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Cross-Border Alternative Dispute Resolution in the European Union

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POLICY DEPARTMENT A: ECONOMIC AND SCIENTIFIC POLICY

INTERNAL MARKET AND CONSUMER PROTECTION

Cross-Border Alternative Dispute Resolution in the European Union

STUDY

Abstract

The study identifies barriers to the use of ADR schemes by consumers in the EU, especially in cross-border cases. It assesses other legislation relevant for consumer redress: the European Small Claims Procedure, the Injunctions Directive and the Mediation Directive. Finally, it examines ways to improve the effectiveness of cross-border ADR and the usefulness of a European legal instrument.

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LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
B2C	Business-to-Consumer
CB	Cross-Border
CBPT	Conciliation Body for Public Transport (Germany)
CMC	Civil Mediation Council (UK)
C2C	Consumer-to-Consumer
DG SANCO	Directorate General Health and Consumers
EC	European Commission
ECC	European Consumer Centre
ECC-Net	European Consumer Centres Network
EEA	European Economic Area
ESCP	European Small Claims Procedure
EU	European Union
IMCO	Committee for Internal Market and Consumers
IT	Information Technology
FCCB	Foundation for Consumer Complaints Boards (Netherlands)
FOS	Financial Ombudsman Service (UK)
MS	Member State(s)
NBCD	National Board for Consumer Disputes (Sweden)
NJM	National Judicial Mediation
NMI	Netherlands Mediation Institute
NNJM	National Non-Judicial Mediation
ODR	Online Dispute Resolution

OFT	Office of Fair Trading (UK)
OJ	Official Journal of the European Union
PLN	Polish Zloty
PLP	Prescription and Limitation Period
SMEs	Small and Medium Enterprises
TFEU	Treaty on the Functioning of the European Union

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EXECUTIVE SUMMARY

Background

- This report presents the results of research on cross-border alternative dispute resolution (ADR) and selected EU legislation relevant for consumer redress. The research was conducted by Civic Consulting between February and May 2011 on the basis of four main tasks specified in the terms of reference (ToR).
- ADR is understood as a dispute resolution procedure (for disputes between consumers and businesses) that takes place out of court through the use of a pre-established third-party mechanism, i.e. an ADR scheme.

Overview of ADR in the EU

- A 2009 study identified 750 ADR schemes that handle consumer disputes across the EU. Research has revealed significant differences in these schemes both among Member States and business sectors.
- Among the very diverse group of ADR schemes, some main features make it possible to construct a general classification. Those features are: notification, nature of a scheme and its funding, participation of industry, outcomes of procedures, geographical coverage, and sectoral coverage.
- Confirming previous research, the latest available data for 21 large schemes (i.e. those which handled more than 4,000 cases in any of the observed years) reveals an increasing trend in the use of ADR. In total, about 410,000 cases were reported in the EU in 2006, about 473,000 in 2007, and more than 500,000 in 2008.
- Progress has been made in terms of the availability of ADR mechanisms in the EU, but they have developed unequally and their use is not evenly distributed across Member States. There are geographical, as well as sectoral gaps in the coverage, pointing to disparities in the accessibility of effective ADR to European consumers.

The functioning of existing cross-border ADR schemes

- Research and public consultations have identified several barriers to the use of ADR by consumers across the EU. Coverage gaps have been identified as a recurring issue, along with the low awareness of ADR among consumers and businesses, and the frequent reluctance of businesses to engage in ADR.
- The main problems with cross-border ADR overlap with problems at the national level, but they are aggravated by specifics of cross-border situations, such as language barriers and the physical absence of the consumer from the trader's country.
- Typically, ADR schemes as a rule do *not* accept complaints against traders in other Member States. This is mainly due to a lack of ADR schemes' jurisdiction, knowledge of applicable law, and/or enforceability of final decisions.
- ECC-Net's centralised and IT-supported complaints-handling system plays a fundamental role in bridging language gaps between consumers, traders, and (where applicable) ADR schemes. Moreover, national ECCs directly intervene in cross-border disputes where no ADR scheme is available.

Assessment of selected legislation relevant for consumer redress

- Both the European Small Claims Procedure (ESCP) Regulation and the Injunctions Directive have been fully implemented into national law in all selected jurisdictions (France, Poland, the Netherlands, the UK, Germany), but only the UK has implemented the Mediation Directive (as of March 2011).
- The overview shows that whenever the EU instruments leave discretion to the Member States, implementation across jurisdictions differs.
- Although, at least theoretically, the examined EU legislative instruments share a high potential for offering consumers alternative redress, they have been used in a rather limited number of cases. That could be mainly due to the low level of awareness by consumers; the potential costs related to translation; travelling and lawyers' fees; gaps in the regulatory framework; lack of clarity of the procedure leading to legal uncertainty; and the complexity of the (differing) procedures.

Possibilities for improving cross-border ADR and the need for a specific legislative instrument

- The examined EU legislative instruments are characterised by the fact that they still presuppose court intervention. They can be considered as complementing cross-border ADR schemes, but they cannot serve as effective substitutes.
- A specific EU legislative instrument mandating cross-border ADR across sectors could build on previous (sectoral) legislative requirements, which have proven to encourage the establishment of ADR schemes in Member States.
- An EU legislative instrument either could specifically address cross-border ADR or be a legislative measure for ADR in general. However, a narrow focus on cross-border ADR has significant disadvantages, as it would be difficult to tackle sectoral gaps for cross-border ADR without addressing shortcomings in coverage within a Member State.
- A simple access point (or 'single entry point') for all consumer disputes is compelling. A key function would be to channel the dispute to the most appropriate dispute resolution venue, including ADR, national small claims procedures, the ESCP, or other paths of redress.
- It is very likely that any future single entry point would need to build on ECC-Net's experiences with cross-border complaints, or use ECC-Net as its 'channel' for cross-border complaints. Handling cross-border complaints would be even more efficient if a standard form for these complaints (such as used by ECC-Net) could be also used to transfer cases to a relevant ADR scheme, and if Member States were required to have at least one ADR scheme in each sector (or a cross-sectoral scheme) that accepts complaints submitted in this form in English.
- An EU legal instrument needs to require Member States to ensure sufficient funding for their ADR system to operate effectively. The question of who ultimately pays for ADR schemes (and a possible single entry point) can be answered in many ways, including the government, traders that face claims, service users, and industry sectors. Regardless of each country's choice, a key consideration will be ensuring that independence is not curtailed by the source of funding.

1. INTRODUCTION

The 2009 *Study on the use of Alternative Dispute Resolution in the European Union* found that progress had been made in terms of ADR's availability but barriers still prevented both consumers and businesses from making more use of ADR.[1] Focusing specifically on the cross-border perspective, ECC-Net, a European network that deals with consumer complaints, concluded that "ADR is not working at a cross-border level".[2]

1.1 Main tasks

This report presents the results of research conducted by Civic Consulting between February and May 2011 on the basis of four main tasks specified in the terms of reference (ToR):

1. Provide an overview of existing ADR schemes in all 27 EU Member States based on recently published studies, indicating differences and similarities among Member States.
2. Evaluate the functioning of existing cross-border ADR schemes (e.g. FIN-NET, ECCs – European Consumer Centres, SOLVIT), clarify the possible differences in ADR use in the 27 Member States, and identify possibilities for improvement.
3. Provide an assessment of recently adopted legislation and elaborate how it contributes to facilitatingor complementing cross-border ADR schemes, or whether it can serve as their effective substitute:
   - Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing an EU small claims procedure
   - Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters
   - Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests
4. Assess whether there is a need for a specific legislative instrument to facilitate or to mandate cross-border ADR.

1.2 Approach

In this report, ADR is understood as a dispute resolution procedure that takes place out of court through the use of a pre-established third-party mechanism, i.e. an ADR scheme (also referred to as an 'ADR body').[3] Unless otherwise specified, the report only covers disputes between consumers and businesses (so-called 'B2C').

The specified tasks were approached with desk research, a review of literature and legal frameworks, and semi-structured interviews with relevant EC officials (from DG SANCO, DG MARKT, and DG JUST), representatives of seven ADR schemes, four European Consumer Centres, and national authorities responsible for the transposition of the above-mentioned legislation in France, the Netherlands, Poland and the UK (England and Wales). In addition, the EC database of notified schemes was systematically reviewed in March 2011 and

[1] Civic Consulting 2009.

[2] ECC-Net 2009, p. 57.

[3] ADR schemes, or bodies, have been defined as "Institutional mechanisms responsible for the out-of-court settlement of disputes between businesses and consumers (B2C)," including those that impose or propose a solution to a dispute, as covered by the Commission Recommendation 98/257/EC, as well as bodies involved in the consensual resolution of consumer disputes within the meaning of the Recommendation 2001/310/EC. Settlements reached in the framework of a judicial procedure and dispute resolution schemes between businesses are not contained in this understanding of the term (Civic Consulting 2009, p. 23).

compared to the situation in 2009, and 21 notified, large ADR schemes were contacted with a request for the latest information on their annual caseloads.

1.3 Relevance of (cross-border) ADR

Nearly one-third (29%) of EU consumers made at least one cross-border purchase in 2008.[4] In previous years the corresponding figure was reported to be about one-fourth of EU consumers, with a similar percentage of traders selling across borders.[5] The average value of these transactions has been stable at about 800 Euro.[6]

In such transactions, as well as in those occurring within Member States, various disputes can arise between consumers and traders. A recently published Special Eurobarometer on consumer empowerment found reasons to believe that losses incurred by European consumers due to problems with purchased goods or services reach up to 0.39% of Europe's GDP.[7] Furthermore, nearly half of EU consumers (48%) will not go to court for damages under 200 Euro, and nearly one in 10 (8%) will never go to court, regardless of the monetary value of their claim.[8]

These and other research findings underline the importance of access to out-of-court redress mechanisms for cases of breakdowns in commercial transactions – both cross-border and in-country. Namely, effective ADR has been confirmed to be a low-cost and quick alternative for settling disputes[9] that increases access to justice,[10] promotes consumer confidence in the market, and improves market performance.[11] When functioning well, the various types of out-of-court dispute resolution mechanisms can overcome many problems associated with court proceedings, such as costs, duration, and formality.[12]

1.4 Recent developments

Shortly before the submission of this report, the European Commission presented the final version of the Communication on the Single Market Act, which emphasises the importance of consumer empowerment. Legislation on ADR, including the electronic commerce dimension, is envisaged to be the key action in this area.[13]

Previously, the European Commission opened a public consultation on ADR[14] as part of consultations held before tabling policy proposals on establishing an ADR system in Europe.[15]

The public consultation – "aimed at gathering information on the use of ADR as a means to resolve disputes with traders, at seeking Member States and stakeholders' views on the difficulties identified and at looking into possible ways in which the use of ADR within the European Union (EU) could be improved"[16] – was launched on 18 January 2011 and officially ended on 15 March 2011. In its recently published feedback statement, the EC

[4] DG SANCO 2010, p. 16.

[5] DG SANCO 2010, p. 16.

[6] In 2009, consumers reported making cross-border purchases worth 795 Euro on average (see DG SANCO 2009, p. 5).

[7] Special Eurobarometer No 342 (see Eurobarometer 2011b), p. 178.

[8] European Commission 2011, para. 10.

[9] The vast majority of ADR schemes' procedures are free of charge or cost below 50 Euro, and most cases are decided within a period of 90 days. See Civic Consulting 2009, p. 8.

[10] See *Katholieke Universiteit Leuven* 2007 and CSES 2009.

[11] See European Commission 2011, para. 1; CSES 2009, p. 10.

[12] See Civic Consulting 2009, p. 17.

[13] European Commission 2011a, p. 9.

[14] European Commission 2011.

[15] Euractiv 2011a.

[16] European Commission 2011b, p. 1.

indicated that a total of 220 responses had been received.[17] After the consultation had closed, the IMCO Committee and DG SANCO organised an 'ADR summit' with diverse participation from key stakeholder groups.[18]

Additional developments at the EU level include the adoption of a set of regulatory instruments that tackle ADR at the level of individual sectors, mainly regulated industries. Some directives state an *encouragement* to Member States to ensure that ADR is accessible to consumers,[19] but the most recent regulatory framework has stipulated stronger *requirements* regarding the availability of ADR mechanisms.[20] Moreover, new measures have been introduced in the area of judicial redress, most notably a European Small Claims Procedure[21] (presented in Chapter 4).

Given the broadness of the subject and the multiplicity of issues covered, and in view of each Member State having its own context, traditions, and practices, generalisations about ADR are not easy to make, nor is it possible to provide comprehensive country-to-country comparisons. An additional aggravating factor is that data collections are rather rudimentary in spite of combined research efforts, as will be evident from some of the figures in this study.

Nevertheless, it can be reported with reasonable certainty that ADR has been gaining prominence not only at the EU level but also within Member States, particularly due to the required transposition of European legal instruments into national legal and policy environments.

[17] For further information on the structure of respondents and an overview of responses see European Commission 2011b. Responses in full have been made available at http://ec.europa.eu/consumers/redress_cons/adr_responses_en.htm .

[18] For a summary of contributions, see European Parliament Committee on the Internal Market and Consumer Protection 2011.

[19] For example, the E-commerce Directive, the Postal Services Directive and the Markets in Financial Instruments Directive (see European Commission 2011, para. 13).

[20] The setting-up of ADR has been *required* by the EU legislative frameworks regarding the telecom sector and the energy sector, as well as by the Consumer Credit Directive and the Payment Services Directive (see European Commission 2011, para. 13). Regarding payment services, for example, Member States have to "ensure that adequate and effective out-of-court complaint and redress procedures for the settlement of disputes between payment service users and their payment service providers are put in place". Moreover, Member States are called to strengthen ADR in relation to cross-border disputes, by making sure "that those bodies cooperate actively in resolving them". There is also a requirement that consumers are provided with information on the available redress mechanisms and procedures (see Directive No 2007/64/EC).

[21] Regulation (EC) No 861/2007 establishing a European Small Claims Procedure ('the ESCP Regulation').

2. OVERVIEW OF ADR IN THE EU

KEY FINDINGS

- A 2009 study identified 750 ADR schemes that handle consumer disputes across the EU. Research has revealed significant differences in these schemes both among Member States and business sectors.
- Among the very diverse group of ADR schemes, some main features make it possible to construct a general classification. Those features are: notification, nature of a scheme and its funding, participation of industry, outcomes of procedures, geographical coverage, and sectoral coverage.
- Progress has been made in terms of the availability of ADR mechanisms in the EU, but they have developed unequally and their use is not evenly distributed across Member States. There are geographical, as well as sectoral gaps in the coverage, pointing to disparities in the accessibility of effective ADR to European consumers.
- Confirming previous research, the latest available data for 21 large schemes (i.e. those which handled more than 4,000 cases in any of the observed years) reveals an increasing trend in the use of ADR. In total, about 410,000 cases were reported in the EU in 2006, about 473,000 in 2007, and more than 500,000 in 2008.

In 2009, 750 ADR schemes that handle consumer disputes were identified across the EU.[22] Research has revealed significant differences in these schemes both among Member States and business sectors.[23] These differences point to disparities between the accessibility of effective ADR to European consumers in different countries and sectors, and in cross-border claims.[24] According to a Danish Consumer Council representative, some ADR systems in fact "are not worth telling the consumer about. The point is that they may be the only systems working in some countries."[25]

This chapter will present the overall diversity of ADR schemes, as well as the situations in individual Member States (as far as available data allows).

2.1 General categories of ADR schemes

Among the very diverse group of ADR schemes operating in the EU, some main features make it possible to construct a classification. The main features and variations presented in Table 1 are, inevitably, very generalised. For instance, all categories include further options, such as combinations of public and private funding (and both can take different forms, for example private funding through a levy and/ or membership and/or case fees), combinations of outcomes of procedures, etc. Additional distinguishing features include the cost of procedures for the consumer,[26] the duration of procedures,

[22] See Civic Consulting 2009.

[23] See for example Civic Consulting 2009; ECC-Net 2009.

[24] Such conclusion was reached already in Civic Consulting 2009, and the present research showed that situation has not significantly changed.

[25] Benedicte Federspiel (speaking at *Alternative Dispute Resolution for consumers in the Internal Market*, organised by DG SANCO and IMCO of the European Parliament; Brussels, 16 March 2011).

[26] Some schemes offer procedures completely free of charge for the consumer and some collect case fees, which can then either be refunded if the complainant is successful, or are not refundable (sources: Civic Consulting 2009 and stakeholder interviews in 2011).

and whether collective cases are also accepted. In spite of such factors, a general classification has proved to be a useful analytical framework and can also serve as a framework for this chapter.[27]

Table 1: General features and categories of ADR schemes

Main features	Main variations
Notification	Notified
	Non-notified
Nature of scheme	Public
	Private
	Mixed
Nature of funding	Public
	Private
	Mixed
Participation of industry	Voluntary
	Mandatory
Outcomes of procedures	Non-binding decision
	Decision binding on both parties
	Decision binding on the trader
	Amicable settlement (in mediation)
Geographical coverage	Cross-border
	National
	Sub-national
Sectoral coverage	Cross-sectoral (Multiple sectors)
	Sectoral (One sector)

Source: Civic Consulting

All of these features and especially their combinations affect access to ADR and, along with it, access to ADR in cross-border disputes (discussed in Chapter 3).

2.2 Notification of ADR schemes

The 'notification' of ADR schemes to the European Commission means that Member States and EEA countries consider a particular ADR scheme to conform with relevant EC recommendations. The EC lists notified schemes in an online database.[28] Interviewees who assist consumers deemed this to be a very important criterion in identifying suitable

[27] Those and other traits of ADR schemes were, as much as data allowed, presented in the report commissioned by DG SANCO and prepared by Civic Consulting in 2009, the main reference point for the present chapter.

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

schemes to deal with cross-border complaints.[29] Yet in 2009, only about 60% of the identified 750 ADR schemes had been notified to the EC.[30] The shares of notified schemes were particularly low in some new Member States, but a considerable number of non-notified schemes were also found in some old Member States, such as Austria, Germany, Ireland, Italy and Sweden.

For the present study, data published in 2009 based on the EC database and complementary research was systematically compared to the current status of the EC's database of notified schemes. Any previously notified schemes that are no longer in the database were noted, as were new schemes notified since 2009. It was also observed whether any newly notified schemes in a particular Member State had been previously identified as non-notified. The main finding is that the situation is not significantly different from 2009. Notable exceptions are the Czech Republic and Malta, neither of which had notified schemes in 2009 but where a significant number have since been notified. In other countries, a small number of previously non-notified schemes have been notified. There are still no notified schemes in Bulgaria, Slovakia and Slovenia. In total, the EC database at the time of review[31] contained 471 notified schemes.[32]

As mentioned, for an ADR scheme to be notified, it must abide by European Commission recommendations.[33] Although notification is a relevant factor in determining consumer access to ADR schemes that meet certain standards, the figures presented here should be interpreted with caution. The mere presence of notified schemes in a particular Member State does not convey whether consumers are actually well served by these schemes across different sectors and throughout the country. For example, while Germany has more than 200 notified ADR schemes, actual access to ADR is much more limited than this might signal.[34] On the other hand, while the Netherlands has only four notified schemes, one alone covers 50 different sectors (presented in Chapter 3).[35]

[29] Interviews with directors of ECCs.

[30] Civic Consulting 2009, p. 11.

[31] As of 17 March 2011.

[32] There are reasons to believe that the EC database is not entirely up-to-date: for example, Internet Mediator (*Mediateur du Net)*, a French scheme presented in more detail in the next chapter, no longer operates but is still in the database.

[33] Guiding principles for ADR schemes were spelled out in Recommendation 98/257/EC (on the principles applicable to the bodies responsible for the 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). The former covers procedures entailing an active intervention of an ADR scheme and the proposition or the imposition of a solution, i.e. arbitration-like mechanisms, while the latter covers consensual resolution, such as through mediation.

[34] Stakeholder interviews.

[35] Previous research also found reasons to believe that a considerably larger number than that of the formally notified schemes do in fact meet the requirements specified in EC Recommendations. The most frequently cited reasons for non-notification were the early stage of existence of some schemes, a low awareness of the notification process, the lack of perceived benefits of notification and uncertainty as to which institution the notification request should be addressed to. Another interesting outcome of the survey conducted in 2009 was that nearly one in five of the responding ADR schemes were not able to answer the question on whether they had been notified or not (see Civic Consulting 2009, p. 32).

Table 2: Identified notified and non-notified ADR schemes by Member State

Member State	Notified ADR schemes[(a)]	Non-notified ADR schemes[(b)]
AT	18	4
BE	25	14
BG	0	3
CY	1	0
CZ	20	5
DE	203	24
DK	19	2
EE	2	0
ES	75	1
FI	4	1
FR	19	16
GR	3	0
HU	18	2
IE	5	10
IT	4	125
LT	1	4
LU	5	1
LV	1	2
MT	6	1
NL	4	0
PL	4	20
PT	13	0
RO	1	1
SE	1	15
SK	0	3
SL	0	6
UK	18	21
EU	**471**	**281**

Sources: (a) EC database of notified schemes (as of 17 March 2011).
(b) The list of non-notified schemes identified in Civic Consulting 2009 was revised against the information in the EC database of notified schemes (as of 17 March 2011). It was noted if any previously non-identified schemes have been notified in the meantime. In such cases the figures provided for non-notified schemes in the corresponding Member States were reduced (compared to 2009). It could not be verified, however, whether all non-notified schemes that were identified in 2009 are still operational.

2.3 Nature of ADR schemes and sources of funding

Looking at the nature of individual ADR schemes and the financing of their operations, a basic distinction can be made between public and private schemes and their funding sources.

Of 437 schemes (in the EU27) for which data is available, 333 are public, 71 private, and 33 do not fit this basic distinction. Information is not available for the remaining 309 identified schemes. Germany, with its high number of ADR schemes, is the main contributor to this information gap (but it can be observed that 39 of 60 German schemes for which data is available are public).

Figure 1 presents the shares of the three main categories – public, private, and other – for the EU27. In most countries where data is fairly complete,[36] ADR schemes are predominantly public. These include the decentralised systems in Hungary, Italy, and Spain. Poland also has a clear predominance of public schemes (19 of 24 identified schemes are public). The same conclusion can be made about Belgium despite the missing data about 11 schemes; there are 19 public schemes among 27 for which data is available. Both ADR schemes identified in Romania are public, and in Estonia, there is at least one public scheme (information is not available for the remaining identified scheme).

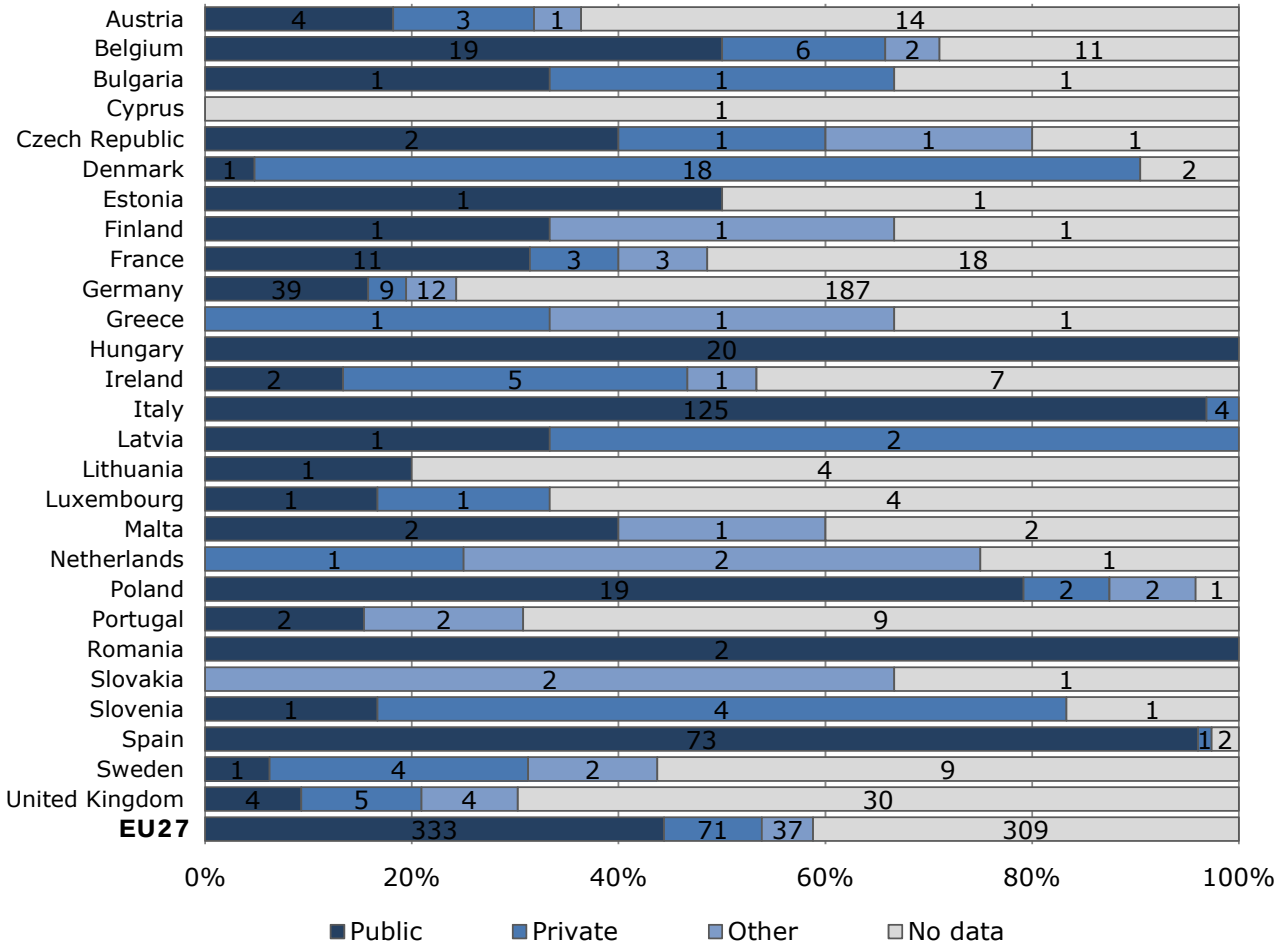
Denmark and Sweden each have a public ADR scheme complemented by private schemes that operate in individual sectors (note that data is available for only seven of 16 identified schemes in Sweden). Latvia and Slovenia emerge as countries with predominantly private ADR schemes. In the financial sector, ADR bodies are often established by the industry, but some have also been established by public law (such as the UK's Financial Ombudsman Service, presented in Chapter 3).

The public-private distinction does not cover all schemes, however. One in five ADR schemes that participated in the 2009 survey[37] stated "other" when asked about the nature of their scheme, often to indicate they were established on the basis of cooperation between the public sector and industry, or consumer organisations and industry. Some other schemes were initially established by industry but approved by regulators. Two ADR schemes presented in Chapter 3 were established in cooperation between industry and consumer organisations – the Netherlands' Foundation for Consumer Complaints Boards and Portugal's Lisbon Arbitration Centre for Consumer Conflicts. Finally, some schemes defined themselves as non-profit or non-governmental bodies without more specific explanations.

[36] It should be noted that the basis for the upcoming country-by-country overviews contained in Figures 1-7 was information published in 2009 in the study on the use and availability of ADR (Civic Consulting 2009). Thus, 100% represents all (750) identified schemes in 2009, including the non-notified ones, and not the updated estimated total (752) of ADR schemes contained in Table 2.

[37] Survey results refer to research conducted by Civic Consulting within the study on the use of ADR in the EU. Unless otherwise specified, the total sample was 164 participating ADR schemes (see Civic Consulting 2009).

