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COMMUNICATION FROM THE COMMISSION

on

“widening consumer access to alternative dispute resolution”

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INTRODUCTION

This Communication builds on existing Community initiatives¹ which seek to address alternatives to the court system aimed at promoting consumers’ access to simple, swift, effective and inexpensive dispute resolution channels. It is clear from the discussions with various interested stakeholders that the use of alternative extra-judicial methods for resolving disputes has a key role to play in improving access to justice for individual consumers. To ensure that consumers have confidence in the internal market it is necessary that effective mechanisms exist that provide them with realistic and affordable options to obtain redress.

Although Recommendation 98/257/EC established principles to ensure consumer confidence in extra-judicial procedures, these were limited to out-of-court bodies where a third party proposes or imposes a decision to resolve the dispute. In order to ensure greater choice and flexibility for consumers, especially in the light of electronic commerce (“e-commerce”) and developments in communications technology, this Communication refers to Commission Recommendation [...] concerning the principles for out-of-court bodies involved in the consensual resolution of consumer disputes not covered by Recommendation 98/257/EC.

The importance of confidence, both for consumers and business, was highlighted at the Internal Market Forum organised jointly by the Commission, the French Presidency and the European Parliament on 28-29 November 2000. Attended by over 400 participants there were loud calls for out-of-court measures for resolving disputes which worked as the courts were seen as too expensive and time consuming.

Principles are essential to fostering such confidence. However the Commission has also begun to address the practical obstacles associated with gaining information about and accessing out-of-court dispute resolution bodies by creating a European Extra-Judicial Network (EEJ-Net) in order to provide information and practical support for consumers who choose to use these procedures. In addition, specific sectoral networks such as the Financial Services Complaints Network are being set up which complement the general network by providing specialist advice and support.

¹ In particular, Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes (OJ L/115, 17.4.1998, p.31-34) and the Commission Working Document on the creation of a European extra-judicial network (EEJ-Net) (SEC (2000) 405).

ACCESS TO JUSTICE WITHIN THE INTERNAL MARKET

The continuing expansion of economic activity within the Internal Market means that more and more consumers' activities are not confined to their own Member State. There is much expectation that this development will accelerate further with the introduction of the EURO, the increase in travel and the use of new technology to facilitate distance selling such as the Internet, mobile communication methods and digital TV home shopping. These means are providing the practical tools to turn national consumers into active cross border consumers. However if consumers are to utilise these opportunities their direct sustained participation must be guaranteed.

Several Community instruments² do provide consumers with a set of basic rights. However, if such rights are to have practical value, mechanisms must exist to ensure their effective exercise. If consumers' are to have sufficient confidence in shopping outside their own Member State and take advantage of the Internal Market, they need assurance that if things go wrong they can obtain redress. The possibility of using alternative mechanisms to the courts can also prevent disputes from arising by providing an incentive for parties to settle before the need to formalise their problems with a third party. Thus the mere presence of these procedures may motivate the prevention of problems. This is not just a question of promoting consumer confidence but also ensuring there is effective competition and access to the Internal Market for business, especially SME's.

Developing communication technologies have a significant role to play in providing both consumers and business with the facilities to resolve a dispute, especially where the parties are located in different jurisdictions. The experience of traditional methods of dispute resolution will be essential for the deployment of procedures in the electronic environment. Many new schemes are already emerging³ which incorporate traditional methods but with the extra advantages provided by new technology. For instance, access is widened, speed is increased and control of the resolution process is placed more firmly in the hands of the parties. Technology will therefore have an increasingly pivotal role in facilitating dispute resolution and should aim to provide a credible alternative to litigation through the courts. This will be a major factor in securing the mutual confidence of consumers and business in the Internal Market.

