European Association of Co-operative Banks
Groupement Européen des Banques Coopératives
Europäische Vereinigung der Genossenschaftsbanken

EACB Position Paper on European Commission Consultation on the use of Alternative Dispute Resolution as a means to resolve disputes related to commercial transactions and practices in the European Union

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The **European Association of Co-operative Banks** (EACB) is the voice of the co-operative banks in Europe. It represents, promotes and defends the common interests of its 28 member institutions and of co-operative banks in general. Co-operative banks form decentralised networks which are subject to banking as well as co-operative legislation. Democracy, transparency and proximity are the three key characteristics of the co-operative banks' business model. With 4.200 locally operating banks and 63.000 outlets co-operative banks are widely represented throughout the enlarged European Union, playing a major role in the financial and economic system. They have a long tradition in serving 160 million customers, mainly consumers, retailers and communities. The co-operative banks in Europe represent 50 million members and 750.000 employees and have a total average market share of about 20%.
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General comments

The EACB welcomes the opportunity to respond to the European Commission's consultation on the use of Alternative Dispute Resolution (ADR) as a means to resolve disputes related to commercial transactions and practices in the European Union.

The EACB is strongly in favour of out-of-court settlements and agrees that consumer disputes require mechanisms that provide consumers with access to remedies that do not impose costs, delay or burden disproportionate to the economic value at stake. However, the EACB believes that the features of ADR schemes should not be addressed via EU regulatory intervention.

The EACB firmly believes in the efficiency of the existing out-of-court schemes in the area of financial services, and in particular of FIN-NET, the network of national ADR bodies competent to resolve both national and cross-border complaints. The existing financial ombudsmen and mediators are competent to deal with all complaints related to the banking services. Even though the EACB recognizes the need to further improve its geographical coverage, FIN-NET constitutes a perfect example of how the sectoral out-of-court resolution scheme can work effectively and provide access to quick, simple and cheap redress for both consumers and businesses.

It should be emphasised that co-operative banks have a longstanding tradition of in-house complaints departments: banks, when addressed by consumers, will first seek to find a proper solution satisfactory to both parties at the level of branches, and will often proceed in a manner instructed by the central body of their co-operative structure. In some cases, a form of in-house appeals procedure is even available, and consumers can bring their complaints already considered at the level of branches further to a relevant internal body of the central institutions of the co-operative structure.[1]

In addition, many independent ADR schemes have been successfully established by, or in collaboration with, co-operative banks. For example, the Austrian banking industry has established a Joint Conciliation Board to which all customers of all participating credit institutions may address their complaints to. The independent and impartial ombudsman, who is not subject to any instructions, is competent to decide on cases related to most of the banking services offered to consumers[2]. Customer complaints are dealt with quickly, based on a procedure that meets the requirements of the relevant EU recommendations[3]. In the Netherlands, KiFid was founded by financial industry associations, who finance it through a foundation. Four different stages of resolving complaints are available: resolution by KiFid staff, resolution by the ombudsman acting as a mediator, Disputes Committee, and Appeals Committee.

[1] For example, in Finland, direct complaints to the banks are at the first stage handled and reported in the bank branches. At the second stage it is also possible to bring the complaint to the OP-Pohjola Group Central Cooperative's internal auditing. Also in Austrian ÖGV "in-house appeals procedure" is provided by the in-house "Volksbank Ombudsmann" (Dr. Hermann Fritzl).

[2] The Conciliation Board (http://www.bankenschlichtung.at/engl.htm) is authorised to try and resolve a complaint when it concerns the following areas (areas of jurisdiction): cash deposits on an account (current account, passbook) and all procedures required to keep an account; domestic and cross-border payment transfers (in EU area); internet banking, electronic banking; bank transactions by telephone, e-mail, fax, the internet, etc.; transfer of a current account to another bank; consumer credit agreements; information provided when granting a loan to build, acquire or renovate a freehold flat or a home in private ownership; banking transactions using payment cards (ATM cards, credit cards, prepaid cards, etc.).