Figure 1: The nature of ADR schemes in the EU27



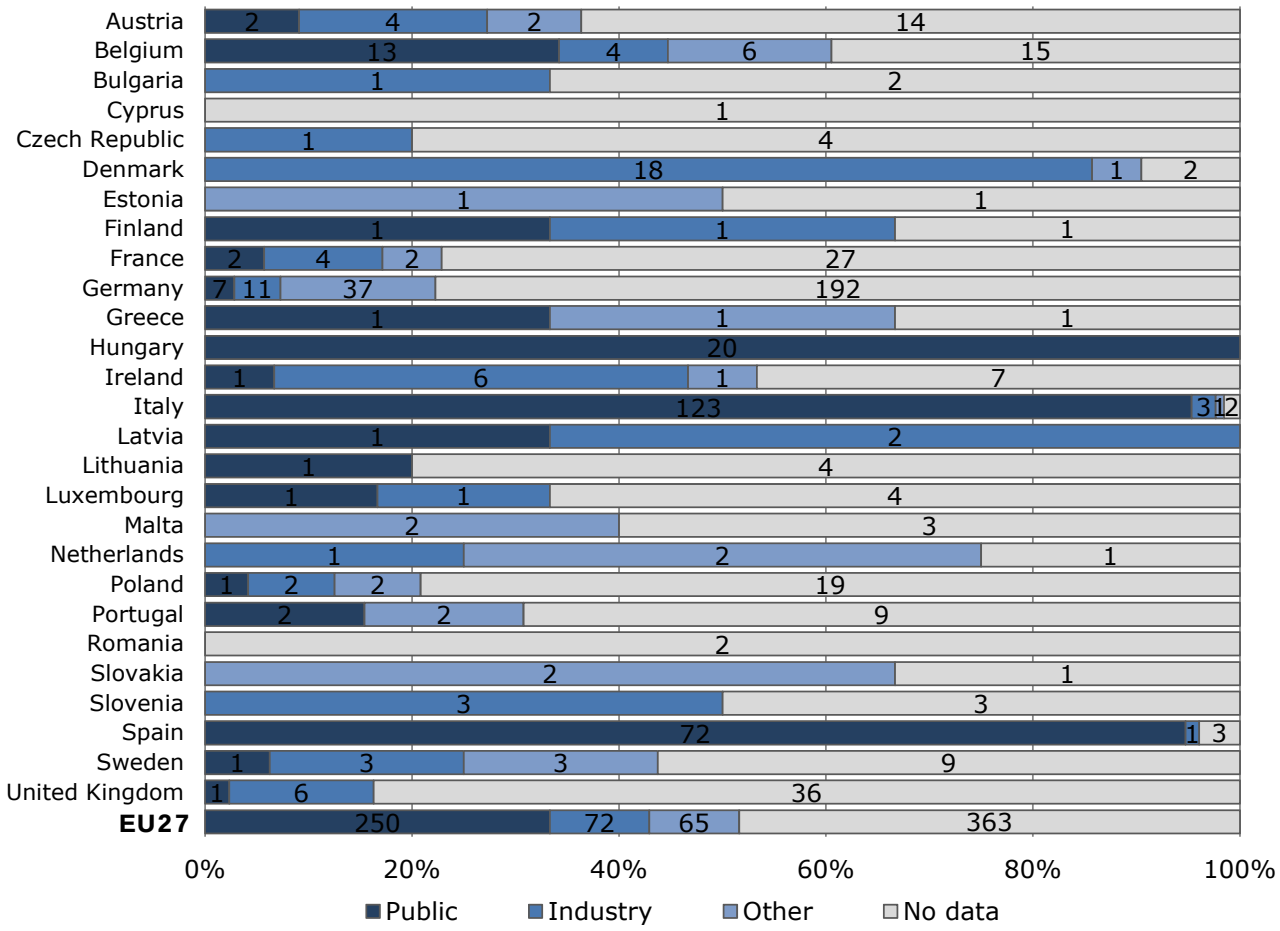
Source: Civic Consulting, based on 2009 data, N = 750

A strong correlation has been found between a scheme's nature and funding, i.e. private schemes are usually financed by industry and public schemes by public funds. However, some ADR bodies established by public law are financed by industry, especially in highly regulated sectors – such examples are Poland's Insurance Ombudsman and the UK's Financial Ombudsman Service.

Most schemes established by a trade association that operate in one sector are financed by the association's members. Few schemes are totally or partially financed by the parties involved in the procedures.[38]

[38] Some national schemes require the party who initiates the procedure to pay a fee to have a case heard by the board. Such example is the Foundation for Consumer Complaints Boards in the Netherlands (see Chapter 3). However, if the final decision is made in favour of the claimant, case fee is refunded and the payment of any awarded damages guaranteed (Civic Consulting 2009 and stakeholder interviews in 2011).

Figure 2: Source of funding for ADR schemes in the EU27



Source: Civic Consulting, based on 2009 data, N = 750

As Figure 2 shows, one-third of the identified 750 ADR schemes in the EU27 are known to be publicly funded. This is a vast majority of all schemes for which data is available. Because there is no information regarding nearly half of the schemes, this share of publicly funded schemes is not conclusive.[39]

The information gap also means that few generalised observations can be made regarding differences and similarities among Member States. What is clear is that the already mentioned decentralised, public ADR systems in Hungary, Italy, and Spain are publicly funded, and that Belgium has a relatively high number of publicly funded schemes among those for which information is available. Belgium is also a good example of the incomplete correlation between a scheme's nature and its funding: while 19 schemes have been identified as public, only 13 have been identified as publicly funded.

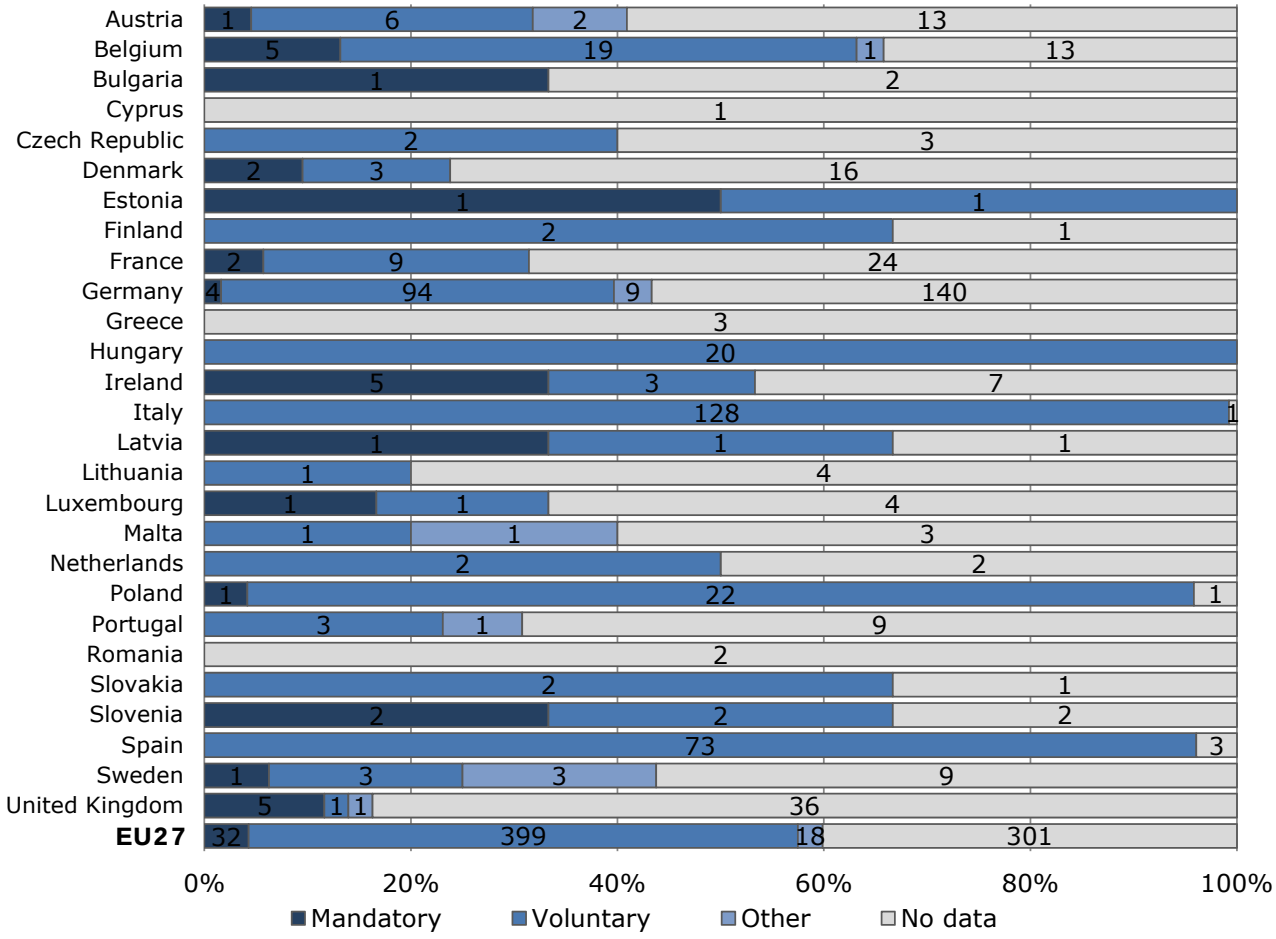
On the other hand, 18 of 19 schemes in Denmark for which information is available are funded privately, as are two of the three identified schemes in Latvia. Austria and Ireland also appear to have large shares of privately funded schemes, but information is not available for many schemes identified in these countries.

[39] It has to be noted that more than 250 schemes receive public funding: some additional ones are included in the "other" category. Participants in the survey conducted by Civic Consulting in 2009 listed some combinations of financing sources, such as industry and public funding, membership fees and public fees, etc.

2.4 Participation and outcomes

Industry participation in ADR procedures is voluntary for a vast majority of schemes (399 of the 449 in the EU27 for which data is available; see Figure 3), but there is also a significant number of mandatory schemes.

Figure 3: Adherence to ADR in the EU27



Source: Civic Consulting, based on 2009 data, N = 750

Participation is considered to be mandatory when an ADR scheme is set up by a trade association, and adherence to the ADR procedure is a condition for professional membership in the association.[40] Adherence by traders can also be mandatory for ADR schemes set up by public authorities. Overall, available data indicates that mandatory participation is more common in regulated sectors, such as financial services, telecommunications, and energy.

Looking at Member States, it is clear that voluntary adherence is characteristic of all identified schemes in Hungary. It can also be observed (even with data missing for some schemes) that Finland, Italy,[41] Poland, Slovakia, and Spain have predominantly voluntary adherence to ADR. Estonia has one voluntary and one mandatory scheme

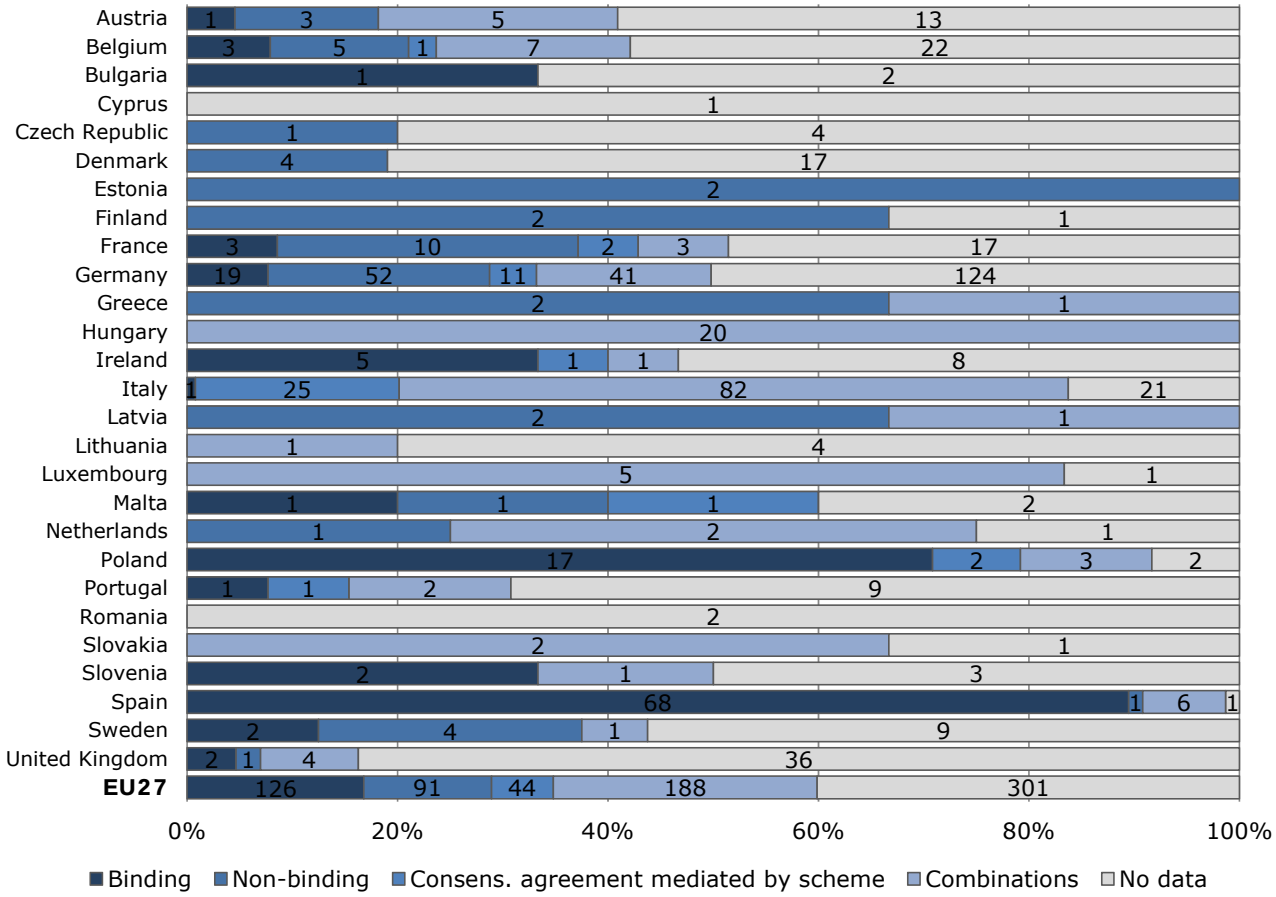
[40] As interviews for this study confirmed, there are somewhat different understandings of what could be considered mandatory participation. The provided example of mandatory participation through the membership in a professional association was in some cases understood as voluntary participation, due to the fact that membership in the relevant professional association itself is not mandatory.

[41] Please note that in Italy, mediation has recently been made mandatory in certain cases as a result of the Mediation Directive (see "La mediazione civile e commerciale" at (*Ministerio della Justizia)* http://www.giustizia.it/giustizia/it/mg_2_7_5_2.wp;jsessionid=6040BCD4300DE291647231B15710A904.ajpAL02 - accessed 5 May 2011).

(the latter covering the insurance industry). The largest numbers of schemes with mandatory adherence were identified in Belgium, Ireland, and the UK (five in each country); they mainly operate in the already mentioned regulated sectors.

As was indicated in Table 1, the diversity of ADR schemes is also reflected in the outcomes of their procedures.[42]

Figure 4: Outcomes of ADR procedures in the EU27



Source: Civic Consulting, based on 2009 data, N = 750

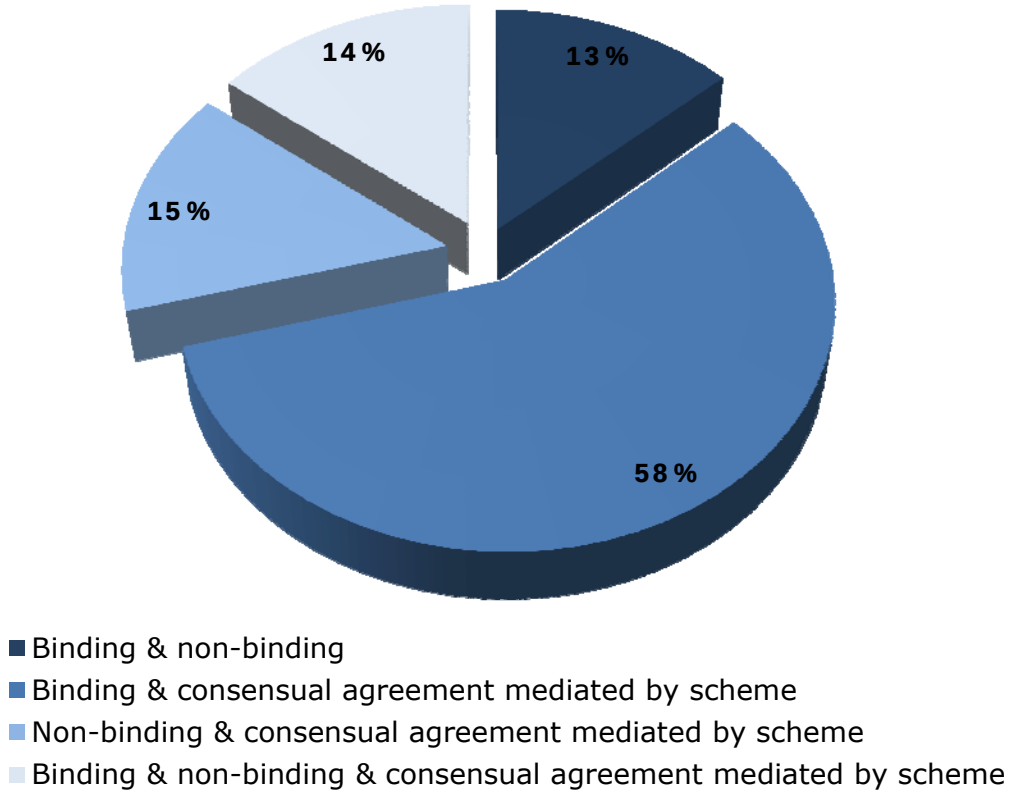
Some schemes issue non-binding decisions or recommendations, while others conclude their procedures with binding outcomes. Some schemes issue decisions binding on businesses but not on consumers, while some issue decisions binding on both parties. Finally, mediation-only schemes do not propose or impose any solutions but try to reach consensual agreements. In practice, many schemes offer a combination of possible outcomes. Especially when decisions are binding on both parties, ADR procedures often foresee a preliminary formal or informal attempt to reach a friendly agreement between the parties, as with Portugal's Lisbon Arbitration Centre and the Netherlands' Foundation for Consumer Complaints Boards (see next chapter).

[42] Civic Consulting 2009, pp. 37-40.

In total, 286 of 449 schemes in the EU27 for which data is available issue binding decisions. Of those 286 schemes, less than one-half (126) only issue binding decisions. The remaining 160 schemes issue binding decisions as one of possible outcomes of their procedures. That is reflected in Figure 4 in the 'combinations' category, examined in more detail in Figure 5.

Among countries where data is relatively complete Poland and Spain stand out with large shares of ADR schemes issuing only binding decisions, whereas Estonia, Finland, and Latvia are predominated by schemes with non-binding outcomes (see Figure). In Hungary, Italy, and Slovakia, most ADR schemes provide for combinations of possible outcomes. In Italy, this refers to combinations of binding decisions and consensual agreements. In Hungary, binding decisions, consensual agreements mediated by the scheme, as well as non-binding decisions are possible outcomes for all 20 identified schemes.

Figure 5: Combinations of outcomes of ADR procedures



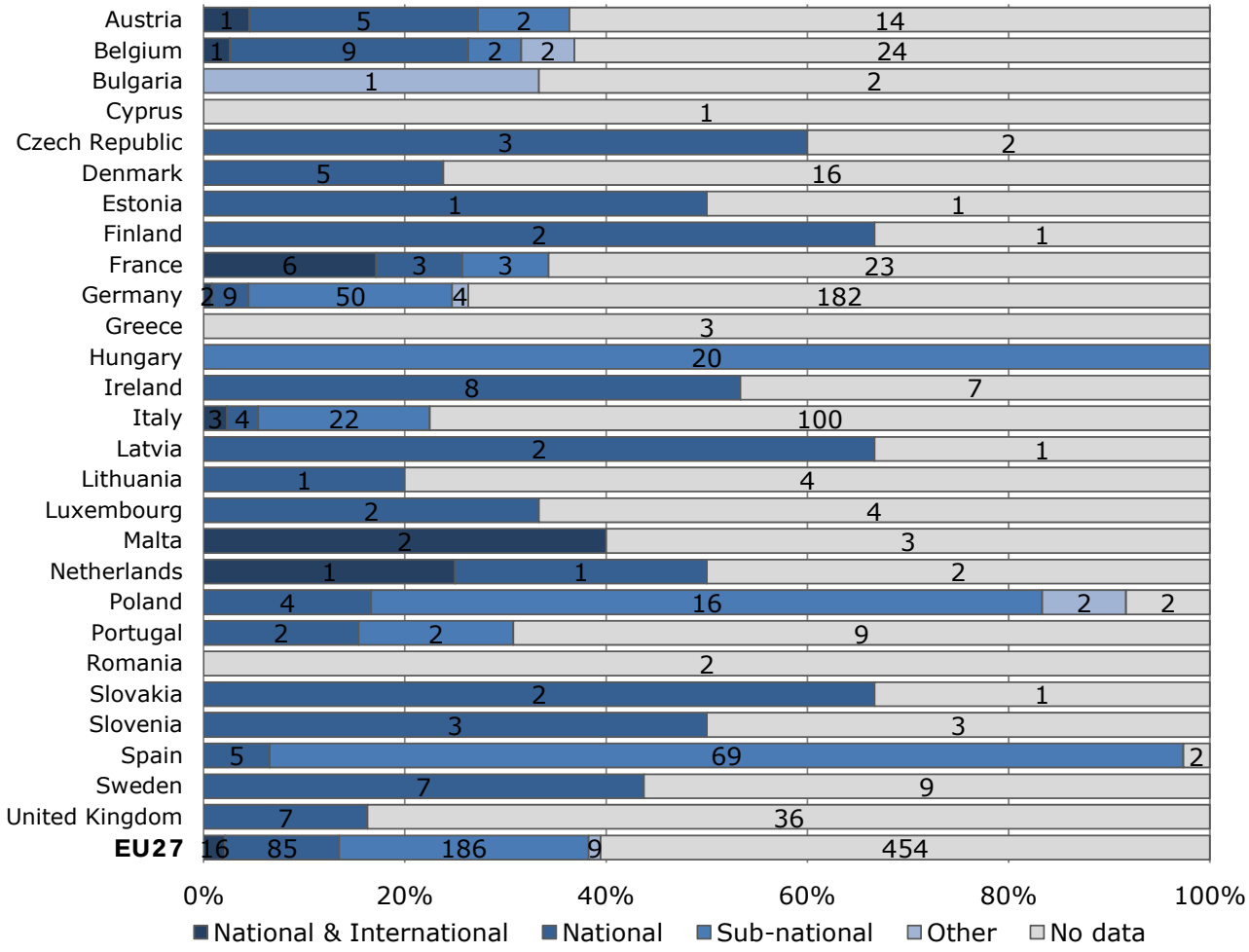
Source: Civic Consulting, based on 2009 data, N = 188

Overall, combinations of possible outcomes are a feature of 188 schemes in the EU27 (among the 449 for which data is available). Further breaking down that group (as in Figure 5), the combination in more than half of all identified schemes (58%) is a binding decision with the option of a prior consensual agreement formally or informally mediated by the scheme.

2.5 Geographical and sectoral coverage

As far as it is possible to generalise from available information, the geographical coverage of ADR schemes in most EU countries is national rather than regional or local.[43]

Figure 6: Geographical coverage of ADR schemes in the EU27



Source: Civic Consulting, based on 2009 data, N = 750

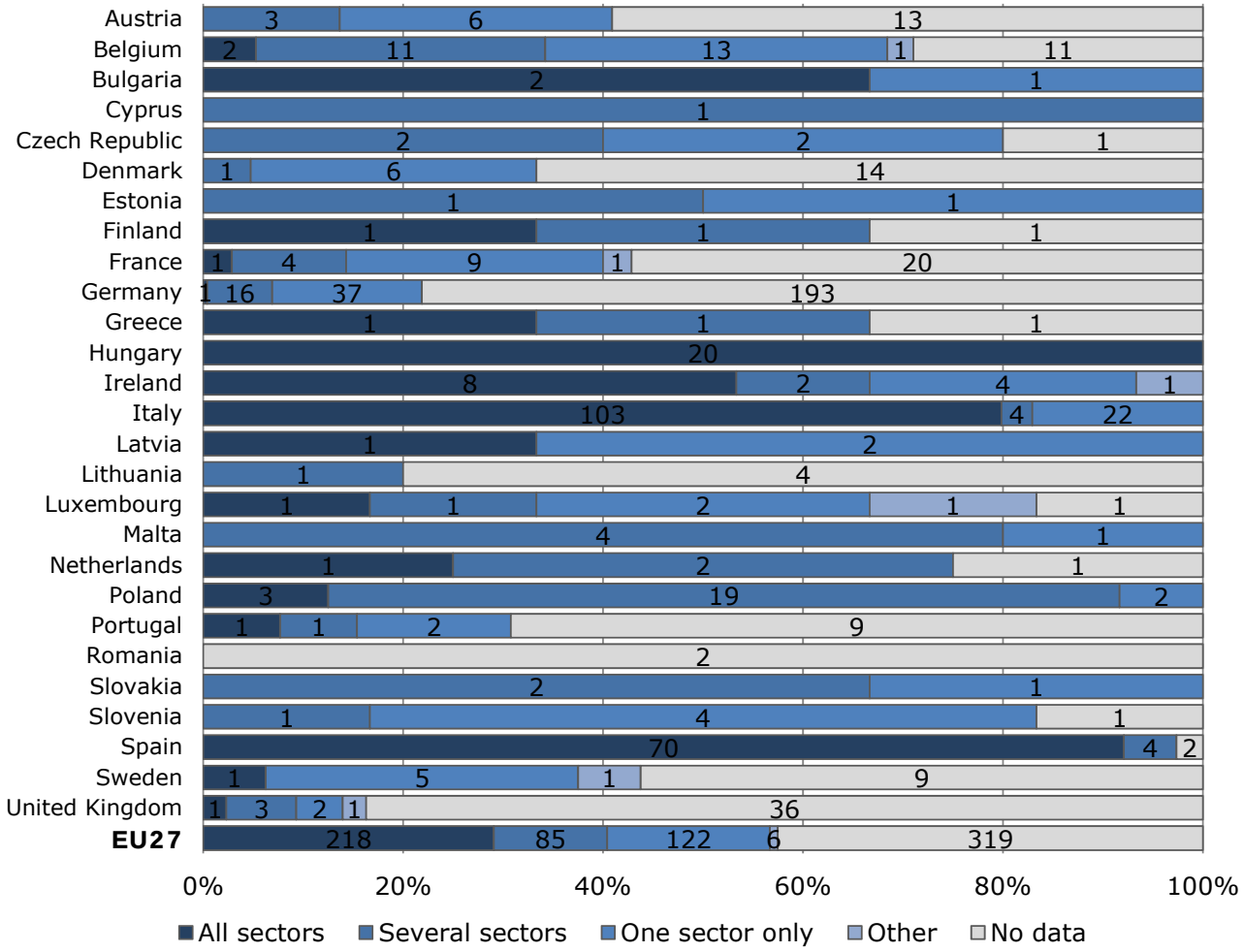
As Figure 6 shows, ADR systems in Hungary, Poland, and Spain are decentralised and the coverage of individual schemes is sub-national. Italy and Germany also have a large number of ADR schemes with sub-national coverage. Information for Portugal was not fully available in 2009 and coverage is specified for only four schemes in Figure 6, but it is clear from the EC database of notified schemes and complementary research conducted for this report that the Portuguese system of arbitration and mediation is predominantly based on sub-national (regional) coverage of individual schemes.[44] However, even in countries with an otherwise decentralised ADR system, some sectors are covered by schemes established by industry with national geographical coverage, especially in the financial services industry.[45]

[43] In Denmark, Estonia, Finland, France, Ireland, Lithuania, Luxembourg, Latvia, the Netherlands, Poland, Slovakia, Slovenia, Czech Republic, Malta, United Kingdom and Sweden, all ADR schemes that participated in the 2009 survey had a national geographical coverage (see Civic Consulting, p. 56).