ALTERNATIVE DISPUTE RESOLUTION

'Alternative Dispute Resolution' (or 'ADR') covers a variety of out-of-court bodies that provide an alternative to litigation through the courts. ADR procedures may include, but are not confined to, arbitration, early neutral evaluation, expert determination, mediation and conciliation. Accordingly, the mechanisms for resolving disputes may vary from binding decisions to recommendations or agreements between the parties. Also the organisation and the management of ADR procedures may vary; they may be publicly or privately organised

² For example, Council Directive 84/450/EEC on misleading advertising (OJ L/250, 19/09/84), Council Directive 97/55/EC amending Directive 84/450/EEC to include comparative advertising (OJ L/290, 23/10/97), Council Directive 93/13/EC on unfair consumer contracts (OJ L/95, 21/04/93), Directive 97/7/EC on distance selling (OJ L/144, 04/06/97) and Directive 99/44/EC on the sale of consumer goods and associated guarantees (OJ L/171, 07/07/99).

³ For instance, Webtrader, ECODIR, Cybercourt, e-Mediator and ODR.NL.

and take the form of an ombudsman scheme, consumer complaint board, private mediator, trade association etc. These various procedures have different characteristics and are more or less effective depending on the circumstances. It is often unhelpful and confusing to group them together under one heading. A useful distinction is that between procedures in which a neutral third party proposes or makes a decision and those where the neutral seeks to bring the parties together and assist them in finding an agreement by common consent. Which of the above procedures is most appropriate will depend on the nature of the dispute to be resolved. The Commission has already responded to the first category of procedures through some specific initiatives:

- **The 1998 Communication on the “out-of-court settlement of consumer disputes”**⁴ referred to Commission Recommendation 98/257/EC setting out 7 principles (independence, transparency, adversarial principle, effectiveness, legality, liberty and representation) that ADRs in each Member State should offer to their users. Compliance with these principles is intended to guarantee consumers and traders that their cases will be treated with rigour, fairness and independence; with the expected advantage, of course, of a simpler and quicker settlement of their dispute. These principles were key to creating mutual confidence in these procedures, particularly when the parties were located in different Member States. All Member States notified the Commission of the out-of-court bodies that they considered are in full conformity with the principles and that information has been placed on the Commission’s website. This Communication anticipated the need and desirability of creating an EU wide network of these bodies with a view to improving the processing of consumer disputes of a cross-border nature.
- In response to the practical obstacles to establishing a network of the notified bodies the Commission proposed the creation of a **European Extra-Judicial Network (EEJ-Net)**⁵. The EEJ-Net will provide a communication and support structure made up of national contact points (or ‘Clearing Houses’) established by each Member State. If a consumer has a dispute with an enterprise he can then contact his national Clearing House for advice and support to assist him in filing a complaint with a notified ADR body where that enterprise is located. In cross-border disputes the Clearing Houses will address existing barriers to seeking out-of-court redress such as language differences and lack of information and then pass the complaint through the network to the appropriate body. This will provide the starting point for consumers to overcome the barriers associated with obtaining the benefits from an ADR situated in another Member State. In the longer term, its flexible structure will allow it to evolve incorporating new ADR schemes as they emerge, make use of developing technologies and provide a basis for synergies with third countries. The Commission is in the process of co-ordinating and setting up the network with Member States. Once up and running the EEJ-Net will cover both traditional methods of distant selling (e.g. mail order, tele-sales) and new communication methods (e.g. e-commerce). Together Recommendation 98/257/EC and the network will go a long way to making ADR’s work in the Internal Market.
- For financial services, **FIN-NET** (FINancial Services complaints NETwork)⁶ has recently been launched complementing the EEJ-Net by providing a specific redress network for

⁴ COM(1998) 198 Final

⁵ see Commission Working Document on the creation of an Extra-Judicial Network (EEJ-Net), SEC(2000) 405 available at:
http://europa.eu.int/comm/consumers/policy/developments/acce_just/acce_just06_en.pdf

⁶ See: http://europa.eu.int/comm/internal_market/en/finances/consumer/adr.htm

disputes involving financial services. It links together the schemes that are responsible for alternative dispute resolution for financial services at national level to form a Community-wide network. Unlike in other areas of commerce specific ADR mechanisms are already in place in every Member State. Thus FIN-NET builds on an established tradition of providing out-of-court solutions using the knowledge and experience at national level. Consumers can seek redress in a flexible manner, particularly through redress bodies in their own country. Information exchange between redress bodies is enhanced and participants have agreed on procedures of co-operation throughout the Union. The form of each participating scheme varies, but they are expected to apply the principles within Commission Recommendation 98/257/EC.

