies, on 29 November 2011 the European Commission issued two new legislative proposals to facilitate consumer ADR in general: a draft Directive on ADR[78] and a draft Regulation on Online Dispute Resolution (ODR).[79]

4.1 The proposed Directive on consumer ADR

The Commission proposed a specific Directive on consumer ADR to ensure the quality and availability of such schemes for contractual disputes.[80] According to Article 1, the objective of the Directive is 'to contribute to the functioning of the internal market and to the achievement of a high level of consumer protection by ensuring that disputes between consumers and traders can be submitted to entities offering impartial, transparent, effective and fair alternative dispute resolution procedures'.

The proposal applies to procedures for the out-of-court resolution of consumer-related disputes. It regulates contractual disputes arising from the sale of goods or the provision of services by a trader established in the Union to a consumer resident in the Union. Hence, the draft Directive would cover both domestic and

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73 Policy Statement 10/1: *Publication of complaints data including feedback to CP09/12*, January 2010.

74 See the complaints data at: http://www.ombudsman-complaints-data.org.uk/ (accessed 29 November 2010).

75 See Study on the Use of Alternative Dispute Resolution in the European Union of 16 October 2009 and the Leuven Study on alternative means of consumer redress other than redress through ordinary judicial proceedings, 2007.

76 See the Consultation Document on *Alternative Dispute Resolution in the Area of Financial Services* (2008), issued by the European Commission, DG Internal Market and Services on 11.12.2008, MARKT/H3/JS D(2008).

77 European Parliament resolution of 5 June 2008 on the Green Paper on the retail financial services in the single market, (2007/2287(INI)).

78 Commission (EC) 'Proposal for a Directive on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR)', COM (2011) 793/2, final, 29 November 2011.

79 Commission (EC) 'Proposal for a Regulation on online dispute resolution for consumer disputes (Regulation on consumer ODR)', COM (2011) 794/2, final, 29 November 2011.

80 See also I. Benöhr, 'Consumer Dispute Resolution after the Lisbon Treaty' (2013), 36 Journal of Consumer Policy 1, 87-110 and in C. Hodges, I. Benöhr & N. Creutzfeld-Banda, *Consumer ADR in Europe*, (Hart Publishing, Oxford, 2012), 22 et seq.

cross-border disputes, but would not apply to in-house dispute resolution services operated by traders, to direct negotiation, or to judicial attempts at settlement.

In particular, this draft Directive tackles three key shortcomings[81] which impede the effectiveness of consumer ADR in the EU:

(a) Gaps in the coverage of ADR entities at both sector-specific and geographical level;

(b) Lack of awareness and insufficient information, which prevent consumers and businesses from using ADR entities; and

(c) Variable quality of ADR, as a significant number of ADR entities are not in line with the core principles laid down by the two Commission Recommendations.[82]

Consequently, the four main elements of the legislative proposal are:

1. Ensuring that ADR procedures exist for all consumer disputes. Member States under the proposed Directive have to ensure that all consumer disputes can be submitted to an ADR scheme. In addition, ADR schemes should make it possible to file a case online and exchange information via electronic means.[83]

2. Information on ADR and cooperation. According to the draft Directive, a trader must inform consumers about the relevant ADR schemes and about whether or not the trader has agreed to use ADR in relation to complaints lodged against it. Member States have to ensure that consumers can obtain help regarding their cross-border complaints – an obligation that Member States can delegate to their European Consumer Centres Network (ECC-Net)[84] offices. Moreover, the proposal encourages cooperation between ADR entities and national authorities entrusted with the enforcement of consumer protection legislation.

3. Quality of ADR entities. ADR schemes should meet the quality principles stated in the two Commission Recommendations. The draft Directive also includes a number of quality requirements for an ADR scheme: expertise, impartiality, transparency, effectiveness and fairness. In addition, the proposal states that disputes should be resolved within 90 days, and that ADR procedures should be free of charge or at moderate cost to consumers.