[44] See http://ec.europa.eu/consumers/redress_cons/ecc_portugal_en.htm.

[45] Civic Consulting 2009, pp. 56-57.

Figure 7: Sectoral coverage of ADR schemes in the EU27



Source: Civic Consulting, based on 2009 data, N = 750

With regard to the coverage of business sectors, one can distinguish between schemes that deal with disputes in several sectors, known as 'cross-sectoral schemes', and those that deal with disputes between businesses and consumers in a specific industry sector (i.e. telecommunications, postal services, travel, transportation), known as 'sectoral' schemes.

Cross-sectoral ADR schemes can be single, centralised operations at the national level that deal with most types of complaints (such as Sweden's National Board for Consumer Complaints and the Netherlands' Foundation for Consumer Complaints Boards; see case studies in Chapter 3). Or they can be arbitration boards with a broad coverage of industry sectors operating at the regional or local level (for example, arbitration centres in Portugal and arbitration courts at Poland's Trade Inspectorates).

Available data indicates that ADR schemes with broad sectoral coverage are the predominant category in Bulgaria, Hungary, Ireland, Italy, and Spain. Meanwhile, Latvia and Slovenia have more schemes that cover only one sector than those that cover multiple sectors.

Among 431 schemes in the EU27 for which data is available (see Figure 7), 122 cover only one sector.[46] A more detailed look at those schemes reveals that 27 are private (established *and* funded by industry), and 29 are public (of public nature *and* publicly funded). Three are of public nature, but funded by industry, among them the Polish Insurance Ombudsman (presented in the next chapter).

A broad cross-sectoral coverage ('all sectors' category in Figure 7) is indicated for 218 ADR schemes. Only five of those are private (in nature *and* funding). Others are predominantly public (in nature *and* funding), and with very few exceptions, they are found in the decentralised ADR systems of Italy, Hungary and Spain.

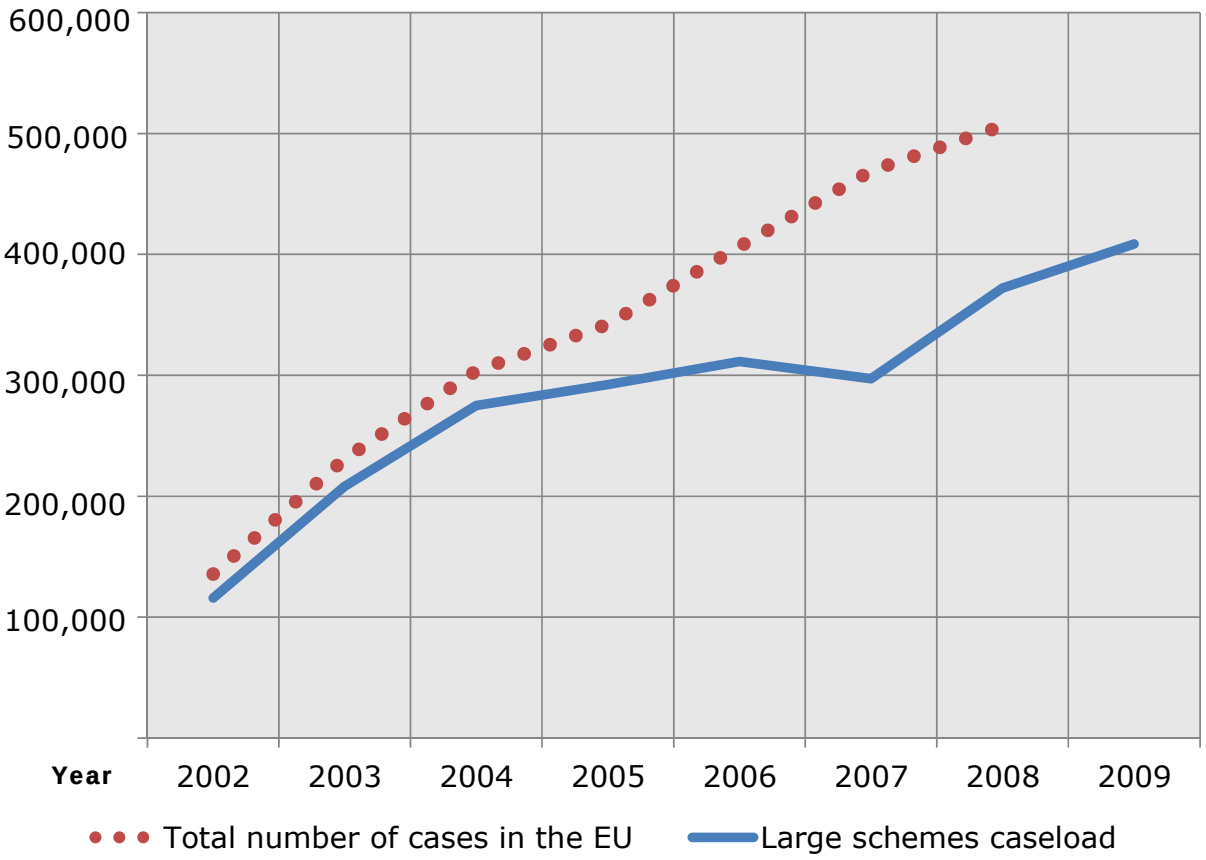
2.6 The use and availability of ADR

Confirming previous research, the latest available data for 21 large schemes (i.e. those which handled more than 4,000 cases in any of the years for which data was reported) reveals an increasing trend in the use of ADR, as can be seen in Figure 8.[47] In total, about 410,000 cases were reported in the EU in 2006, about 473,000 in 2007, and more than 500,000 in 2008.

It is not possible to determine exactly why the number of ADR cases has been rising, but it is likely that the increased availability of ADR schemes combined with higher consumer awareness have played a role. One of the arguments for that conclusion is the fact that several large schemes were only set up in the past decade. Such examples are the *Ombudsmann für Versicherungen* in Germany and the Financial Ombudsman in the UK, both launched in 2001. In addition, many ombudsman schemes related to network industries (energy and telecommunications) were also created only when these services were opened to competition in the late 1990s/early 2000s. With the creation of those schemes both the availability and visibility of ADR were significantly increased.

[46] It should be noted that sectoral schemes do not always cover all companies within a particular sector.
[47] Civic Consulting 2009, p. 13.

Figure 8: Caseload of large schemes and estimated total of ADR cases in the EU



Source: Civic Consulting (data published in 2009 was updated with the latest available figures for 21 large schemes)

As Table 3 shows, large schemes often deal with B2C disputes in one sector (e.g. financial services, telecommunications, transportation) at the national level. By far the highest caseload has consistently been reported by the UK's Financial Ombudsman Service (more than 163,000 cases in 2010), whereas others typically report from 5,000 to 20,000 cases per year.

Table 3: Number of cases handled by large schemes (2003-2010)

Name of scheme	MS	2003	2004	2005	2006	2007	2008	2009	2010
Rundfunk und Telekom Regulierungs GmbH	AT	2,183	4,766	3,646	2,852	3,494	5,226	4,258	4,403
Internet Ombudsman	AT	716	960	1,460	4,730	7,478	7,353	10,009	10,046
Service de médiation pour les telecomm.	BE	9,380	11,434	13,191	17,611	16,372	19,800	22,899	25,017
Service de médiation pour le secteur postal	BE	3,645	5,928	7,560	8,747	11.990	9,608	10,979	11,428
Service de médiation auprès du Groupe SNCB	BE	2,339	2,378	2,961	3,664	6,130	5,518	5,127	7,200
Ombudsmann für Versicherungen	DE	6,295	6,608	7,141	12,786	11,583	13,375	12,371	n.a.[(a)]
Ombudsmann der privaten Banken	DE	2,470	4,263	2,791	3,753	3,610	4,837	6,514	6,495
Federal Financial Supervisory Authority	DE	20,985	24,419	19,035	18,051	16,591	22,408	22,329	n.a.
Consumer Complaints Board	DK	5,329	3,727	3,101	2,976	2,669	2,647	2,812	3,242
Sistema arbitral de consumo (national total)	ES	58,504	65,577	52,333	56,476	61,759	76,242	91,922	n.a.
Consumer Disputes Board	FI	3,566	3,982	3,404	3,977	4,115	4,506	4,189	4,381
Médiateur de la Fédération Française des Sociétés d'Assurances	FR	723	741	1,502	2,761	4,002	4,350	5,067	n.a.
Financial Ombudsman Services	IE	-	-	3,337	3,795	4,374	5,947	7,619	7,230
Banking Ombudsman	IT	4,512	4,683	4,204	3,881	3,702	4,206	4,284	407[(b)]
Foundation for Consumer Complaints Boards	NL	11,873	11,781	12,990	11,973	11,280	11,064	10,483	7,826[(c)]
Insurance Ombudsman	PL	3,518	4,425	4,801	6,610	7,037	7,772	8,566	11,947
National Board for Consumer Disputes	SE	6,578	6,448	6,721	6,797	7,197	7,758	8,381	7,216
Financial Ombudsman Service	UK	62,170	97,901	110,963	112,923	94,392	123,089	127,471	163,012
Advertising Standards Authority	UK	3,519	12.711	26,236	22,429	24,192	26,433	28,929	n.a.
Office of the Telecomm. Ombudsman	UK	-	2,426	4,979	4,712	4,295	5,824	7,784	9,673
Energy Ombudsman	UK	-	-	-	17	1,676	4,173	6,606	5,438
Total caseload (21 large schemes)		*208,305*	*275,158*	*292,356*	*311,521*	*297,147*	*372,136*	*408,599*	*(partial) 284,961*

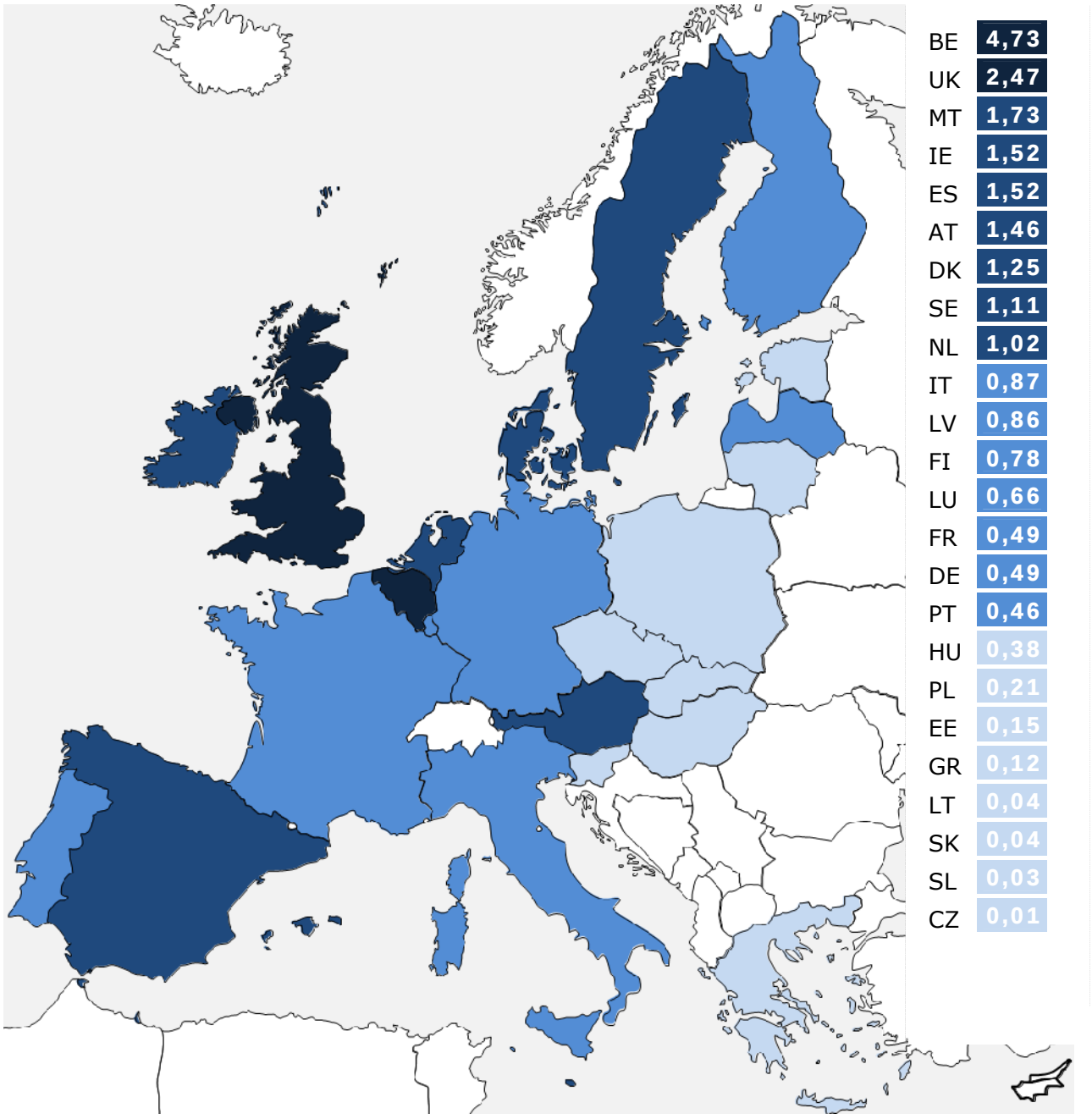
Source: Civic Consulting, based on data provided by ADR schemes

(a) n.a. stands for 'not available' at the time of submission of this report.
(b) The Italian scheme explained that the drop in the number of complaints is due to the fact that the competence of the scheme has been limited to investment-related complaints since mid-October 2009.
(c) The Dutch scheme emphasised that figures for 2010 are not directly comparable with those for previous years due to some changes in the scheme's policies and procedures.

The use of ADR, as Figure 9 shows, is not evenly distributed across Member States (based on the number of cases per 1,000 inhabitants in 2007, the year for which the most complete dataset is available).

Placing the incidence of ADR cases in proportion to country populations, Belgium emerges as the clear leader in the use of ADR schemes with 4.73 cases per 1,000 inhabitants, followed by the UK (2.47). Other countries above the average (0.99) are Malta, Ireland, Spain, Austria, Denmark, Sweden, and the Netherlands. Greece stands out with the lowest figure among old Member States (0.12), and in several new Member States (Czech Republic, Lithuania, Slovakia, and Slovenia), fewer than 0.1 cases per 1,000 inhabitants were noted.

Figure 9: The use of ADR in the EU27

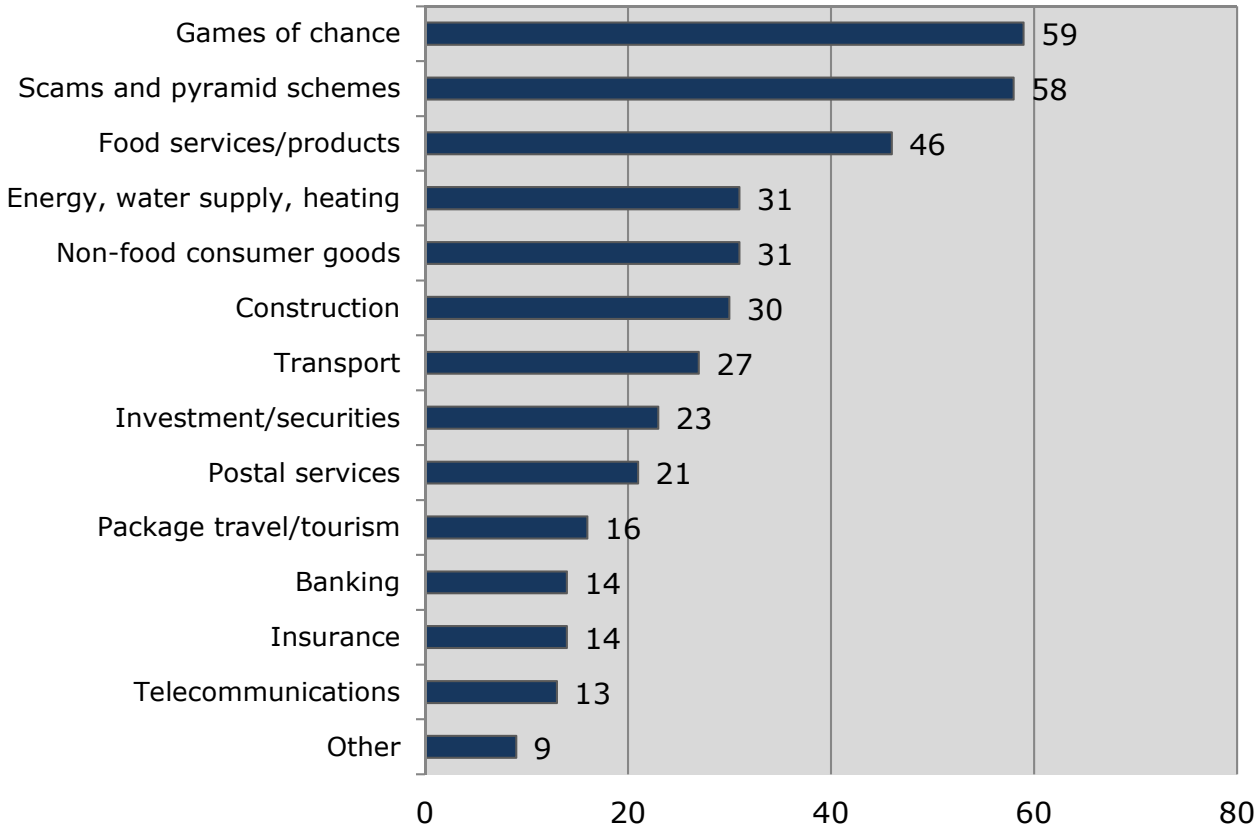


Source: Civic Consulting, based on 2009 data

Looking at the availability of ADR in different sectors, observations by participants in the five complementary surveys conducted in 2009 are instructive. Respondents – ADR schemes, notifying authorities in Member States, ECCs, national business associations, and consumer organisations – were asked to identify industry sectors in which it was not possible for consumers to obtain redress through ADR because no relevant schemes were available.

Although gaps in coverage vary across Member States, several sectors have been identified as those in which ADR is particularly inaccessible: games of chance, scams and pyramid schemes, and food services and products (see Figure). On the other hand, the financial services, package travel/tourism, and telecommunications sectors are most widely covered by ADR schemes.

Figure 10: Sectors that lack ADR coverage



Source: Civic Consulting 2009, N=80 (multiple choices possible)[48]

ADR schemes operating in the financial, travel, and transportation sectors often also deal with cross-border disputes, typically in close cooperation with the ECCs or through FIN-NET. How that cooperation takes place and how ADR generally functions in cross-border situations will be covered in the next chapter.

[48] Surveys among all stakeholder groups; only those who answered the question (Civic Consulting 2009, p. 59).

3. THE FUNCTIONING OF EXISTING CROSS-BORDER ADR SCHEMES

KEY FINDINGS

- Research and public consultations have identified several barriers to the use of ADR by consumers across the EU. Sectoral and geographical coverage gaps have been identified as recurring issues, along with the low awareness of ADR among consumers and businesses, and the frequent reluctance of businesses to engage in ADR.

- The main problems with cross-border ADR overlap with problems at the national level, but they are aggravated by specifics of cross-border situations, such as language barriers and the physical absence of the consumer from the trader's country.

- Typically, ADR schemes as a rule do *not* accept complaints against traders in other Member States. This is mainly due to a lack of ADR schemes' jurisdiction, knowledge of applicable law, and/or enforceability of final decisions.

- ECC-Net's centralised and IT-supported complaints-handling system plays a fundamental role in bridging language gaps between consumers, traders, and (where applicable) ADR schemes. Moreover, national ECCs directly intervene in cross-border disputes where no ADR scheme is available.

Having set the basic framework, the report now focuses on cross-border ADR. Seven ADR schemes with cross-border coverage and three relevant European networks were examined in detail and some of the key issues in cross-border ADR were discussed with ADR professionals and relevant EC officials. These schemes and networks will be presented in the form of short case studies. The narrative presentations of ADR schemes are complemented by a schematic overview with standardised/comparable information about each scheme (see Table 4). The chapter concludes with an assessment of main barriers obstructing access to (cross-border) ADR.

3.1 Case studies: ADR schemes with cross-border coverage

A common characteristic of the ADR schemes presented here is that they all deal with cross-border cases and have been notified to the European Commission. However, some of their other features and methods of practicing alternative dispute resolution differ greatly.

The following ADR schemes are presented: Foundation for Consumer Complaints Boards *(Stichting Geschillencommissies voor consumentenzaken)* of the Netherlands; Financial Ombudsman Service, of the UK; *Mediateur du Net* of France; Insurance Ombudsman *(Rzecznik Ubezpieczonych)* of Poland; Lisbon Arbitration Centre *(Centro de Arbitragem de Conflitos de Consumo de Lisboa)* of Portugal; National Board for Consumer Disputes, *(Allmänna reklamationsnämnden)* of Sweden; and Conciliation Body for Public Transport *(Schlichtungsstelle für den öffentlichen Personenverkehr)* of Germany.

Table 4: Overview of case studies – ADR schemes with cross-border coverage

ADR CASE STUDIES	NL	UK	FR	PL	PT	SE	DE
	Foundation Consumer Complaints Boards	Financial Ombudsman Service	Internet Mediator	Insurance Ombudsman	Lisbon Arbitration Centre	National Board for Consumer Disputes	Conciliation Body for Public Transport
Established	1970	2001	2003	1995	1989	1968	2009
Sectors covered	multiple (50 ADR boards)	financial services (all)	all	insurance	all	all	transport
Cases (2010)	7,826	163,012	not available	11,947	2,930	7,216	3,424
Nature of scheme (founders)	private (consumers' & traders' org.)	public	non-profit association	public	public	public	private (service providers)
Funding	mixed (public and traders)	industry (levy & case fees)	mixed (public & industry)	industry	public	public	industry
Cost for consumer	25-125 Euro (refundable)	free of charge	free of charge	free of charge	free of charge	free of charge	free of charge
Attempt at amicable settlement	yes	yes	yes	yes	yes	no	no
Adherence	mandatory for members	mandatory (by law)	voluntary	mandatory (by law)	voluntary	voluntary	voluntary
Bindingness of decisions	yes (for members)	yes (with legal basis)	consensual agreements	no	yes	no	no
Decisions published	yes, anonymously	summary data	no	summary data (a)	no	yes	no
ODR	yes	no (upcoming)	yes	no	partially(b)	no (upcoming)	yes (c)
Web site language	NL (directing non-speakers to ECC-Net in EN)	26 languages (plus EN & British sign language)	FR (basic presentation in EN)	PL (general info also in EN)	only PT	SE (partially DE, EN, ES, FR, FI, Arabic, Romani, sign)	only DE
Language capacities	NL	large (outsourced)	FR, EN	PL, EN, DE, FR	PT, ES, EN, FR	SE, EN	DE, EN, FR
Web site says cross-border (CB) cases are accepted	yes	yes	yes	no	yes	yes	no
Type(s) of CB complaints accepted	only against NL traders with a few exceptions	against UK providers & non-UK within voluntary jurisdiction	all cases (including non-EU countries)	all cases (d)	only against traders based in PT	against SE traders & against non-SE on case-by-case basis	against DE companies & against non-DE (voluntary jurisdiction)
Share of CB cases	about 1-2%	about 2%	9.5% (2009)(e)	around 4%	about 3%	not available	about 30%
Most frequent CB cases	travel, leisure & recreation, legal services, energy, telecomm.	banking, investment, insurance	e-commerce, travel, electronic comm.	insurance	travel/air transport, car rental	air travel, timeshare/ holiday clubs, car rental, e-commerce	air travel, rail
Cooperation with networks	ECC-Net	FIN-NET & ECC-Net	ECC-Net	FIN-NET & ECC-Net	FIN-NET & ECC-Net	FIN-NET & ECC-Net	ECC-Net

Source: Civic Consulting

Notes to Table 4:

(a) As explained by the scheme's representative, the Polish Insurance Ombudsman's annual report includes the names of implicated insurers as well as numbers of complaints, of settlements, and of cases in which the insurers did not change their initial (disputed) decisions.
(b) Lisbon Arbitration Centre makes ODR available in the information and mediation phase.
(c) CBPT explained that they offer the possibility to file complaints online and they conduct most of the communication by e-mail, but they typically try to call the implicated company and the complainant and speak to them at least once.[49]
(d) All cases of complaints against insurance providers are accepted, but those against providers based outside of Poland are, when that is possible, forwarded through FIN-NET to the competent bodies in the providers' Member States.
(e) The quoted share of cross-border cases dealt with by the French Insurance Ombudsman is not directly comparable with data for other schemes, as it includes cases involving non-EU parties as well as C2C cases.

3.1.1 Foundation for Consumer Complaints Boards (the Netherlands)

The Foundation for Consumer Complaints Boards (FCCB) is an ADR scheme that operates as an umbrella body with national and broad cross-sectoral coverage. It handled 7,826 cases in 2010. Adherence is mandatory for businesses by virtue of their membership in the trade associations that participate in the scheme,[50] and the outcomes of its procedures are binding on both parties. The trade associations cover 85% of the budget, and the government subsidises infrastructural cost.[51] Apart from its broad coverage, the main distinguishing features of this scheme are its longevity, cooperation with consumer organisations, the so-called compliance guarantee, and a high capacity to support the introduction of ADR in new trade branches.

The FCCB has been steadily expanding since it was founded in 1970. It had eight complaints boards in 1985, 44 in 2009,[52] and there are 50 at present, with new boards being developed on an ongoing basis.

The complaints boards as a rule only accept complaints against Dutch traders. An exception is a small number of traders outside the Netherlands that are voluntarily committed to relevant complaints boards.[53] The overall number of cross-border cases is low compared to the total caseload, ranging from 138 to 220 per year in the period from 2005 to 2009.

[49] The interviewee explained that pure ODR is not always the most appropriate solution and offered an example: "Of course, the advantage of online dispute resolution is the efficiency, but there is the risk that it gets too impersonal… For example, we had many claims regarding a railway company that had problems with its air conditioning in Germany in the summer and people got the compensation of 500 Euro if they seriously physically suffered. But to know how… it was for them from a health perspective, we decided it was better to talk to people in person rather than to just read what they wrote online. We all know that the capacities of expressing yourself via email are quite different from those in person, depending on education and so on, and we didn't want to exclude people from our procedure."

[50] All members have to participate in ADR procedures in case complaints arise, but non-members are not subject to ADR procedures. As a scheme's representative explained, complaints boards are for that reason set up in cooperation with trade associations wich represent the main part of the market in their sectors.

[51] Civic Consulting 2009, p. 483.

[52] Civic Consulting 2009, p. 483.

[53] The interviewee provided the example of a large furniture store in Belgium which has a lot of Dutch customers and thus found it beneficial to commit itself to ADR procedures provided by this ADR scheme.

"One of the important aspects of our structure is that we are a cooperation between the traders, represented by the trade associations, and the consumer organisations on the other hand, and the government supports that. In the Netherlands this is fully integrated into the way of thinking, doing business and dealing with consumers."

Foundation for Consumer Complaints Boards

A general requirement for the admissibility of complaints is that the consumer must have already attempted to solve the problem directly with the trader. If there is no satisfactory response from a business within four weeks, the consumer can file a complaint. As a rule, there are no limitations of the minimum or maximum value of the subject of a complaint. To register a complaint, the claimant has to pay a case fee based on the value of the claim.[54] The fee is refunded if the complaint is resolved positively. There is also a compliance guarantee, meaning that if the trader does not comply with the final decision, the trade association of which the trader is a member covers any damages awarded in the ADR procedure.[55]

The FCCB is not a member of FIN-NET because it does not deal with financial services, but it relies strongly on the ECC-Net to bridge language gaps (all web content, as well as case forms and documents produced within ADR procedures are available only in Dutch). Cooperation between the FCCB and ECC Netherlands works quite well according to the interviewees. The director of ECC Netherlands praised the existence of an umbrella ADR body for the ease of access and coordination.

