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**GREEN PAPER**

**on alternative dispute resolution  
in civil and commercial law**

(presented by the Commission)

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## **OBJECTIVE OF THE GREEN PAPER**

The purpose of this Green Paper is to initiate a broad-based consultation of those involved in a certain number of legal issues which have been raised as regards alternative dispute resolution in civil and commercial law.

Answers to specific questions and general comments can be sent, preferably by 15 October 2002, to the following address:

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The Commission intends to organise a public hearing on the subject early in 2003.

## SUMMARY

Growing interest is being shown in alternative dispute resolution (ADR) in the European Union, for three main reasons.

First, there has been the increasing awareness of ADR as a means of improving general access to justice in everyday life.

Second, ADR has received close attention from the Member States, many of which have passed legislation encouraging it.

Third, ADR is a political priority, repeatedly declared by the European Union institutions, whose task it is to promote these alternative techniques, to ensure an environment propitious to their development and to do what it can to guarantee quality. This political priority was specifically asserted in the context of the information society, where the role of new on-line dispute resolution (ODR) services has been recognised as a form of web-based cross-border dispute resolution.

This specific context explains the background to the political mandate for the preparation of this Green Paper. The Council asked the Commission to prepare a Green Paper taking stock of the current situation and launching broad consultations on the measures to be taken.

This Green Paper is an opportunity to familiarise the broadest possible public with ADR facilities and also to make the initiatives taken by the Member States and the Community more highly visible.

The purpose of consulting the public on the Green Paper is to ascertain the general opinion of all circles concerned and their reactions to the question put here.

These questions are primarily legal and concern the salient features of ADR processes such as ADR clauses in contracts, limitation periods, confidentiality constraints, the validity of consent given, the effectiveness of agreements generated by ADR processes, the training of third parties, their accreditation and the rules governing their liability.

The Commission plans to consider the views expressed as input for defining the general lines of its own policy to be conducted in the years ahead in its role as promoter of legislative and operational initiatives.

## 1. OVERVIEW

### 1.1 Wide variation

1. In the last few years there have been developments in “alternative” means of settling or resolving disputes within Member States, even though it is generally agreed that they are very old. The specific advantages of these forms of private justice and the crisis affecting the effectiveness of justice have led to renewed interest in these methods of dispute resolution, which are more consensual than recourse to the courts or arbitration. Considerable efforts have been made in the Community to regulate their development, particularly in the information society context, in order to improve the trust that consumers and small and medium-sized businesses place in electronic commerce.
2. Alternative methods of dispute resolution, for the purposes of this Green Paper, are defined as out-of-court dispute resolution processes conducted by a neutral third party,<sup>1</sup> excluding arbitration proper.<sup>2</sup> The alternative methods of dispute resolution will therefore be referred to below by the acronym that is tending to be accepted universally in practice, i.e. “ADR”.<sup>3</sup> This Green Paper is concerned only with ADR in civil and commercial matters, including employment and consumer law.<sup>4</sup>
3. Alternative dispute resolution governed by civil and commercial law can be subsumed under various categories which depend on specific legal arrangements. An initial distinction must be drawn between ADRs which are conducted by the court or entrusted by the court to a third party (“ADR in the context of judicial proceedings”), and ADRs used by the parties to a dispute through an out-of-court procedure (“conventional ADRs”). A second distinction, which is equally fundamental in the view of the Commission, must

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<sup>1</sup> This definition results in excluding the following procedures from the scope of this Green Paper:

- expert opinions, which are not a method of dispute resolution, but a procedure involving recourse to an expert in support, for example, of a judicial or arbitration procedure.
- complaint handling systems made available to consumers by professionals. These procedures are not conducted by third parties, but by one of the parties to the dispute.
- “automated negotiation systems”, which do not involve any human intervention, which are offered by providers of IT services. These systems are not dispute resolution procedures conducted by third parties but technical instruments designed to facilitate direct negotiations between the parties to the dispute.

<sup>2</sup> Arbitration is closer to a quasi-judicial procedure than to an ADR as arbitrators’ awards replace judicial decisions. Arbitration is the subject of a certain number of legislative instruments in the Member States and at international level, such as the 1958 New York Convention on the recognition and enforcement of foreign arbitration decisions <http://www.uncitral.org/en-index.htm>, or, within the framework of the Council of Europe, the 1966 European Convention providing a Uniform Law on Arbitration <http://conventions.coe.int/Treaty/EN/cadreprincipal.htm>.

<sup>3</sup> The notions most commonly used in national practice and legislation, i.e. mediation and conciliation, will therefore not be used systematically in this Green Paper, but only in the context of a particular national legislation or of specific work by an international organisation.

<sup>4</sup> This Green Paper does not cover questions relating to non-negotiable rights of public policy concern, such as certain provisions of the law of persons and the family, competition law and consumer law that cannot be put to ADR.

be made between the different conventional ADRs. Following certain ADR procedures,<sup>5</sup> the third party or parties responsible for the procedure can be called upon to take a decision that is binding for one party<sup>6</sup> or make a recommendation to the parties which they are free to follow or not.<sup>7</sup> In other ADR procedures, the third parties do not formally adopt a position on the possible means of resolving the dispute but simply help the parties come to an agreement.<sup>8</sup>

4. ADRs are not a new development but have in recent years become increasingly common and have been the focus of more and more attention by a number of observers. The proliferation of grass-roots initiatives<sup>9</sup> and the plethora of academic writings are a precious help for the public authorities in their task of monitoring and/or developing ADRs.

## 1.2 Wider access to justice

5. One of the factors underpinning the development of ADR is of a practical and conjunctural nature. ADRs offer a solution to the problem of access to justice faced by citizens in many countries due to three factors: the volume of disputes brought before courts is increasing, the proceedings are becoming more lengthy and the costs incurred by such proceedings are increasing. And the quantity, complexity and technical obscurity of the legislation also help to make access to justice more difficult.
6. Cross-border disputes tend to result in even more lengthy proceedings and higher court costs than domestic disputes.<sup>10</sup> With the completion of the internal market, the intensification of trade and the mobility of citizens, irrespective of the importance of the issue or the monetary value involved, disputes between citizens from different Member States and between persons residing in different Member States, amplified by the expansion of cross-border e-commerce, are steadily increasing, and the number of cross-border disputes being brought before the courts is increasing correspondingly. In addition to the practical problem of overworked courts, these disputes often raise complex issues which involve conflicts of laws and jurisdiction and practical difficulties of finance and language.

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<sup>5</sup> These two types of ADR are the subject of Commission Recommendation 98/257/EC of 30 March 1998 concerning the principles applicable to the bodies responsible for the extrajudicial resolution of consumer disputes, OJ L 115, 17.4.1998, p. 31. This recommendation also covers arbitration.

<sup>6</sup> As it is often the case with the Ombudsmen of clients created by certain professional sectors such as banks and insurance companies. The decisions of the Ombudsmen are binding on the companies affiliated to the system.

<sup>7</sup> As is the case with the Consumer Complaint Boards that operate in the Scandinavian countries.

<sup>8</sup> This type of procedure, in the consumer field, is the subject of Commission Recommendation 2001/310/EC of 4 April 2001 on the principles applicable to the extrajudicial bodies charged with the consensual resolution of consumer disputes, OJ L 109, 19.4.2001, p. 56.

<sup>9</sup> Many of these date back a long time, such as the establishment in 1994 of a European Economic Interest Grouping to network arbitration and mediation centres in France, Italy, Spain and the United Kingdom. This "European Network for Dispute Resolution" (ENDR) enjoyed financial support from the Community, managed by the Commission's Directorate-General XXIII (Small and Medium-sized Enterprises).

<sup>10</sup> On these questions, see in particular the information in the Commission Green Paper of 9 February 2000 "Judicial cooperation in civil matters: the problems confronting the cross-border litigant", COM(2000)51 final.

7. Access to justice for all is a fundamental right enshrined in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The right to valid remedies has been determined by the European Court of Justice to be general principle of Community law<sup>11</sup> and proclaimed as such by Article 47 of the Charter of Fundamental Rights of the European Union. Access to justice is an obligation which is met by the Member States through the provision of swift and inexpensive legal proceedings. Moreover, certain Member States have undertaken to modernise their legal system by simplifying referral procedures or by envisaging the possibility of taking legal action by electronic means.<sup>12</sup>
8. The European Union is endeavouring to facilitate access to justice through a series of measures such as the creation of an information system on easily accessible justice which is maintained and updated by a network of competent national authorities.<sup>13</sup> These efforts complement those already undertaken with a view to creating a European area of justice based on the principle of mutual recognition, such as the measures concerning the easing of exequatur procedures,<sup>14</sup> the initiatives aimed at doing away with the exequatur for uncontested credit, simplifying and accelerating the settlement of cross-border disputes concerning small claims.<sup>15</sup>
9. ADRs are an integral part of the policies aimed at improving access to justice. In effect, they complement judicial procedures, insofar as the methods used in the context of ADRs are often better suited to the nature of the disputes involved. ADR can help the parties to enter into dialogue where this was not possible before, and to come to their own assessment of the value of going to court.
10. It is worth highlighting the role of ADRs as a means of achieving social harmony. In the forms of ADR in which the third parties do not take a decision, the parties do not engage

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<sup>11</sup> Case 222/84 *Johnston* [1986] ECR 1651 (judgment given on 15.5.1986).

<sup>12</sup> This possibility, as regards small claims, is effective in Germany, Denmark, Finland and England. This information comes from the replies of the Member States to a questionnaire sent to them by the Commission in September 2000 on the legal procedures applicable to small claims.

<sup>13</sup> Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters, OJ L 174, 27.6.2001, p. 25. Under Article 14 of this Decision, an “Internet-based information system for the public” will be set in place and will in particular include information sheets, some of which will concern “alternative dispute-settlement possibilities, with an indication of the national information and advice centres of the Community-wide Network for the Extra-Judicial Settlement of Consumer Disputes”.

<sup>14</sup> Commission Communication to the Council and the European Parliament “Towards greater efficiency in obtaining and enforcing judgments in the European Union”, COM(97)609 final, 26.11.1997. Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, p. 1 (hereinafter the “Brussels I Regulation”). Except for Denmark, the Brussels I Regulation replaces the 1968 Brussels Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (consolidated version in OJ C 27, 26.1.1998, p. 1).

<sup>15</sup> See in particular on these questions the programme of measures of the Commission and the Council on the implementation of the principle of mutual recognition of decisions in civil and commercial matters, OJ C12, 15.1.2001, p. 1. The Commission intends to present during the first half of 2002 a proposal for a regulation for the creation of a European enforcement order for uncontested claims and a Green Paper to prepare new procedural legislation on money payments and for disputes concerning small claims. See the Commission Communication on the biannual update of the scoreboard to review progress on the creation of an area of “freedom, security and justice” in the European Union, COM(2001) 628 final, 30.10.2001.

in confrontation but rather in a process of rapprochement, and they themselves choose the means of resolving the dispute and play a more active role in this process in such a way that they themselves endeavour to find the solution best suited to them. This consensual approach increases the likelihood that, once the dispute is settled, the parties will be able to maintain their commercial or other relations.

