European Communities Trade Mark Association

14 March 2011

ECTA'S RESPONSE TO DG SANCO'S CONSULTATION ON THE USE OF ALTERNATIVE DISPUTE RESOLUTION AS A MEANS TO RESOLVE DISPUTES RELATED TO COMMERCIAL TRANSACTIONS AND PRACTICES IN THE EUROPEAN UNION

ECTA, the European Communities Trade Mark Association, was formed in 1980. ECTA numbers approximately 1.500 members, coming from the Member States of the European Union with associate members from all over the world. It brings together all those persons practising professionally in the Member States of the European Community in the field of trade marks, designs and related IP matters. These professionals are lawyers, trade mark advisors, trade mark attorneys, in-house counsel and others who can be considered specialist practitioners in these areas. With this membership, ECTA takes care of the needs of large, medium and small sized companies. More information on ECTA can be found at our website www.ecta.eu.

ECTA wanted to add its efforts to those of the Commission in relation to a matter as important as the use of Alternative Dispute Resolution as a means to resolve disputes relating to commercial transactions and practices in the European Union.

To that end, ECTA has prepared replies to the questions raised in the Consultation Paper regarding consumer and business awareness of ADR, involvement of traders/suppliers, ADR coverage and funding as follows:

1. What are the most efficient ways to raise the awareness of national consumers and consumers from other Member states about ADR schemes.

(a) From a governmental perspective:

Implementation of European Directive 2008/52/CE which establishes minimum rules to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial procedures in cross-border disputes on civil and commercial matters. In fact, Member States shall bring into force the laws, regulations and administrative provisions to comply with the Directive before 21 May 2011.

(b) From the perspective of traders:

Promoting that traders inform consumers about ADR scheme in their contractual conditions.

(c) From the perspective of regulators:

In regulated markets, regulators should direct consumers to ADR.

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2. What should be the role of European Consumer Centre's Network, national authorities (including regulators and NGO's) in raising consumer and business awareness of ADR?

From the perspective of European consumers Centre Network:

The European Centre Network should raise consumers and business awareness helping consumers identifying the ADR competent authority to deal with their dispute in another country online and in the centres that the Network may have in different countries.

From the perspective of national authorities implementing European Directive 2008/52/CE within the deadline mentioned in Item 1 (a) above, which can be applied by the Member States not only to cross-border disputes in civil and commercial issues but also to internal Mediation processes, which would encourage the adoption of mediation not only at the start of Court proceedings but also once these proceedings have started. Member states should also be encouraged to introduce mediation in certain administrative proceedings which are suitable for mediation, for example, inter parte proceedings before Patent and Trade Mark Offices, which will especially help SME`s with limited financial resources.

From the perspective of regulators, as already mentioned under item 1 (c) above, in regulated markets, regulators should direct consumers to ADR.

From the perspective of NGO's:

NGO's should give information to their members about ADR by organizing working groups and giving lectures and training on Mediation.

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

Where permissible under local law, pre-dispute commitments to dispute resolution are acceptable if they are clearly disclosed before the initial transaction is completed. This will allow consumers to take the dispute resolution provision into consideration and make an informed choice about doing business with the company.

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

(a) By creating Mediation Institutions with mediators capable of finding negotiated settlements actually desired by the parties to the conflict.

(b) By making more and better information available by individual mediators about their skills, capabilities and personalities.

(c) By making information on Mediation available in Business Schools, Law Schools and Organizations such as the Chambers of Commerce and the like through the organization of talks, courses and training on Mediation.

(d) By encouraging professional associations or national bars, among many others, to promote mediation by organizing seminars, sessions in conferences, etc.

(e) By informing consumers and traders about the possibility of introducing mediation clauses in agreements and contracts and encouraging their use.

(f) By offering information and training to judges and officers from different administrative offices, which would include national Patent and Trade Mark offices and the Community trade Mark Office.

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?

It is not a question of persuading anybody to use ADR instead of litigation, but a complex exercise when making an informed decision about whether to litigate a case or propose an alternative process such as mediation, arbitration or other ADR variation. Judgment, experience, timing and the known facts about the dispute all come into play. The most relevant criteria to decide what route to take are the following:

- participation: voluntarily or by obligation
- agreement/decision: binding / non-binding
- function/purpose of third party
- procedure, formalities
- nature of process
- public / confidential
- time
- costs

Additionally and often underestimated, the abilities of each of the parties have to be evaluated. Thought patterns have a direct effect on the behavioural pattern:

thought pattern	behavioural pattern
kamikaze	Lose - Lose
capitulation	Win - Lose
confrontation	Win - Lose
cooperation	Win - Win

Hence, before a party decides whether or not to use ADR the above criteria should be checked. At the same time the above criteria are crucial in order to "persuade" consumers and traders to use ADR. In fact, nobody should be "persuaded" to use ADR, consumers and traders should rather become well informed and then choose their own best resolution technique along the above mentioned criteria.