The interviewee from the FCCB said umbrella organisations are effective because they make it easier for ADR bodies in different sectors to communicate with one another and operate in a professional manner. This is important, among other reasons, because it builds trust in ADR procedures among traders. The scheme provides consumers with one central point to which they can turn, and procedures are uniform across various sectors, so once consumers know one procedure, they know them all.

The interviewee also emphasised the benefits of the scheme managing ADR procedure in a fully electronic manner. This ensures a high level of transparency for claimants, who can use IT to check the current status of their complaints. The scheme is also transparent regarding the types of cases and decisions made. Companies' names are not published (as they are in Sweden; see Section 3.1.6), but cases are published anonymously, along with final decisions, which helps consumers and traders resolve similar disputes. As mentioned, however, the scheme operates exclusively in Dutch, so it is not directly accessible for people who do not know the language.[56]

[54] Fees range from 25 to 125 Euro.

[55] As previously reported (Civic Consulting 2009, p. 483), the complaints boards issue 'binding advice' and the branch organisation of the trader involved in a dispute guarantees the execution of the decision of the complaints board. If the trader does not comply with the decision, the trade association compensates the consumer and passes the cost on to the reluctant entrepreneur.

[56] In the view of the scheme's representative, cooperation with the ECC can "take away the language problems". The director of ECC Netherlands emphasised that the ECC assists non-Dutch-speaking consumers in accessing the scheme and its procedures, but it does not have the resources to provide extensive translation services.

3.1.2 Financial Ombudsman Service (UK)

The Financial Ombudsman Service (FOS) was established by public law but is financed by industry. It operates in a highly regulated financial services market with specified legal requirements that the scheme and businesses have to follow. Participation by UK-based businesses operating in sectors covered by FOS is mandatory and final decisions are binding.[57] There are also several hundred non-UK businesses within the so-called voluntary jurisdiction.[58] FOS processed more than 163,000 cases in 2010, which makes it by far the largest ADR scheme in Europe in terms of annual caseload. In 2010, 2,078 cross-border consumers from 93 countries brought complaints to the scheme about UK financial services and products.[59] Economies of scale allow for highly professional services and ease of access for those who do not speak English.

FOS was founded under the Financial Services and Market Act 2000, on the basis of several separate schemes that had been set up by industry (including banking, insurance, and investment ombudsmen).[60] The scheme has national coverage and received almost one million cases in its first decade.[61]

Regulations lay out the procedures to be followed by every UK-based financial services company in case of a consumer complaint.[62] If the complaint cannot be resolved at the company level, the consumer can initiate a FOS procedure. Registering a claim is free for the consumer, while every business involved in a case must pay a set fee (500 Pounds), regardless of the outcome. This provides an incentive to resolve complaints at the company level.

"We are not only large, but we also have a strong jurisdiction under the law. Thousands of firms have to join us by law, and we have the power to order redress. And there is a regulator behind us that can enforce that redress."

Financial Ombudsman Service

FOS does not publish its individual cases, but it does publish complaints data every six months, showing the number and outcome of cases they handle. They make available the data for about 150 "*named* financial businesses that together account for around 90% of the ombudsman service's workload".[63]

The share of cross-border cases handled by the scheme was about 2% in 2010. FOS deals with claims from consumers – regardless of where they live – that involve traders operating from UK-based establishments. The scheme does not handle complaints against businesses based in other Member States. An important exception is so-called voluntary jurisdiction, which means that businesses contractually bind themselves to

[57] FOS is one of the schemes with multiple possible outcomes of ADR procedures. Final decisions are automatically binding on the businesses, whereas consumers are not prevented to take their case to court, unless they accept the scheme's final decision, which then becomes binding for both parties.

[58] See regulations regarding voluntary jurisdiction at http://fsahandbook.info/FSA/html/handbook/DISP/2/5 (accessed on 25 March 2011).

[59] FOS 2010, p. 22.

[60] Together with the building societies ombudsman they employed around 350 staff and handled some 25,000 cases a year. Ten years on, in 2010, FOS had over 1,000 staff and settled more than 165,000 cases (see FOS 2010, p. 12).

[61] FOS (2010, p. 25) reported that 966,598 cases had been brought to the scheme by the time of publication of its annual report in 2010.

[62] See http://fsahandbook.info/FSA/html/handbook/DISP/2/5 (accessed on 25 March 2011).

[63] See http://www.financial-ombudsman.org.uk/publications/complaints-data.html (accessed on 25 March 2011).

an indiscriminate adherence to FOS' final decisions. A fairly broad coverage in this way is another distinguishing feature of this ADR scheme.

As the FOS interviewee explained, voluntary jurisdiction is primarily aimed at businesses in other Member States that provide services to UK consumers. The interviewee cited the example of PayPal: "They are a Luxembourg firm, authorised and based in Luxembourg, but they have joined our voluntary jurisdiction to cover all of their activities across the whole of the EEA. So for businesses like PayPal, we are the ADR for the whole of their EEA activities." In practice, a Hungarian consumer shopping in Germany from a trader in Austria could use PayPal as the payment instrument for the transaction. If something goes wrong, the consumer would be able to turn to FOS and the case would be treated in the same way as if the consumer was from the UK and the case involved a UK firm.

For cases in which FOS has no formal jurisdiction, it deems its membership in FIN-NET as very important, and it tries to help consumers identify the correct scheme for their complaint. If no appropriate scheme is available for a consumer's grievance, the point of further reference is ECC-Net.

Strengths of this scheme include its economies of scale, which make it possible to accommodate consumers' language preferences, as well as to organise the procedure in a highly professional manner. FOS' language capacities are the strongest among all identified ADR schemes. The consumer-oriented content on its website is available in 26 languages, in addition to English and British sign language.[64] Through an outsourced translation service, FOS can provide immediate assistance in many additional languages. The regulatory backing is a strength beyond any others, effectively representing an enforcement guarantee for the consumer.

3.1.3 Internet Mediator (France)

The French Internet Mediator frequently appears as an exemplary scheme in reports and discussions about ADR. It is marked by good practices such as conducting the entire dispute resolution procedure online, its broad geographical coverage, and its high rates of conflict resolution. However, this ADR scheme is no longer operational. It was discontinued in December 2010 after an operating grant from the government was terminated. It is nevertheless included in this overview because of its unique practices and as an illustration of the volatility of the ADR system under its current set-up.

This scheme was established in 2003 by the Internet Rights Forum as a pilot project to assess the feasibility, reception and impact of a mediation service among Internet users and businesses.[65] Its purpose was to deal with disputes related to e-commerce and the provision of Internet access services (e.g. problems related to cancelling a contract). Business-to-business (B2B) cases were excluded, but the scheme did admit consumer-to-consumer (C2C) cases, making it rather exceptional among ADR schemes. This meant, for example, that the scheme in practice also covered transactions involving private individuals carried out on eBay.

[64] As of 30 April 2011 (at http://www.financial-ombudsman.org.uk/accessibility/languages.html).

[65] The Internet Rights Forum was constituted in 2001 as a non-profit association with several missions: informing and increasing awareness on Internet-related issues, organising consultation between authorities, businesses and users on these issues, and offering a mediation service to the general public in order to manage the disputes arising online. Its funding (at the time when the scheme was still in existence) was 80% covered from public funds.

The claimant first must have tried to obtain redress from the trader. If there was no response within one month or the consumer deemed the response unsatisfactory, he or she could file a claim to the online mediation service. The purpose of the scheme was to provide easy and free access to mediation to Internet users. As the interviewed representative of the scheme explained, the electronic platform copied the patterns of mediation when parties are physically present, and enabled geographically distant parties "to benefit from a simple, flexible and supervised access to mediation". Compliance rates were found to be "very high".[66]

"The mediator played the traditional role of the benevolent and delivering mediator attentive to the parties. The rules of independence, impartiality, neutrality and confidentiality were followed to the letter."

Internet Mediator

Cross-border situations are frequent in e-commerce, and the Internet Mediator dealt both with claims from consumers from other countries against companies based in France, as well as complaints from French consumers against traders located abroad. Complaints could be submitted in French or English. In 2009 nearly one in 10 cases was cross-border (9.5%), though this is not directly comparable with available data for other schemes, as it includes cases involving non-EU parties as well as C2C cases.[67]

The scheme relied heavily on ECC France for support with handling cross-border complaints. In fact, in most cases ECC tried to intervene first. As the director of ECC France explained, "If we had sent all the e-commerce cases we received to the *Mediateur Du Net* – who was also handling national cases – they would not have been able to deal with all of them. So, we agreed to be a kind of filter: try first, and if we cannot find a solution, then the case goes to ADR." Even with such filtering, the share of cross-border cases dealt with by the scheme constantly increased.

The interviewee assessed the online dispute resolution (ODR) aspect of the service to be a particular strength of the scheme. Weaknesses were tied to resource constraints, and in the end this clearly led to the dissolution of the otherwise seemingly well-functioning mechanism.

Discussions are ongoing as to whether the Internet Mediator should be replaced by an entirely new scheme founded and funded by businesses.

3.1.4 Insurance Ombudsman (Poland)

The Polish Insurance Ombudsman is a scheme with national coverage that is limited to the insurance sector. Established by public law,[68] it is financed by insurance companies and open pension funds. Regulations specify all major aspects of the scheme, as well as require businesses to provide information about problematic matters to the scheme within a specific time.[69] While adherence to the procedures is mandatory, final decisions are not binding. The scheme handled 8,566 cases in 2009.[70]

[66] See Civic Consulting 2009, pp. 107, 193.

[67] Statistics regarding B2C cases within the EU only are not available.

[68] The roots of current legislation are in the basic provisions which regulated the functioning of the Insurance Ombudsman in the Act of 28 July 1990 concerning the insurance business. Later the competence of the Insurance Ombudsman was extended (see http://www.rzu.gov.pl/english/Causes_of_creating_the_Insurance_Ombudsman_institution_in_Poland_2322English (accessed on 27 April 2011)).

[69] The law specifies the bodies entitled to appoint the Insurance Ombudsman, required qualifications, term of office, the tasks of the institution, sphere and the cost of activity, prohibition to join offices and to own stocks of insurance companies as well as the competence and the membership of the Insurance Council (see previous reference).

[70] Rzecznik Ubezpieczonych 2010, p. 2.

The law requires all complaints to be filed in written form therefore it is not possible to initiate procedures online.[71] If the complaint is found admissible, the insurance company is asked to provide its position in writing and is obliged to respond within 30 days. If the insurer's position is found to be unjustified, the expert dealing with the case continues the settlement procedure, including stating the laws and regulations that should be enforced and the recommended actions the insurer should undertake. If the insurer does not comply, a legal opinion is sent to the complainant that may be used as evidence in court proceedings.[72]

An increase of cross-border cases has been observed over the years, representing 4% of all complaints in 2009. Cross-border disputes typically relate to insurance sold along with other financial products, such as credit or mortgages. All complaints are accepted, but when a case involves a business in a different Member State, the scheme tries to forward it through FIN-NET.

"Cases concerning financial providers from another Member State are much more difficult that national cases and require the work of a specialised employee; sometimes such cases are impossible for us to handle because of the lack of knowledge of the provisions of the law related to the dispute."

Insurance Ombudsman

If forwarding a complaint is not possible, the scheme initiates a regular procedure, but this raises problems. The main problem is, as the scheme's representative explained, that the Polish Insurance Ombudsman cannot apply the law of other Member States: "For example, we received a complaint from a Polish citizen injured in a car accident in Germany who was entitled to monetary indemnification from a German insurer… We could not advise the consumer if the opinion of the German insurance company is correct as we do not know the German rules and the case could not be resolved based only on the provisions of directives."

Despite some problems, cooperation via FIN-NET is considered to be the main strength in handling cross-border complaints. The scheme also cooperates with the Polish ECC, for example through mutually referencing the organisations on their websites. The scheme's perceived weaknesses in dealing with cross-border cases mainly concern resources: a limited number of employees are qualified to handle such disputes and speak foreign languages. They lack knowledge of applicable laws, and complaints can take a great deal of time to be handled.

3.1.5 Lisbon Arbitration Centre (Portugal)

The Lisbon Arbitration Centre is composed of two divisions. The Legal Advice Service provides support and information to consumers and traders solving complaints through mediation. The Arbitration Tribunal decides upon cases in which mediation has failed. Decisions are binding on all parties and directly enforceable. The scheme receives public funding[73] and was co-founded by the Town Hall of the City of Lisbon, the Portuguese Consumer Association, and the Union of Associations of Traders in the District of Lisbon. This cross-sectoral ADR scheme only covers the metropolitan area of Lisbon for Portuguese cases, whereas its coverage for cross-border cases is nationwide. The total number of cases handled in 2010 was 2,930 (of that 1,087 complaints).

[71] The interviewee explained that the scheme occasionally uses IT tools during cross-border procedures, for example it contacts the complainant and the service provider via e-mail.

[72] See http://www.rzu.gov.pl/english (accessed on 27 April 2011).

[73] The scheme is financed by the Ministry of Justice, the Ministry of Economy, the Town Hall of Lisbon and the Metropolitan Area of Lisbon (Civic Consulting 2009, p. 498).

The scheme was created in 1989 as a pilot arbitration project for consumer redress supported by the European Commission.

It deals with cross-border cases mainly forwarded through FIN-NET (of which it is a member) and ECC-NET, and it only accepts cases involving traders operating in Portugal. It can deal directly with claims of consumers from other Member States if they are filed in Portuguese, Spanish, English, or French. According to the interviewed representative of the scheme, the complainant determines the language of the case. When the scheme receives a complaint, it communicates to the trader in Portuguese and to the consumer in their language (provided it is one of those listed above).

"When we contact the traders without them knowing where we come from, what we are, and why we are contacting them about a cross-border case, it is rather difficult to ensure their cooperation."

Lisbon Arbitration Centre

In 2010 there were 28 cross-border complaints. The most prominent sectors are travel/air transportation and car rental; the average value of complaints is 200-250 Euro.

The arbiter hears both parties before making a final decision. The procedure typically takes fewer than 30-40 days and is conducted free of charge. An important aspect of the scheme's service is that consumers receive all documentation relevant for their case if the ADR procedure fails, which facilitates the potential to seek redress in court.

Purely ODR procedures – in which the entire procedure can be conducted with IT tools – are not currently possible, as arbitration requires an appearance of both parties before the arbiter. This requirement could be quite problematic for cross-border consumers, but the scheme has an agreement with the Portuguese Consumer Association (DECO), entitling every consumer to *pro bono* legal representation in the procedure; therefore it is not necessary for the consumer to personally appear before the arbiter.

A lack of consumer and trader awareness of the scheme's existence has been indicated as a major weakness,[74] whereas the capacity to handle claims in several languages can be counted among the scheme's strengths. However, its language capacities are not indicated on its website, which is only available in Portuguese. According to the interviewee, the scheme would like to provide web content in English but resources are lacking.

3.1.6 National Board for Consumer Disputes (Sweden)

The National Board for Consumer Disputes (NBCD) is a cross-sectoral ADR scheme with national coverage. Established by the Swedish government in 1968, it has been fully independent since 1981 but its funding continues to be public. The scheme, which issues non-binding decisions, is one of the few in the EU that provide for collective procedures. It handled 7,216 individual complaints in 2010.

The NBCD is divided into 13 departments: banking, housing, boating, electronics, estate agents, furniture, insurance, motor vehicle, travel, shoes, textile, cleaning services, and general (goods and services that do not belong to other departments).[75]

[74] The interviewee emphasized that (not focusing specifically on cross-border cases) the scheme nevertheless has a high overall resolution rate (84%), and a high number of voluntary adhesions (4,412 in 2010).

[75] See http://www.arn.se/Other-languages/English (accessed on 20 April 2011).

"Generally speaking, the strength of our system is that the media publish our decisions and statistics and in this way make them available to interested consumers. The availability of our decisions and statistics concerning compliance puts pressure on businesses, as they obviously wish to avoid bad publicity."

National Board for Consumer

The board receives about 200-250 cross-border claims per year. The admissibility of cross-border cases involving businesses not based in Sweden is evaluated individually, and the decision largely depends on the expectation of compliance. A representative of the scheme explained: "Whether we try such a cross-border case depends on whether we think our recommendation in the case will influence businesses. If the business has a local branch in Sweden or is available to Swedish customers on the Internet, we would usually assume that it would have an effect on them. Another factor is which law is to be applied to the dispute. We usually would not apply foreign law, because we do not know it well enough."

Submissions in English are accepted if both parties agree, but the scheme itself does not translate documents, and the decisions and other documents are drafted in Swedish. If the consumer prefers to use English but the trader objects because it does not sufficiently understand the language, the consumer has the opportunity to translate the documents. Otherwise the case is dismissed. If the trader uses English or any other foreign language, and the consumer says he or she does not understand it, the same rule applies. If the trader does not translate the submitted documents, the scheme acts as if the trader submitted no answer.

A particular strength of the scheme is that its decisions and statistics are made available to the public, and can be used by consumers not directly involved in specific cases. Publicised decisions also have the 'naming and shaming' impact on traders who resort to negative practices.

3.1.7 Conciliation Body for Public Transport (Germany)

CBPT is a relatively new, privately founded and funded scheme that is active in the transportation sector. It was set up after a publicly financed scheme with similar coverage was discontinued. The scheme intends to become as intermodal (covering all means of transportation) and as international as possible. In 2010, the scheme received 3,424 complaints.

The scheme is financed by its members – namely, transportation companies. Its set-up has allowed for some continuity between the publicly funded (pilot) scheme[76] and the newer one, although they are not related. Every member company must pay an annual fee, as well as case fees.

Though the scheme is privately founded and funded, its advisory council includes public authorities that hold around a one-third share. The other two-thirds represent associations that deal with consumer and travellers' rights, and transportation companies.

[76] The Conciliation Body for Long-Distance Travel *(Schlichtungsstelle Mobilität)*, which was presented as a case study in Civic Consulting 2009, pp. 455-460.

The work of this ADR scheme is guided by a "one-face-to-consumer" concept, as the interviewee explained: "Travellers using different kinds of transportation do not have to get confused by several arbitration boards. There should only be a single arbitration board that is competent to deal with all the issues, no matter what kind of transportation was used."

The same principle is pursued regarding cross-border travel. Since this is a growing sector and multiple transportation companies already entail cooperation by several national operators (including German), SÖP is attempting to expand its voluntary jurisdiction and aspires to become a pan-European ADR scheme covering all modes of transportation.

"It would not make sense to exclude non-German transportation companies, especially in times when all sectors of the individual travel market are getting more and more inter-national, and more and more non-German companies are entering the German market."

Conciliation Body for Public Transport

Currently the main challenge and coverage gap stems from the reluctance by airline companies to participate in ADR procedures: "In 2010, we had more than 3,400 arbitration requests, thereof two-thirds from train passengers and one-third from flight passengers. We could handle almost all requests from the train passengers. But from the flight passengers, only a few could be arbitrated because most of the flight companies refused to cooperate with the SÖP," the interviewee said, and added that the German federal government is considering legislation to require airlines to subject themselves to ADR.

Otherwise, the main disadvantage is deemed to be low awareness of the scheme abroad. An important strength is that online dispute resolution is offered, so complainants do not have to be physically present in Germany.

3.2 Case Studies: EU-Wide Networks and Services

The following subsections present three EU networks of particular interest:

- **ECC-Net**, the network of European Consumer Centres;
- **FIN-NET**, the financial dispute resolution network of national out-of-court complaint schemes;
- **SOLVIT**, the network that solves problems caused by the misapplication of Internal Market law by public authorities.

Some general background on each network will be provided, including the definitions of formal roles these networks are meant to play. Strengths and weaknesses of each network with regard to cross-border ADR will be presented based on a literature review and interviews with directors of ECCs (in France, the Netherlands, Poland, and the UK), representatives of ADR bodies, and relevant EC officials.

3.2.1 ECC-Net

The European Consumer Centres Network was established in 2005 from the merger of two previously existing networks – the Euroguichets and European Extra-Judicial network (EEJ-Net). ECC-Net comprises 29 centres that deal with cross-border B2C issues in the 27 EU Member States plus Iceland and Norway.[77] The European Consumer Centres (ECCs) provide consumers with

[77] DG SANCO 2009, p. 8.

information on their rights under European and national law and give advice and assistance in the resolution of their cross-border complaints. The overall aim is to promote consumer confidence in the internal market.[78] The national centres are hosted by public bodies or non-profit organisations approved by the EC.[79] The network is co-financed by EU grants and participating countries.

The incidence and nature of cases

The number of consumer inquiries (information requests, complaints, and disputes) handled by ECC-Net rose 25% between 2005 and 2009 – from 42,795 to 52,825.[80] The network distinguishes between 'simple' and 'normal' complaints.[81] Since 2007 'normal' complaints have been systematically registered in an online case-handling system,[82] referred to within the network as 'the IT-tool'. These complaints bare the most relevance for this report, as they require an active intervention. In recent years the ECCs have annually handled nearly 8,000 'normal' complaints.[83]

ECC-Net reported in 2009 that complaints related to airline transportation were the largest category for most ECCs,[84] and this same issue was raised consistently in interviews conducted for this study. Overall, complaints about transportation ranked first among all 'normal' complaints received in 2007 and 2008, followed by audio-visual, photographic, and information processing equipment; accommodation services; and recreational and cultural services.[85] On the other hand, when it comes to the type of transaction involved, more than half of all complaints filed in 2009 concerned online transactions (55.9%), and their volume reportedly had nearly doubled since 2006.[86]

Typical procedures

In theory, ECCs act as intermediaries between a consumer with a cross-border grievance and a competent ADR scheme.[87] The idea is to enable consumers to contact the ECC in their own country, where the consumers' language is understood and spoken. This is termed the 'consumer ECC'. This centre processes information with the IT tool used by the entire network and makes it available in English to the ECC located in the country of the trader that is the target of the complaint. This is called the 'trader ECC'. The trader ECC establishes contact with the trader to communicate the consumer's complaint in view of an amicable settlement. If none is reached, ECCs

[78] To pursue the end of increasing consumer confidence in internal market, ECCs are supposed to follow the following six main objectives: (1) promotional activities to raise consumer awareness; (2) responding to consumer inquiries about rights in connection to cross-border shopping; (3) to assist consumers with complaints; (4) to assist consumers with disputes; (5) to contribute to the development of ADR schemes in their host countries; (6) to engage in networking in feedback (CPEC 2011, p. v).

[79] DG SANCO 2009, p. 9.

[80] CPEC 2011, p. 21.

[81] Normal complaint refers to a statement of dissatisfaction by a consumer concerning a cross-border transaction with a seller or a supplier. Simple complaint is one that has been dealt with by an ECC in a one-step operation without any follow-up (typically an e-mail or telephone answer to a consumer inquiry). See ECC-Net 2009, p. 6.

[82] ECC-Net 2009, p. 13.

[83] In 2008, the number of normal complaints was 7,716, and it was 7,987 in 2009 (CPEC 2011, p. 22-23).

[84] ECC-Net 2009, p. 15.

[85] ECC-Net 2009, p. 15.

[86] DG SANCO 2009, p. 5.

A particular increase has recently been noted in cross-border e-commerce transactions involving traders from the UK, if that can be inferred from the fact that the ECC UK has much more frequently acted as "trader ECC" than it used to, which the director of ECC UK interpreted in connection with the changes of currency ratios in recent years, with Euro worth much more against the Pound than it had been.

[87] See ECC-Net 2009, pp. 11-12.

inform the consumer about other possibilities for solving the case. Where possible, they direct the consumer to an appropriate ADR scheme and continue to provide information and assistance in the proceedings.[88]

For numerous reasons, the actual referral rate is very low: "In reality, after the case has been submitted to the consumer's ECC and translated into English, it is forwarded to the ECC where the trader is located, where case handlers of the trader's ECC make a legal assessment of the case and try to solve it on their own as a first step. If they have not been successful in solving the case, then only very rarely and only as a step 2 they try to contact appropriate ADR," ECC-Net reported, adding that, "In the vast majority of cases the reason for this is that no ADR possibility exists for the complaint in question."[89] If the possibility does exist, "there are so many limitations in the competences of many ADR-systems such as the ADR dealing only with cases concerning members of a certain organization, only dealing with cases if the trader agrees or only having regional competences that the ADR-way is not a possible approach in practice".[90]

The network found it "very disappointing that the data has shown that only 500 out of the 11,500 cases [received by ECC-Net in 2007 and 2008] were transferred to alternative dispute resolution mechanisms".[91] A more recent example from present research comes from the UK, where the ECC handled about 1,800 normal complaints as a trader ECC in 2010, of which only 24 were transferred to an ADR body.

The ECCs were able to solve 62% of the closed cases amicably without the intervention of other organisations in 2008, and 48% in 2009.[92] Where no ADR exists and an ECC cannot resolve a complaint, consumers are referred to the police, lawyers and courts, consumer organisations, national authorities, and/or the European small claims procedure.

The number of complaints received has increased each year, whereas the number of cases forwarded to ADR has remained relatively unchanged.[93] Some progress can be noted by looking at country-specific data: ECC-Net report on cross-border ADR indicates significant increases in cases forwarded from ECCs to ADR schemes in Belgium, France, Latvia, the Netherlands and Norway.[94] On the other hand, in 2007 and 2008 not a single case was forwarded to ADRs in Bulgaria, Cyprus, Lithuania, Malta, Romania, Slovakia or Slovenia.[95]

[88] There are differences between ECCs, and the transferring of cases to ADR schemes is not uniform throughout the network. In all circumstances, the transfer of a complaint to an ADR scheme requires the agreement of the consumer.
[89] ECC-Net 2009, p. 12.
[90] ECC-Net 2009, p. 57.
[91] ECC-Net 2009, p. 57.
[92] CPEC 2011, p. 22.
[93] ECC-Net 2009, p. 57.
[94] See ECC-Net 2009, p. 18.
Despite the noted increase in the transfers of cases to ADR schemes, the ECC Netherlands, for example, currently appears overall more relevant for a majority of cross-border cases than the national cross-sectoral ADR scheme (the Foundation for Consumer Complaints Boards, presented in Section 3.1.1). Firstly, as mentioned, the ADR scheme requires the consumer to attempt to resolve the case with a trader prior to lodging a complaint, and in such a case the ECC's assistance might be necessary to bridge a possible language gap with the trader. Secondly, if there is no response from the trader or the response is unsatisfactory, ECC Netherlands finds it difficult to use the ADR scheme because traders that are members of the participating trade associations typically do not find themselves in cross-border disputes addressed to the ECC. So the ECC mainly deals with complaints regarding traders that are not within the jurisdiction of the ADR scheme.
[95] Bulgaria, Slovenia, Slovakia and Romania are the newest ECC-Net members, opening their centres in 2007 and 2008. So far they have received a very small number of cross-border complaints. For other countries the reason could be the lack of ADRs that meet the requirements of the European Commission (ECC-Net 2009, p. 18).

In cases that are transferred to ADR schemes, ECC-Net plays a vital role in ensuring that case materials are linguistically accessible to all involved, as was confirmed by interviews with representatives of ADR schemes.[96] It appears to be fairly common for ADR schemes to have more or less formal agreements with ECCs to the effect that ECCs would provide translation services when complaints from foreign consumers are handled.[97]

Strengths and weaknesses

Interviewees cited several strengths of their national ECCs and the network as a whole: EU-wide coverage; an IT tool that enables smooth and efficient communication and cooperation; overcoming language barriers within the network; essentially standard though informal ways of working that allow for quick and flexible procedures;[98] and a size of national teams that enables efficient coordination. On the other hand, it has been noted that the size of national ECC teams could also be considered a weakness, since a vast majority of ECCs (24 of 29) indicated they have "little or no margin to deal with a sudden increase in the level of enquiries".[99]

A number of ECCs reportedly have experienced financial constraints and uncertainty as a result of the system of annual funding, and uncertainties with respect to national co-financing.[100] As an ECC director explained in an interview for this study, ECCs, at least in large countries, are "at the very maximum of what we can handle because we do not only do cross-border complaints, so the financing issue definitely is a problem".