WIDENING CHOICE

However Recommendation 98/257/EC did not address the second category of ADRs where a third party facilitates the resolution of a consumer dispute by bringing the parties together and assisting them in reaching a solution by common consent. Most consumer disputes are usually characterised by the fact that the transactions have a low economic value compared to the costs of seeking a judicial settlement. Therefore it is necessary to encourage a wide range of flexible solutions that are proportionate to the problem, efficient, responsive and understandable to users generally.

The Council Resolution of 25 May 2000, on a Community-wide network of national bodies for the extra-judicial settlement of consumer disputes,⁷ noted that many ADRs exist in Member States that fall outside the scope of Recommendation 98/257/EC but which also play a useful role for the consumer. In particular, the Council invited the Commission to develop common criteria for the assessment of such out-of-court bodies that should ensure, inter alia, the quality, fairness and effectiveness of such bodies in order that they could be included in the EEJ-Net.

The Commission, Member States and the European Parliament have been involved in discussions on consumer confidence in dispute resolution over the last few years in relation to discussions on jurisdiction and, in particular, on promoting the e-commerce marketplace⁸. A clear message to emerge has been that a “one size fits all” approach will not be appropriate to encouraging diverse, innovative, flexible and effective ADR solutions for consumer disputes. However there is a wide consensus that all ADRs should be underpinned by some common guarantees ensuring their impartiality, transparency, effectiveness and fairness. It is therefore necessary to create an environment where the most effective solutions are allowed to emerge, particularly in respect of cross border disputes.

⁷ Official Journal C/155, 06/06/2000 p.1-2

⁸ In particular, the Commission Hearing on 4-5 November 1999 on “Electronic Commerce: Jurisdiction and Applicable Law”, a Commission Workshop on “Out-of-court dispute settlement systems for e-commerce” on 21 March 2000, the US Federal Trade Commission hosted a public workshop on ‘Alternative Dispute Resolution for Consumer Transactions in the Borderless Online Marketplace’ on 6-7 June 2000 and a joint conference in the Hague was organised by the OECD, ICC and HCOFIL on 12-13 December 2000 entitled ‘Building Trust In The Online Environment: Business To Consumer Dispute Resolution Conference’.

COMMON CRITERIA

To establish this environment sufficient guarantees of confidence are required for all participants. Consumers and business need assurance that their dispute will be handled with fairness, rigour and effectiveness. A dispute resolution system must be reliable, consistent and credible. ADRs need safeguards to ensure their services are not undermined and their general reputation tarnished by poor ADR providers. It is therefore necessary to establish common criteria that these ADR procedures should meet. This does not mean prescribing in detail the working of such procedures. What it does mean is identifying a set of principles that such procedures should follow in order to ensure a common minimum standard. To a great extent the underlying core of these principles had been identified through the Commission's other initiatives in this area and therefore it was necessary to refine these standards to ensure similar minimum guarantees that would be appropriate for less formal types of ADR. This process of establishing these principles was supported by a consultation with Member States' government experts.

Recommendation [../../] therefore lays down principles for any third party body offering procedures that attempt to resolve a dispute by bringing the parties together to convince them to find a solution by common consent. However, the Recommendation is not intended to cover customer complaint mechanisms operated by a business and conducted directly with the consumer or to such mechanisms carrying out such services operated by or on behalf of the business. The application of the principles should guarantee greater confidence in the operation of such procedures by ensuring transparency of its functioning and reliability of the procedure through its impartiality, transparency, effectiveness and fairness. These basic safeguards will make it considerably easier for such bodies to offer their procedures in all Member States.

It is necessary to develop greater awareness for both consumers and business of the potential and role of such procedures. Such procedures will also have an important part to play in providing more options for consumers and business to use in resolving disputes. Therefore, the Commission invites Member States to communicate the particulars of those ADR procedures, applying these principles, that wish to be included in its website database and participate in the EEJ-Net.