[3] Recommendation 98/257/EC on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, and Recommendation 2001/310/EC on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes

In France, each credit institution is in fact obliged to appoint at least one mediator who is in charge of suggesting non-binding solutions. The mediation is confidential and free of charge for consumers, and disputes must be settled in a period of maximum two months. A complaint can be brought in by the consumer personally or by a consumer organisation on his/her behalf. The scope of competence includes disputes related to any contract between the bank and the consumer[4]. Banks' mediators are regulated by the Banking Mediation Committee. The number of recorded cases has been steadily increasing since 2003, and in 2009, the Banking Mediation Committee recorded a 15.7% increase compared to 2007. These figures can be partly explained by the enlargement of the scope of banking mediation but it also proves that the ombudsmen system guarantees an objective, professional, balanced and fast resolution of disputes.

Finally, the existing body of legislation requiring banks to provide information to consumers on their adherence to the ADR scheme in the context of pre-contractual and contractual information[5] ensures that consumers are well aware of the redress options available to them.

Detailed comments

(1) What are the most efficient ways to raise the awareness of national consumers and consumers from other Member States about ADR schemes?

Actors responsible

Information on the existing schemes should be disseminated through as many channels as possible, including the European Commission, national authorities, regulators, national and EU consumer organisations, industry, courts, law societies and ADR schemes themselves.

Information campaigns & websites

The methods of reaching consumers with information on ADR could include websites (especially in the countries where the use of the Internet is high), information campaigns, information in the contracts and brochures, as well as information at the premises of traders, consumer organisations, courts and other relevant stakeholders.

The initiative of the European Commission to create a website[6] listing the notified ADR schemes is an example of a good practice and further steps should be taken to increase awareness of both consumers and businesses of the existence of this website. The information on the websites of ADR bodies themselves could also be improved (the information should include clear presentation of the main features, competence, formalities of lodging a complaint, procedures, information on what the future decision will mean for the consumer, etc.).

Financial education

In order to create a perception amongst all consumers that ADRs constitute a legitimate part of the redress options available to them, ADRs should become a part of school curricula in all Member States. The co-operative banks are committed to initiatives aiming at raising the levels of financial literacy of their clients and members, and would

[4] Application of account agreements, tied selling, selling incentives, credit transactions, investment services, financial instruments and savings products

[5] Directive 2002/65/EC on distance marketing of consumer financial services, Directive 2004/39/EC on markets in financial instruments, Directive 2007/64/EC on payment services, Directive 2008/48/EC on consumer credit (as well as possible future measures on access to a basic payment account and transparency and comparability of bank fees) all oblige banks to inform consumers about access to a relevant ADR body.

[6] http://ec.europa.eu/consumers/redress_cons/adr_en.htm#coop

like to call on the Commission to take necessary steps to encourage Member States to put more emphasis on financial education in general.

Creating ADR networks
Connecting the ADR bodies competent to deal with disputes in the same sector but based in different Member States into networks (such as FIN-NET for ADR schemes dealing with financial services related complaints) could elevate their status and increase their recognition, both at national and cross-border level.

Specific case of cross-border complaints
Further information should be provided by consumer stakeholders. The ECC-NET plays an important role in overcoming the language barrier in the context of cross-border disputes, as consumers can contact the ECC in their own country and receive information, in their own language, on the relevant ADR in the country of the trader.

Specific case of banking services
For financial services, consumers can address an ADR which is a member of FIN-NET for all banking related national and cross-border complaints. For cross-border complaints, consumers may always address a FIN-NET member in their own Member State who will either take on a complaint, or will assist the consumer in contacting the relevant member of the network in another Member State. Currently, in the majority of Member States there is at least one FIN-NET member who can deal with banking related complaints, and in all Member States but two there is an ADR competent to resolve banking/payment disputes. FIN-NET, although could be further improved mainly through the closing of geographical gaps, constitutes a perfect example of how a sectoral out-of-court resolution scheme can work effectively and provide access to quick, simple and cheap redress for both consumers and businesses.

There is also a heavy body of EU legislation requiring banks to provide information to consumers on available ADR schemes in the context of pre-contractual and contractual information, including the Directive 2002/65/EC on distance marketing of consumer financial services (DMFSD), Directive 2004/39/EC on markets in financial instruments (MiFID), Directive 2007/64/EC on payment services (PSD), or Directive 2008/48/EC on consumer credit (CCD). In all cases Member States are obliged to encourage the ADR bodies competent to deal with consumer credit, payment or investment services to cooperate in order to also resolve cross-border disputes within their competence. It can also be expected that possible future measures on access to a basic payment account and on transparency and comparability of current bank account fees may also address the issue of information and access to relevant out-of-court dispute resolution in the areas targeted by those measures.

