

Cross-Border ADR Roundtable – Simplifying Cross-Border ADR

21 June 2022

Roundtable 2. Cross-border collective ADR

Prof. dr. Stefaan Voet

Recital (27) of the Consumer ADR Directive states that **Member States can maintain or introduce ADR procedures dealing jointly with identical or similar disputes between a trader and several consumers.** However, comprehensive impact assessments should be carried out on such collective out-of-court settlements before such settlements are proposed at Union level. The existence of an effective system for collective claims and easy recourse to ADR should be complementary and they should not be mutually exclusive procedures.

This recital focuses on what is called **collective ADR**. This is an umbrella term used to describe dispute resolution processes that can be used in collective harm cases in order to reach a consensual and collective outcome. On the one hand these processes are voluntary. On the other hand they have an alternative nature: they are situated outside of the courts.¹

Different forms of collective ADR exist: collective negotiation without an ADR entity, collective negotiation through an ADR entity, collective adjudication through an ADR entity, collective Ombudsman procedures through an ADR entity, collective arbitration through an arbitration tribunal.²

Some argue that ADR and collective redress should be **separated**. There should be a two-track policy, in the sense that both should be developed and stimulated, but should be kept separated. Collective ADR is seen by some as ‘a surrogate of justice’.³ Others underline the **risks of collective ADR**: it is costly, takes a lot of time and could be ignored by non-compliant traders.⁴ Finally, it is argued that collective ADR is exclusively based on private interests and void of values that only a public dimension could provide.

The advantage of ADR is that it is **better placed** when it comes to collective redress. For example, many sectoral consumer ombudsmen play a key role in offering collective redress. Moreover, they can easily aggregate data, collaborate with regulators and have a *quasi*-regulatory role (for example in the United Kingdom)⁵. It is argued that collective ADR leads to once-and-for-all solutions, both for consumers and traders.

To date there are **no EU tailor-made instruments focusing on collective ADR**.

In developing such instruments, the following questions arise:

- **(1) Which intermediary should play a key role in collective (cross-border) ADR proceedings? Should this be a public or private entity?**
- **(2) How do consumers consent to collective (cross-border) ADR proceedings? Should there be a pre-dispute consent or post-dispute (explicit or implicit) consent? Should (collective) ADR be made mandatory?**
- **(3) What about the cross-border recognition and enforcement of ADR outcomes? In which sense is the Brussels *Ibis* Regulation apt to deal with this?**

¹ For collective litigation see the RAD Directive (Directive (EU) 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers).

² Egeilyn Braun, ‘Collective alternative dispute resolution (ADR) for the private enforcement of EU competition law’ (2016) https://cadmus.eui.eu/bitstream/handle/1814/44324/Braun_2016_LLM.pdf?sequence=1, 3-5.

³ Gina Gioia, ‘L’uniforme regolamentazione della risoluzione alternativa delle controversie con i consumatori’ (2018) 1 *Revista Ítalo-española de Derecho procesal* 3, 44.

⁴ Grégory Renier, ‘Le nouvel encadrement de l’Union européenne pour le règlement extrajudiciaire des litiges de consommation. Examen de la directive 2013/11/UE en matière d’ADR’ (2014) 1 *Revue européenne de droit de la consommation* 135.

⁵ Alexandre Biard and Christopher Hodges, ‘Médiation de La Consommation: Un Bilan, Des Défis, Des Pistes de Réflexion Pour l’avenir.’ (2019) 2 *Contrats Concurrence Consommation* 1, 8.