4. Monitoring. In each Member State, a competent authority will be in charge of monitoring the work of ADR entities established on its territory. The ADR bodies have to give certain information to these national authorities including their contact details, the names of the persons responsible for the ADR scheme, the funding of the scheme, the applicable rules, the length of the procedures and the fees.

4.2 The ODR Regulation

The draft Regulation on Consumer ODR, which aims to encourage the EU internal market, has a special focus on e-commerce. Recent data[85] showed that current ADR schemes for e-commerce are incomplete and that only half of the existing schemes offer the possibility of submitting consumer complaints online, while very few provide the option to deal with the entire process online.[86] Thus, a key element of the draft Regulation addresses precisely this point, by proposing the establishment of a *European online dispute resolution platform* ("ODR platform").

The platform would consist of an interactive website which offers a single point of entry to consumers and traders who seek to resolve disputes out of court. Under the current proposals, this platform would be used for disputes arising from cross-border e-commerce transactions, and would be free of charge.[87]

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81 See Study on the use of Alternative Dispute Resolution in the European Union of 16 October 2009, at: http://ec.europa.eu/consumers/redress_cons/adr_study.pdf, 56-63; 112-115; 120-121.

82 Commission (EC) 'Communication by the European Commission on Alternative Dispute Resolution for consumer disputes in the Single Market', COM (2011) 791, final, 29 November 2011, 6.

83 Commission (EC) 'Proposal for a Directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR)', COM (2011) 793/2, final, 29 November 2011, 4.

84 The ECC-Net was established in 2005 to help consumers in the resolution of cross-border complaints and disputes.

85 The 2010 report of the European Consumer Centre's Network indicates that more than half of all complaints (56.3%) received by the ECC-Net were linked to e-commerce transactions. However, out of the 35,000 cross-border complaints received by the ECC network in 2010, 91% could not be referred to an ADR scheme in another Member State as no suitable ADR scheme existed (ec.europa.eu/consumers/ecc/docs/2010_annual_report_ecc_en.pdf).

86 Commission (EC) 'Proposal for a Regulation of the European Parliament and of the Council on online dispute resolution for consumer disputes (Regulation on consumer ODR)', COM (2011) 794/2, final.

87 ADR schemes established in Member States and notified to the Commission in accordance with the Directive on Consumer ADR would automatically be registered electronically with the ODR platform.

Consumers and traders would be able to submit their complaints through an electronic form on the platform's website. The platform would then check if a complaint could be processed, and would seek the agreement of the parties to transmit it to the competent ADR scheme. The chosen ADR scheme would, in turn, try to resolve the dispute, in accordance with its own rules of procedure, within 30 days from the date of receipt of the complaint. It would notify the platform of relevant information regarding the development of the dispute.

Moreover, the draft Regulation proposes that a network of online dispute resolution facilitators should be established (the "ODR facilitators' network"). Such a network would have one contact point in each Member State, and would provide support to the resolution of disputes submitted via the platform.

Another important element of the proposal is that it would require EU traders engaged in cross-border e-commerce to inform consumers about the ODR platform. This information would have to be made easily, directly and permanently accessible on the traders' websites, and would be provided again when the consumer submitted a complaint to the trader. The compliance by ADR schemes with the obligations set out in this Regulation would be monitored by the competent authorities to be established in the Member States, in accordance with the Directive on consumer ADR.

In December 2012 a political agreement was reached on the two legislative proposals explained above and on 12 March 2013 the European Parliament voted to support a revised version of these proposals. As a result, they will soon be adopted.[88]

Both legislative proposals are ambitious and useful tools for strengthening consumer ADR in the European Union. The combination of the ODR Regulation and the ADR framework Directive is a promising move towards a comprehensive solution to allow consumers to access out-of-court schemes. The ADR Directive offers full ADR coverage, requiring that ADR schemes are available for contractual disputes between a trader and a consumer in every Member State.[89] Thus, the ADR Directive may also help to overcome existing gaps in the financial services dispute resolution landscape, raising protection standards in countries where some ADR mechanisms have important limitations in terms of transparency or independence. By setting quality requirements with respect, for example, to the impartiality and transparency of ADR schemes, the proposals are expected to strengthen the independence of ADR bodies, which is especially needed for schemes funded and monitored by private associations.