Therefore the information about the adherence of banks to FIN-NET is to a large extent already clearly communicated to consumers.

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

National authorities and regulators should assume an active role in raising consumer and business awareness of the existence and functioning of ADR bodies. In particular for businesses, the regulators could focus on raising awareness of the businesses about the advantages of the ADR procedure, which is simple, quick and cheap. National consumer agencies should provide consumers with information on the existing ADRs in a given Member State.

The ECC-NET has a significant role to play in raising consumer awareness on ADRs particularly in the context of cross-border complaints. If amicable solution is not possible

via the ECC procedure, the Centre will always inform the consumer about an ADR body which he/she could refer his/her complaint to, and often will assist in lodging the complaint. It will also be able to inform the consumers about the main features of such a body and advise whether the procedure would be suitable in the consumer's individual case. In addition, the Centres organise information campaigns, regularly issue press releases and reports on ADR bodies[7], produce leaflets and other publications. The ECCs list on their websites all the ADR bodies existing in their Member States as well as provide a link to the European Commission's website on notified ADR bodies.

The ECCs, national authorities (including regulators), NGOs and ADRs themselves should launch communication campaigns about ADRs and could also help businesses to identify the ADR that they could potentially adhere to.

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

It should be recognised that the information about adherence to an ADR scheme can be used by businesses as a form of commercial advertising, as it attributes to the potential consumer's reassurance of the reliability of the trader. The EACB supports the obligation to inform consumers about the possibility of resolving disputes through an ADR scheme and about the main features of such a scheme. However, businesses should be free to decide on the best ways to communicate this information to their consumers (e.g. in the contracts, at the premises, on the websites, etc.).

It should be noted that EU legislation regulating retail banking and other financial services (CCD, PSD, DMFSD, MiFID) already obliges banks to inform their consumers, both in the pre-contractual stage and in the contract, of the relevant ADR body that consumers could address their complaint to (see answer to question 1).

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

This information could be provided by the ADR bodies via easily accessible websites where information in the national language would be provided. ADRs could include on their websites the following information: contact details, process (including information on how to lodge a complaint), average timeframe of resolving a complaint, information on whether the decision is binding (and if yes, for which party), fees if any, information on possible alternative/next steps that the consumer could take.

ADR bodies should maintain a close co-operation with national consumer agencies, ECCs, relevant NGOs, courts (especially those in charge of the small claims procedure), national law societies, schools, regulators, trade associations, and launch regular information campaigns organised in close cooperation with the above stakeholders.

ADR bodies within the same sector based in different Member States should co-operate and exchange the information about each other's competences and procedures. Creation of networks similar to FIN-NET in other sectors would be also recommended.

(5) What means could be effective in persuading consumers and traders to use ADR for individual or multiple claims and to comply with ADR decisions?

Concerning the encouragement of consumers to resort to ADR schemes as means of redress, the EACB would recommend increasing consumer awareness about the ADR schemes, on their main features, and especially on their advantages: simple, cheap and

[7] E.g. http://www.eccireland.ie/downloads/ADR-report-final.pdf

quick means of resolving disputes and obtaining compensation (see our answer to questions 1 and 2).

Through portraying the ADRs as convenient, quick and confidential means of resolving disputes, and demonstrating the potential influence of adherence to an ADR on consumer's trust in the provider, traders' willingness to participate in those types of schemes could be further increased. Adherence to out-of-court resolution bodies could be also encouraged by relevant trade associations.

Ensuring proper set-up and procedures of ADRs, and guaranteeing impartiality of the decisions made by highly-qualified experts (e.g. ex-judges, mediators, decision bodies composed of business and consumer representatives) could contribute to increasing of the rate of voluntary compliance with the ADR decisions. Obligatory compliance with the decision would be against the very nature of the scheme and has no support of the EACB.