The lack of a consistent ADR system, with significant coverage gaps, poses a particular problem, as the ECCs have to handle complaints on their own, while they do not have the power in relation to traders that some ADR schemes have. As one ECC director explained, "We try and follow our process as best we can by contacting the trader and trying to negotiate with them, and trying to mediate and resolve the situation. If a trader ignores us or disagrees with us, there is nothing we can do." Nearly 1,600 normal complaints were closed within the network in 2009 as "no solution found: lack of agreement from the trader".[101]

3.2.2 FIN-NET

FIN-NET, launched by the EC in 2001, is a network of very diverse ADR schemes within the European Economic Area. At the time of this report, the network had 52 members from 23 countries. They are responsible for handling disputes between consumers and financial service providers, including banks, insurance companies, and investment firms.[102] High success rates have been noted among active ADR schemes. When cases were not handled effectively, this was mainly due to "service coverage gaps" in some countries.[103]

[96] Notable exceptions are FOS with its outstanding (outsourced) language processing capacities, and ECC UK which receives all complaints against traders in the UK through ECC-Net already translated into English, since that is the official language of this network.

[97] Nevertheless, translation is not an objective of the ECC-Net's service in itself but rather a parallel activity. The Vademecum states (in connection with objective 4) that ECCs are to provide access to translation services when required.

[98] A 'case handling protocol' was tested in practice over the period of 1 July to 31 December 2010 (CPEC 2011, p. xi).

[99] CPEC 2011, p. x.

[100] CPEC 2011, p. x.

[101] CPEC 2011, p. 27.

[102] See http://ec.europa.eu/internal_market/fin-net/index_en.htm (accessed on 10 May 2011).

[103] CSES 2009, p. iii.

The incidence and nature of cases

The number of cross-border cases has tended to grow, according to an EC official, but their percentage of the total number of cases handled by participating ADR schemes is low. This is also evident from the presented cases of ADR schemes that handle disputes in the financial sector (Section 3.1). The EC interviewee noted that the low shares of cross-border ADR cases can be explained by low levels of cross-border purchases of financial services.

There is no central database or IT tool for registering and exchanging cross-border cases, such as used by ECC-Net, and annual caseload data is not available for all ADR schemes that are FIN-NET members. In 2009, 38 of its members reported a total of 1,542 cases to the EC, of which 884 were in the banking sector, 244 in insurance, 410 in investment services, and four that could not attributed to any one sector.[104] This was higher than in 2008, when 40 schemes reported 1,346 cases (673 in banking, 326 in insurance, 335 in investment services, and 12 that could be attributed to one sector).[105]

A striking figure quoted in the 2009 evaluation report is that in the preceding year, more than 85% of all reported cases were handled by five ADR schemes, of which the caseload of the UK's Financial Ombudsman Service was by far the largest (see Section 3.1.2).[106] Another 20 FIN-NET members reported between five and 20 cases each, whereas the remaining ADRs had only a few cases annually.[107] The interviewed EC official confirmed that the network's cross-border cases continue to be unevenly distributed but that can be explained by the differences in the size of financial markets.

Typical procedures

ADR procedures are carried out depending on the particular scheme handling the cases. FIN-NET's main operational principle is that even though the ADR scheme competent for a particular transaction is the one in the trader's country of origin, consumers should be able to receive assistance from the ADR scheme that covers financial services in their own country. This is stipulated in the Memorandum of Understanding on a Cross-Border Out-of-Court Complaints Network for Financial Services in the European Economic Area,[108] which an ADR scheme must sign in order to become a member of the network.

A significant disparity has been found, however, between the procedure laid down in the Memorandum of Understanding and reality. The so-called 'nearest scheme principle' reportedly concerned fewer than one in every 10 complaints handled by FIN-NET members in 2008. In a vast majority of cases (91%), consumers directly contacted the competent scheme based on information they collected on their own, or by following their contact and information provided by the nearest scheme.[109]

[104] DG MARKT 2010, p. 5.

[105] DG MARKT 2010, p. 5.

[106] Other schemes with the highest numbers of reported cross-border cases are the Irish Financial Services Ombudsman Bureau, the Luxembourg *Commission de Surveillance du Secteur Financier*, the Greek Ombudsman for Banking and Investment Services and the Spanish Complaints Service of the Bank of Spain (CSES 2009, pp. 27-28).

[107] CSES 2009, p. 27.

[108] See CSES 2009, pp. 7-8.

[109] CSES 2009, p. 28.

Strengths and weaknesses

From the point of view of consumers, FIN-NET has been positively valued in terms of the support and guidance provided by ADRs regarding complaints.[110] However, obstacles have limited the efficiency and accessibility of ADR. It has been assessed that FIN-NET cannot provide all European consumers with an effective mechanism to handle cross-border complaints.[111]

Coverage gaps have been the main problem, from a two-fold perspective. First, some existing ADR schemes covering financial services are not members of FIN-NET. Second, there are gaps in ADR coverage *per se*; some countries have no ADR schemes for financial services. Representatives of ADR schemes interviewed for this report – while invariably considering membership in FIN-NET to be a strength – consistently highlighted this problem. In practice, if the financial service provider's country has no competent scheme, consumers have no ADR scheme to turn to, since schemes in their own country typically will not take up such a case due to a lack of jurisdiction.

Another noted weakness are the significant differences in the jurisdiction of schemes that cover financial services in different countries.[112] Consumers with complaints might not have access to procedures comparable to those of an ADR scheme in their own country.

Language regimes among ADRs and the limited language support provided by only a few FIN-NET members have been found to further limit the network's effectiveness.[113] Moreover, providing information on the network's website in only three languages is not considered appropriate for an EU-wide service.[114]

Another important gap arises from the lack of activity by some members of the network – for example, regarding reporting to the EC and making numbers and types of cases available to the entire FIN-NET. "It is a voluntary network and our members provide the statistics. We usually have the reports from 40 or 38 members out of 50, so although they constitute the majority of members there is still some part of cross-border complaints that is not reported," explained the EC official.

It has been assessed that the network's effectiveness is further impeded by its "very low visibility among European consumers".[115] The interviewed EC official commented that FIN-NET is not solving any disputes *per se*, and that consumers do not always know or need to know that the ADR scheme is a member of the network.

3.2.3 SOLVIT

The SOLVIT network was created in 2002 by the European Commission and EU Member States (plus Iceland, Liechtenstein, and Norway). Each national administration has a SOLVIT centre. The network differs from others presented here, in that it does not deal with B2C cases. Instead, SOLVIT's aim is to provide "rapid and pragmatic" solutions to cross-border problems caused by a misapplication of EU rules by public authorities.[116]

[110] CSES 2009, p. 44.
[111] CSES 2009, p. iv.
[112] Civic Consulting 2009, p. 521.
[113] CSES 2009, p. iv.
[114] CSES 2009, p. 60.
[115] CSES 2009, p. 61.
[116] DG MARKT 2011, p. 5.

The incidence and nature of cases

Year 2009 saw a particularly large increase in the number of cases handled by the network: the total (1,540)[117] was 54% higher than in the preceding year.[118] A vast majority of cases involved residence rights, with the number of these more than tripling during this period. Increases were also recorded in cases related to social security and recognition of professional qualifications.[119]

In 2010, the network's caseload dropped to 1,363.[120] The main reason for the drop is that in the preceding year, SOLVIT handled a large number of similar cases filed by non-EU family members of EU nationals' who suffered delays in obtaining residence permits in the UK:
"The number of such cases dropped significantly in 2010, after the UK authorities took structural measures to put an end to the problems."[121]

The main types of complaints remained unchanged in 2010, with social security ranking first (34%) and residence rights ranking second (23%).[122] The distribution of cases has been uneven: in 2010 more than half involved France, Spain and the UK.[123]

These figures are limited to cases within SOLVIT's remit, which represent only about one-third of all cases referred to the network. The remaining cases "also need to be examined and analysed in order to point the complainants in the right direction".[124]

Typical procedures

The network is based on cooperation between the 'home centre' and 'lead centre'.[125] The home centre is normally located in the applicant's country of origin. After receiving the complaint and contacting the client, the centre prepares a legal analysis and translates it into English. This is submitted to the lead centre through the online SOLVIT database. The lead centre, located in the country of the relevant public administration, compares the home centre's legal assessment with the position of the national administration of the lead centre's country. The lead centre has 10 weeks to find a solution for the client.

If two SOLVIT centres cannot agree on the correct legal assessment of a case, they can turn to European Commission services for informal advice (obtained from an appropriate EC expert). Though this does not represent the official position of the EC, it can help resolve problematic cases. In 2010, 72 such requests for advice were adressed to the Commission.

In addition, the EC in 2009 opened up the possibility for SOLVIT centres to request advice during the preparation of preliminary case assesments from independent legal experts working for Your Europe Advice.[126]

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[117] DG MARKT 2011, p. 17.
[118] DG MARKT 2010a, p. 5.
[119] DG MARKT 2010a, p. 5.
[120] DG MARKT 2011, p. 17.
[121] DG MARKT 2011, p. 5.
[122] DG MARKT 2011, p. 7.
[123] DG MARKT 2011, p. 14.
[124] DG MARKT 2011, p. 17.
[125] This summary of typical procedures is based on DG MARKT 2011 and an interview with the EC official responsible for SOLVIT.
[126] Your Europe Advice is an EU advice service for the public, currently provided by the legal experts from the European Citizen Action Service (ECAS) operating under contract with the European Commission. It consists of a

Strengths and weaknesses

An important strength of the network is its use of the previously mentioned central online database. SOLVIT can effectively function as an online dispute resolution mechanism. While citizens are not prevented from lodging their complaints in other ways, they can submit them through an online complaint form that is linked to the database. The database was deemed by the interviewed EC official to be "the backbone of the whole network," together with with the people working in the national SOLVIT centres, who are "a real network amongst themselves".

On the other hand, a recurring problematic issue is the already mentioned high number of non-SOLVIT cases submitted to the network that require signposting,[127] which a large majority of SOLVIT centres regards "as one of the main bottlenecks".[128] The proportion of cases submitted to SOLVIT that were outside its remit was 73% in 2008, 69% in 2009,[129] and 64% in 2010.[130] The interviewed EC official explained that such cases encompass not only actual complaints, but also, for example, mere inquiries about legal rights. In such cases, citizens would be signposted to Your Europe Advice.

More than one-third of SOLVIT centres reported in 2009 that they are regularly hampered by the unwillingness of national authorities to solve problems informally. Moreover, national administrations find it difficult to meet short deadlines, and some have difficulties in reviewing their decisions in order to comply with EU rules.[131]

A "critical issue" noted in SOLVIT annual reports is that of staffing. Four SOLVIT centres with medium to very large case loads (Austria, France, Germany, and Spain) are considered to be understaffed relative to their caseload. This is "particularly important" for France, Germany, and Spain because they are involved in 41% of all SOLVIT cases either as a home or lead centre.[132] The latest SOLVIT report indicates that staffing had improved at a number of centres but still needs attention. A particularly important improvement was noted in France, which has the second-highest caseload, where staffing increased by one at the beginning of 2011.[133]

3.3 Barriers to the use of cross-border ADR

Despite the utilisation of best practices by currently operating ADR schemes, the fairly high levels of compliance by ADR schemes with relevant EC recommendations,[134] and overall progress in the availability and use of ADR, research and public consultations have identified several barriers to the use of ADR by consumers across the EU. The main problems with cross-border ADR overlap with problems at the national level,

team of lawyers who cover all EU official languages and are familiar with national laws in all EU countries (see http://ec.europa.eu/citizensrights/front_end/about/index_en.htm).

[127] DG MARKT 2010a, p. 6.

[128] DG MARKT 2010a, p. 13.

[129] DG MARKT 2010a, p. 17.

[130] DG MARKT 2011, p. 18.

[131] DG MARKT 2010a, p. 15.

[132] DG MARKT 2010a, p. 14.

[133] DG MARKT 2011, p. 6.

[134] Regarding the two relevant European Commission recommendations, available evidence suggests that ADR schemes comply with most of the requirements. Independence, adversarial principle, costs, duration, active role of the decision-making body, mandatory consumer protection, reasoned decision, access to courts and legal representation appear to be predominantly in line with the EC guidelines. Problems persist in some areas, such as the transparency of ADR procedures. Many websites do not have their own website, and many consumers do not have easy access to information about the use, number, and types of cases and past performance of ADR schemes. Electronic access to the procedure is not always possible. See Civic Consulting 2009, p. 162.

but they are aggravated by specifics of cross-border situations, such as language barriers and the physical absence of the consumer from the trader's country.

Ensuring comprehensive coverage among various business sectors and across the territory of the EU was raised as a key challenge by all interviewed ADR professionals. Sectoral and geographical coverage gaps have been identified as recurring issues, along with the low awareness of ADR among consumers and businesses, and the frequent reluctance of businesses to engage in ADR. ECC-Net reports a lack of viable ADR schemes in many countries, which is often due to the fact that no ADR schemes are currently up and running, or that the respective powers of ADR schemes in certain sectors are weak.[135]

Regarding geographical coverage, there are problems in new Member States, where ADR is not yet fully developed, as well as in old Member States, where ADR procedures are not always available homogeneously throughout the territory.[136] Differences in the respective geographical coverage of ADR schemes in Member States, and the resulting gaps, appear to contribute to differences among Member States in the use of ADR, as measured by the number of reported ADR cases relative to population (see Figure in Chapter 2).

Among the presented case studies, only the former Internet Mediator accepted and processed complaints regardless of location; it accepted complaints by French consumers against traders outside France, as well as those from consumers outside France against French-based traders. Typically, however, ADR schemes as a rule do *not* accept complaints against traders in other Member States. This is mainly due to a lack of ADR schemes' jurisdiction, knowledge of applicable law, and/or enforceability of final decisions.

As the case studies indicated, exceptions to this rule include the extension of ADR schemes' competences through so-called voluntary jurisdiction[137] and the handling of complaints against traders in other Member States on a case-by-case basis (if it is deemed likely that the final decision or its publication would have an impact on the trader).[138]

The Polish Insurance Ombudsman is notable because it accepts all complaints from Polish consumers regarding insurance providers, including those against service providers from other Member States. However, the scheme attempts to forward through FIN-NET every complaint which does not target a Poland-based provider to a competent scheme in the Member State where the provider is located. Only if this is not possible does the scheme initiate its own procedure. But it has no jurisdiction over businesses outside of Poland and is regularly hampered by the lack of knowledge of applicable law.

FIN-NET has noted strong imbalances in the coverage of financial services by ADR schemes across the EU,[139] but financial services have been found to be among the sectors with the strongest sectoral coverage.[140] Other sectors with relatively strong coverage are package travel/tourism and telecommunications, but even in these sectors ADR mechanisms are not available to consumers across the EU.

Interviewees from ECC-Net highlighted the lack of coverage of tourism- and travel-related services as particularly problematic in cross-border situations. The network handled more than 4,100 tourism-related complaints in 2009, an increase of about 37% from 2005.[141] As reported by the director of ECC UK: "As a consumer ECC, our major number of cases

[135] ECC-Net 2009, p. 22.
[136] Civic Consulting 2009, p. 60.
[137] Financial Ombudsman Services (UK) and Conciliation Body for Public Transport (Germany).
[138] National Board for Consumer Disputes (Sweden).
[139] See FIN-NET 2009, p. 19.
[140] Civic Consulting 2009.
[141] DG SANCO 2009, p. 16.

relates to holiday club and timeshares and there is no real ADR for them available. And then as a trader ECC, e-commerce is quite a popular one for the rest of Europe, and there is no e-commerce ADR in the UK as such to use."

The lack of schemes dealing exclusively with e-commerce[142] is notable. Schemes typically do not differentiate cases based on how products and services are sold, so they also cover purchases conducted online. However, given incomplete sectoral and geographical ADR coverage, the coverage of such transactions is inconsistent across countries and sectors, as noted by the EC's consultation document on ADR.[143]

Awareness of ADR is another commonly cited problem.[144] Neither consumers nor businesses are sufficiently aware of the existence of ADR bodies and procedures for solving disputes and obtaining redress.[145] In larger countries such as Germany and the UK, fragmentation of ADR services is a particular problem in ensuring consumer awareness.[146] A broad consensus on the need for action in this area emerged from interviews and the EU's recent public consultation.[147]

Other barriers include non-compliance by businesses with non-binding ADR decisions and their refusal to enter the procedure.[148] Similar problems were noted by most ADR professionals interviewed in the course of the present research. Exceptions include the Financial Ombudsman Service in the UK, where participation by businesses and compliance with decisions is mandatory, therefore non-adherence is not really a problem for that scheme.

Other ADR schemes have also noted high levels of adherence, though gaps remain. For example, not all Dutch traders are members of the otherwise quite strong Foundation for Consumer Complaints Board in the Netherlands. And while a compliance guarantee applies to every member of the traders' associations which participate in the Dutch scheme – in which consumers are guaranteed any awarded damages or compensation – there is no jurisdiction over traders that have not joined. The national ECC, meanwhile, reports that it deals primarily with complaints against non-members of the scheme.[149]

Non-compliance, most frequently regarding non-binding decisions of ADR schemes, is yet another aspect of the traders' reluctance to accept ADR. Together with the refusal by businesses to enter procedures in the first place, this can "ultimately undermine consumer trust in such schemes".[150]

Traders' reluctance to engage in ADR schemes is likely strongly related to a lack of awareness, though in this case that mainly refers to the apparent lack of awareness regarding the benefits of ADR for businesses themselves. For example, while German transportation companies established an ADR scheme (see Section 3.1.7) "to improve customer relations," as the interviewed scheme's representative put it, the scheme has been struggling to convince airline companies that arbitration procedures would be advantageous for them as well. On the other hand, the rather extensive voluntary

[142] See European Commission 2011, para. 25.

[143] European Commission 2011, para. 25.

[144] For example: Civic Consulting 2009; DG SANCO 2011; speakers at the recent ADR Summit; interviews for this report.

[145] Forty percent of retailers declared they did not know any ADR mechanisms (Eurobarometer No. 278, p. 70, quoted in European Commission 2011, para. 18)

[146] Civic Consulting 2009, p. 117.

[147] See European Commission 2011b.

[148] Civic Consulting 2009, p. 117.

[149] Interview with the director of ECC Netherlands.

[150] Civic Consulting 2009, p. 117.

jurisdiction of the UK's Financial Ombudsman Service (encompassing non-UK businesses not legally bound to this scheme) is a clear example that there are indeed benefits from adhering to ADR. As the scheme's representative explained, "Several hundred businesses have come to us and asked us to cover them. They are usually businesses that want consumers to have confidence in them. And they want to be on a level playing field with their competitors in the UK. They want to be able to make the same consumer offering... These are commercial reasons, essentially."

Even if the above-outlined barriers to using ADR were remedied, one significant problem would remain that has particular relevance for cross-border situations: language barriers.

As case studies showed, different practices seek to bridge language gaps between consumers, traders, and ADR schemes: from the very large (outsourced) language capacities of the UK's Financial Ombudsman Service, to the Dutch ADR scheme's strong reliance on the national ECC for translations required for the ADR procedures.

Most ADR schemes presented have the capacity to process complaints in English and at least one additional language apart from their official language, but this is typically not advertised on their websites. Moreover, among the presented schemes, two only have information in their own language, three have only general information in English, and only two have some website content in several or many languages. Interviewed ADR representatives typically cited the lack of financial resources as the main reason for these language limitations. They also pointed out that ADR schemes are primarily set up to deal with national cases, which affects the availability of funding to expand their language capacities and other arrangements for cross-border ADR.

Overall, ECC-Net's centralised and IT-supported complaints-handling system plays a fundamental role in bridging language gaps between consumers, traders, and (where applicable) ADR schemes. Moreover, national ECCs directly intervene in cross-border disputes where no ADR scheme is available, which is rather frequent given the geographical and sectoral coverage gaps.

4. ASSESSMENT OF SELECTED LEGISLATION RELEVANT FOR CONSUMER REDRESS

KEY FINDINGS

- Both the ESCP Regulation and the Injunctions Directive have been fully implemented into national law in all selected jurisdictions, but only the UK has implemented the Mediation Directive (as of March 2011). The overview shows that whenever the EU instruments leave discretion to the Member States, implementation differs across selected jurisdictions.

- Although, at least theoretically, the EU legislative instruments share a high potential for offering consumers alternative redress, practice shows that the ESCP, the cross-border mediation, and the injunctions procedure have been used in a rather limited number of cases.

- The main reasons for the detected limited use of the examined procedures could be summarised as follows: the low level of awareness by consumers of the existence of the alternative routes of redress; the potential costs related to translation; travelling and lawyers' fees; gaps in the regulatory framework; lack of clarity of the procedure leading to legal uncertainty; and the complexity of the (differing) procedures.

This chapter focuses on the aims and key elements of three European legislative instruments: (1) Regulation (EC) No 861/2007 establishing a European Small Claims Procedure (the 'ESCP Regulation'),[151] (2) Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters (the 'Mediation Directive'),[152] and (3) Directive 2009/22/EC on injunctions for the protection of consumers' interests (the 'Injunctions Directive').[153]

Both the ESCP Regulation and the Mediation Directive were proposed by the European Commission against the background of the Tampere European Council Conclusions which set the goal of establishing an "area of freedom, security and justice".[154]

[151] Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, *OJ L* 199 of 31 July 2007, 1-22. The ESCP has been available from 1 January 2009 (Art. 29 ESCP Regulation).

[152] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, *OJ L* 136 of 24 May 2008, 3-8. The Mediation Directive has to be transposed into national law before 21 May 2011 (Art. 12 Mediation Directive).

[153] Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, *OJ L* 110 of 1 May 2009, 30-36.

[154] Tampere European Council Conclusions of 15 and 16 October 1999 (see http://www.europarl.europa.eu/summits/tam_en.htm#b).
The European Council invited the European Union "to establish special common procedural rules for simplified and accelerated cross-border litigation on small consumer and commercial claims" and stipulated that "extra-judicial procedures should also be created". This was reaffirmed by the Stockholm European Council Conclusions in which the European Council indicated that the Union should give priority to mechanisms that facilitate access to justice, so that people can enforce their rights throughout the EU (see Notice of the European Council, the Stockholm Programme: An open and secure Europe serving and protecting citizens, *OJ C* 115 of 4 May 2010, 4). See new Title V TFEU on "Area of Freedom, Security and Justice".

This includes, *inter alia*, better access to justice,[155] including both judicial and non-judicial mechanisms, so as to ensure citizens and SMEs are not prevented from or discouraged from seeking legal address by costs, time, and other practical issues. Consequently, the ESCP Regulation and the Mediation Directive seek to establish quicker, simpler, and more cost-efficient (judicial) ways to solve cross-border disputes.

On the other hand, the Injunctions Directive (2009/22/EC), which coordinates the different amendments made to Directive 98/27/EC on injunctions for the protection of consumers' interests,[156] forms part of the *consumer acquis directives*[157] adopted on the basis of Article 95 Treaty of European Union [Article 114 Treaty on the Functioning of the Union].[158] The internal market law dimension lays in the fact that the Injunctions Directive seeks to give consumers confidence to shop abroad by guaranteeing adequate judicial protection which they would benefit from if they shopped in their own Member State. Please note that country-by-country analysis of the implementation of the Injunctions Directive refers to the whole period since the implementation of Directive 98/27/EC.

The ESCP has been available in the Member States as of 1 January 2009,[159] whereas the transposition of the Mediation Directive into national law is required by 21 May 2011.[160] The Injunctions procedure had to be implemented by 1 January 2001.[161]

The implementation of these legislative instruments was analysed in five selected jurisdictions: France, Poland, the Netherlands, UK (England and Wales), and Germany. These jurisdictions were selected on the basis of the following criteria: (i) they reflect the main European legal families (common law, French civil law, and German civil law), (ii) they include one new Member State (Poland), and (iii) they include one smaller Member State (the Netherlands).

The study is based on current legislation, if available, or, as the case may be, on preparatory works. To the extent possible, examined issues were discussed with representatives of the French Ministry of Justice, the Polish Ministry of Justice, the UK Department for Business, Innovation and Skills (having also consulted the UK Ministry of Justice), and the Dutch Ministry of Justice. In addition, our findings are supported by relevant literature.

Descriptive overviews of the selected EU instruments are followed by comparisons of implementation in the selected jurisdictions and assessments of the effectiveness of legislation in practice (*l'effet utile*).

[155] This has now been confirmed in Art. 67(4) TFEU which states that, "the Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters".

[156] Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, *OJ L* 166 of 11 June 1998, 51. This Directive has been repealed by the Injunctions Directive.

[157] Nordhausen, Bradgate, and Twigg-Flesner 2009, p. 55.

[158] This provision allows the Union to adopt measures for the approximation of the provisions laid down by law, regulation, or administrative action in Member States which have as their object the establishment and functioning of the internal market.

[159] Art. 29 ESCP Regulation.

[160] Art. 12 Mediation Directive.

[161] Art. 8-9 Directive 98/27/EC.

4.1 European Small Claims Procedure

4.1.1 Aims and key elements

Having regard to the general objective of facilitating access to justice, the ESCP Regulation's aims are twofold.[162] Firstly, it intends to simplify and speed up litigation concerning small civil and commercial cross-border cases, as well as to reduce costs. Secondly, it envisages an abolishment of intermediate measures (the need for so-called *exequatur*, or declaration of enforceability, which exists in some Member States) to enable the recognition and enforcement of a judgment given in an ESCP in another Member State. At the same time, the court or tribunal handling the small claim should respect the right to a fair trial and the principle of an adversarial process.[163] It has been advanced that the ESCP Regulation thus strikes a balance between fast and cheap procedures on the one hand and the right of a fair trial on the other hand.[164]

The ESCP differs from traditional, private, international law rules in that it does not merely coordinate national laws, but establishes an autonomous[165] European procedure available to litigants as an alternative to the procedures existing under national laws. This means that Member States are allowed to continue to apply their national (domestic and/or cross-border) small claims procedures, if any, as long as they also provide for the ESCP.[166]

The ESCP consists of a written[167] procedure (based on standard forms) for dealing with European[168] cross-border civil and commercial disputes, the value of which does not exceed 2,000 Euro.[169] The court can decide whether an oral hearing is necessary.

The ESCP Regulation only lays down main procedural rules and provides for some minimum requirements, e.g. with regard to the commencement, conduct, and conclusion of the ESCP; languages; taking of evidence; the provision that parties do not need to be represented by a legal professional; assistance for the parties in the filling of the forms; service of documents; time limits which both parties and the court shall respect for speeding up litigation, recognition, and enforcement of the judgment; and minimum standards for review of the ESCP judgment.

For the remaining aspects of the ESCP, such as the possibility of appeal and enforcement of the judgment, the ESCP Regulation refers to national procedural law of the Member State in which the claim is lodged.[170] It does not contain any jurisdiction rules so that the ESCP Regulation does not affect the jurisdiction rules of the Brussels I Regulation.[171]

[162] Recital (8), (23), (30), and (36) and Art. 1 ESCP Regulation.
[163] Recital (9) ESCP Regulation.
[164] De Greef 2008, p. 240; Haibach 2005, pp. 595-596; Kramer 2008, p. 275.
[165] Kramer 2009, p. 258.
[166] Haibach 2005, p. 596.
[167] Recital (14) and Art. 5,1 ESCP Regulation. The forms are annexed to the ESCP Regulation.
[168] Denmark is not bound by ESCP Regulation nor subject to it (recital (38) ESCP Regulation).
[169] Art. 2,1 and 3 ESCP Regulation.
[170] Art. 19 ESCP Regulation.
[171] 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 of 16 January 2001, 1-23.
A brief summary of the Brussels I Regulation can be found on:
http://ec.europa.eu/civiljustice/jurisdiction_courts/jurisdiction_courts_ec_en.htm. For further details see Mayer and Heuze 2004, pp. 234-258.