However, it remains to be seen how these schemes themselves will be funded. As all Member States have to provide full coverage of consumer ADR, the establishment of such a system may turn out to be expensive. The new legislative proposals on consumer ADR and ODR are very welcome initiatives that can help to overcome problems caused by a lack of information and gaps in coverage, which also affect financial services ADR schemes. In particular, the ODR Regulation will facilitate the processing of consumer complaints in e-commerce matters.

5 Conclusions

This paper has discussed recent trends, at the EU and Member State level, in the design and adoption of ADR schemes for consumers, focusing on financial services disputes. Out-of-court redress mechanisms are increasingly recognized as an important element in strengthening access to justice and protecting consumers effectively. Consequently, a growing number of EU measures and initiatives in Member States have adopted specialized financial services ADR schemes, which vary extensively across Europe.

In the last decade, the EU has also become more active in the regulation of consumer ADR. While this has been done initially through soft law recommendations, the current trend is towards adopting binding measures for

[88] The implementation period of the ADR/ODR rules will be two years; see: http://europa.eu/rapid/press-release_MEMO-13-192_en.htm.

[89] However, the health and education sectors will not be covered by the Directive. See also: http://ec.europa.eu/consumers/redress_cons/adr_policy_work_en.htm.

consumer ADR. This active approach by the Commission is supported by the broader competence that the EU has received, since the Lisbon Treaty, to legislate in cross-border civil justice matters.

A comparison of consumer ADR schemes in the financial insurance sector, across Germany, France and the UK, reveals different out-of-court models.[90] While some financial services ADR schemes (such as the FOS in the UK) are established by law, others rely rather more on self-regulation (as in Germany). When it comes to the funding arrangements, all assessed ADR bodies are paid for by the financial services providers, ensuring that the complaints procedure is free of charge for the consumer. Given this funding structure, several safeguarding measures have been put in place to strengthen the independence and impartiality of the ADR bodies. In France and Germany, representatives from both the business and the consumer side are involved in the selection process for the insurance mediator or ombudsman, aiming to ensure a balanced representation of interests. In the UK, the ombudsmen of the FOS are appointed by the public interest board of the organization. The FOS seems to benefit from a strong position from a comparative perspective, because it is established by law and its decisions are generally binding on financial services providers. Furthermore, the impact of the decisions adopted by ADR schemes also differ: some (e.g. those of the insurance mediator in France) are merely non-binding opinions, whereas others are binding on the parties, if the complainants accept the final decision taken by the ombudsman (as in the case of the FOS).[91]

Another distinctive feature is that in some national systems, including those of France and Germany, a large number of ADR schemes exist for the financial services sector (e.g. investment, banking or insurance). In contrast, the FOS covers all major areas of financial services.

As shown previously, while there has been an increase in financial services ADR schemes in Europe, the availability and quality of ADR schemes for consumers across the EU Member States differ considerably in this sector, leaving important gaps in coverage.[92]The recent ADR and ODR legislative proposals by the European Commission may overcome some of the challenges, as Member States will have an obligation to ensure that ADR schemes are available for all consumer disputes, and that they conform to certain quality principles.

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90 A.A.S. Zuckerman, *Civil Justice in Crisis, Comparative Perspectives of Civil Procedures* (Oxford University Press, Oxford, 1999) 3 et seq; C. Hodges, S. Vogenauer & M. Tulibacka (eds.) *The Costs and Funding of Civil Litigation: A Comparative Perspective* (Hart Publishing, Oxford, 2010).

91 ec.europa.eu/consumers/redress/out_of_court/index_en.htm.

92 The data from FIN-NET's activity reports reveal a strong increase in the number of complaints handled from the initial annual total of 335 in 2001. In 2009, FIN-NET handled 1,542 cross-border cases, of which 884 were in the banking sector and 244 in the insurance sector. The most active ADR scheme is by far the UK Financial Ombudsman Service that covers all types of financial services; see: www.fin-net.eu.

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