11. ADRs are flexible, that is, in principle the parties are free to have recourse to ADRs, to decide which organisation or person will be in charge of the proceedings, to determine the procedure that will be followed, to decide whether to take part in the proceedings in person or to be represented and, finally, to decide on the outcome of the proceedings.
12. The cost of ADRs is of course an essential factor that must be taken into account. As a general rule, the cost is borne by the parties. However, the parties may not have to pay the costs connected with ADRs. For one thing, it may be that the third parties responsible for ADRs are not paid,<sup>16</sup> and it may be that the operating costs of the bodies responsible for ADR are paid by the public authorities,<sup>17</sup> or by professional organisations,<sup>18</sup> or one and/or other party may be entitled to legal aid.
13. Certain Member States provide legal aid to cover the costs connected with ADRs and any costs for legal representation.<sup>19</sup> The Commission has already taken the initiative to harmonise the legislation of the Member States on this point in its draft Council directive on the approximation of certain laws, regulations and administrative provisions of the Member States on legal aid and other financial aspects of civil proceedings.<sup>20</sup> Article 16 of this draft directive stipulates that “Legal aid shall be granted in cases where disputes are settled via extra-judicial procedures, if the law makes provision for such procedures or if the parties to the dispute are ordered by the court to have recourse to them.”

### 1.3 A political priority

14. The European Council has repeatedly stressed the importance it attaches to alternative means of settling cross-border disputes, in particular at Vienna in December 1998<sup>21</sup> and then in Tampere in October 1999 at a meeting devoted to the creation of an “area of freedom, security and justice within the European Union”.<sup>22</sup>

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<sup>16</sup> For example, in France, the justice conciliators.

<sup>17</sup> For example, in Ireland, the family mediation service.

<sup>18</sup> For example, in Sweden, the office for damage attributable to road traffic, whose operating costs are covered by automobile insurance companies.

<sup>19</sup> For example, in France, legal aid can be granted to pay the fees of the lawyer who conducts transactional negotiations.

<sup>20</sup> Proposal presented on 18 January 2001, COM(2001) 13 final.

<sup>21</sup> Paragraph 83 of the Presidency Conclusions <http://ue.eu.int/en/Info/eurocouncil/index.htm>: “The European Council endorses the Council and Commission action plan on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice”, OJ C 19, 23.1. 1999, p.1. Paragraph 41(b) of the action plan states: “examine the possibility of drawing up models for non-judicial solutions to disputes with particular reference to transnational family conflicts. In this context, the possibility of mediation as a means of solving family conflicts should be examined”. Conclusions of European Councils can be consulted at <http://ue.eu.int/en/Info/eurocouncil/index.htm>.

<sup>22</sup> Paragraph 30 of the Presidency conclusions <http://ue.eu.int/en/Info/eurocouncil/index.htm>: “Alternative, extrajudicial procedures should also be created by Member States.”

15. At the Lisbon European Council in March 2000 devoted specifically to “Employment and the Information Society”, the European Council invited the “Commission and the Council to consider how to promote consumer confidence in electronic commerce, in particular through alternative dispute resolution systems”.<sup>23</sup> This objective was reaffirmed at the European Council at Santa Maria da Feira in June 2000 when the “e-Europe 2002 Action Plan”<sup>24</sup> was approved. And in the employment relations field, the Brussels (Laeken) European Council in December 2001 “stresses the importance of preventing and resolving social conflicts, and especially trans-national social conflicts, by means of voluntary mediation mechanisms ...”.<sup>25</sup>

#### 1.4 A topical issue

16. ADRs were very much on the agenda during the recent legislative debates concerning electronic commerce, in particular in connection with certain discussions at European<sup>26</sup> and global<sup>27</sup> levels on the issues raised by conflicts of jurisdiction in the field of consumer litigation.<sup>28</sup>
17. These debates were in line with Article 17 of the Directive on electronic commerce adopted in June 2000,<sup>29</sup> which stipulates that “the Member States should ensure their legislation does not hamper the use of out-of-court schemes available under national law, for dispute settlement, including appropriate electronic means”. The Member States are also invited under the terms of this article 17 to encourage “the bodies responsible for the out-of-court settlement ... to operate in a way which provides adequate procedural guarantees for the parties concerned”.

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<sup>23</sup> Paragraph 11 of the Presidency conclusions

<sup>24</sup> Paragraph 22 of the Presidency conclusions and the eEurope action plan [http://europa.eu.int/information\\_society/eeurope/action\\_plan/index\\_en.htm](http://europa.eu.int/information_society/eeurope/action_plan/index_en.htm)

<sup>25</sup> Paragraph 25 of the Presidency conclusions.

<sup>26</sup> Debates preceding the adoption of the above-mentioned Brussels I Regulation.

<sup>27</sup> Debates in the context of the negotiations within the Hague Conference on Private International Law on a draft international convention on jurisdiction and the recognition of foreign judgments <http://www.hcch.net/f/workprog/index.html>

<sup>28</sup> Apart from questions related to e-commerce, the role of ADRs has been highlighted directly or indirectly in a number of Community instruments. The Commission devotes considerable space to them in its second report on the implementation of Council Directive 85/374/EEC (the product liability Directive), COM(2000) 893 final. ADRs are expressly referred to in Article 10 of Directive 97/5/EC on cross-border credit transfers (OJ L 43, 14.2.1997, p. 25), Article 11 of Directive 97/7/EC on the protection of consumers in respect of distance contracts (OJ L 144, 14.6.1997, p. 19), Article 12 of the proposal for a Directive concerning the distance marketing of consumer financial services (COM(1998) 468 final) and Article 9 of the proposal for a Directive on insurance mediation (COM(2000) 511 final. Regarding disputes between firms, see also Articles 18 and 19 of the Common Position (EC) No 38/2001 of 17 September 2001 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting a European Parliament and Council Directive on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ C337, 30.11.2001, p. 34).

<sup>29</sup> Directive 2000/31/EC of 8 June 2000 concerning certain judicial aspects of the services of the information society, and in particular electronic comments, within the internal market, OJ L 178, 17.7.2000, p. 1. Furthermore, Article 17 encourages ADR bodies to organise a certain feedback to the Commission. Their role would therefore extend beyond implementation to allow the public authorities, where appropriate, to adapt their legal policy.

18. In its opinion on the draft Brussels I Regulation in September 2000, the European Parliament proposed going further with ADRs in certain conditions and making binding on consumers clauses in which the consumer and the operator agree in their contract that any dispute must be referred to a system of extrajudicial dispute resolution which is approved under the terms of a plan approved by the Commission. Parliament also proposed to make enforceable the settlements obtained within the framework of such alternative dispute resolution schemes.<sup>30</sup>
19. The “Brussels I” Regulation adopted by the Council in December 2000 does not include these amendments of Parliament. However, at the time of the adoption of this Convention, the Council and the Commission highlighted the useful complementary role of ADRs, in particular with regard to electronic commerce.<sup>31</sup>

### 1.5 An international dimension

20. The work being done in the Community obviously incorporates the international dimension in that they do not regard only nationals of the Member States of the European Union as potential subjects of ADRs. ADRs are also on the agenda of a number of intergovernmental organisations:
- The Council of Europe adopted a recommendation in 1998 on family mediation,<sup>32</sup> and is currently drawing up a draft recommendation on civil mediation.<sup>33</sup> These projects, in which the Member States and the countries applying to join the European Union are participating, are being followed with very great interest by the Commission. The present Green Paper takes full account of these initiatives undertaken by the Council of Europe.
  - The United Nations Commission on International Trade Law, for its part, is drawing up model legislative provisions concerning commercial conciliation.<sup>34</sup>
  - ADRs (in connection with electronic commerce) are also mentioned directly or indirectly in the work of the Organisation for European Cooperation and Development,<sup>35</sup> and they are mentioned in context with the negotiations under way within the Hague Conference on Private International Law on a draft international convention on jurisdiction and the recognition of foreign judgments.<sup>36</sup>

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<sup>30</sup> OJ C 146 of 17 May 2001, p. 94. See also the reactions of the Commission to these different points in its amended proposal presented on 26 October 2000, COM(2000)689 final.

<sup>31</sup> Joint declaration of the Council and the Commission concerning Articles 15 and 73 of the Regulation in the minutes of the Council meeting of 22 December 2000 which adopted this regulation. The Declaration can be consulted at [http://europe.eu.int/comm/justice\\_home/unit/civil\\_en.htm](http://europe.eu.int/comm/justice_home/unit/civil_en.htm)

<sup>32</sup> Recommendation n° R(98)1 <http://cm.coe.int/ta/rec/1998/f98r1.htm>

<sup>33</sup> Work of the Committee of experts on the efficiency of justice  
<http://www.legal.coe.int/civilandcommercial>

<sup>34</sup> Work of the working group on arbitration <http://www.uncitral.org/fr-index.htm>

<sup>35</sup> Council Recommendation concerning the guidelines governing the protection of consumers in the context of electronic commerce <http://www.oecd.org>

<sup>36</sup> <http://www.hcch.net/f/workprog/index.html>

21. ADRs in the field of electronic commerce are the subject of recommendations issued by a number of international non-governmental organisations whose work is being closely followed by the Commission, such as the GBDe (Global Business Dialogue on e-commerce<sup>37</sup>), the TABD (Transatlantic Business Dialogue<sup>38</sup>) and the TACD (Transatlantic Consumer Dialogue<sup>39</sup>).
22. ADRs (in the field of civil and commercial law) are the subject of major projects in a number of third countries:
- The countries applying to join the European Union are just as keenly aware as the Member States of the importance of developing ADRs within the framework of their own reflections on ways to improve access to justice, as shown by their active involvement in the above-mentioned work of the Council of Europe.
  - The USA has a long and rich experience of ADRs in various forms, which have been able to develop because they were supported by the court system. Most US States have adopted Mediation Acts in different areas. The plethora of such Acts adopted by the States has prompted the National Conference of Commissioners on Uniform State Laws to draw up a uniform Mediation Act.<sup>40</sup>
  - In Canada, work began in August 2000 within the framework of the Uniform Law Conference to assess the need to draw up a uniform law on mediation.<sup>41</sup>
  - In Japan, general legislative work on ADRs is among the recent recommendations adopted in June 2001 by the Justice System Reform Council.<sup>42</sup>

### 1.6 A pivotal mandate

23. This overview of ADRs highlights the need to draw up a detailed inventory of the various initiatives and projects undertaken by the Member States and by the European Union and to reflect on the legal issues raised in terms of the quality of ADRs. The Ministers of Justice of the Fifteen have therefore decided to begin work at the level of the European Community on ADRs governed by civil and commercial law. In May 2000 they invited the Commission to gather information on the situation within the Member States as regards the alternative methods of resolving cross-border disputes governed by civil and commercial law. Based on this information, the Commission was invited to draw up and present a Green Paper to outline the current situation and initiate a broad consultation with a view to laying the groundwork for practical measures.<sup>43</sup>

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<sup>37</sup> <http://www.gbde.org>

<sup>38</sup> <http://www.tabd.com>

<sup>39</sup> <http://www.tacd.org>

<sup>40</sup> <http://www.nccusl.org> This draft uniform Act was completed on 16 August 2001.