The main differences between litigation and mediation, for example are the following. These differences are a good example to show litigants pros and cons of their dispute resolution choice:

Lawsuit	**Mediation**
Looking back	Looking ahead
Reduced set of facts	Enlarged set of facts
Dependency on third party affidavits	Joint clarification of facts
Question of evidence	Question of facts
Controlled by others	Self controlled
Time: 6 months - 3-5 years	Time: 1-2 days
All or nothing	Less or more
Confrontation	Communication

Hence, the most important issue is to **educate and inform** consumers and traders so that they are enabled to choose their own best dispute resolution tool.

Whether or not a party shall comply with ADR decisions is not a question of choice but should be a question of law. Again, the parties should be well informed about any ADR procedure, its possible outcomes and that any agreement / decision can then be executed in accordance with the applicable law.

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

No. Mandatory ADR is (i) counterproductive as it is against the voluntary character of ADR, (ii) will lengthen processes in certain instances as parties might not want to participate in ADR procedures and (iii) will deprive parties from some fundamental rights, such as obtaining a preliminary injunction in obvious cases.

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?

No - see 6 above.

However, courts should be trained to inform and encourage parties to use ADR once a court action has been filed. In Munich for example, there is a court mandated mediation practice which parties can use any time during a litigation procedure and the litigation procedure will be suspended during such time. If parties do not want to have a judge mediator they can choose an attorney mediator from associations recommended by the court or any other suitable private mediator.

Further, ADR should become a mandatory subject when studying law at European Universities as right now the knowledge (and willingness) to use ADR among lawyers can be improved.

After all, if parties, lawyers and judges are all well informed about all kind of ADR techniques, ADR should become much more common even without making it mandatory to any extent.

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

ADR decisions should be binding on both parties in all sectors; otherwise, ADR would be rather useless. Why would one invest time and money in a process which leads to a non-binding resolution? In most jurisdictions worldwide, the binding resolution (agreement, decision) at the end of the ADR process is important for the effectiveness of the process. As mentioned before, both parties must be well informed before adopting any ADR process, they should have their own independent advisor and they should be aware of all possible consequences of such procedure.

Of course, there are non-binding processes such as ENE, conciliation, etc. However, these processes are normally adopted in preparation for a binding resolution which is then taken at a subsequent stage, such as arbitration, negotiation or even litigation.

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

A central authority/ombudsman could be appointed to act as an access point for consumer related queries/disputes. Given that the aim of both ADR and SME disputes is to secure quick, inexpensive solutions to conflicts, they may not have to be dealt with separately. There thus could be a common ADR scheme for consumer disputes and SME disputes alike.

10. How could ADR coverage for e-commerce transactions be improved? Do you think that a centralized ODR scheme for cross-border e-commerce transactions would help consumers to resolve disputes and obtain compensation?

A single authority could be appointed for e-commerce transactions (national or cross-border). Its policies could vary depending on the type of the dispute involved, i.e., consumer related disputes or disputes arising between two or more enterprises. However, consideration would have to be given to the advisability of this approach given the celerity required in cases of this nature.

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?

Please refer to the reply to question 9 above. The central authority/ombudsman should refer parties to the existing ADR bodies, which are usually specialized in certain aspects of law, or, in case these existing ADR bodies do not exist, they should deal with disputes themselves.

12. Which particular features should ADR schemes include to deal with collective claims?

Most countries are unfamiliar with class actions or other collective claims. In any event, the approach of an ADR scheme for collective claims should not differ from that for individual claims. There does not seem to be much difference. Perhaps the only difference might be that an ADR dealing with collective claims might require more than one mediator/neutral to handle all the claims and much more time to prepare and conduct the ADR proceedings. From this standpoint, collective claims might be more expensive than a case dealing with individual claims.

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

The method used by WIPO in the Mediation and Arbitration Centre is sound. In this regard, it should be underscored how important it is for the panelist or panelists to be independent. The panelists should also sign a document declaring that he/she would not face any conflict of interest situation vis-à-vis the respective parties.
(http://www.wipo.int/amc/en/domains/index.html)

IMI is a non-profit Foundation and registered charity established in 2007 as a global public service initiative to drive transparency and high competency standards into mediation practice across all fields, worldwide (www.imimediation.org)

14. What is the most efficient way to fund an ADR scheme?

The parties to the dispute should be required to fund their case.

15. How best to maintain independence, when the ADR scheme is totally or partially funded?

Please refer to the reply to question 13 above.

16. What should be the cost of ADR for consumers.

It is not possible to determine a priori the cost, which will ultimately depend on the characteristics of the case, its complexity, the time spent, etc. Mediation or ADR should not be in any case for free. Those consumers and SMEs who cannot afford it should get some support from the schemes.