This means that, as far as the case falls within the scope of the Brussels I Regulation,[172] the ESCP claim has to be lodged with the competent court of the Member State which has jurisdiction as established in accordance with the Brussels I Regulation.[173]

The ESCP Regulation lays down the obligation for Member States to notify[174] the Commission of the competent courts for dealing with an ESCP claim, the means of communication, the courts for appeal if appeal is provided, languages accepted, and the authorities competent to enforce a judgment given by the court in the context of an ESCP.[175]

4.1.2 Use since 1 January 2009

Exact data could not be provided. The report to be drafted by the European Commission by 1 January 2014 will likely bring more clarity on the use and application of the ESCP Regulation.[176]

Some preliminary data can be provided on the basis of interviews conducted for this report, but it should be noted that available statistics do not differentiate between different subjects of claims, i.e., it is not possible to determine how many ESCP applications dealt with B2C disputes. The French Ministry of Justice indicated that there were 36 ESCP applications in 2010, whereas the interviewees in the UK pointed to 233 ESCP applications and 139 applications to enforce the ESCP decision in 2009-2010. The Dutch Ministry of Justice reported in an interview that there were only 10 or 20 cases in 2009 and 2010 (and only in six of the 19 district courts). The contact persons within the Commission indicated that ESCP has not been used often. Scholars also point to the limited use of the ESCP.[177]

[172] See Art. 1 – 4 Brussels I Regulation. One of the applicability conditions is that at least the defendant is domiciled in a Member State (other than Denmark).

[173] Subject to exceptions laid down in the Brussels I Regulation, the defendant shall normally be sued in the courts of the Member State where he or she is domiciled (the *actor sequitur forum rei* principle). Consequently, the Claim Form must be lodged in the Member State where the defendant is domiciled. One of the exceptions provided for by the Brussels I Regulation (relevant for this study) relates to matters concerning a (non-insurance) contract concluded by a person (a consumer) for a purpose which can be regarded as being outside his or her trade or profession. In such case, the consumer may bring proceedings against the other party to the contract either in the courts of the Member State in which that party is domiciled or in the courts where the consumer is domiciled. This rule transposed into the ESCP context means that a consumer may lodge the Claim Form in the Member State where the consumer or the defendant is domiciled. This 'consumer contract exception', however, only applies if the contract (i) is a contract for the sale of goods on instalment credit terms; or (ii) is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or (iii) in all other cases, if the contract has been concluded with a person that pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities (cf. Art. 15-16 Brussels I Regulation). If this 'consumer contract exception' does not apply, the special jurisdiction rules regarding a contract might apply (Art. 5 Brussels I Regulation). In such a case, the defendant might also be sued in another Member State (other than where he or she is domiciled) in the courts for the place of performance of the obligation in question. However, the parties might have concluded a valid clause conferring jurisdiction to a Member State other than the one designated by Art. 5 Brussels I Regulation, e.g., in general conditions (Art. 23 Brussels I Regulation).

[174] Art. 25 ESCP Regulation.

[175] For a consolidated version see

http://ec.europa.eu/justice_home/judicialatlascivil/html/pdf/vers_consolide_en_861.pdf.

[176] Art. 28 ESCP Regulation.

[177] E.g., De Coninck 2010, p. 208 (as to the use of the ESCP in the Netherlands, Luxembourg, and Belgium).

4.1.3 Analysis of the implementation of the ESCP Regulation

France

The ESCP was introduced in France by a Decree of 17 December 2008 and was subsequently inserted into the Civil Procedure Code (CPC).[178]

The claimant must lodge the file by post[179] or by electronic means.[180] If the court considers the file to be outside the scope of the ESCP, it invites the claimant to cite the defendant. In such case, the court will judge the file in accordance with the general civil procedure rules, unless the claimant has withdrawn his claim within the period prescribed by the court.[181]

In case the court decides the claim to be manifestly unfounded or inadmissible, or if the claimant does not complete or rectify the claim as requested by the court within the prescribed period, the claim will be rejected. There is no appeal available against this decision.[182]

The court can decide to hold a hearing; in that case, the hearing will be held in accordance with common civil procedural rules.[183]

The right of review is governed by the procedure of opposition, or in accordance with similar procedural modalities.[184]

The ESCP judgment is subject to an ordinary appeal (*opposition*) if the losing party has neither personally received the notice served nor responded in the form prescribed (i.e., in the case of a judgment given by default).[185] An extraordinary appeal is available when the ESCP judgment may no longer or may not be challenged. It can be lodged before the Court of Cassation[186] or before the court or tribunal that issued the judgment challenged for revision (*recours en révision*).[187]

As indicated by the French Ministry of Justice, court proceeding is free in France. As the case may be, the cost of the notification by bailiff is supported by public budget.

Poland

The ESCP was introduced in Poland by the Act of 5 December 2008 on changes to Civil Procedure Code[188] and some other acts.[189] This Act has been in force since 12 December 2008.[190]

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[178] Art. 3 of "Décret" nr. 2008-1346 of 17 December 2008, *French Official State Gazette* n°0295 of 19 December 2008, p. 19478, text n° 30. Articles 1382-1391 of the Civil Procedure Code (CPC). Please note that France also provides for a national simplified procedure for certain small claims not exceeding 4,000 Euro by lodging a declaration to the Clerk's office of the court of First Instance (*Déclaration au greffe,* Art. 847-1 and following of Code of Civil Procedure). See Rutten 2009, p. 58.

[179] Art. 1383 CPC.

[180] As communicated by France to the European Commission (see p. 16 at http://ec.europa.eu/justice_home/judicialatlascivil/html/pdf/vers_consolide_en_861.pdf).

[181] Art. 1384 CPC.

[182] Art. 1385 CPC.

[183] Art. 1388 CPC.

[184] Art. 1391 CPC.

[185] Art. 571-578 CPC.

[186] Art. 605-618-1 CPC.

[187] Art. 593-603 CPC.

[188] *Kodeks postępowania cywilnego*, Dz.U. z 1964, nr. 43, poz. 296.

[189] *Ustawa z 5.12.2008 o zmianie ustawy – Kodeks Postępowania Cywilnego oraz niektórych innych ustaw*, Dz. U. nr. 234, poz. 1571.

The claimant can lodge a file personally in the court's secretariat or by post.[191]

The competence for the ESCP belongs to regional courts[192] and district courts.[193] The court referendary may make decisions of a technical nature but is not entitled to give judgements on the merits.

The exchange rates provided by the National Bank of Poland on the day of lodging the file are used to convert the value of a claim from a foreign currency into PLN.[194]

Where a claim is outside the scope of the ESCP Regulation, the claimant is informed by the court to that effect. Unless the claimant withdraws the claim within the period prescribed by the court, the court is to proceed with it in accordance with common procedural rules, relevant distinctive procedure, or non-litigious proceedings provided in the CPC.[195]

As required by the ESCP Regulation, the ESCP is a written procedure and the judgment is given in a closed session,[196] which constitutes an exception to the general rule,[197] subject to instances stated in the ESCP Regulation.

The claim is to be dismissed by the court's order under conditions stipulated in the ESCP Regulation.[198] Where the court considers the information provided by the claimant to be inadequate or insufficiently clear, or if the claim form is not filled in properly, the claimant is allowed to—within a specified period of time—complete or rectify the claim form, to supply supplementary information or documents, or to withdraw the claim.

The court may take evidence through written statements of witnesses,[199] which constitutes an exception to the general rule of oral testimony.[200] The written statement must include a signed oath and be submitted to the court within a specified period.[201] If the witness refuses to give evidence or sign the oath without foundation, the court may impose a fine.

The judgment of the court passed at a closed session[202] binds the court from the moment of signing the conclusion of the judgment and is delivered to the parties of the proceedings with information on remedies available to them under the CPC.[203]

In accordance to the Constitutional right of appeal,[204] the parties may appeal the judgment in conformity with the rules of a simplified procedure.[205]

The cost of a claim is set at 100 PLN.[206]

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[190] Note that there is a national simplified procedure provided for in Art. 505(indexed 1)-505(indexed 14) CPC. This is a small claims procedure available to claimants in a national dispute in two situations: claims of 10,000 PLN and below (approximately 2,500 Euro) and, regardless of the threshold, for claims concerning rent for housing.

[191] Art. 50521 CPC.

[192] *Sąd rejonowy*.

[193] *Sąd okręgowy*.

[194] Decision by the Supremacy Court, SN 8.08.2008, V CZ 49/08.

[195] Art. 505^{9}-505^{11}, 505^{12}(1) and (3), 505^{13} in conjunction with 505^{27}(1) CPC.

[196] Art. 505^{23} CPC.

[197] Art. 9 and 148(1) CPC stipulate that the proceedings take the form of open oral hearings.

[198] Art. 505^{24} CPC.

[199] Art. 505^{25} CPC.

[200] Art. 271(1) CPC. Overall exceptions to the general rule of oral testimony are instances of the witness being deaf or speech-impaired (Art. 271(2) CPC).

[201] Art. 505^{25} CPC.

[202] Art. 505^{26} CPC.

[203] Art. 505^{26} CPC.

[204] Art. 176(1) of the Constitution of the Republic of Poland (*Konstytucja Rzeczpospolitej Polskiej*, Dz. U. z 1997, nr. 78, poz. 483).

[205] Art. 505^{27}(1) CPC.

[206] Art. 27b of Legal Costs of Civil Procedure Act (*Koszty sądowe w sprawach cywilnych*, Dz. U. z 2010, nr. 90, poz. 594).

The Netherlands

The ESCP Regulation was implemented by the Law of 29 May 2009 (hereafter 'the Dutch Implementation Law').[207]

Sub-district courts (*kantonrechter*) are competent to hear small claims,[208] and it is provided that they also deal with the ESCP.

An ESCP claim is filed either by post or directly at the clerk's office. Whether it can be lodged by electronic means depends on the procedure regulation provided by each court.[209] Clerk's duties must be paid by the claimant.[210] They amount to 71 Euro for claims whose value do not exceed 500 Euro, and 142 Euro for claims whose value are above 500 Euro.[211]

In case the court finds the claim or the counterclaim to be outside the scope of ESCP Regulation, the claimant or the defendant has 30 days to withdraw their (counter)claim. The clerk's duties are not reimbursed. If the (counter)claim is not withdrawn, the procedure is continued in accordance with the common national civil procedure rules.[212]

No appeal is available against an ESCP decision.[213] The rationale of this choice lays in the fact that the relatively small financial interest of the ESCP does not weigh up against the time and costs involved when the case is dealt with in appeal.[214] However, under limited circumstances, the decision can be attacked before the High Court (*Hoge Raad*).[215]

The review procedure is available within four weeks after notice is given to the defendant under Article 18 (1)(a) ESCP Regulation, or after the grounds mentioned in Article 18 (1)(b) ESCP Regulation have ceased to exist.[216]

It is provided that the ESCP decision will be recognised and enforced in accordance with national law.[217] Judgments of courts of other Member States will be recognised and enforced if a copy of the judgment and the certificate (Form D) of the judgment can be delivered in Dutch.[218]

As a general rule, due to their simplicity and informality, the national rules regarding the unilateral request procedure apply accordingly.[219]

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[207] Law of 29 May 2009 concerning the implementation of Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, *Dutch Official State Gazette* 2009, 234.

Please note that the Netherlands provide for certain simplifications compared to the ordinary civil procedure for national small claims up to 5,000 Euro, for claims of unspecified value that obviously do not exceed 5,000 Euro, and for claims arising from employment contracts, collective employment agreements, agency agreements, lease or hire purchase agreements, and tenancy agreements, regardless of the value of the claim.

[208] Art. 93 Civil Procedure Code (CPC) provides that the local court is competent to hear cases involving claims up to 5,000 Euro.

[209] Art. 33 CPC.

[210] Art. 3 Dutch Implementation Law.

[211] See http://www.rechtspraak.nl/Procedures/Tarieven-griffierecht/Pages/Griffierecht-sector-Kanton.aspx.

[212] Art. 69 CPC.

[213] In accordance with Article 2, §3 Dutch Implementation Law.

[214] See Preparatory Works, File number 31 596, nr. 3, p. 12.

[215] On the grounds mentioned in Art. 80 of the Law on Judicial Organisation.

[216] Art. 6 Dutch Implementation Law.

[217] Art. 7 Dutch Implementation Law.

[218] The legislator did not want to allow certificates in another language so as to protect the Dutch defendant (Preparatory Works, File number 31 596, nr. 3, p. 17).

[219] Art. 9 Dutch Implementation Law.

The United Kingdom

The rules on the ESCP can be found in Rules 78.12-78.22 of the Civil Procedure Rules (CPR).[220] The ESCP is governed by the national small claims track procedure laid down in Part 27 CPR.[221]

The ESCP claim form must be filed at the court in person or by post.[222]

Rule 78.1 CPR provides that, except where the ESCP Regulation makes different provisions about the certification or verification of translations, every translation must be accompanied by a statement by the person making it that it is a correct translation. The statement must include that person's (the translator's) name, address, and qualifications for making the translation.

In case the court identifies the (counter)claim to be outside the scope of the ESCP Regulation, the claimant/defendant has 21 days to withdraw their claim. If the claim is not withdrawn, the (counter)claim will be treated as a claim under Part 7 CPR.[223]

The review procedure must be in accordance with Part 23 CPR.[224]

As for the provision of appeal, in the absence of any indication to the contrary in Rules 78.12–78.22 CPR, one must refer to the rules governing the national small claims track-procedure. In principle, the losing party needs to obtain permission of the judge to appeal.[225]

A person seeking to enforce an ESCP judgment in England and Wales must file the documents required by Article 21 ESCP Regulation at the court in which enforcement proceedings are to be brought.[226]

Under the ESCP, the issue fees are 30 Pound for cases up to 300 Pound; 45 Pound for cases from 300 Pound to 500 Pound; 65 Pound for cases from 500 Pound to 1000 Pound; 75 Pound for cases from 1000 Pound to 1500 Pound; and 85 Pound for cases exceeding 1500 Pound.[227]

Germany

The Law for the improvement of cross-border claims enforcement and service of documents of 30 October 2008 contains procedural by-laws to, *inter alia*, the ESCP Regulation.[228]

It adds a new Division 6 to the 11th Book of the *Zivilprozessordnung* (ZPO) titled "Judicial cooperation within the European Union", and consists of two parts.

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[220] Please note that the UK provides for a small claims track-procedure for claims the amount of which should normally not exceed 5,000 Pound and consist mainly of consumer claims (e.g., goods sold, faulty goods or workmanship), accident claims, disputes about ownership of goods, and disputes between landlords and tenants about repairs, deposits, rent arrears, and so on, but not possession (see Part 27 CPR). The small claims track-procedure is based on standard forms. It has been advanced that the ESCP has been inspired on the UK small claims-track (see Voet 2007, p. 76). In addition, claims the value of which does not exceed 100,000 Pound can in certain circumstances be filed online through *Money Claim Online* (www.moneyclaim.gov.uk) (see Rutten 2009, pp. 56-58).

[221] Rule 78.14 CPR. Accordingly, Part 27 CPR applies to the ESCP except Rule 27.14 concerning costs since recital 29 to the ESCP Regulation contains different provisions on costs.

[222] Rule 78.13 CPR.

[223] Rules 78.15, 78.17, and 78.18 CPR.

[224] Rule 78.19 CPR.

[225] According to para. 10 of the Practice Direction 78, Part 52 CPR applies to any appeals.

[226] Rule 78.20 (1) CPR.

[227] The amount of the issue fees has been confirmed by the UK Department for Business, Innovation and Skills.

[228] *Gesetz zur Verbesserung der grenzüberschreitenden Forderungsdurchsetzung und Zustellung.* As regards the ESCP Regulation, the Law entered into force on 1 January 2009.

The claimant may submit the ESCP Claim Form and other procedural documents as electronic documents, but regional exceptions may apply.[229] In case the ESCP claim is outside the scope of the ESCP Regulation and the claimant does not withdraw the claim, proceedings must be continued; however, they are continued without the application of the ESCP.[230]

The parties can, within one week, refuse documents submitted by the other party on the grounds of the language they are written in.[231]

Counterclaims not meeting the requirements of the ESCP Regulation must be dismissed (except when the counterclaim exceeds 2,000 Euro), in which case the proceedings are continued without applying the ESCP.[232]

The court may allow litigation via video conference.[233]

The ESCP judgment is enforceable.[234]

The initial court issues a certificate of the ESCP judgment provided that the respondent is heard before the issuance of the certificate.[235] An ESCP judgment given in another Member State is recognised without a declaration-of-enforceability requirement.[236]

The certificate of the ESCP judgment needs to be in German.[237]

4.1.4 Comparison and assessment

Table 5 provides an overview of the main differences between the implementation laws in the selected jurisdictions.

[229] Section 1097 (1) ZPO.

[230] Section 1097 (2) ZPO.

For regional exceptions, see *Information communicated by Member States in accordance with Article 25 of Regulation (EC) no. 861/2007 of the European Parliament and the Council of 11 July 2007 establishing a European Small Claims Procedure*.

[231] Section 1098 ZPO.

In its report on the draft 'ESCP-implementing law', the committee on legal affairs of the German *Bundestag* discussed whether one week may be too short; in the end, it found that consumers nevertheless enjoyed adequate protection (see Deutscher Bundestag 2008, p. 4).

[232] Section 1099 ZPO.

[233] Section 1100 ZPO.

[234] Section 1105 ZPO.

[235] Section 1106 ZPO.

This requirement has no legal basis in the ESCP Regulation, but has adverse effects on the claimant as it gives the respondent the possibility to delay enforcement. Whether this provision is in accordance with the ESCP Regulation seems questionable (see Freitag and Leible 2009, p. 2ff. [5]).

[236] Section 1107 ZPO.

[237] Section 1108 ZPO.

Table 5: Overview of the implementation of the ESCP Regulation in selected jurisdictions

	ESCP Regulation	France	Poland	The Netherlands	UK	Germany
Lodging the claim	by post and other means acceptable in MS	by post or electronic means	by post or personally in the court's secretariats	by post or with clerk's office; electronically at some local courts	by post or in person	possible electronically; regional exceptions
Oral hearing	may be requested by the parties and decided for or refused by court; may be provided for through comm. tech.	court can decide to hold a hearing (common civil procedural rules apply)	may be held; hearings via communication technology not available	no oral hearing	in principal no oral hearing; if held, normally via communication technology	litigation via video conference may be allowed by the court
Appeal	choice of MS	none available; ordinary appeal in certain cases; extraordinary appeal for both parties	available in conformity with simplified procedure rules	none available; decision can be attacked before the High Court	available; permission required	available
Accepted languages	at least the official language(s) of MS	FR, EN, DE, IT, ES	PL	NL	EN	DE
National small claims procedure	left to the discretion of MS	for claims not exceeding 4,000 Euro	for claims up to 10,000 PLN (approx. 2,500 Euro) or if the claim concerns a rent for housing	up to 5,000 Euro	for claims (normally) up to 5,000 Euro	none available
Costs related to the ESCP	costs of proceedings (determined by national law) borne by unsuccessful party; costs unnecessarily incurred or disproportionate to the claim not awarded to the successful party	court proceedings free in general; the cost of notification by bailiff supported by public budget	100 PLN	claimant pays the clerk's duties: 71 Euro (claims up 500 Euro); 142 (above 500 Euro)	issue fees: 30 Pound (for cases up to 300 Pound); 45 (300-500); 65 (500-1,000); 75 (1,000-1,500) 85 (above 1,500 Pound)	data not available
Information on the ESCP	MS to cooperate (especially through EJN in Civil in Commercial Matters) to provide information	provided through cooperation with consumers' organisations (a)	data not available	no specific promotional measures (a)	available (incl. a downloadable leaflet) on a Courts and Tribunals Service website	press releases on the ESCP published by Ministry of Justice

Source: Civic Consulting; (a) Ministry of Justice

At first glance, the ESCP Regulation appears to be an instrument with high potential for creating European civil procedural law by laying down a European, uniform, simplified, and accelerated procedure for handling small claims.[238]

More specifically, it could offer consumers a cheap tool to lodge a claim by filling in the uniform Claim Form A, electronically available in all official languages of the EU,[239] as well as at all courts and tribunals at which the ESCP can be commenced,[240] and lodging it with the competent court of the Member State (which has jurisdiction in accordance with the Brussels I Regulation) either by post or in person at the clerk's office or, if available, by electronic means (e.g., France). As such, citation fees do not need to be paid. Lawyers' fees do not have to be paid either, since legal representation of the parties is not mandatory. To avoid parties' need for legal assistance for filling in the forms, the ESCP Regulation provides for standard forms which are carefully designed, and include some explanation. Moreover, it obliges Member States to assist parties in filling in the forms,[241] and provides specific time limits for both parties and the court so that the ESCP will be handled within a rather limited period of time. Finally, the ESCP Regulation offers the advantage that an ESCP judgment can be enforced in all Member States (except Denmark) without any *exequatur*. It thus represents a further step towards the effective free movement of judicial decisions within the EU.[242]

Notwithstanding these (potential) advantages that the ESCP Regulation offers, one must acknowledge the small use of the ESCP by consumers for enforcing their rights in cross-border cases.[243]

Various explanations could be offered for this occurrence. First, assuming that people are generally less likely to commence legal proceedings for small claims,[244] the threshold of 2,000 Euro may just be too low (making the scope of application of the ESCP without any practical relevance).[245] Second, as certain scholars feared[246] and as indicated by the French Ministry of Justice, the UK Department for Business, Innovation and Skills, and the Dutch Ministry of Justice, consumers may not be fully aware of the availability of the ESCP,[247] notwithstanding the obligation for Member States to inform the public on the ESCP.[248]

In addition, even if consumers know about the availability of the ESCP, they are still confronted with practical obstacles. A first obstacle may be that forms must be completed. One could wonder how consumers are able to fill in the Claim Form, especially where the questions are open.[249] For instance, one could assume that not every consumer

[238] De Greef 2008a, p. 170; Kramer 2008, p. 27; Voet 2007, p. 85.
[239] See http://ec.europa.eu/justice_home/judicial_atlascivil/htm/index_en.htm.
[240] Art. 4 (5) ESCP Regulation.
[241] Voet 2007, p. 76.
[242] Traest 2009, p. 867.
[243] Cfr. Section 4.3) b).
[244] Certainly if one takes into account that the unsuccessful party shall bear the costs of the ESCP (Art. 16 ESCP Regulation).
[245] This amount was debated during the preparation of the proposal of the EC, since Member States that provide for some kind of national small claims procedure apply different thresholds (see Table 5). For example, the Netherlands wanted the threshold to be set at 5,000 Euro (see Kramer 2007, p. 75).
[246] De Greef 2008, p. 257; De Greef 2008a, p. 170; Traest 2009, p. 867.
[247] De Coninck (2010, p. 210) points out that, at least in Belgium, no information campaigns have taken place. In this sense, the contact person within the EC indicated to have received complaints from consumers regarding the implementation of the ESCP.
[248] Art. 24 ESCP Regulation.
[249] Kramer 2008, p. 275.

knows which court will be competent or even which Member State will have jurisdiction for dealing with the case. Such problems faced by a consumer when filling in the Claim Form constitute an even larger obstacle in the case that the competent court is established in a Member State other than the Member State where the consumer is domiciled. Under the Brussels I Regulation, if applicable, such a situation is not merely hypothetical if one takes into account the limited scope of application of Article 15 Brussels I Regulation (by virtue of which the consumer may sue the defendant in the Member State where the consumer is domiciled).[250] As the Claim Form needs to be completed in the language of the court or tribunal with which the Form needs to be lodged, consumers may have to fill in the Form using a foreign language, even if they are not fluent in that language.

Furthermore, as it is difficult to understand how and whether the courts will comply with their obligation[251] to inform the parties about procedural questions,[252] one could assume that consumers will have to be assisted by a legal professional to lodge a Claim Form. This increases the cost of the ESCP, inhibiting consumers from initiating legal proceedings for small claims.

Another issue could be that consumers do not fully understand the procedure in the Member State concerned, e.g., as to the costs involved[253] and the length of the procedure,[254] taking into account that the ESCP Regulation does not harmonise national procedural law[255] so that any such differences continue to exist also in the ESCP context.[256] The lack of clarity and legal certainty regarding the respective rights of the parties involved in the ESCP could inhibit consumers from lodging the ESCP Claim Form.

Finally, whether (translation/travel) costs will be reduced by the ESCP is questionable since certain forms need to be translated and oral hearings (implying, in most cases, obligatory physical presence) might be held in certain circumstances during the procedure and/or for the obtainment of the certificate of the ESCP judgment (as is the case in Germany). It can also be noted that in certain circumstances, it might be difficult to execute the decision.

In conclusion, although the ESCP Regulation provides for an additional judicial way of handling small claims, its effectiveness is significantly undermined in reality, which is evidenced by the data on the limited use of the ESCP.

[250] See Footnote 180.

[251] Art. 12 (2) ESCP Regulation.

[252] See Voet 2007, p. 76.

Some scholars advanced that it is crucial for the courts to be sufficiently familiar with the ESCP (see Storme 2009, p. 31; De Greef 2008, p. 257; De Greef 2008, p. 170).

[253] Kramer (2008, p. 273) recommends that the details of the involved costs should be published.

[254] Notwithstanding the strict time limits imposed by the ESCP Regulation, there is no provision that the ESCP will be handled within a certain period (as opposed to Art. 10(1) of the Commission Proposal which states that the judgment shall be rendered within six months following the registration of the claim form).

[255] Traest 2009, p. 867.

[256] As it appears in Table 5, differences concern mainly the availability of appeal; the way in which the ESCP claim form needs to be filed; the languages accepted for enforcing an ESCP judgment from another Member State; and the possibility of a hearing by communication technology. In addition, most Member States provide for another simplified and accelerated procedure for national small claims leading to a multiplicity of procedures. If appeal is available, translations need to be made and a hearing with physical presence is held. The costs and the length of the ESCP will accrue accordingly.

4.2 Mediation in civil and commercial matters

4.2.1 Aims and key elements

The aims of the Mediation Directive are twofold. For one, it promotes (extra-)judicial mediation as an autonomous ADR without competing with judicial proceedings.[257] The Mediation Directive therefore promotes mediation by obliging Member States to allow courts to suggest mediation to parties in civil and commercial cross-border disputes and to invite them to attend an information session on the use of mediation, if such sessions are held and are easily available.[258] As the Commission does not consider mediation an alternative to court proceedings,[259] but rather one of many other possible dispute resolution methods, the Mediation Directive is without prejudice to national legislation that makes the use of mediation compulsory or subject to incentives or sanctions, provided such legislation does not prevent the parties from exercising their right of access to the judicial system.[260]

The second objective of the Mediation Directive could be described as seeking to reinforce the quality of mediation procedures, and thus enhancing consumers' confidence in mediation, by establishing a general framework and minimum requirements for the Member States without creating a uniform mediation procedure or regulating the profession of mediator.

Those key aspects of the mediation procedure focused on by the Mediation Directive are: (1) encouragement by Member States of mediator training and the development of, and adherence to, a voluntary code of conduct; (2) the fact that the mediator cannot, in principle, be compelled to give evidence in subsequent proceedings of information obtained during mediation;[261] (3) enforceability of agreements resulting from mediation if all parties consent thereto; (4) the suspension of limitation periods while parties mediate; and (5) information for the general public.

4.2.2 Analysis of the expected implementation of the Mediation Directive

France

A Law Proposal has been lodged in order to implement, *inter alia*, the Mediation Directive, but it still needs to be adopted.[262] Article 9 of this Proposal authorises the government to adopt legislative provisions so as to transpose the Mediation Directive into national law, to extend those implementing provisions to domestic mediation, and to harmonise, if necessary, other aspects of law in accordance with the new provisions.

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[257] See Art. 1 Mediation Directive.

[258] Art. 3 Mediation Directive.