<sup>41</sup> <http://www.chlc.ca/fr>

<sup>42</sup> <http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html>

<sup>43</sup> Conclusions of the Justice and Home Affairs Council of 29 May 2000, <http://ue.eu.int/newsroom>

## 2. REAPING THE BENEFITS OF WORK ALREADY UNDERTAKEN

24. The Commission was invited by the Council to draw up an inventory of ADRs in the Member States and in the European Union. To be effective, any analysis of ADRs should be based on the work already undertaken. The Commission compiled the information on this work on the basis of the replies to a questionnaire addressed to the Member States<sup>44</sup> and studies on ADRs.<sup>45</sup>

### 2.1 In the Member States

25. The Member States do not have detailed framework regulations on ADRs.<sup>46</sup> Nonetheless, a number of general studies have been undertaken to this end in Denmark,<sup>47</sup> in Italy,<sup>48</sup> in Austria<sup>49</sup> and in Portugal<sup>50</sup>. This work might yield a definition of the status of ADRs and lead to the introduction of the possibility of recourse to ADRs in civil procedure law.

26. Certain Member States have taken sectoral initiatives to promote ADRs by creating consultative authorities on ADRs,<sup>51</sup> by providing financing for ADR structures,<sup>52</sup> by

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<sup>44</sup> Questionnaire on the alternative methods of dispute resolution governed by civil and commercial law, prepared by the Portuguese Presidency of the Council of the European Union in June 2000.

<sup>45</sup> Study carried out by professional associations involved in ADRs in the commercial field who received European financial support for this work under the Grotius programme. The description of this project – MARC 2000 – can be consulted under the reference GR/2000/136 at the following address: [http://europa.eu.int/comm/justice\\_home/pdf/grotius2000.pdf](http://europa.eu.int/comm/justice_home/pdf/grotius2000.pdf)

The Grotius programme was set up by the Council Joint Action of 28 October 1996 on a programme of incentives and exchanges for legal practitioners, OJ L 287, 8.11.1996, p. 3. This programme, which expired in 2000 and was renewed in 2001 (Council Regulation of 12 February 2001, OJ L 43, 14.2.2001, p. 1), should be recast for 2002-2006 (proposal for a Regulation establishing a general framework for Community activities to facilitate the implementation of a European judicial area in civil matters, OJ C 213 E, 31.7.2001, p. 271).

<sup>46</sup> Some regional legislation has been enacted, for instance in North Rhine Westphalia: <http://www.streitschlichtung.nrw.de>

<sup>47</sup> In Denmark, the Standing Committee on Procedural Law (“Retsplejerådet”) carries out work with a view to a general reform of the Code of Civil Procedure. The first report, which was presented in spring 2001, includes a description of the existing extrajudicial procedures in civil matters. The Retsplejerådet is currently continuing its work looking into ways of improving coordination between ADRs and procedures before the courts.

<sup>48</sup> Italian bill drawn up in spring 2000 (schema di disegno di legge recante norme per l’accesso alla giustizia civile, per la risoluzione consensuale delle controversie e per l’abbreviazione dei tempi del processo civile).

<sup>49</sup> Mediation Act (Mediationgesetz) currently being discussed.

<sup>50</sup> The public consultation of the Portuguese Ministry of Justice on the “resolução alternativa de litígios” led to the Justices of the Peace and Ombudsman Act (No 78/2001 of 13 July 2001).

<sup>51</sup> See for example the setting-up in France by decree of 8 October 2001 of the “national consultative council on family mediation”, which is charged with “proposing all measures that may be useful in encouraging the organisation of family mediation and promoting their development. To this end, it is looking into the scope of application of family mediation, the training of family mediators and the ethical rules, the evaluation of practices and the effect of mediation, in particular on the need to maintain links within the family” <http://www.justice.gouv.fr/presse/com091001.htm>

<sup>52</sup> For example, in the Scandinavian countries, the Consumer Complaint Boards are financed directly by the national budget.

implementing vocational training programmes,<sup>53</sup> and by disseminating information to the general public on ADRs. Sometimes, the work envisaged consists in amending national legislation to take more account of the specific nature of ADRs.<sup>54</sup>

### 2.1.1 ADRs in the context of court proceedings

27. As regards ADRs conducted by a court, the Member States' codes of civil procedure allow for the possibility of seising a judge principally concerned with conciliation,<sup>55</sup> make conciliation the compulsory phase of the procedure<sup>56</sup> or explicitly encourage judges to intervene actively in the search for an agreement between the parties.<sup>57</sup> These specific missions entrusted to judges, which are not necessarily among their usual functions, must therefore be accompanied by suitable training programmes.
28. ADRs entrusted by the court to a third party are the subject of general regulations or draft regulations in most Member States. These range from the possibility of recourse to ADRs (for example in Belgium<sup>58</sup> and in France<sup>59</sup>) to the encouragement (in Spain,<sup>60</sup> in Italy,<sup>61</sup> in Sweden<sup>62</sup> and in England and Wales<sup>63</sup>) and even the prior obligation to have recourse to

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<sup>53</sup> For example, in Portugal, the Ministry of Justice presented on 30 October 2001 a protocol on the training of justices of the peace and ombudsmen: <http://www.mj.gov.pt>

<sup>54</sup> For example, in Germany, the law gives advocates a monopoly as regards the provision of legal services. A court was called upon to consider that ADRs are legal services and are under the monopoly of the jurists. The authorities are considering a change to the texts that would mean that ADRs would no longer be under the monopoly of the advocates.

<sup>55</sup> For example, in Italy, the position of “justice of the peace”, whose jurisdiction is defined by article 322 of the Code of Civil Procedure. In Greece, the conciliatory intervention of the justice of the peace is governed by article 209 of the Code of Civil Procedure. In Belgium, article 731 of the Judicial Code provides for general jurisdiction for first judges who can be seised by an application for conciliation.

<sup>56</sup> For example, in Finland, in all civil actions the judge must first obtain an arrangement between the parties.

<sup>57</sup> In Germany, in accordance with section 279 ZPO (Code of Civil Procedure), the court must favour the search for an amicable solution throughout the procedure. In France, article 21 of the new Code of Civil Procedure stipulates that it is the responsibility of the judge to reconcile the parties.

<sup>58</sup> Article 665 of the Judicial Code, introduced by the law on family mediation of 21 January 2001, allows the judge, at the joint request of the parties or at his own initiative but with the agreement of the parties, to appoint a mediator.

<sup>59</sup> See articles 131-1 to 131-15 of the new Code of Civil Procedure on judicial mediation.

<sup>60</sup> Articles 414 and 415 of Act No 1/2000, which came into force on 9 January 2001, stipulates that the judge must intervene to invite the parties, at the start of the “ordinary” procedure, to a conciliation or transaction once their respective claims have been expressed.

<sup>61</sup> Articles 183, 185 and 350 of the Code of Civil Procedure stipulates that the judge must take all measures to assess in practice whether the necessary conditions are present to extinguish the judgment in hand by a document establishing the effective reconciliation of the parties.

<sup>62</sup> Pursuant to chapter 42, section 17, of the Code of Procedure, the court must take all measures to allow the dispute to be resolved amicably.

<sup>63</sup> Pursuant to Rules 26.4 and 44.5 of the Civil Procedure Rules for England and Wales, which came into force on 26 April 1999, the court may suspend a case to allow the parties to have recourse to mediation. The courts can order the parties to make financial penalty payments if they refuse mediation.

ADRs under the law or by decision of the judge (for example in Germany,<sup>64</sup> in Belgium<sup>65</sup> and in Greece<sup>66</sup>).

29. Practical experiments have been carried out, at the initiative of the courts themselves<sup>67</sup> or at the initiative of the competent ministers through pilot projects<sup>68</sup> aimed at encouraging more widespread use of ADRs.
30. The third parties appointed by courts can be civil servants,<sup>69</sup> citizens who are appointed by the judicial authorities on the basis of a certain number of criteria and who appear on a list<sup>70</sup> or on a case-by-case basis.<sup>71</sup>

### 2.1.2 Conventional ADRs

31. Conventional ADRs are not the subject of any specific general regulations in the Member States. The only provisions applied are the general provisions of contract law or specific provisions connected with the transaction agreements to which ADRs can lead. ADRs are based on the general principles of contract law, the law of civil procedure and private international law. The level of development of the contractual practices and of the rules of professional ethics of the third parties who offer their services in the context of ADRs varies in the different Member States.
32. Sectoral legislation has been adopted in a certain number of Member States aimed at creating services responsible for ADRs, for example in Denmark,<sup>72</sup> in Ireland,<sup>73</sup> in Finland<sup>74</sup> and in Sweden.<sup>75</sup>

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<sup>64</sup> Pursuant to a federal Act of 15 December 1999, three Länder ruled that ADR procedure known as “Schlichtung” is compulsory, stipulating that the court action is not admissible unless Schlichtung has first been attempted. A new federal procedural law is being drafted which is designed to allow parties to demand a date for the hearing which is reserved for mediation and will oblige the judge to begin the proceedings by prior mediation.

<sup>65</sup> The recourse to extrajudicial procedures is compulsory, under the Judicial Code, for example, in matters of litigation involving employment contracts and agricultural leases. A bill currently being discussed envisages an overall reform within the framework of the Judicial Code and introducing the possibility whereby any judge can order a mediation procedure.

<sup>66</sup> Article 214 of the Code of Civil Procedure stipulates that disputes which fall within the jurisdiction of the court of first instance cannot be heard unless there has first been an attempt at conciliation.

<sup>67</sup> An experiment is being conducted in a French labour tribunal: <http://www.mediationsociale.com>.

<sup>68</sup> Experimental project being conducted in the Netherlands: <http://www.minjust.nl>

<sup>69</sup> In Greece, the conciliator acting pursuant to articles 13 to 16 of Act No 1876/1990 on collective labour disputes is an official from the Ministry of Labour.

<sup>70</sup> In France, the legal conciliator must meet certain conditions: morality (he must have his civil and political rights), qualification (he must have at least three years of experience in legal matters) and independence (incompatibility with elective or judicial office).

<sup>71</sup> In France, mediators must meet certain conditions with regard to probity (having no criminal, disciplinary or administrative convictions), qualification, experience and independence.

<sup>72</sup> Arbejdsmarkedets Ankenarven (labour market mediation commission), Huslejenævnet (leasing commission), Forbrugerklagenævnet (consumer mediation commission).

<sup>73</sup> Conciliation Service of the Labour Relations Commission.

<sup>74</sup> Kuluttajavalituslautakunta (Office for consumer disputes).