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

It should be noted that already in practice most consumers of the co-operative banks in Europe can bring their case to the relevant FIN-NET member, or other relevant ADR body competent to deal with cases related to retail banking services, with the exception of course of complaints that have already been brought to court. However, it must be emphasised that the very nature of ADR schemes is that they are voluntary and alternative to traditional judiciary venues. The EACB is therefore opposed to the introduction of an obligation for the industry to adhere to such schemes.

In addition, it should not be forgotten that banks which already do adhere to an ADR scheme are obliged by extensive body of legislation to inform consumers of such a body and the relevant procedures.

(7) Should an attempt to resolve a dispute via individual or collective ADR be a mandatory first step before going to court? If so, under what conditions? In which sectors?

The EACB is of the opinion that parties should be encouraged to use ADR schemes before resorting to judicial proceedings, however, it does not consider that introducing an obligation to choose an ADR as a pre-condition to initiate judicial proceedings fits with the alternative character of those schemes. Parties should have a right to choose between an ADR and a court, as it should also be born in mind that obligatory ADR procedure could be detrimental for consumers or businesses, in cases when the most important for one or the other party is an enforceable judgement, without any delay.

On the other hand, the EACB concurs in the current practice according to which the in-house complaints procedure of the relevant bank must be completed before the dispute can be looked into by a relevant ADR.

Finally, should an individual ADR be a mandatory first step, it should be obligatory for both parties involved in a dispute.

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

A possibility of having an ADR decision reviewed judicially must be always preserved. This is particularly the case where difficult legal questions are under consideration or when a court ruling is needed in a general sense, in order to address a specific legal question requiring interpretation, which in turn could be then used by ADR bodies when making their decisions in other cases. In addition, binding character of ADR decisions

would raise a question of the availability of an appeals procedure, as well as of the effective enforcement of such decisions. Therefore, it is a view of the EACB that ADR decisions should not be legally binding, although voluntary compliance by both the industry and consumers should be of course encouraged. Compliance with the decisions made by properly set-up ADRs, with sound procedures in place guaranteeing impartiality of the decisions should be a strong commitment of all reputable businesses, and co-operative banks across the EU are highly motivated in this regard. Finally, the challenging of ADR decisions should only be exercised through a judicial review by a competent court.

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

ADR coverage could be improved by the introduction of provisions in sectoral legislative measures obliging Member States to ensure the creation of ADR schemes, and by promotion of ADR at both European and national level. The focus should be on those sectors and geographical areas where sound ADR systems do not yet exist.

The EACB does not consider that the same ADR could be successfully dealing with both consumer and SME complaints. This would create a risk of SME complaints being given priority and consumer complaints falling behind. First and foremost, an efficient and quick ADR mechanism for consumers should be ensured before expanding the schemes to SMEs, particularly as there are already in place proper ADR schemes addressing specific needs of the SMEs[8].

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

In the view of the EACB, there is no basis for a distinction between ADR bodies depending on the selling method. The existing ADR schemes should deal with all kinds of disputes in their field of competence. National e-commerce transactions can be resolved by national sectoral ADR schemes. In order to deal with cross-border complaints, in each sector, the setting up of a network of all the existing sector-specific ADRs should be investigated (like in the case of FIN-NET). A dedicated internet website accessible in all EU languages could be created to provide information on the existing ADR bodies relevant for a given sector. National ADR websites could also give clear information about this network with a link to the European network website. Concerning an ODR scheme for cross-border e-commerce transactions, the EACB is not in favour of such a scheme and would like to stress that any dual-track systems between the existing and new solutions should be avoided.

(11) Do you think that the existence of a "single entry point" or "umbrella organisations" could improve consumers' access to ADR? Should their role be limited to providing information or should they also deal with disputes when no specific ADR scheme exists?

The ECC-NET already, to some extent, constitutes such a platform of referral and information for cross-border complaints. The EACB would like to stress that direct access

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[8] For example in Austria, for business-to-business contracts, agreements on ADR schemes were concluded (e.g. concerning permanent arbitral tribunal of Austrian Chamber of Commerce, WKÖ) and a complete range of existing arbitration and even ad hoc arbitration is available for B2B disputes.

to ADR schemes should be maintained. For financial services, consumers can address their complaints to the national FIN-NET member who will assist also in case of cross-border complaints in finding and contacting the relevant body. Creating extra layers of administration is therefore unnecessary and the EACB advises against it.