[259] Proposal for a directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters, COM (2004)718 final, 4.

[260] Art. 5, 2 Mediation Directive.

[261] Under Art. 7 Mediation Directive, the information arising out of or in connection with a mediation process is in principle confidential subject to three exceptions: (1) where the parties agree otherwise; (2) if giving of evidence is necessary for overriding considerations of public policy of the MS; or (3) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement. Note that "overriding considerations of public policy" is narrowly interpreted in EU law as "a genuine and sufficiently serious threat affecting one of the fundamental interests of society" (see CJEU Case 30/77 *Bouchereau* [1997], *ECR* 1999, para. 35; Barnard 2007, p. 465).

[262] Law Proposal of 22 September 2010, Senate session 2009-2010 (see http://www.legifrance.gouv.fr/html/actualite/actualite_legislative/exp_transpo_dir_civiles_com.html).

In the Impact Assessment[263] of the Law Proposal, it is indicated that France currently regulates judicial mediation, i.e., if a claim has been lodged and the court has proposed to the parties to settle their dispute via mediation.[264]

Certain articles from these provisions already ensure the transposition of the Mediation Directive: Article 131-1 CPC (*Code du Procédure Civile*) provides that the court may propose to the parties that they settle their dispute by mediation; Article 131-5 CPC lays down certain conditions the mediator must meet, the absence of which is only controlled by the parties themselves who can sue the mediator on the basis of civil liability (e.g., no criminal record, independence, a particular education or equivalent practical experience, required qualification regarding the nature of the dispute); Article 131-12 CPC provides the homologation of the agreement by the court upon request of the parties; and Article 131-14 CPC entails the principle of confidentiality of declarations arising during mediation. Article 2238 of the Civil Code provides that the prescription period is suspended as soon as parties agree to settle their dispute by mediation. Article 131-13 CPC provides that the court determines the mediator's fee.

On the other hand, France has not yet laid down a legislative framework with regard to non-judicial mediation.[265] As to non-judicial mediation, different professional organisations provide, however, for the adherence of mediators to a code of good conduct.[266]

Poland

To date, only a Proposal of the Ministry of Justice implementing the Mediation Directive is available.[267]

It is proposed that, instead of social and professional organisations,[268] particular non-governmental organisations and universities may draw up (non-binding) lists of permanent mediators and create mediation centres.[269]

In order to implement Article 6 Mediation Directive, it has been proposed to add that parties give their consent to request court approval by signing a mediation agreement.[270] The mediator should inform the parties of this rule.

It is already provided for that the agreement resulting from mediation approved by court has the same validity as judicial settlement[271] and that such agreement may not be made enforceable where its content is contrary to the law,[272] where its content aims to circumvent the law, or where it is unclear or self-contradicting.[273]

[263] See République Française 2010.

[264] Articles 131-1 to 131-15 CPC.

[265] In practice, however, certain mediation practices have been set up and certain professional organisations have elaborated Codes of Good Conduct applicable to mediators (see République Française 2010, pp. 41, 43-44).

[266] République Française 2010, pp. 43-44.

[267] The Proposal was consulted on http://bip.ms.gov.pl/pl/projekty-aktow-prawnych/prawo-cywilne (point number 7) (accessed 21 March 2011). It will be presented to the government for approval and subsequently sent to Parliament in order to be enacted.

[268] Art. 183^2(3) CPC.

[269] Art. 183 indexed 2(3) CPC.

[270] New Art. 183 indexed 12(2 indexed 1) CPC. According to the Polish Ministry of Justice, the implementation of Article 6 Mediation Directive constituted the main issue in implementing the Mediation Directive. In effect, the Polish legal system traditionally does not provide for consent of all parties to agreements and enforcement; only the motion of one party is required to enforce the agreement arisen from mediation.

[271] Art. 183^{15}(1) CPC.

[272] *Zasady współżycia społecznego.*

[273] Art. 183^{14}(3) CPC.

The Ministry of Justice now proposes adding that the agreement approved by court and made enforceable constitutes a writ of execution (*tytułykonawczy*).[274]

As for the remaining points of the Mediation Directive, reference could be made to the existing provisions on mediation as introduced into the Polish Civil Procedure Code in 2005.[275]

Mediation is voluntary.[276] It may be initiated by a mediation contract, court order, or the request of a party to which the other party consents.[277]

Mediation may be conducted prior to court proceedings or, with parties' consent, in the course of proceedings.[278] The court may direct the parties to mediation only once in the course of proceedings.[279] In principle,[280] the court may do so until the end of the first oral hearing, afterwards this is only possible on joint request of the parties.[281]

Mediation is not conducted if parties do not consent to mediation within one week.[282]

When directing to mediation, the court appoints the mediator, but the parties may choose to appoint one instead.[283]

The court prescribes a period of maximum one month for mediation, unless the parties request a longer period. In the course of mediation, its duration may be extended on joint request of the parties.[284] The presiding judge schedules an oral hearing after the prescribed period has passed, but if one of the parties does not consent to mediation, the oral hearing is scheduled before the prescribed period has passed.[285]

A judge may not act as mediator.[286] Permanent mediators may refuse to conduct mediation only for important reasons.[287] Mediators have to remain impartial in the course of the mediation.[288]

The mediation process is confidential.[289] Mediators may not reveal facts learnt through mediation, unless authorised by the parties to do so.[290] Invoking proposals of agreements or concessions or other statements from the course of mediation process before the court is legally ineffective.[291]

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[274] Art. 183 indexed 15(1) CPC.

[275] Act of 28 July 2005 on changing the Civil Procedure Code and some other acts (*Ustawa z 28.07.2005 o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw*, Dz. U. nr. 172, poz. 1438).
The main inspiration for the reform was Recommendation R (2002) 10 by Committee of Ministers of the Council of Europe on mediation in civil matters (see Kalisz and Prokop-Perzyńska 2010).

[276] Art. 183^1(1) CPC.

[277] Art. 183^1(2) CPC.

[278] Art. 183^1(4) CPC.

[279] Art. 183^8(2) CPC.

[280] The court may not direct the parties to mediation in injunctions procedure (*pol. postępowanie nakazowe*) and writ procedure (*pol. postępowanie upominawcze*) (art. 183^8(4) CPC).

[281] Art. 183^8(1) CPC.

[282] Art. 183^8(3) CPC.

[283] Art. 183^9 CPC.

[284] Art. 183^{10}(1) CPC.

[285] Art. 183^{10}(2) CPC.

[286] Unless retired (Art. 183^2(2) CPC).

[287] Art. 183^2(4) CPC.

[288] Art. 183^3 CPC.

[289] Art. 183^4(1) CPC.

[290] Art. 183^4(2) CPC.

[291] Art. 183^4(3) CPC.

An official record of the mediation process is kept.[292] A written agreement resulting from mediation signed by the parties is included in or attached to the record.[293]

Poland has made information available regarding mediation on the website of the Ministry of Justice.[294] In addition, the Ministry of Justice has been conducting an educational campaign on mediation within the European Social Fund's Human Capital Programme, through distributing posters, brochures, leaflets, and guidebooks in places where people potentially interested in mediation could easily find them.[295] In the first quarter of 2011, the campaign was also conducted through television and radio spots.

The website of the Ministry of Justice also provides a link to the Regulation of the Minister of Justice of 30 November 2005 on mediator's remuneration and returnable expenses in civil matters. In property rights cases, the mediator receives 1% of the value of dispute, however not less than 30 PLN and not more than 1,000 PLN for the whole mediation process. Where the value of a dispute can not be determined, and in non-property rights cases, the mediator receives 60 PLN for a first mediation session and 25 PLN for subsequent sessions. Where the court authorises the mediator to familiarise him- or herself with the case file, remuneration for the whole mediation process is increased by 10%.

The Netherlands

A Law Proposal of 18 November 2010 intends to amend Book 3 of the Civil Code and the Civil Procedural Code so as to implement the Mediation Directive.[296]

The Proposal does not limit the scope of the implementation to cross-border disputes but extends it to national disputes. The rules on confidentiality and prescription will consequently be applicable to national disputes.

The legislator advanced two reasons to justify this extension.[297] Firstly, it avoids legal inequality between parties involved in (non-)cross-border disputes given the fact there is no reason to protect only parties involved in cross-border disputes. Secondly, it allows parties to benefit from the rules on prescription and confidentiality even in case the (cross-border) nature of the dispute has subsequently changed.

Furthermore, it is provided that the court may propose mediation to parties in all cases and at each stage of the proceedings. It is not proposed to lay down the possibility of the court to invite the parties to attend an information session on the use of mediation on the ground that it is already common practice that the court provides information to the parties when proposing that they settle the dispute by mediation.[298] In addition, mediation will continue to be non-compulsory.

As to the quality of mediation, the Dutch legislator did not deem it necessary to implement Article 4 Mediation Directive. The Netherlands left the question of the quality of mediation to the mediators' professional organisation itself. It is indicated that the Netherlands

[292] Art. 183^{12}(1) CPC.

[293] Art. 183^{12}(2) CPC.

[294] See http://ms.gov.pl/pl/dzialalnosc/mediacje. This website provides brochures, lists of mediators drawn up by district courts (*pol. sądy okręgowe*), legal acts referring to mediation, and expert commenty on the subject.

[295] See http://ms.gov.pl/pl/dzialalnosc/mediacje/aktualne-dzialania-ministerstwa-sprawiedliwosci-w-przedmiocie-mediacji.

[296] Law Proposal, Chamber file 32 555, nr. 2 (hereafter 'the Proposal')
(see www.zoek.officielebekendmakingen.nl/zoeken - file nr. 32555).
The Law has not been adopted yet (as of 23 May 2011).

[297] Preparatory Works, Chamber file 32 555, nr. 3, p. 4.

[298] Preparatory Works, Chamber file 32 555, nr. 3, p. 6.

Mediation Institute (*Nederlands Mediation Instituut; NMI*), a private organisation, is currently in charge of ensuring the quality of mediators by granting the possibility for mediators to become an 'NMI Mediator' and/or an 'NMI Certified Mediator' by following classes and passing exams. Moreover, a central possibility of complaints about mediators is already available.[299]

Under current Dutch law, parties can decide to lay down the result of the mediation in an agreement (*vaststellingsovereenkomst*) and to have it confirmed by notary deed so that its content becomes enforceable,[300] unless the agreement is contrary to public order.[301] Furthermore, it is already provided that a settlement agreed before court can be enforced whenever the case has been brought before court through writ of summons.[302] The Proposal provides this same possibility where the case has been filed with the court through request.[303]

As to the confidentiality requirement laid down in Article 7 Mediation Directive, the Proposal states that parties to mediation are allowed to not give evidence if the confidential character of the mediation has been explicitly agreed upon. Giving evidence is, however, obligatory in case this is necessary for overriding considerations of public policy, in particular when it is required to ensure the protection of the best interests of children, or to prevent harm to the physical or psychological integrity of a person. It is also obligatory where disclosure of the content of the agreement resulting from mediation is necessary in order to implement that agreement.

The Proposal ensures that parties who choose mediation are not subsequently prevented from initiating judicial proceeding or arbitration by the expiry of limitation or prescription periods during the mediation process, by providing that the limitation or prescription period of the claim will be interrupted by mediation.

The Proposal does not contain any provisions aiming at providing information on mediation for the general public. The legislator considered that the Netherlands is already taking care of making such information available, e.g., through the website of the NMI.[304]

The mediator's fee is determined by the mediator and agreed upon before the mediation takes place.[305]

The United Kingdom

The Civil Procedure (Amendment) Rules 2011[306] intend, *inter alia*, to implement the Mediation Directive by inserting a new Section III in the Civil Procedure Rules 1998 (new Rules 78.23–78.28).

The Civil Procedure Rules 2011 (hereafter 'the CPR 2011') restricts the rules on mediation to cross-border disputes.[307]

[299] Preparatory Works, Chamber file 32 555, nr. 3, p. 7.
[300] Art. 430 (1) CPC.
[301] Art. 902 of Book 7 Civil Code.
[302] Art. 87 (3) CPC.
[303] Art. 22a (D) Proposal.
[304] Preparatory Works, Chamber file 32 555, nr. 3, p.11. The website can be consulted at www.nmi-mediation.nl.
[305] See http://www.nmi-mediation.nl/over_mediation/over_mediation/wat_kost_mediation.php.
[306] The Civil Procedure (Amendment) Rules 2011 No. 88 (L.1) (hereafter 'the CPR 2011'); see http://www.legislation.gov.uk/uksi/2011/88/made. The new provisions on cross-border mediation apply only if the mediation is commenced on or after 6 April 2011 (Rule 13 CPR 2011).

The CPR 2011 do not contain any provisions in relation to the encouragement of mediator training, the development of a code of conduct, or judicial powers to invite parties to mediate, since the Ministry of Justice considered that current procedures already comply with Articles 4 and 5 of the Mediation Directive.[308] In effect, the Civil Mediation Council (CMC) has set as its objective, *inter alia*, to encourage good practice in mediation. It therefore has set up an accreditation system for mediators establishing a minimum set of criteria for providers of mediation services in terms of training, insurance, codes of conduct, continuing professional developments, administration, etc.[309]

As to the judicial power to invite parties to mediate, the CPR currently obliges the court to encourage the parties to use an ADR procedure if it considers that appropriate, and the court is obliged to facilitate the use of such procedure.[310] Moreover, it is common practice that the court takes into account the parties' attitude to mediation when considering who should bear the costs of the judicial procedure.[311] Scholars indicate that "UK mediators have an excellent reputation."[312]

Under new Rule 78.24 CPR 1998, a party (or parties) to the mediation settlement agreement may obtain a mediation settlement enforcement order, making the mediation settlement agreement enforceable.

If a party wishes to obtain mediation evidence from a mediator or mediation administrator by witnesses and depositions, it must provide the court with evidence that all parties to the mediation agree to the obtaining of the mediation evidence and that obtaining the mediation evidence is necessary for overriding considerations of public policy or is necessary to implement or enforce the mediation settlement agreement.[313] This procedure must also be followed whenever a person seeks disclosure or inspection of mediation evidence that is under the control of a mediator or mediation administrator.[314]

However, both new Rules 78.26 and 78.27 CPR 1998 do not apply to proceedings that have been allocated to the small claims track. In such cases, the party wishing to rely on mediation evidence must inform the court immediately. Nonetheless, the UK Department for Business, Innovation and Skills indicated that confidentiality in the mediation process is the same, irrespective of the value of the case.

As to the effect of mediation on limitation periods, in the context of a domestic mediation, the limitation period can be suspended if parties agree thereto or if a party seeks a stay from the court in order to try to settle the case by ADR.[315] In other words, domestic mediation does not automatically interrupt the limitation periods. The CPR 2011, however, does not provide for any interruption of limitation periods in relation to cross-border mediation.

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[307] New Rule 78.23 CPR 1998.

[308] See Oddy 2011.

[309] The CMC is an independent body recognised as the organisation which represents the interests of civil, commercial, and workplace mediation in England and Wales, with links throughout the UK and Europe (see www.civilmedation.org).

[310] Rule 1.4 (e) CPR.

[311] E.g., in *Dunnett v. Railtrack Plc* [2002] EWCA Civ. 302 the Court did not award the defendant its costs because of its refusal to mediate without having given any reasons. In *Earl of Malmesbury v. Strutt and Parker* [2002] EWCA Civ. 302, it was decided that where a party adopts a "plainly unrealistic and unreasonable" stance during mediation, the court "can and should" take account of this when deciding the appropriate costs order.

[312] Cornes 2008, p. 404.

[313] New Rule 78.27 CPR 1998. In domestic mediation this 'Confidentiality' rule corresponds with the notion of privilege developed in Common Law (see Cornes 2008, pp. 403-404).

[314] New Rule 78.26 CPR 1998. Note that this is not required by Art. 7 Mediation Directive. The UK has taken advantage of Art. 7 (2) Mediation Directive, which allows Member States to enact stricter measures to protect the confidentiality of mediation.

The costs related to mediation depend on the value of the claim and vary from 50,00 Pound to 95,00 Pound per hour.[316]

Germany

In January 2011, the government presented a Draft Statute *Mediationsgesetz* which still needs to be passed by Parliament.[317] If adopted, it will apply equally to domestic and cross-border disputes.[318]

As to conduct of mediation and tasks of the mediator, Section 2 of the Draft Statute stresses, *inter alia*, that mediation is voluntary and that either the parties or the mediator can put an end to it. The mediator is to be selected by the parties. The mediator must ensure that the parties understand the concept of mediation and that the final agreement is based on "informed consent". To parties that are not represented by a counsel, the mediator must point out that they can consult a counsel, e.g., a lawyer, before concluding an agreement. The terms of the agreement can be reduced to writing if parties consent.

The Draft Statute sets out very detailed rules to implement the "impartiality requirement" laid down in Article 3(b) Mediation Directive. The mediator must disclose all facts that may give rise to bias or impartiality on their part. If there are potentially biasing factors, the person can only act as mediator if the parties explicitly agree. An absolute exclusion criterion is previous counselling of one of the parties regarding the same dispute. Also, the mediator must not act on behalf of one of the parties during the mediation or afterward. The same is generally true for persons that are in an office community with the mediator, although exceptions apply here.

Section 4 of the Draft Statute puts the mediator under a universal obligation of secrecy. This is, however, levelled by a reservation of statutory powers in order that exceptions— especially in the field of criminal law—become possible. Apart from that, the Draft Statute adopts the Mediation Directive's provision on confidentiality almost as it stands, adding that facts that are "obvious or whose nature makes confidentiality unnecessary" cannot be kept secret. The mediator must inform the parties of the existence and extent of his or her obligation of secrecy.

As to adequate training of the mediator, there are no systematic control mechanisms.[319] Upon request, the mediator must give information on training undertaken,

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[315] Rule 26.4 CPR.

[316] Costs of the mediator can be consulted on http://www.nationalmediationhelpline.com/costs-of-mediation.php.

[317] The Draft Statute can be consulted on http://www.bmj.de/SharedDocs/Downloads/DE/pdfs/GE_Mediation_Zuleitungsexemplar.html?nn=1468700 (accessed 21 March 2011).

[318] Note that Section 15a of the *Gesetz, betreffend die Einführung der Zivilprozessordnung* (statute governing the introduction of the code of civil procedure) requires, in certain circumstances (e.g., in neighbour disputes and small claims) that parties try to resolve their conflict by means of negotiation before they can bring proceedings before a court. In such cases, mediation is to take place before a government/government-authorised arbitration board. Parties cannot choose the mediator themselves. Moreover, some courts offer free mediation by judges not concerned with the respective lawsuit. Various laws also refer to mediation, however, they do not set out detailed rules on the training of mediators, confidentiality of negotiations, suspension of prescription, enforceability of agreements, etc. However, the Federal Bar Association has set high standards regarding qualification and confidentiality for lawyers who want to call themselves 'Mediator' (the title "may only be used by those who can prove that, on the basis of appropriate training, they master the principles of mediation procedure"; see Federal Bar Association Rules of Professional Practice, Section 7a).

professional experience, and professional background. The occupational title of 'Mediator' is not protected.[320]

Only mediation by a judge without decision-making power is cost-neutral[321]; other mediators must be paid for by the parties without the help of legal aid. There is no reduction of court fees, which would be an incentive to use mediation. Legal aid is only available under very exceptional circumstances. The costs of mediation other than court-internal mediation are to be freely negotiated between the parties and the mediator. Neither the *Mediationsgesetz* nor the attorney remuneration law contains any guidelines or caps.

The mediation agreement can be declared enforceable by a court (*Amtsgericht*) or a notary. The refusal of a notary to declare an agreement enforceable can be challenged before the *Amtsgericht*.

Furthermore, changes to the Code of Civil Procedure facilitate the suspension of prescription.

No information on mediation can be found on official websites. It is, however, expected that Ministry of Justice will publish more detailed information on its website (www.bmj.de) once the *Mediationsgesetz* is adopted.

4.2.3 Comparison and assessment

Table 6 provides an overview of the main differences between the (proposed) implementation laws in the selected jurisdictions.

[319] The *Bundesrat*, the second legislative body on the federal level, criticised that without any set of quality standards, consumers would not enjoy adequate protection from random, self-proclaimed mediators without sufficient knowledge or training (see Bundesrat 2011).

[320] Federal Supreme Court Decision of 1 July 2002, AnwZ (B) 52/01.

[321] The *Bundesrat* suggested making court-internal mediation subject to a charge, arguing that free, court-internal mediation might thwart the aim of unburdening the courts (see Bundesrat 2011).

Table 6: Overview of (proposed) implementation of the Mediation Directive in selected jurisdictions

	Mediation Directive	France[a]	Poland[a]	The Netherlands[a]	UK	Germany[a]
Recourse	voluntary; court may suggest mediation	in national judicial mediation (NJM): optional	voluntary; court may direct once during proceeding, parties may decline	voluntary	voluntary; court may take into account parties' attitude to a reasonable offer of mediation	voluntary; court may suggest mediation
Scope	cross-border disputes	domestic & cross-border disputes	domestic & cross-border disputes	domestic & cross-border disputes	cross-border disputes[b]	domestic & cross-border disputes
Quality	MS are to encourage training and effective control mechanisms (self-regulatory processes)	in NJM: conditions apply but no *a priori* control; the mediator can be sued by parties if not meeting conditions	self-regulation; NGOs & universities may create mediation centres & (non-compulsory) lists of mediators	self-regulation	self-regulation through accreditation system developed by the CMC	no standardised control mechanisms; no training requirements; title 'mediator' not protected
Confidentiality	subject to exceptions, no evidence can be given arising out of the mediation procedure	in NJM: principle of confidentiality of declarations arisen out of mediation; in national non-judicial mediation (NNJM): self-regulation	required; mediator may be authorised by parties to reveal facts learnt during mediation; invoking any statements from mediation process before the court: legally ineffective	parties allowed to *not* give evidence if confidentiality of mediation was explicitly agreed; exceptions apply[c]	respected as to obtaining mediation evidence (ME) by witnesses and depositions, and disclosing or inspecting ME under control of a mediator[d]	universal obligation of secrecy levelled by reservation of statutory powers; overriding obligation to press criminal charges
Prescription & limitation period (PLP)	judicial proceedings or arbitration possible after mediation	in NJM: PLP suspended as soon as parties agree to settle dispute by mediation	judicial proceedings possible after mediation *not* resulting in an agreement	PLP interrupted as soon as parties decide to settle dispute by mediation	PLP suspension not provided for; in domestic mediation, possible if parties agree or if request is lodged with the court	suspension of prescription periods during mediation
Costs	nothing provided for	in NJM: fee determined by court at the end; in NNJM: fee determined by parties	remuneration depends on the subject-matter of the case[e]	fee determined by the mediator & agreed upon before the mediation begins	depending on the value of the claim, from 50 to 95 Pound per hour	mediation by a judge without decision-making power: cost-neutral; otherwise: negotiated
Information	MS are to provide information on mediation	no official website on mediation, but some information available[f]	provided on the website of the Ministry of Justice; campaign conducted (posters, brochures, media content, etc.)	provided on the Netherlands Mediation Institute's website	available on the website of the Ministry of Justice	no information on an official website available

Source: Civic Consulting

Notes to Table 6:

(a) Proposal/draft statute.

(b) Rules on judicial power to invite parties to mediate and the effect of mediation on limitation periods also apply to domestic mediation.

(c) Giving evidence is obligatory if necessary for overriding considerations of public policy, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or where disclosure of the content of the agreement resulting from mediation is necessary in order to implement that agreement.

(d) Exceptions are proceedings allocated to the small claims track. Nonetheless, the UK Department for Business, Innovation and Skills indicated that confidentiality in the mediation process is the same, irrespective of the value of the case.

(e) Determined by the Regulation of Minister of Justice of 30 November 2005.

(f) The *Direction Générale de la Concurrence, de la Consommation et de la répression des fraudes (DGCCRF)* has published a leaflet on mediation and the *Mouvement des Entreprises de la France (MEDEF)* published a practical guide destined for enterprises and professional organisations (see MEDEF 2009).

As follows from Table 6, the (envisaged) implementation of the Mediation Directive has led to different approaches in the analysed Member States. For instance, France and the Netherlands have chosen to lay down one framework dealing with both domestic and cross-border mediation. In contrast, the UK has implemented the provisions on confidentiality and enforcement only as to cross-border mediation. This may seem regrettable in terms of legal certainty and transparency, as it creates two different mediation procedures with a different level of confidentiality protection and a different level of enforceability of the mediation agreement.

Given the voluntary character of mediation in all analysed Member States,[322] the Mediation Directive offers the advantage that the awareness of availability of mediation by consumers will be enhanced through the judicial power to invite parties to settle their dispute by mediation and to attend information sessions on mediation. However, the effectiveness of the Mediation Directive could be enhanced by introducing a more obligatory element into mediation, e.g., (in line with UK practice) by imposing the costs of a judicial procedure on the (winning) party that unreasonably refused an offer of mediation.

Notwithstanding this judicial power, which only indirectly promotes mediation, the Mediation Directive as such does not oblige the Member States to provide for a mediation scheme to which consumers could have recourse before even going to court. Among Member States where mediation is provided for, the case of France (where no official website on mediation exists) shows that the Mediation Directive does not sufficiently ensure that consumers are aware of the availability of mediation.

As to the encouragement of the quality of mediators, the Commission has chosen not to oblige Member States to monitor the compliance of mediators with one European set of requirements, e.g., those laid down in the European Code of Conduct of Mediators. One could question this approach, as a high level of quality of mediation (e.g., independence, neutrality, impartiality, and competence) is thus not ensured in all Member States. This might encroach upon the consumers' confidence in the settlement of their disputes by mediation.[323]

[322] Knotz and Zach 2007, p. 665.
[323] Knotz and Zach 2007, p. 681.

The same reasoning applies with regard to the disclosure of information arising from mediation. It is regrettable that the Mediation Directive does not equally apply the obligation of confidentiality regarding the giving of evidence of information obtained during mediation by the mediator (Article 7) to such information ordered by the court or offered to the court (in line with new Rule 78.26 CPR in the UK).[324] In effect, the fear of parties that such information might be used in subsequent proceedings might inhibit them from engaging in mediation.[325]

Finally, the Mediation Directive leaves open certain points which might be of crucial importance when a consumer considers mediation for settling their cross-border dispute: the language in which the mediation is conducted (will it be a foreign language with which the consumer is not familiar?); how the mediation will be conducted in practice (in the Member State of one of the parties so that both parties need to be physically present or via an online mediation procedure?); and the question of costs. As Table 6 shows, the mediator's fees are not always known in advance (e.g., in France) or cannot be consulted on the national mediation website (e.g., in the Netherlands). These uncertainties might deter consumers from choosing mediation as a method to solve their case.

In conclusion, notwithstanding the existence of the Mediation Directive, it appears that mediation in cross-border cases has not often been used.[326] This could be explained by the lack of transparency with regard to the rules applicable to mediation, the lack of awareness of mediation,[327] the gaps in regulatory framework regarding the confidentiality of mediation, its quality and costs, as well as the practical obstacles to cross-border mediation (language and place where mediation procedure will be conducted).

4.3 Injunctions procedure for the protection of consumers' interests

4.3.1 Aims and key elements

The Injunctions Directive seeks to approximate national provisions designed to enjoin the cessation of the unlawful practices infringing Directives on consumer matters[328] and harmful to the collective interests of consumers,[329] irrespective of the Member State in which the unlawful practice has produced its effects.[330]

Therefore, it lays down the obligation for every Member State to make sure that independent public bodies or organisations responsible for protecting the collective interests of consumers in other Member States[331] may apply to its court or administrative

[324] Note that the Proposal initially considered such information as inadmissible and prevented the court from ordering such information (except in certain circumstances) (see Art. 6 (3) Proposal for a Directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters, COM(2004)717 final).

[325] Bombois and Renson 2009, p. 542.

[326] Bombois and Renson 2009, p. 548; interviews with representatives of the French Ministry of Justice and the UK Department for Business, Innovation and Skills.