33. It would appear that certain principles common to all procedures have been observed on the ground by the public authorities.<sup>76</sup> The parties to the dispute are free to decide whether or not to have recourse to ADRs. They decide themselves whether to organise the procedure, based on the impartiality and fairness of the third party in charge of the procedure. The said third party must respect the principle of confidentiality. The Member States are particularly keen to ensure that these principles offer minimal procedural guarantees.

## **2.2 At the level of the European Union**

34. The most important work on ADRs which has already been undertaken at the level of the European Union which might be used as a basis is connected with consumer protection law, family law and labour law.

### **2.2.1 Reaping the benefits of the initiatives taken in the field of consumer protection law**

35. Major projects have been undertaken in recent years in the field of consumer disputes (domestic or cross-border, connected with the Internet or otherwise) within the framework of a programme aimed at providing consumers with better access to justice.<sup>77</sup> The outline of the work that has been done is given here for two reasons: to take stock of all the initiatives taken in this field so far and open a great debate in the context of a broader consideration of ADRs so as to give a fuller picture of the situation in the European Union. This sets the debate in the more general context of the ongoing review of consumer law.

36. In the context of the programme to improve consumer access to justice, Parliament and the Council, on a Commission proposal, adopted Directive 98/27/EC of 19 May 1998 on injunctions for the protection of consumer interests.<sup>78</sup> Under this Directive, the Member States must enable independent public bodies and consumer organisations to bring actions for an injunction against certain commercial practices. Further initiatives aimed at safeguarding the rights of consumers have been taken in certain sectors such as transport<sup>79</sup> and energy.<sup>80</sup>

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<sup>75</sup> National office for consumer claims, office for damage attributable to road traffic.

<sup>76</sup> The replies of the Member States to the questionnaire on this point are particularly interesting.

<sup>77</sup> See in particular the Commission Green Paper of 16 November 1993 on the access of consumers to justice and the settlement of consumer disputes within the single market (COM(93)576), the Commission Communication of 14 February 1996 concerning an action plan on access of consumers to justice and the settlement of consumer disputes in the single market (COM(96)13), the Commission Communication of 30 March 1998 on the extrajudicial resolution of consumer disputes (COM(1998)198) and the Commission Communication of 4 April 2001 on the widening of access of consumers to other dispute resolution systems (COM(2001)161).

<sup>78</sup> OJ L 166, 11.6.1998, p. 51

<sup>79</sup> The importance attached by the Commission to ADR is stressed in its White Paper of 12 September 2001 on "European transport policy for 2010: time to decide" (COM(2001) 370 final), its Communication of 21 June 2000 on the protection of air passengers in the European Union (COM(2000) 365 final) and its Communication of 23 January 2002 "Towards an integrated European railway area" (COM(2002) 18).

<sup>80</sup> Proposal for a Parliament and Council Directive amending Directives 96/92/EC and 98/30/EC concerning common rules for the internal market in electricity and natural gas (COM)2001 125).

37. The Commission has adopted two recommendations establishing the principles applicable to out-of-court procedures for the resolution of consumer disputes. These recommendations, which are all accompanied by a Commission communication, have been accompanied by the publication of the European claim form for consumers.<sup>81</sup>

- The first recommendation, which was adopted on 30 March 1998,<sup>82</sup> relates to the procedures which, no matter what they are called, lead to a resolution of the dispute through the active intervention of a third party who formally adopts a position with regard to a solution. This first recommendation, which sets out the seven minimum principles for the establishment and operation of ADR facilities, does not relate to the procedures often referred to as “mediation” procedures. The Member States have been called upon to draw up an inventory of the bodies responsible for the out-of-court resolution of consumer disputes which they consider to be in line with the Commission’s recommendation. These national lists have been communicated to the Commission which in turn is responsible for publishing them.<sup>83</sup>
- The second recommendation (of 4 April 2001<sup>84</sup>) relates to the procedures which are limited to a simple attempt to bring the parties together to convince them to find a solution by common consent. However, it may be that the third party is called upon to propose a solution informally.

38. The Commission has also established two European networks of national bodies both aimed at facilitating access for consumers to out-of-court procedures for the resolution of cross-border disputes in the event that the professional is located in a Member State other than the Member State of residence. The two networks pursue the same objective but operate differently:

- The European Extra-Judicial Network “EEJ-Net”<sup>85</sup> is a consumer support and information structure which consists of national contact points (or “Clearing Houses”) located in each Member State and in Iceland and Norway. Each of the contact points relays information to the 400 bodies which the Member States consider as having met the requirements of the two Commission recommendations concerning the principles applicable to bodies responsible for the out-of-court resolution of consumer disputes. This network was officially launched on 16 October 2001. There will be a one-year pilot stage, and the Commission will produce a full report in autumn 2002 to record progress and sound out those concerned as to its success;
- “FIN-NET” (FINancial Services complaints NETwork)<sup>86</sup> is a network of the competent national ADR bodies which meet the requirements of the first Commission

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<sup>81</sup> [http://europa.eu.int/comm/consumers/policy/developments/acce\\_just/index\\_en.html](http://europa.eu.int/comm/consumers/policy/developments/acce_just/index_en.html)

<sup>82</sup> OJ L 115, 17.4.1998, p. 31.

<sup>83</sup> The list of notified bodies can be consulted at the following address:  
[http://europa.eu.int/comm/consumers/policy/developments/acce\\_just/acce\\_just04\\_fr.html](http://europa.eu.int/comm/consumers/policy/developments/acce_just/acce_just04_fr.html)

<sup>84</sup> OJ L 109, 19.4.2001, p. 56.

<sup>85</sup> [http://europa.eu.int/comm/consumers/policy/developments/acce\\_just/index\\_en.html](http://europa.eu.int/comm/consumers/policy/developments/acce_just/index_en.html)

See in particular, on the EEJ-Net, Commission working document SEC(2000) 405, the Council Resolution of 25 May 2000, OJ C 155, 6.6.2000, p. 1, and the Own-Initiative Resolution adopted by the European Parliament on 3 July 2001, not yet published.

<sup>86</sup> [http://europa.eu.int/comm/internal\\_market/en/finances/consumer/adr.htm](http://europa.eu.int/comm/internal_market/en/finances/consumer/adr.htm)

recommendation. By 22 February 2002 there were 37 such bodies. FIN-NET provides consumers who have problems relating to financial services (banks, insurance companies, investment services) with direct access to an ADR facility. It was launched by the Commission on 1 February 2001 and has already had beneficial effects. A guide to FIN-NET will be published to familiarise consumers with it in the context of the Dialogue with Citizens and Business that sets out to brief them on their rights in the single market.

39. The two Commission Recommendations have had considerable influence in the Member States. The Commission will not take new measures relating to consumers until there has been a full evaluation of EEJ-Net and extensive consultations with all the Member States, ADR providers and other interested parties.
40. ADRs connected with consumer disputes have been the focus of particular attention in the field of electronic commerce, in particular in the e-Europe Action Plan.<sup>87</sup> This concerns the “traditional” alternative channels and “ODR” or “Online Dispute Resolution”, which, moreover, can be used to resolve disputes which are not connected with electronic commerce. A number of questions relating to ODR will be considered in a forthcoming Commission communication.
41. The reflections concerning ADRs surrounding consumer disputes in the field of electronic commerce are also part and parcel of the more general context of a policy aimed at bolstering the confidence of consumers in electronic commerce. Within the framework of the “eEurope 2002 Action Plan”,<sup>88</sup> the Commission has set up a discussion and information exchange forum on the theme of consumer confidence on the Internet (“e-confidence”).<sup>89</sup> Within this framework, the Commission has encouraged the promotion by the interested stakeholders themselves, representing professionals and consumers, of high standards of commercial good practice.<sup>90</sup> All these measures and their results should be the subject of a Commission initiative in the near future.
42. Considerable efforts have been undertaken at Community level to boost the development of ADR on the ground in the field of electronic commerce. For example, Community financial support has been granted for online ADR initiatives,<sup>91</sup> quality control projects for commercial sites,<sup>92</sup> university studies and training programmes.<sup>93</sup>

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<sup>87</sup> See paragraph 15 of this Green Paper.

<sup>88</sup> See paragraph 15 of this Green Paper.

<sup>89</sup> <http://econfidence.jrc.it>

<sup>90</sup> On 22 October 2001 the European Consumers’ Organisation (BEUC) and the Union of Industrial and Employers’ Confederations of Europe (UNICE) presented a proposal for a European accreditation system of confidence labels in electronic commerce, <http://www.beuc.org>, <http://www.unice.org>

<sup>91</sup> ECODIR (Electronic CONsumer DISpute Resolution Platform): <http://www.ecodir.org> receives Community financial support which is managed by the European Commission, Health and Consumer Protection Directorate-General. Online Confidence is a project supported by the Commission under its TEN-Telecoms programme (Directorate-General for the Information Society).

<sup>92</sup> Webtrader, a private international project aimed at controlling commercial sites and awarding quality labels. This project includes consumer organisations from 10 countries, 8 of them Member States (see for example [http://www.budget-net.com/webtradersite/reseau\\_be.html](http://www.budget-net.com/webtradersite/reseau_be.html)). This project includes the development of codes of conduct and the setting in place of ADR systems. It receives Community financial support which is managed by the European Commission, Enterprises Directorate-General.

43. ADR methods designed to resolve consumer disputes in the field of electronic commerce raise a certain number of legal issues. The Commission has already adopted general guidelines which reflect its concern for ADRs to follow principles which are identical to those applied to the traditional channels of conflict resolution.<sup>94</sup> But it is also looking into further initiatives that reflect a number of specific features and constraints of the on-line environment, notably in technical respects.<sup>95</sup> Moreover, the Community has adopted a legal framework which guarantees the validity of virtual agreements, that is, not only the contractual clauses defining recourse to ADRs, but also the contracts in which the parties decide to submit an existing dispute to an ADR procedure and ADR agreements concluded at the end of the procedure. The above-mentioned Directive on electronic commerce stipulates in fact that the Member States must permit electronic contracts.<sup>96</sup> The Member States must also ensure that their legal system permits the use of ADR mechanisms by electronic means.<sup>97</sup>
44. The Community legislative provisions have been supplemented by the adoption of the Brussels I Regulation, of which the provisions relating to choice-of-court clauses, including vis-à-vis consumers, do not by definition affect recourse to ADRs. The links between this Regulation and ADRs had been the subject of a political and legal debate during the negotiations for the adoption of the Regulation. In September 2000 the European Parliament had in fact proposed under certain conditions the “incorporation in consumer contracts of a clause under which the consumer and the trader agree that any dispute is to be referred to an extrajudicial dispute resolution system accredited under a scheme approved by the Commission”.<sup>98</sup>
45. In its amended proposal,<sup>99</sup> the Commission did not follow the Parliament on this point, giving the following justifications: “Parliament proposes a provision that the consumer and the supplier may agree a contractual clause whereby disputes are referred, prior to any court action, to a non-judicial dispute-settlement scheme. A number of conditions are provided for, including prior approval of the scheme by the Commission. The Commission shares the concerns underlying this amendment and Parliament’s desire to consider the proposed Regulation as one component of a package of legislative and non-legislative measures, including the establishment of non-judicial dispute-settlement schemes. It acknowledges that it is desirable for parties to be able to settle their disputes on an amicable basis rather than going straight to the courts and that reference to the courts should be the last resort. It also observes that in practice the consumer will tend to prefer non-judicial solutions where they are available. To this end, a large number of

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<sup>93</sup> Work spearheaded by ECLIP (Electronic Commerce Legal Issues Platform), a consortium of five European research centres specialising in legislation on the new technologies, <http://www.eclip.org>. This work receives the support of the European Community, which is managed by the Commission, Information Society Directorate-General, under the IST programme (Information Society Technology Programme) <http://www.cordis.lu/ist/home.html>

<sup>94</sup> See the two recommendations and the two above-mentioned communications concerning consumer disputes.