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

As a general remark, the EACB would like to stress that the features of ADRs, weather individual or collective, should not be dealt with by any European regulation. Each ADR scheme has been developed at national level according to local specificities (local demand, legal culture, existing judicial procedures) with the aim of providing cheap and quick solutions. As a consequence, a European one-size-fits-all approach cannot successfully be taken.

Concerning specifically collective schemes, ADR bodies are signified by their focus on individual solutions, where a trader reaches an individual out-of-court settlement with an individual customer. Each dispute has its specificities and the solution must therefore be an individual one. Collecting complaints would hinder the possibility to seek individual, most favourable solutions and therefore only make sense for legal disputes before court where a legal framework for class action has been installed as a legally sound procedure, with suitable safeguards ensuring that abusive claims are avoided.

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

The awareness of the existing systems could be further improved, and the assistance of the ECCs could be further enhanced.

For the banking sector, cross-border complaints are already successfully handled by FIN-NET, however, it should be born in mind that the volume of cross-border banking complaints dealt with by ADR appears to be small, in line with the share of cross-border transactions in retail financial services.

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

There are no unsuitable methods of funding ADR bodies, as long as the funding does not affect the impartiality of the ADR scheme (see answer to question 15). As ADR schemes, developed at national level according to local specificities, are very different from one Member States to the other, the details of funding arrangements should be decided at national level.

(15) How best to maintain independence, when the ADR scheme is totally or partially funded by the industry?

It is important to remind that Directive 2008/52/CE on certain aspects of mediation in civil and commercial matters, as well as Commission Recommendation 2001/310/EC on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes do not list independence as an essential principle of ADR schemes. They both refer instead to effectiveness, impartiality, and competence.

The Commission Recommendation 98/257/EC on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes does define independence,

but as one of the elements, among many others, aiming at ensuring impartiality[9]. Moreover, this independence does not require *"the need for guarantees that are as strict as those designed to ensure the independence of judges in the judicial system"*. The EACB therefore believes that what is really important is impartiality of ADR bodies, rather than simply their independence.

Moreover, the EACB does not believe that impartiality of an ADR scheme is threatened when the scheme is totally funded by the industry provided that certain conditions are fulfilled. The Recommendation 98/257/EC lists some of those conditions, e.g.: the person appointed should possesses the abilities, experience and competence, particularly in the field of law, required to carry out his function; the person appointed should also be granted a period of office of sufficient duration to ensure the independence of his action and shall not be liable to be relieved of his duties without just cause. Other conditions might also be defined at the national level. For example, the French Comité de la Médiation[10] states that the ombudsman should have sufficient human and financial resources and that - if the scheme is funded by the industry - the ombudsman service should have a separated budget ensuring its autonomy. The Dutch Financial ADR, KiFid, was founded by several industry associations and is financed by the affiliated service providers through a foundation. The board of KiFid and market do not affect treatment or outcome of a complaint. The rules and method of appointment ensure the independence of all the steps available within KiFid: Ombudsman, the Disputes Committee and Appeals Committee.

The impartiality could be further ensured by involving consumer stakeholders in the ADR schemes. National specific supervision authorities involving representatives of consumer associations could supervise sector specific ADR schemes. For example, in France each bank chooses its mediator[11]. The "Comité de la médiation bancaire", in charge of the supervision of banking mediation, is composed of one representative of the industry, one representative of consumer associations, two experts nominated by the Ministry of Economy, and is presided by the Governor of the Bank of France[12].

(16) What should be the cost of ADR for consumers?

The cost of ADR for consumers must be low, and fees could be reimbursed to consumers if the dispute is resolved in their favour. However, a small fee could be charged to consumers in order to prevent abusive claims.

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[9] See Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer: "the independence of the decision-making body is ensured in order to guarantee the impartiality of its actions".
[10] In its « Avis relatif à la médiation et aux modes alternatifs de règlement » of 27th March 2007
[11] http://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000020866955&cidTexte=LEGITEXT000006072026&dateTexte=20110128&fastPos=7&fastReqId=1633778852&oldAction=rechCodeArticle