<sup>95</sup> Forthcoming Communication on the promotion of ODR, mentioned at paragraph 40 of this Green Paper.

<sup>96</sup> Article 9(1).

<sup>97</sup> Article 17(1).

<sup>98</sup> OJ C 146, 17.5.2001, p. 94.

<sup>99</sup> Amended proposal presented on 26 October 2000, COM(2000)689 final.

projects are in hand, both by operators and by institutions, to promote the establishment of such alternative dispute-settlement schemes. But in the current state of progress it is not possible to make the options available to the consumer under the Regulation in terms of international jurisdiction subject to an obligation to go first to a non-judicial dispute-settlement scheme. For one thing, this solution could raise constitutional difficulties in certain Member States. For another, the schemes that this obligation would presuppose are not yet in operation. And thirdly, the procedural relationships between alternative dispute-settlement schemes and the courts (regarding limitation periods, for example) are highly complex and need further study. In any event the Commission is planning to pursue current initiatives on alternative consumer dispute-settlement schemes. In the report that it is to make five years after the entry into force of the Regulation under Article 65, it will take stock of the situation and review the relevant provisions of the Regulation”.

46. The Brussels I Regulation, as adopted by the Council in December 2000, does not include these amendments of the Parliament. When the Regulation was adopted, the Council and the Commission stressed in a joint declaration<sup>100</sup> the importance of ADRs: “The Council and the Commission take the view that in general it is in the interest of consumers and undertakings to try to settle their disputes amicably before resorting to the courts. The Council and the Commission stress in this connection that the purpose of the Regulation, and in particular of Articles 15 and 17 thereof, is not to prohibit the parties from making use of alternative methods of dispute settlement. The Council and the Commission accordingly wish to reiterate how important it is that work on alternative methods of dispute settlement in civil and commercial matters should continue at European Community level, in keeping with the Council's conclusions of 29 May 2000. They are aware of the great significance of this work and stress the useful complementary role represented by alternative methods of dispute settlement in civil and commercial matters, in particular with regard to electronic commerce. Pursuant to Article 73 of the Regulation, the Commission is to submit a report on the application of the Regulation, accompanied, if need be, by proposals for adaptations, to the European Parliament, the Council and the Economic and Social Committee. The Council and the Commission consider that in preparing the report especial attention should be paid to the application of the provisions of the Regulation relating to consumers and small and medium-sized undertakings, in particular with respect to electronic commerce. For this purpose, the Commission will, where appropriate, propose amendments to the Regulation before the expiry of the period referred to in Article 73 of the Regulation.”

### **2.2.2 Reaping the benefits of the initiatives taken in the field of family law**

47. At the Vienna European Council in December 1998, the Heads of State or Government gave their approval to the action plan of the Council and of the Commission concerning the optimum arrangements for the implementation of the provisions of the Treaty of Amsterdam on the creation of an area of freedom, security and justice.<sup>101</sup> Paragraph 41(c) of this action plan includes among the measures which should be taken within five years following the entry into force of the Treaty to: “examine the possibility of drawing up

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<sup>100</sup> Joint Declaration of the Council and the Commission concerning articles 15 and 73 of the Convention in the minutes of the meeting of the Council of 22 December 2000 which adopted this Regulation: [http://europa.eu.int/comm/justice\\_home/unit/civil\\_en.htm](http://europa.eu.int/comm/justice_home/unit/civil_en.htm)

<sup>101</sup> OJ C 19, 23.1.1999, p.1.

models for non-judicial solutions to disputes with particular reference to transnational family conflicts. In this context, the possibility of mediation as a means of solving family conflicts should be examined”.

48. The political leaders are therefore aware of the key role that ADRs can play in resolving cross-border family disputes, whether such disputes involve matters relating to the exercise of parental authority (custody rights with regard to children and rights of access to children), the distribution of family property or the setting of maintenance payments. The parties to the dispute could therefore have recourse to ADRs before they even envisage the possibility of seising a court, during the court proceedings or during the stage of implementation of the judicial decisions. However, recourse to ADRs is limited as in this field the parties do not enjoy free disposal of their rights. The usefulness of ADRs can in fact be questioned in the context of extreme disputes.<sup>102</sup>
49. On 29 May 2000 the Council adopted Regulation (EC) No 1347/2000 on jurisdiction and the recognition and enforcement of decisions in matrimonial matters and in matters of parental responsibility for joint children (the Brussels II Regulation).<sup>103</sup> This Regulation represents a considerable breakthrough in that it offers the possibility of recognising and enforcing throughout the Community decisions which are handed down according to the jurisdiction rules laid down in the Regulation. However, the system set in place by the Brussels II Regulation is based on jurisdiction criteria which can result in more than one court having jurisdiction. Under Article 11 of the Regulation, where a case is brought before courts of different Member States, the jurisdiction first seised will be called upon to issue a ruling on the case.<sup>104</sup> This system could therefore tend to encourage parties to bring their case before the jurisdiction that suits them best as quickly as possible without prior recourse to ADR.
50. On 6 September 2001 the Commission adopted a draft Council Regulation on jurisdiction and the recognition and enforcement of decisions in matrimonial matters and in matters of parental responsibility (draft Brussels II bis Regulation<sup>105</sup>). This draft aims to extend the arrangements for the recognition and enforcement of the Brussels II Regulation to all decisions with regard to parental responsibility. In its draft, the Commission sought to promote the use of ADR in two ways. Firstly, the draft establishes a system of jurisdiction rules which identifies in each case one single jurisdiction which is competent to decide. Secondly, it sets in place a system of cooperation between authorities.

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<sup>102</sup> A painful lesson can be drawn from the dispute connected with the right of custody of children and right of access to children in the event of the kidnapping of a child and subsequently the decision not to return the child. In this eventuality, it is essential to organise a right of access for the parent who is the “victim” after this decision not to return the child, but also during the examination of the request for the return of the child submitted by this parent and which can last several months. Using ADR to decide on the right of access is hindered not only by the communication problems between the parents but also by the possible reticence of the “victim” parent to accept such a solution which is reached through ADR to establish his or her right of access. This parent could in fact regard this as a solution which prejudices his/her attempts to achieve restored or effective right of access.

<sup>103</sup> OJ L 160, 30.6.2000 p. 19. This “Brussels II” Regulation includes the content of the “Brussels II” Convention concerning jurisdiction and the recognition and enforcement of decisions in matrimonial matters, established by Council Act of 28 May 1998, OJ C 221, 16.7.1998, p.1.

<sup>104</sup> Lis pendens.

<sup>105</sup> COM(2001) 505 final, OJ C 332E, 27.11.2001, p. 269.

51. This draft Brussels II bis Regulation is based on a system of cooperation between central authorities who can be called upon to play an active role when it comes to guaranteeing the effective exercise of parental responsibility, including through the promotion of ADR.<sup>106</sup> Furthermore, such a system of cross-border cooperation and promotion of ADR in the context of family disputes was already included in the initiative presented by France on 3 July 2000 with a view to the adoption of the Council Regulation on the mutual enforcement of decisions concerning rights of access to children.<sup>107</sup>

### **2.2.3 Boosting the development of ADR in the labour relations area**

52. ADRs are already a key component of dispute settlement in industrial relations in all the Member States. They have developed on the basis of specific procedures in which the social partners (representatives of employers and employees) predominate. ADRs in industrial relations have demonstrated their usefulness with regard to the resolution of individual and collective disputes relating to interests (on the adoption or modification of collective agreements that require the harmonisation of conflicting economic interests) and conflicts relating to rights (on the interpretation and application of contractual or regulatory provisions). Most ADRs in the field of industrial relations are organised by the social partners themselves. In the event of failure they can then have access to ADR structures offered by the public authorities. Procedures vary from one Member State to another, but they are generally voluntary as regards both the decision to go to them and the acceptance of the outcome.

53. The fact that in most Member States these ADR facilities are available and used where the social partners themselves have not achieved a satisfactory result has prompted the Union institutions to consider the possible value of establishing European ADR facilities for transnational disputes. In its Communication of 28 June 2000 (“Agenda for Social Policy”),<sup>108</sup> the Commission in the context of modernising the European social model, identified the creation of tools designed to prevent and mediate disputes as an issue to address. It declared its intention to “consult the social partners on the need to establish, at European level, voluntary mechanisms on mediation, arbitration and conciliation for conflict resolution”. The Commission has already begun preparatory work for this. It is financing a study on the modus operandi of industrial dispute resolution mechanisms in the Member States. The results should be available in April 2002 and will be distributed widely. The Commission is pursuing its reflections on the possibility of setting up European mechanisms, the value they would add and the way they would operate. The Council (Employment and Social Affairs) on 3 December 2001 welcomed the Commission's intentions and called on it to report on the results of its consultations with

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<sup>106</sup> Articles 16 and 17 of this proposal stipulate that “Each Member State shall designate a central authority to assist with the application of the Regulation...The central authorities shall cooperate on specific cases for the purpose of ensuring the effective exercise of rights of parental responsibility over a child. To this end, and in accordance with their laws, they shall ... promote agreement between holders of parental responsibility through mediation or other means...”.

<sup>107</sup> OJ C 234, 15.8.2000, p. 7. Article 12 of this initiative provides for a system of cooperation between Member States “via the national central bodies which they designate ... to ensure the effective exercise of rights of access to children and their prompt return to the parent with custody at the end of the access period .... In particular, either directly or through any intermediary, those bodies shall take appropriate measures to ... facilitate any parental agreement on the exercise of rights of access by conciliation, mediation or any other similar means”.

<sup>108</sup> COM(2000)379, 28.6.2000.

the social partners on the need to establish European voluntary dispute resolution mechanisms.<sup>109</sup> The Laeken European Council of 14 and 15 December 2001 stressed the "the importance of preventing and resolving social conflicts, and especially trans-national social conflicts, by means of voluntary mediation mechanisms concerning which the Commission is requested to submit a discussion paper".<sup>110</sup>

### **3. GUARANTEEING THE QUALITY OF ADR**

54. All the political and legislative endeavours, initiatives and debates to date at national, Community and international level have been aimed at preserving the quality of ADRs in terms of accessibility, effectiveness and guarantees of good justice while maintaining their flexibility. In order to achieve this twofold objective, we must decide whether the approach to be followed should be sectoral or global and whether the initiatives to be taken should deal differently with ODR and traditional techniques.

#### **3.1 What approach should be followed?**

55. The reactions to the present Green Paper, that is, the replies to all the questions asked and the general comments, are geared towards determining the approach to be taken by the Commission in promoting ADR. These reactions may determine how much importance should be given to setting in place Community-wide rules on ADR. These rules should in any event complement the efforts of the Community institutions which have been deployed and those which will be deployed in future with regard to the operational, financial and technical aspects of ADR. The choice of the legal basis for such rules depends on their precise content and their scope.

56. If such rules are found to be useful, their scope, level and content should then be determined. The appropriate instrument – regulation, directive or recommendation – should be selected according to the nature of the measures envisaged. Any measure that might thus be implemented in line with this Green Paper and on the basis of the consultation should also respect the principles of subsidiarity and proportionality as set out in article 5 of the EC Treaty and in the protocol on the application of the principles of subsidiarity and proportionality.<sup>111</sup>

57. If Community regulations were not to be envisaged, to further reinforce the convergence of national laws and practice on ADR, one solution could be for the Commission to pursue its policy aimed at promoting research and cooperation with regard to comparative law, especially between universities and legal practitioners, including judges and experts. Such cooperation could be geared towards defining common principles in areas relevant to ADR, which may include the drafting of specific guidelines or codes of conduct for certain types of ADR. In relation to e-commerce, trade and consumer associations and organisations themselves produce codes of conduct at Community level to regulate information society services inline with Article 16 of the e-commerce Directive.<sup>112</sup>

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<sup>109</sup> Conclusions of the Council meeting (Employment and Social Affairs) on social mediation:  
<http://ue.eu.int/newsroom>

<sup>110</sup> Paragraph 25 of the Presidency Conclusions.

<sup>111</sup> OJ C 340, 10.11.1997, p. 105. Thus, in accordance with the principle of subsidiarity, the objectives of the measures should not be sufficiently achievable by the Member States and should therefore be achievable only at Community level. Moreover, in accordance with the principle of proportionality, the measures should not exceed what is necessary to achieve these same objectives.

<sup>112</sup> See paragraph 41, of this Green Paper.

Consideration might be given to the possibility for the various actors in ADR of preparing common codes of conduct applying on the regional or global levels and offering a number of procedural guarantees in ADR schemes.

58. In the first two parts of this Green Paper (“Overview” and “Reaping the benefits of work already undertaken”), the Commission sought not only to draw up an inventory of the work that has already been done but also to outline the political and legal implications of the initiatives that might be undertaken in addition to this work. These implications can be presented in the form of questions:

Question 1: Are there problems such as to warrant Community action on ADR? If so, what are they? What is your opinion on the general approach to ADR that should be followed by the institutions of the European Union, and what might be the scope of such initiatives?

Question 2: Should the initiatives to be taken be confined to defining the principles applicable to one single field (such as commercial law or family law) – field by field – and in this way discriminate between these different fields, or should they as far as possible extend to all the fields governed by civil and commercial law?

Question 3: Should the initiatives to be undertaken deal separately with the methods of online dispute resolution (ODR) (an emerging sector which stands out because of its high rate of innovation and the rapid pace of development of new technologies) and the traditional methods, or on the contrary should they cover these methods without making any differentiation?

Question 4: How might recourse to ADR practices be developed in the field of family law?

### **3.2 Overall approach to ADR**

59. Whatever approach is selected by the Community, a number of questions arise, in particular the requirements with regard to access to justice, the minimum quality standards and the status of third parties.

#### **3.2.1 ADR and access to justice**

60. In the “Overview” part of the present Green Paper, the Commission sought to indicate the role that ADR can play in the general context of access to justice for all. The actual functioning of ADRs must also be analysed from this point of view of access to justice. We must then determine the scope of the contractual clauses with regard to recourse to ADRs, the limitation periods, confidentiality, the effectiveness of ADRs and the responsibility of third parties.

##### **3.2.1.1 Recourse to ADR**

61. Certain Member States have stipulated in their legislation the obligation to have recourse to ADR before the case is brought before a court.<sup>113</sup> However, their legislation is limited in scope and relates to specific subject areas. The Member States’ legislation usually provides that ADRs will be optional: either the parties accept the proposal of a judge or one of the parties takes the initiative and the other party accepts.

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<sup>113</sup> See paragraph 28 of this Green Paper.

62. But contractual clauses with regard to recourse to ADRs are likely to affect the right of access to the courts as they delay or can hinder the seising of the courts.<sup>114</sup> Recourse to ADRs may therefore prevent access to justice in the meaning of Article 6(1) of the European Convention on Human Rights and Article 47 of the Charter of Fundamental Rights of the European Union.<sup>115</sup>
63. Recourse to ADR is in fact generally characterised by the predominance of a consensual approach. Freedom of consent is expressed at all stages of its implementation. If the parties are in a contractual relationship, they can anticipate a possible dispute by inserting in their contract a clause that obliges them in the event of any dispute connected with the performance of this contract to embark on an ADR procedure. If they have not included an ADR clause in the contract, they are free to reach an agreement through ADR once the dispute has arisen, with or without the help of a court.
64. We can therefore question the usefulness of conferring a binding character on such clauses because it might serve no purpose to oblige someone to participate in an ADR procedure against his will insofar as the success of the procedure depends on his will.
65. Where the parties are free to dispose of their rights, in the event of non-fulfilment of the obligations resulting from an ADR agreement, the solutions are to be found in the interpretation of the will of the parties and in the recourse to contractual law. The seising of the courts indicating a refusal to participate in an ADR procedure stipulated in a contract could therefore be sanctioned as it constitutes a violation of a contractual obligation. Such a refusal could result in the judge to whom a plea is entered relating to the performance of other provisions of the contract declaring this request to be inadmissible. Similarly, refusal to participate in ADR might be considered as a violation of the obligation of good faith.
66. Finally, the question arises of the scope of such clauses where there is an imbalance of forces between the parties to the contract. The legislation of many Member States attaches a certain amount of importance to the objective of protecting weak contracting parties, such as salaried employees versus employers, tenants versus landlords, the insured versus the insurer, the consumer versus the professional, the trader versus the large retailer, the manufacturer versus the purchasing centre and even the partner (minority shareholder) versus the company.
67. In this context, one might raise the question whether ADR clauses in consumer contracts are not in principle forbidden by Directive 93/13/EEC on unfair terms.<sup>116</sup> According to this Directive, “a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer”. The annex to the directive contains an indicative and non-exhaustive

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<sup>114</sup> The introduction of arrangements for the suspension of periods of limitation could avoid the extinction of the action following ADR procedure, see point 3.2.1.2 below.

<sup>115</sup> Article 47(1) of the Charter states: “Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article”.

<sup>116</sup> Council Directive 93/13/EEC of 5 April 1993 concerning abusive clauses in contracts concluded with consumers, OJ L 95, 21.4.1993 p. 29.

list of clauses which can be declared unfair, inter alia “clauses ... to exclude or hinder the consumer’s right to take legal action or exercise any other legal remedy”.

Question 5: Should the legislation of the Member States be harmonised so that in each Member State ADR clauses have the same legal value?

Question 6: If so, should the validity of such clauses be generally accepted or should such validity be limited where these clauses appear in membership contracts in general or in contracts with consumers in particular?

Question 7: What in any case should be the scope of such clauses?

Question 8: Should we go as far as to consider that their violation would imply that the court has no jurisdiction to hear the dispute, for the time being at least?

### 3.2.1.2 Limitation periods

68. Recourse to ADR procedures is likely to affect access to justice insofar as such recourse does not end the limitation periods for the seising of the courts. At the end of the ADR procedure, and in the event of the failure of the procedure, the action of the parties could then be extinguished or the limitation period open to them might be unjustifiably reduced.

69. Certain Member States have stipulated in their legislation that the recourse to certain approved ADR bodies entails the “suspension” of the limitation period relating to the request made according to ADR procedure.<sup>117</sup> In order to promote ADR, it may therefore be necessary to amend the civil procedure rules with regard to limitation periods, whereby the period could be interrupted when ADR procedure begins and subsequently resume when the procedure ends without a settlement having been reached.

70. Such a rule could, however, cause some problems insofar as we would have to give a precise definition to such ADR procedures and determine the precise point at which they begin and the precise point at which they end.

71. The case of a cross-border dispute in which the parties have unsuccessfully attempted an ADR procedure in one Member State but which falls under the jurisdiction of the courts of another Member State shows the importance of ensuring that the same arrangements apply in all Member States as regards the actual content of the rule and as regards the evidence to be furnished to benefit from this rule. The rules with regard to limitation periods applicable to this dispute, which are set out in the civil procedure law of the competent court (“*lex fori*”), could stipulate the suspension of the periods, but in order for the parties to be able to benefit therefrom they should then furnish proof that they have effectively had recourse to an ADR procedure and that said procedure took place during this period.

Question 9: Should the legislation of the Member States be harmonised so that in each Member State recourse to an ADR mechanism entails suspension of the limitation periods for the seising of courts?

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<sup>117</sup> This is the case in Germany where ADR bodies involved are approved by the judicial administration of the *Land*.

### 3.2.2 Minimum quality standards?

72. ADRs are flexible but must be based on minimum quality standards, including a number of guideline principles of procedure. ADRs in the context of court proceedings are regulated by the public authorities and are conducted under the supervision of the court. Conventional ADRs are based on procedural principles which the parties have freely chosen. For example, they adhere to the procedural regulations which are proposed as models by professional associations or via codes of conduct to which they subscribe. So the question is how best to ensure that these principles of procedure are actually applied. Self-regulation initiatives could be taken along the lines of those proposed for the information society. The Commission actively supports these initiatives but is concerned about the need to encourage the actors involved in them to boost third-party control facilities and establish trustmarking and certification schemes.<sup>118</sup> Boosting self-regulation initiatives could help to improve trust in the use of ADR while preserving their flexibility, and thus obviate the need for more mandatory public instruments.
73. As mentioned earlier, in the context of consumer disputes the Commission has adopted two recommendations on the principles which are applicable to the out-of-court bodies charged with the task of resolving consumer disputes, whether they be national or transnational.<sup>119</sup> These recommendations are essentially geared towards ensuring that ADRs offer the parties minimum quality guarantees such as independence, impartiality, transparency, effectiveness and respect for the law. This therefore enhances the credibility of the bodies that meet these criteria.
74. To establish these principles, the Commission has drawn a distinction depending on whether the third party formally adopts a position on the possible resolution of the dispute<sup>120</sup> or merely helps the parties to reach an agreement. If the third party formally intervenes in the negotiations, he must meet certain specific requirements with regard to his independence, and the procedure must be based on the principle of adversarial debate, whereby each party must be able to put forward its point of view, and each step in the process, the submission of any exhibit, document or evidence by the opposing party must be brought to the knowledge of the other party and freely discussed. Where the third party has a less interventionist role, these requirements can be made more flexible. The first recommendation sets out seven principles: independence, transparency, adversarial principle, effectiveness, legality, liberty and representation. The second recommendation is based on the principles of impartiality, transparency, effectiveness and fairness.
75. The first of the Commission's recommendations has already been implemented in Member States, witness the number of bodies that are deemed to satisfy the principles of the recommendation, notified by the Member States and meeting within the EEJ-Net. The effectiveness and credibility of FIN-NET proceed from this recommendation and in compliance with its principles. The recommendation is acquiring a privileged status

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<sup>118</sup> These questions will be considered in the Communication on ODR referred to at paragraph 40 of this Green Paper.

<sup>119</sup> See point 37 of this Green Paper.

<sup>120</sup> It should be noted that this recommendation and the present Green Paper follow a different approach and do not have the same scope of application. Arbitration is covered by the recommendation but is not covered by the Green Paper; court ADRs are covered by the Green Paper but are not covered by the recommendation.

within Community legislation.<sup>121</sup> As for the second recommendation, all observers agree that it is very useful. The two recommendations should now be given time, therefore, to prove their worth, but the consultation exercise on this Green Paper provides a good opportunity to ascertain the reactions of interested circles on their effectiveness.

76. Against the backdrop of this reinforcement of Community action and given the success on the ground of the principles set out in the recommendations, one might consider new initiatives that could then extend beyond the field of consumer protection law and cover other branches of the law. These principles confirmed in consumer law would then, given the necessary adaptations, benefit ADRs in general. The Council in its above-mentioned decision of 29 May 2000 had expressed the desire that the priority in the Green Paper and subsequent work on ADR should be on “the possibility of establishing basic principles, either in general or in specific areas, which offer the necessary guarantees to ensure that the settlement of disputes by extrajudicial bodies enjoys the degree of reliability which the administration of justice requires.”
77. While ADRs are based on a certain number of minimal procedure guarantees, they can take the form of general principles laid down at a legislative level and can then be implemented and developed at an infra-legislative level in codes of conduct. The guiding procedural principles can thus take the form of ethical rules. In reality, the codes of conduct are given particular attention in the functioning of ADRs. Their development provides proof of the efforts of practitioners to guarantee the quality of ADRs. In this regard, the procedural rules which they lay down are designed to guarantee the impartiality of third parties, to define precisely the role of third parties during the procedure, to determine the deadline by which a solution must be found and to make proper arrangements for the agreements to be concluded. These codes could thus be an excellent means of enhancing the quality of ADRs.
78. Furthermore, the Commission felt it was essential to emphasise among the minimum procedural guarantees respect for the confidentiality obligation.

### **3.2.2.1 Confidentiality**

79. In most cases, the parties who have recourse to ADRs wish the information which is exchanged in the course of the procedure, whether it be oral or in writing, to remain confidential, even up to the point when the procedure achieves actual results. Confidentiality appears to be the key to the success of ADRs because it helps guarantee the frankness of the parties and the sincerity of the communications exchanged in the course of the procedure. It is necessary to ensure that ADR is not abused and that a party who has presented a document or evidence in the course of the procedure can use them in court proceedings brought after the failure of the ADR. Confidentiality is binding both on the parties themselves and on third parties.

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<sup>121</sup> Proposal for a Parliament and Council Directive amending Directives 96/92/EC and 98/30/EC concerning common rules for the internal market in electricity and natural gas, COM(2001) 125, Annex I(f): “Member States shall ensure that transparent, simple and inexpensive procedures are available for dealing with final customer complaints. Member States shall adopt measures to ensure that such procedures enable disputes to be settled fairly and promptly with provision, where warranted, for a system of reimbursement and/or compensation. They should follow, wherever possible, the principles set out in Commission Recommendation 98/257/EC”.

80. The confidentiality obligation is binding first and foremost on the parties. Any information that may be exchanged between the parties in the course of the procedure should not be admissible as evidence in any subsequent court or arbitration procedure. A certain number of exceptions can be envisaged. For example, the parties can decide by common consent that all or part of the procedure will not be confidential. A party may divulge one or other aspect of ADR procedure if it is required to do so under an applicable law. Finally, a party may divulge the agreement that ends the dispute between the parties if this is essential for the implementation or performance of said agreement.
81. Most especially, the confidentiality obligation is binding on third parties. Where one of the parties conveys certain information to the third party in the course of bilateral discussions (a procedure referred to as “caucus”), the third party should not be able to divulge the information to the other party. Moreover, this confidentiality obligation provides a means of defining more precisely the role of the third party during the procedure in order to guarantee fairness. Where the third party is called upon to play an active role in the search for a solution to the dispute, he must necessarily respect the principle of adversarial debate and undertake to hear the parties separately only where the purpose is to help bring about an agreement. The possibility of hearing one or other party confidentially should be ruled out if the third party is to take a decision or make a recommendation at the end of the ADR process. The above-mentioned Commission Recommendation of 4 April 2001 stipulates in the chapter on “Fairness” that “if at any stage, the third party suggests possible solutions for resolving the dispute, then each party should have the opportunity to present their viewpoint and comment on any argument, information or evidence presented by the other party”.
82. As a rule the third party should not be able to be called as a witness or to intervene as an arbitrator within the framework of the same dispute if ADR has failed, as in the course of the procedure he may have had access to information which an arbitrator would not necessarily have been able to obtain. However, the confidentiality obligation imposed on the third party can be waived if the parties to ADR procedure allow such protected information to be divulged or if the third party himself who is by virtue of his profession required to maintain professional secrecy is obliged to divulge any such information under the terms of the applicable law.<sup>122</sup>

Question 10: What has been the experience of applying the Commission recommendations of 1998 and 2001?

Question 11: Could the principles set out in the two recommendations apply indiscriminately to fields other than consumer protection law and in particular be extended to civil and commercial law?

Question 12: Of the principles enshrined in the recommendations, which in your view could be incorporated in the legislation of all the Member States?

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<sup>122</sup> For example, the legislation on suspicions of money laundering, like the Directive of 19 November 2001 amending Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering, which, however, exonerates notaries, independent lawyers and law firms from the obligation to provide information on suspicions of laundering when they are acting for their client before, during and after legal proceedings or at the time of the evaluation of the legal situation of a client. This rule appears to benefit these professions when they act as the counsel for their clients, but not when they act as third parties responsible for ADRs.

Question 13: In your opinion, should the legislation of the Member States in regulated areas such as family law be harmonised so that common principles may be laid down with regard to procedural guarantees?

Question 14: What initiative do you think the institutions of the European Union should take, in close cooperation with interested circles, as regards the ethical rules which would be binding on third parties?

Question 15: Should the legislation of the Member States be harmonised so that the confidentiality of ADRs is guaranteed in each Member State?

Question 16: If so, how and to what extent should such confidentiality be guaranteed? To what extent should guarantees of confidentiality apply also to publication of the results of ADRs?

### 3.2.2.2 The validity of consent

83. The parties' agreement is the essential and, from a certain standpoint, the most sensitive stage of the procedure. Indeed, care must be taken to ensure that the agreement concluded is genuinely an agreement. If the final agreement does not reflect the real wishes of the parties, that is, the actual compromise which the parties are willing to accept, with all that this implies in terms of waiver of their original wishes, ADR mechanism has not achieved its primary objectives, i.e. the genuine resolution of the dispute and the social pacification that ensues. Further problems can therefore be anticipated. For example, the validity of the agreement may be disputed, the responsibility of the third parties may be set at issue on the grounds that he "extracted" an unfair agreement from one of the parties, etc. In particular, in the event of an economic imbalance between the parties, the notion of a certain protective formalism is required when it comes to concluding and signing the agreement. All steps must be taken to guarantee the validity of the consent expressed. It would therefore appear that there is a need for a period of reflection before the signing<sup>123</sup> or a period of retraction after the signing of the agreement.<sup>124</sup> There is also the need to analyse the possibility of providing for a confirmation stage at which the validity of the agreement is verified prior to becoming an enforceable decision. A judge or notary would be in charge of this proceeding, though specialised bodies such as Chambers of Commerce might take their place in specific subject areas.

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<sup>123</sup> The recommendation of 4 April 2001 stipulates in the chapter on "Fairness": "prior to the parties agreeing to a suggested solution for resolving the dispute, they should be allowed a reasonable period of time to consider this solution".

<sup>124</sup> This legal technique is well known in Community law. See, for example, Council Directive 85/577/EEC of 20 December 1985 concerning the protection of consumers in the case of contracts negotiated outside commercial establishments, OJ L 372, 31.12.1985 p.31; Council Directive 90/619/EEC of 8 November 1990 on the coordination of laws, regulations and administrative provisions relating to direct life assurance, laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 79/267/EEC (second life insurance Directive), OJ L 330, 29.11.1990, p. 50; Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, OJ L 280, 29.10.1994, p. 83; Directive 97/7/EC of 20 May 1997 on the protection of consumers in respect of contracts negotiated at a distance, OJ L 144, 4.6.1997, p. 19.

### 3.2.2.3 The effectiveness of ADRs

84. In the field of consumer protection law, the third party can be called upon to adopt a formal position on the solution to the dispute in the form of a decision which can be binding on a party. This is the case for clients' ombudsmen who were appointed by certain professional sectors such as banks and insurance companies and whose decisions are binding on the companies who are affiliated to the scheme. In this case, the effectiveness of the decision taken can essentially be measured in terms of marketing. If these professionals do not in fact comply with these decisions, they run the risk that this decision will be published, or if they are affiliated to a commercial system which, for example, awards quality labels, they may be excluded from this system.
85. Where ADRs lead to an agreement between the parties, one might question the scope of such an agreement, in particular in the context of a cross-border dispute. Indeed, the question of the legal qualification of the agreement arising from ADR mechanism is determining for the effectiveness of ADRs. However, the variety of names used in the Member States for agreements arising from ADR mechanisms makes the picture particularly complex. In certain States, ADR can in fact often lead to a simple contractual transaction, but it can also yield other arrangements, such as conciliation minutes or mediation minutes. All these arrangements are in fact "transactions", whatever name is applied to them. Agreements between parties can thus be implemented insofar as they are made enforceable, either because the judge gives his approval and issues an enforceable order or the parties have recourse to an authentic deed executed before a public official, such as a notary. Finally, in certain Member States the transactions set out in the minutes of an approved ADR session are deemed to be enforceable.<sup>125,126</sup> However, the transaction does not have the same legal force in all Member States. Consequently, the question of the validity of this agreement (and therefore of its effectiveness) depends on the law as dictated by the rules governing conflicts of laws.<sup>127</sup>
86. In addition, a legal settlement, within the meaning of the Brussels Convention and of the Brussels I Regulation,<sup>128</sup> is merely a contract concluded before the judge whereby the parties end the dispute through reciprocal concessions. Also, as the Court held in a case on the Brussels Convention of 1968, which the "Brussels I" Regulation replaces,<sup>129</sup> such settlements do not constitute "decisions" within the meaning of Article 25 of the Convention, as "settlements in court are essentially contractual in that their terms depend first and foremost on the parties' intention". In the event of any conflict between a contested trial and an agreement resulting from an alternative dispute resolution

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<sup>125</sup> If the court before which the transaction was concluded is recognised by the judicial administration of the *Land*, in accordance with article 794, paragraph 1, of the Code of Civil Procedure.

<sup>126</sup> Since 1998, article 1441-4 of the new French Code of Civil Procedure has authorised the President of the *Tribunal de Grande Instance*, seised on application by a party to the settlement to make the deed which is presented to him enforceable. However, the legal nature of the settlement thus approved is still under debate – is it a court decision as such or is it rather of contractual status?

<sup>127</sup> Uniform rules on conflicts of law in this area were laid down at Community level by the Rome Convention of 19 June 1980 on the law applicable to contractual obligations, consolidated version published in OJ C 27, 26.1.1998, p. 36.

<sup>128</sup> Article 58 of the regulation.

<sup>129</sup> Case C-414/92 *Solo Kleinmotoren* [1994] ECR I-2237 (judgment given on 2 June 1994).

mechanism having the same aim in view, ADR agreement, which is similar to a legal transaction, will not provide a basis for opposing the exequatur request of this judgment.

87. Moreover, authentic instruments benefit from the simplified exequatur system set in place by the Brussels Convention and the Brussels I Regulation allowing them to circulate on the territory of the European Union. The Court<sup>130</sup> reiterates, citing the Jenard-Möller report on the Convention of Lugano,<sup>131</sup> that the conditions which had to be fulfilled by authentic instruments in order to be regarded as authentic are as follows: “the authenticity of the instrument should have been established by a public authority; this authenticity should relate to the content of the instrument and not only, for example, the signature; the instrument has to be enforceable in itself in the State in which it originates”. The Court holds on this basis that “An acknowledgement of indebtedness enforceable under the law of the State of origin whose authenticity has not been established by a public authority or other authority empowered for that purpose by that State does not constitute an authentic instrument within the meaning of Article 50 of the [Brussels] Convention”. It has been suggested that certain minutes of ADRs could, if they were drawn up by public authorities and made enforceable, be considered as authentic instruments within the meaning of the Brussels I Regulation. Those which do not arise from the wishes of the parties and have not received the approval of a public authority (for example a judge or a notary) could not benefit from these rules. As a result of these considerations, there is much heterogeneity in the nature of the agreements arising from ADR mechanisms and in terms of their legal force and therefore of their international effectiveness at European level. Furthermore, paradoxically the attempt to avoid court proceedings, which is the whole point of ADR mechanisms, leads to a recourse to the judge to confer binding force on the agreements resulting from such mechanisms.

Question 17: In your opinion, should there be a Community rule to the effect that there is a period of reflection following ADR procedures before the agreement is signed or a period for withdrawal after the signing of the agreement? Should this question be instead handled within the framework of the ethical rules to which the third parties are subject?

Question 18: Is there a need to make ADR agreements more effective in the Member States? What is the best solution to the question recognition and enforcement of ADR agreements in other Member States of the European Union? Should specific rules be adopted to render ADR agreements enforceable? If so, subject to what guarantees?

### 3.2.3 Should third parties be given a status?

88. The third party or parties responsible for the ADR procedure are in fact selected by the parties. Either the parties designate them directly or they refer to a body which is then responsible for designating them. This selection process is facilitated when the third parties offer guarantees resulting from the ethical rules which they have committed themselves to respect, as mentioned earlier. In addition, the training of third parties raises the question of their accreditation.

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<sup>130</sup> Case C-260/97 *Unibank AS v Flemming G. Christensen* [1999] ECR I-3715 (judgment given on 17 June 1999).

<sup>131</sup> OJ C 189, 28.7.1990, p. 57, paragraph 72.

### 3.2.3.1 The training of third parties

89. The quality of ADRs is essentially contingent upon the jurisdiction of the third parties who are responsible for ADR mechanisms. Proper training is required to master the techniques involved in ADR. Vocational training therefore plays a pivotal role, not only with regard to the functioning of ADRs and of their quality, and therefore from the point of view of the protection of users of ADRs, but also with a view to the free provision of ADR services secured by Article 49 of the Treaty.
90. Judges themselves need specific training. The third parties charged with ADRs in the context of court proceedings must always furnish proof of the necessary skill, training or minimal experience, which is assessed on a case-by-case basis by judges or recognised in the form of an accreditation. However, no such conditions are imposed on third parties responsible for conventional ADRs.
91. Whether or not they belong to a regulated profession, third parties are sometimes members of associations. Such associations encourage their members to follow a training course or are sometimes called upon to offer ADR training themselves and to set in place, alongside the training courses they provide, a system of certification, accreditation and periodic evaluation of their members. Furthermore, these associations develop ethical codes and procedural regulations. It might be important to establish specific ADR expertise so that, where the third party is not a member of a regulated profession, his qualifications can be verified and his freedom of movement can thus be secured.

### 3.2.3.2 Accreditation of third parties

92. One of the tasks of the public authorities is to make sure that minimal guarantees exist to ensure the competence of third parties. We should consider whether the public authorities should support the efforts of the practitioners by setting in place third party accreditation systems that should not, however, be allowed to jeopardise the flexibility and simplicity of ADRs.<sup>132</sup>
93. Where the third parties belong to a regulated profession, the general system of recognition of qualifications between Member States<sup>133</sup> or the Directives to facilitate the provision of services and the right of establishment for lawyers would be applicable.<sup>134</sup> Otherwise, difficulties are to be expected.

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<sup>132</sup> See in particular the opinion of the European Parliament on the above-mentioned draft Brussels I Regulation, amendments 35 and 39, OJ C 146, 17.5.2001 p. 94.

<sup>133</sup> Working document of the services of the European Commission of 21 May 2001 on the future regime for professional recognition:  
[http://europa.eu.int/comm/internal\\_market/en/qualifications/consultation\\_en.pdf](http://europa.eu.int/comm/internal_market/en/qualifications/consultation_en.pdf)

<sup>134</sup> Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services, OJ L 78, 26.3.1977, p. 17; Parliament and Council Directive 98/5/EC of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, OJ L 77, 14.3.1998, p. 36; Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration, OJ L 19, 24.1.1989, p. 16; Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC, OJ L 209, 24.7.1992, p. 25; Parliament and Council Directive 1999/42/EC of 7 June 1999 establishing a mechanism for the recognition of qualifications in respect of the professional activities covered by the

### 3.2.3.3 The liability of third parties

94. Finally, the question of the liability of third parties must also be addressed. Third parties may be liable for the consequences of their intervention in the procedure, whether it be in a personal capacity where they intervene as private citizens or even, in certain cases, in a public issue, in the event of an irregularity in ADR process. Examples might include a violation of the confidentiality obligation or a proven lack of impartiality which benefits one of the parties. They may also be liable under common civil liability law of the Member States, even if the Member States do not appear to have specific rules on the liability of mediators or conciliators.<sup>135</sup> We might envisage the creation of a system of liability or at least specific rules that determine the precise role of third parties in the procedure (often confined to that of a catalyst). In any event, we should probably seek to avoid blocking the wishes and initiatives of parties by excessively binding measures.

Question 19: What initiatives in your view should the Community institutions take to support the training of third parties?

Question 20: Should support be given to initiatives to establish minimum training criteria with a view to the accreditation of third parties?

Question 21: Should special rules be adopted with regard to the liability of third parties? If so, which rules? What role should ethical codes play in this field?

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Directives on liberalisation and transitional measures and supplementing the general systems for the recognition of qualifications, OJ L 201, 31.7.1999, p. 77.

In any case, this was not mentioned in the replies to the questionnaire. In certain countries there are precise rules governing their appointment and the required qualifications, and therefore their removal from office or dismissal in the event of failure to comply with their obligations must be provided for. Thus, in France, article 3-2 of the decree of 20 March 1978 concerning justice conciliators stipulates that the judicial authority can dismiss them prior to the expiry of their mandate by a reasoned decision, having heard the interested parties.

## SUMMARY OF QUESTIONS

Question 1: Are there problems such as to warrant Community action on ADR? If so, what are they? What is your opinion on the general approach to ADR that should be followed by the institutions of the European Union, and what might be the scope of such initiatives?

Question 2: Should the initiatives to be taken be confined to defining the principles applicable to one single field (such as commercial law or family law) – field by field – and in this way discriminate between these different fields, or should they as far as possible extend to all the fields governed by civil and commercial law?

Question 3: Should the initiatives to be undertaken deal separately with the methods of online dispute resolution (ODR) (an emerging sector which stands out because of its high rate of innovation and the rapid pace of development of new technologies) and the traditional methods, or on the contrary should they cover these methods without making any differentiation?

Question 4: How might recourse to ADR practices be developed in the field of family law?

Question 5: Should the legislation of the Member States be harmonised so that in each Member State ADR clauses have the same legal value?

Question 6: If so, should the validity of such clauses be generally accepted or should such validity be limited where these clauses appear in membership contracts in general or in contracts with consumers in particular?

Question 7: What in any case should be the scope of such clauses?

Question 8: Should we go as far as to consider that their violation would imply that the court has no jurisdiction to hear the dispute, for the time being at least?

Question 9: Should the legislation of the Member States be harmonised so that in each Member State recourse to an ADR mechanism entails suspension of the limitation periods for the seising of courts?

Question 10: What has been the experience of applying the Commission recommendations of 1998 and 2001?

Question 11: Could the principles set out in the two recommendations apply indiscriminately to fields other than consumer protection law and in particular be extended to civil and commercial law?

Question 12: Of the principles enshrined in the recommendations, which in your view could be incorporated in the legislation of all the Member States?

Question 13: In your opinion, should the legislation of the Member States in regulated areas such as family law be harmonised so that common principles may be laid down with regard to procedural guarantees?

Question 14: What initiative do you think the institutions of the European Union should take, in close cooperation with interested circles, as regards the ethical rules which would be binding on third parties?

Question 15: Should the legislation of the Member States be harmonised so that the confidentiality of ADRs is guaranteed in each Member State?

Question 16: If so, how and to what extent should such confidentiality be guaranteed? To what extent should guarantees of confidentiality apply also to publication of the results of ADRs?

Question 17: In your opinion, should there be a Community rule to the effect that there is a period of reflection following ADR procedures before the agreement is signed or a period for withdrawal after the signing of the agreement? Should this question be instead handled within the framework of the ethical rules to which the third parties are subject?

Question 18: Is there a need to make ADR agreements more effective in the Member States? What is the best solution to the question recognition and enforcement of ADR agreements in other Member States of the European Union? Should specific rules be adopted to render ADR agreements enforceable? If so, subject to what guarantees?

Question 19: What initiatives in your view should the Community institutions take to support the training of third parties?

Question 20: Should support be given to initiatives to establish minimum training criteria with a view to the accreditation of third parties?

Question 21: Should special rules be adopted with regard to the liability of third parties? If so, which rules? What role should ethical codes play in this field?