[327] This has been implicitly confirmed by one of the interviewees who noted that "traditional methods of conflict resolution are deeply ingrained in our minds".

[328] Those Directives are listed in Annex I to the Injunctions Directive (e.g., infringements of consumer rights as set out by the Directives on consumer credit, package travel, unfair commercial practices, unfair terms in consumer contracts, distance selling contracts, sale of consumer goods, and associated guarantees).

[329] Following recital (3) Injunctions Directive "Collective interests of consumers" are not to include the accumulation of interests of individuals who have been harmed by an infringement.

[330] Recital (7) Injunctions Directive.

[331] In Art. 3 Injunctions Directive referred to as "qualified entities to bring an action".

authority in case the infringement has caused harm to the collective interests of the consumers it protects.[332] By making available the lodging of actions in the Member State where the business is located, the result should be more effective. Member States are to accept the legal capacity of this qualified entity, provided that it appears on a list drawn up by the European Commission in accordance with the Member States' communications of entities qualified to bring an action for an injunction.[333]

As such, the Injunctions Directive entails the principle of mutual recognition of entities which other Member States have recognised as qualified to bring an action for an injunction. A derogation to this principle is laid down in Article 5, according to which Member States may require a qualified entity seeking an injunction for the termination of an infringement to first negotiate with the defendant and/or the qualified entity of the Member State in which the injunction is sought.

4.3.2 Analysis of the implementation of the Injunctions Directive

France

Articles 19 and 20 of the Order of 23 August 2001 modified Article L421-6 of the Consumption Code so as to transpose Directive 98/27 into national law.[334]

Article L421-6 of the Consumption Code allows the qualified entities which are on the list drawn up by the European Commission, as well as aggregated associations declared to have as their purpose the defence of consumers' interests, to bring actions before a civil jurisdiction to require cessation or prohibition of any infringement of the Directives covered by Article 1 Injunctions Directive.[335]

The court can also require the exclusion of any illegal or abusive clause in each (type of) contract proposed or destined to the consumer, and, as the case may be, a penalty payment.[336]

It is not required by law to organise a prior consultation before seeking an injunction for the termination of an infringement.

Poland

Implementation of the Injunctions Directive in Poland can be found in the Competition and Consumer Protection Act,[337] as introduced by the Act of 5 July 2002 on changing the Competition and Consumer Protection Act, Civil Procedure Code, and Combating of Unfair Competition Act.[338] The procedure may be used for any infringement causing harm to collective interests of consumers.[339]

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[332] Art. 4, 1 Injunctions Directive.

[333] An updated list shall be published in the OJ every six months. The most recent list can be found in the Communication of the Commission of 25 June 2010 concerning Art. 4(3) of Directive 98/27/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interests, concerning the entities qualified to bring an action under Art. 2 of this Directive, *OJ C* 167 of 25 June 2010.

[334] Order N°2001-741 of 23 August 2001 relating to the transposition of the Community Directives and the adaptation to community law in the field of consumer law, *Official French State Gazette*, 25 August 2001.

[335] Art. L421-6, 1 Consumption Code.

[336] Art. L421-6, 2 Consumption Code.

[337] *Ustawa o ochronie konkurencji i konsumentów*, Dz. U. 2007, Nr 50, poz. 331.

[338] Dz.U. 2002, Nr 129, poz. 1102.

[339] Resolution of the Supremacy Court from 13th July 2006, III SZP 3/06, OSNP 2007, nr 1-2, poz. 34.

The President of the Office of Competition and Consumer Protection (hereafter 'the President') is the central government Administrative Authority competent to rule in proceedings concerning protection of consumers' interests.[340]

Proceedings in cases of infringements causing harm to the collective interests of consumers are initiated solely by the President on his or her own initiative.[341] However, one may notify the President, in a written form, of a suspicion of practices causing harm to the collective interests of consumers.[342] Notification may also be submitted by an organisation from another Member State, provided that it appears on the list drawn up by the European Commission and the aim of its general activity justifies the notification of infringement occurring within Polish territory, which may harm collective interests of consumers on the territory of a Member State where the organisation is established.[343]

Documents which may constitute evidence of the infringement must be attached to the notification.[344]

Although the notification does not oblige the President to initiate the proceedings (the decision whether to do so lies within his or her discretion), the President is to provide the notifying person or organisation with written and reasoned information on the outcome of the consideration of the notification.[345] The notifying person or organisation does not become a party to the proceedings.[346]

The President may, on his or her own initiative, initiate a preliminary investigation where circumstances indicate that collective interests of consumers may be harmed.[347] The preliminary investigation may last for a period of 30 days and, in cases of particular complexity, a maximum of 60 days.[348]

Conciliation is possible where the character of the case allows it, provided that its aim is not to circumvent the law and that it would not contradict public interest or the justified interest of consumers.[349]

In cases of infringement causing harm to the collective interests of consumers, the President passes decisions acknowledging that the practice is harmful to the collective interests of consumers and requiring the concerned undertaking to cease applying the illicit practice.[350] The President may oblige the undertaking to issue a declaration of the content and in the form prescribed in the decision, and/or the decision may be published at the cost of the undertaking.[351] The President may impose a fine of maximum 10% of revenue received by the undertaking for the fiscal year prior to the year of the imposition of the fine.[352]

[340] Art. 29 Competition and Consumers' Protection Act.
[341] Art. 49(1) Competition and Consumers' Protection Act.
[342] Art. 100(1) Competition and Consumers' Protection Act.
[343] Art. 100(2) Competition and Consumers' Protection Act.
[344] Art. 86(3) in conjunction with Art. 100(3) Competition and Consumers' Protection Act.
[345] Art. 86(4) in conjunction with Art. 100(3) Competition and Consumers' Protection Act.
[346] *A contrario* to Art. 101(1) Competition and Consumers' Protection Act.
[347] Art. 48(1) Competition and Consumers' Protection Act.
[348] Art. 48(4) Competition and Consumers' Protection Act.
[349] Art. 102 Competition and Consumers' Protection Act.
[350] Art. 26(1) Competition and Consumers' Protection Act.
[351] Art. 26(2) Competition and Consumers' Protection Act.
[352] Art. 106(1) Competition and Consumers' Protection Act.

Where an undertaking has ceased applying the practice causing harm to the collective interests of consumers, prior to or during the proceedings, the President issues a decision acknowledging the ceased practice to have caused harm to consumers and stating that the undertaking has ceased applying the practice in question.[353] The undertaking carries the burden of proof thereof.[354] As in the situation described above, the President may oblige the undertaking to issue a declaration of the content and in the form prescribed in the decision, and/or the decision may be published at the cost of the undertaking.[355] The decision can only be passed within one year after the end of the calendar year in which the undertaking ceased applying the illicit practice.[356]

Where an undertaking is applying a practice causing harm to the collective interests of consumers, but is willing to commit itself to cease performing certain actions in order to prevent harming consumers, the President may pass a decision obliging it to fulfil these commitments.[357] In this case, the President may not impose a fine on the undertaking.[358] In the decision obliging the undertaking to implement these commitments, the President may prescribe a period within which the commitments are to be fulfilled.[359] The undertaking is obliged to inform the President about the progress of realisation of its commitments within the period prescribed by the President.[360] The President may annul the decision establishing the aforementioned commitments if it is established that it was based on untruthful, incomplete, or misleading information or documents, or if the undertaking is not fulfilling its commitments.[361] In addition, the President, with the consent of the undertaking concerned, may also annul the decision if circumstances have changed, provided that those circumstances had a significant influence on the passing of the decision.[362] In case of annulment of the decision establishing the aforementioned commitments, the President decides on the merits and imposing a fine is then possible.[363]

The President may render the decision, partly or completely, with immediate force, owing to an important interest of consumers.[364]

The Netherlands

Directive 98/27 was implemented by the Law of 25 April 2000.[365]

It introduced a new Article 305 C into Book 3 of the Civil Code providing that organisations or public bodies with their seat outside the Netherlands and mentioned on the list drawn up by the European Commission can lodge an action with the Civil Courts ('s *Gravenhage*) to protect similar interests of other persons with residence in the Member State where the organisation or public body is vested; the precondition is that

[353] Art. 27(1) and Art. 27(2) Competition and Consumers' Protection Act.
[354] Art. 27(3) Competition and Consumers' Protection Act.
[355] Art. 27(4) in conjunction with Art. 26(2) Competition and Consumers' Protection Act.
[356] Art. 105 Competition and Consumers' Protection Act.
[357] Art. 28(1) Competition and Consumers' Protection Act.
[358] Art. 28(4) in conjunction with Art. 106(1) point 4 Competition and Consumers' Protection Act.
[359] Art. 28(2) Competition and Consumers' Protection Act.
[360] Art. 28(3) Competition and Consumers' Protection Act.
[361] Art. 28(5) Competition and Consumers' Protection Act.
[362] Art. 28(6) Competition and Consumers' Protection Act.
[363] Art. 28(7) in conjunction with Art. 28(4) Competition and Consumers' Protection Act.
[364] Art. 103 Competition and Consumers' Protection Act.
[365] Law of 25 April 2000 amending Books 3 and 6 of the Civil Code in accordance with the Directive on injunctions for the protection of consumers' interests, *Official Dutch State Gazette* 2000, 178 and Royal Decree of 6 June 2000 concerning the determination of entry into force, *Official Dutch State Gazette* 2000, 254.

the organisation is responsible for protecting those interests in accordance with its purpose, or the public body has been made responsible for protecting those interests. Furthermore, these organisations or public bodies can bring actions aimed at declaring that certain clauses in general conditions used or destined to be used in agreements with persons whose residence is in the country where the organisation or public body is vested are imposing an unreasonable burden.[366]

In both cases, the organisation or public body is to try to achieve what is claimed or to amend the general conditions in prior consultation with the defendant. A period of two weeks after the request for consultation is received is to be considered as sufficient.[367]

It is provided that such actions may give rise to the publication of the decision, in the way determined by the court and paid for by the party or parties determined by the court. Monetary compensation for damages can never be obtained.[368] The claimant can also claim the prohibition of the use of certain general conditions or the revocation of a recommendation to use those general conditions.[369]

The United Kingdom

The implementation of Directive 98/27 can be found in Part 8 of the Enterprise Act 2002, which replaced Part III of FTA 1973 and the Stop Now Orders (EC Directive) Regulations 2001 (SNORs).[370] The former Act established injunction procedures in case of infringement of national consumer laws, whereas the latter focused on the injunction procedures in case the consumer Directives listed in Annex 1 Injunctions Directive were infringed.

The Enterprise Act 2002 creates a single, unified enforcement regime across the consumer field to secure that injunctive actions (cessation or prohibition of the infringement) can be taken against both: businesses infringing domestic consumer law and those infringing EU consumer law.

It is provided that enforcers[371] under the Enterprise Act 2002 can lodge an Enforcement Order with the High Court or County Court where a business has engaged in conduct that constitutes either a domestic or a EU infringement or is likely to engage in conduct that constitutes an EU infringement. Before applying for an Enforcement Order all enforcers must consult the OFT.[372] According to the interviewed officials, the reason for this prior consultation lies in the need to ensure that businesses do not face a multiplicity of actions on the same issue or related issues and that efforts of the enforcers are not duplicated. Except in very urgent circumstances, the enforcers must also consult the business, and a minimum period of 14 days must be allowed for consultation, so as to accept an undertaking from the business — such as an undertaking to cease certain practices — against which proceedings are brought. If the enforcer wishes to apply for an interim order,[373] a minimum of seven days must be allowed for the consultation with the business.

[366] Art. 240, 6 Book 6 Civil Code.

[367] Art. 305 a, 2 Book 3 and Art. 240, 4 Book 6 Civil Code.

[368] Art. 305 A, 3 Book 3 and Art. 241, 3 Book 6 Civil Code.

[369] Art. 241, 3 Book 6 Civil Code.

[370] Note 455 of Explanatory notes to the Enterprise Act 2002 (see http://www.legislation.gov.uk/ukpga/2002/40/notes/division/4/8?type=en&view=plain). The Office of Fair Trading (OFT), established by the Enterprise Act 2002, has provided guidance on Part 8 of the Enterprise Act 2002 (see Office of Fair Trading 2003).

[371] Section 213 Enterprise Act 2002 indicates three types of bodies empowered to act: general enforcers, designated enforcers, and community enforcers.

[372] Section 214 Enterprise Act 2002 lays down the prior consultation procedure.

[373] See Section 218 Enterprise Act 2002 with regard to the Interim Order.

Germany

The implementation of the Injunctions Directive can be found in the *Gesetz gegen den unlauteren Wettbewerb* (UWG) on unfair competition and in the *Unterlassungsklagengesetz* (UKlaG) on injunctions in the field of consumer law.

Only qualified entities are allowed to bring 'outwards' actions (i.e., domestic entities bringing injunction actions in other Member States).[374] Qualified entities are consumers' associations that are registered with the Federal Administration Office, which communicates its list of registered entities to the European Commission.[375]

Regarding 'inwards' actions (i.e., non-German entities bringing injunction actions in Germany), Germany allows EC-registered entities from other Member States to bring actions for infringements of the Directives listed in Annex 1 to the Injunctions Directive as well as for infringements of other EU legislation.[376]

The *Landgericht* (higher regional court) of the region where the respondent has its place of business is competent for dealing with the case.[377]

Prior consultation with the respondent is not required under the UKlaG. In the field of unfair competition, a cease-and-desist letter is to be sent prior to the commencement of proceedings.[378] Section 15 III UWG gives every party the right to invoke an arbitration board in matters with relevance to consumer protection, even if the other party does not consent.

Qualified entities must not misuse their right to bring actions for an injunction.[379] Especially bringing actions for an injunction in order to generate court and legal fees for the respondent constitutes such misuse.

The injunction action can aim at: (i) the cessation or prohibition of any infringement;[380] (ii) the publication of the decision and/or a corrective statement; (iii) imposing a fine not exceeding 250,000 Euro or a maximum of two years imprisonment in case of noncompliance;[381] and (iv) in the case of fraud, the UWG provides for skimming of profits.[382]

Court fees are only reduced under exceptional circumstances.

4.3.3 Comparison and assessment

Table 7 provides an overview of the main differences in the implementation laws in selected jurisdictions.

[374] Section 4 UKlaG and Section 8 III 3 UWG.

[375] Only non-profit associations with the following qualities can, upon application, be registered, those that: have as their permanent aim the protection of consumer interests; have legal capacity; have as their members consumer-protection-oriented legal entities or a minimum of 75 natural persons; have existed for a minimum of one year; and have proven to work reliably. Publicly funded consumer advice centres are always eligible for registration.

[376] The UKlaG makes reference to the Annex of Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, *OJ L* 364 of 9 December 2004, p.1 (hereafter 'the CPC Regulation'), as implemented by Commission Decision 2007/76/EC of 22 December 2006 (*OJ L* 32 of 6 February 2007, p. 192) which has been amended by Commission Decision 2011/141/EU of 1 March 2011(*OJ L* 59 of 4 March 2011, p. 63). This Annex includes, *inter alia*, Directive 98/6/EC on consumer protection in the indication of the prices and Regulation 261/2004/EC on the rights of air passengers, which are not included in the Annex to the Injunctions Directive. The UWG to a large extent makes reference to certain unfair competition practices.

[377] Section 6 UKlaG and Section 13 UWG.

[378] Section 12 I UWG.

[379] Section 2 III UKlaG and Section 8 IV UWG.

[380] Section 4a I UKlaG and Section 8 I UWG.

[381] Section 890 of the Code of Civil Procedure.

[382] Section 10 UWG.

Table 7: Overview of implementation of the Injunctions Directive in selected jurisdictions

	Injunctions Directive	France	Poland	The Netherlands	UK	Germany
Competent body / civil or administrative jurisdiction	court or administrative authority	civil jurisdiction	President of the Office of Competition and Consumer Protection	civil courts ('s *Gravenhage*)	High Court or County Court	*Landgericht* (higher regional court)
Infringements envisaged	infringements of Directives on consumer protection listed in Annex I; MS may adopt or maintain in force provisions designed to grant more extensive rights to bring action at national level	infringements of Directives listed in Annex I	infringements of Directives listed in Annex I; any practice harming the collective interests of consumers	infringements of Directives listed in Annex I; any practice harming the collective interests of consumers	infringements of Directives listed in Annex I; infringements of domestic consumer legislation	infringements of Directives in Annex I and of provisions on unfair competition; non-German entities: also actions for infringements of the Directives listed in the Regulation on Consumer Protection Cooperation
Sanctions	cessation or prohibition of the infringement; possible: publication of the decision and/or corrective statement and/or an order of payment to ensure compliance with the decision	cessation or prohibition; exclusion of any illegal or abusive clause; payment of penalty	cessation of the infringement; the issuance by the business of a declaration of the content of the decision; publication of the decision; possibility of commitments; fine (share of revenue)	cessation or prohibition; a declaration that a clause imposes an unreasonable burden; publication of the decision; prohibition of use of certain general conditions; revocation of a recommendation to use those general conditions	cessation or prohibition of the infringement	cessation or prohibition; publication of the decision and/or a corrective statement; in case of noncompliance: fine not exceeding 250,000 Euro or a max. of two years imprisonment; in case of fraud: skimming of profits
Prior consultation	possibility to provide prior consultation with the defendant and/or the qualified entity	no prior consultation provided for	no prior consultation provided for; conciliation is possible (if its aim is not to circumvent the law and it does not contradict public interest or justified interest of consumers)	prior consultation with the defendant is obligatory	obligation to consult with the OFT & (except in very urgent circumstances) with the defendant	infringements of consumer law: no prior consultation; unfair competition: a cease-and-desist letter to be sent prior to commencement of proceedings

Source: Civic Consulting

In accordance with Article 9 Injunctions Directive, the European Commission submitted its report on the application of the Directive on 18 November 2008.[383]

The Commission concludes that the use of the Injunctions Directive has been disappointing[384] and points to the following reasons: (i) the costs related to a cross-border injunction procedure including travel/translation costs, lawyers' fees, as well as the financial risk of bearing the cost of the procedure when losing the procedure; (ii) the complexity of the injunction procedure which differs across Member States (since the Injunctions Directive does not address all aspects of the injunctions procedure and leaves some options to the Member States, e.g., with regard to the competent court or authority, the infringements envisaged, the possible sanctions, and the possible obligation of prior consultation); and (iii) the limited impact of an injunction (pointing to the fact that an injunction has in most cases an effect between the parties involved and is of a national nature).[385]

The Commission indicates, however, that the Regulation on Consumer Protection Cooperation could at least address the second problem mentioned since it allows public authorities with specific expertise to pursue injunctions in their Member State at the request of a public authority in another Member State where the consumers suffer from the illegal practice committed in the other Member State.[386] Although this might appear promising in terms of enhancing the protection of consumers' interests, the Commission has revealed in a report on the application of the Regulation on Consumer Protection Cooperation dated 2 July 2009 that the application of the Regulation on Consumer Protection itself contains some shortcomings.[387] Those shortcomings relate to (i) the fact that a significant number of appointed public authorities did not use the information exchange system and the request system for mutual assistance so far; (ii) the increasing duration of the requests; (iii) the different use by the authorities of the IT-tool that authorities must use for exchanges of information; (iv) the different interpretation of EU consumer protection rules; and (v) the uncertainty as to what law is applicable and which jurisdiction is competent.

Nevertheless, even if the Injunctions Directive were to become more effective through the application of the Regulation on Consumer Protection Cooperation (which appears, however, not to be the case to date), one could question whether the Injunctions Directive in itself could provide for legal redress for a consumer in a cross-border transaction. In effect, the Injunctions Directive only protects the collective interests of consumers. As such, it does not provide for any individual remedy, such as compensation.

4.4 Shortcomings in the examined EU legislative instruments

Preceding subsections identified a series of shortcomings in the three existing EC instruments that should be addressed.

[383] See European Commission 2008.

[384] See European Commission 2008, pp. 5, 9.

[385] The UK Department for Business, Innovation and Skills also pointed to the difficult and expensive nature of cross-border injunctions procedures.

[386] Art. 8(1) CPC Regulation. This Article is part of Chapter II of the Regulation which is applicable as of 29 December 2006.

[387] Report form the Commission to the European Parliament and to the Council on the application of Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation), COM(2009)336 final.

First, our analysis revealed shortcomings of the ESCP Regulation:

(i) The threshold of 2,000 Euro may just be too low (making the scope of application of the ESCP without any practical relevance).

(ii) Consumers should be made more aware of the availability of the ESCP (the obligation for Member States to inform the public on the ESCP seems to be insufficient).

(iii) The Claim Form should be simplified.

(iv) The Claim Form should be in the language of the consumer (since it is unrealistic to expect consumers to complete the Form in the language of the court or tribunal in case the competent court or tribunal is located in another Member State).

(v) As it is difficult to understand how and whether courts will comply with their obligation to inform the parties about procedural questions, one could assume that consumers will have to be assisted by a legal professional to lodge a Claim Form. This increases the cost of the ESCP refraining consumers from taking legal proceedings for small claims.

(vi) Another issue we have identified could be that consumers do not fully understand the procedure in the Member State concerned, e.g. as to the costs involved and the length of the procedure, taking into account that the ESCP Regulation does not harmonise national procedural law.

(vii) Finally, the problem of (translation/travel) costs should be addressed at Community level. Given the low value of the claims concerned, it is necessary that these costs are eliminated. Community action should be undertaken to avoid the need for forms to be translated and oral hearings held.

Second, the analysis showed the following shortcomings in the (envisaged) implementation of the Mediation Directive:

(i) Although largely a policy question, it may be regretted that, through the implementation of the Mediation Directive, two types of mediation procedures are being created. We have compared, for instance, France and the Netherlands (which have chosen to lay down one framework dealing with both domestic and cross-border mediation) with the UK (which has implemented the provisions on confidentiality and enforcement only as to cross-border mediation). This may seem regrettable in terms of legal certainty and transparency as it creates two different mediation procedures with a different level of confidentiality protection and a different level of enforceability of the mediation agreement.

(ii) The effectiveness of the Mediation Directive could be enhanced by introducing a more obligatory element into mediation, e.g. (in line with UK practice) by imposing the costs of a judicial procedure on the (winning) party that unreasonably refused an offer of mediation.

(iii) The mere existence of a mediation scheme does not sufficiently ensure that consumers are effectively aware of the availability of mediation.

(iv) As to the encouragement of the quality of mediators, the Commission has chosen not to oblige Member States to monitor the compliance of mediators with one European set of requirements, e.g. those laid down in the European Code of Conduct of Mediators. One could question this approach as a high level of quality of mediation (e.g. independence, neutrality, impartiality, and competence) is thus not ensured in all Member States. This might encroach upon the consumers' confidence in the settlement of their dispute by mediation.

(v) The same reasoning applies with regard to the disclosure of information arisen from mediation. It is regrettable that the Mediation Directive does not equally apply the obligation of confidentiality regarding the giving of evidence of information obtained during mediation by the mediator (Article 7) to such information ordered by the court or offered to the court (in line with new Rule 78.26 CPR in the UK). In effect, the fear of parties that such information might be used in subsequent proceedings might refrain them from engaging in mediation. We believe these concerns should be addressed.

(vi) Finally, the Mediation Directive leaves open certain points which might be of crucial importance when a consumer considers mediation for settling its cross-border dispute: the language in which the mediation is conducted (will it be a language with which the consumer is not familiar?), how the mediation will be conducted in practice (in the Member State of one of the parties so that both parties need to be physically present or via an online mediation procedure?) and the question of costs. As Table 6 shows the mediator's fees are not always known in advance (e.g. in France) or cannot be consulted on the national mediation website (e.g. in the Netherlands). Those uncertainties might deter consumers from choosing mediation as a method to solve the case and should therefore be addressed.

Finally, as to the Injunctions Directive, the Commission concluded that the use of the Injunctions Directive has been disappointing. In this respect the following shortcomings need to be addressed:

(i) The 'qualified entities to bring an action' face too much uncertainty about the costs related to a cross-border injunction procedure including travel/translation costs, lawyers' fees, as well as the financial risk of bearing the cost of the procedure when losing the procedure.

(ii) The injunction procedure is highly complex as it differs across Member States as is shown by Table 7 (since the Injunctions Directive does not address all aspects of the injunctions procedure and leaves some options to the Member States, e.g. with regard to the competent court/authority, the infringements envisaged, the possible sanctions and the possible obligation of prior consultation).

(iii.) An injunction has a limited impact (pointing to the fact that an injunction has in most cases an effect between parties and is of a national nature). Even if the Injunctions Directive were to become more effective, one could question whether the Injunctions Directive in itself could provide for legal redress for a consumer in a cross-border transaction. In effect, the Injunctions Directive only protects the collective interests of consumers. As such, it does not provide for any individual remedy, such as compensation.

5. POSSIBILITIES FOR IMPROVING CROSS-BORDER ADR AND THE NEED FOR A SPECIFIC LEGISLATIVE INSTRUMENT

KEY FINDINGS

- The Regulation establishing a European Small Claims Procedure, the Mediation Directive, and the Injunctions Directive are characterised by the fact that they still presuppose court intervention. Considering that ADR, by definition, aims to offer an alternative to settling disputes through judicial litigation, the three EU legislative instruments do not provide for an ADR mechanism. They can be considered as complementing cross-border ADR schemes, but they cannot serve as effective substitutes.

- A specific EU legislative instrument mandating cross-border ADR across sectors could build on previous (sectoral) legislative requirements, which have proven to encourage the establishment of ADR schemes in Member States.

- An EU legislative instrument either could specifically address cross-border ADR or be a legislative measure for ADR in general. However, a narrow focus on cross-border ADR has significant disadvantages in practice, as it would be difficult to tackle sectoral gaps for cross-border ADR without addressing shortcomings in coverage within a Member State.

- A simple access point (or 'single entry point') for all consumer disputes is compelling. A key function would be to channel the dispute to the most appropriate dispute resolution venue, including ADR, national small claims procedures, the European Small Claims Procedure, or other paths of redress.

- It is very likely that any future single entry point would need to build on ECC-Net's experiences with cross-border complaints, or use ECC-Net as its 'channel' for cross-border complaints. Handling cross-border complaints would be even more efficient if a standard form for these complaints (such as used by ECC-Net) could be also used to transfer cases to a relevant ADR scheme, and if Member States were required to have at least one ADR scheme in each sector (or a cross-sectoral scheme) that accepts complaints submitted in this form in English.

- A EU legal instrument needs to require Member States to ensure sufficient funding for their ADR system to operate effectively. The question of who ultimately pays for ADR schemes (and a possible single entry point) can be answered in many ways, including the government, traders that face claims, service users, and industry sectors. Regardless of each country's choice, a key consideration will be ensuring that independence is not curtailed by the source of funding.

In this study we have provided an overview of existing ADR schemes in EU Member States, evaluated the functioning of existing cross-border ADR schemes, and provided an assessment of three European legislative instruments – namely, the Regulation establishing a European Small Claims Procedure (ESCP Regulation), the Mediation Directive, and the Injunctions Directive.

In this concluding chapter we discuss:

- How these legislative instruments contribute to facilitating or complementing cross-border ADR schemes, and whether they can serve as an effective substitute.
- Whether a specific legislative instrument is needed to facilitate or mandate cross-border ADR.
- Possibilities for improving cross-border ADR.

5.1 Assessment of the relation of the examined EU legislative instruments to cross-border ADR

Shortcomings of the ESCP Regulation, the Mediation Directive, and the Injunctions Directive were identified in the previous chapter. So far, and to the extent that they already have been implemented by Member States, their use has been rather limited. Some of the reasons lie in low awareness of these routes of redress, the potential costs and uncertainties in this regard, as well as the complexity of the different procedures. All three EU legislative instruments are also characterised by the fact that they still presuppose court intervention.

More particularly, the ESCP constitutes an additional (more or less simplified, faster, and cheaper) judicial method of settling small cross-border claims.

The Mediation Directive seeks to promote mediation in cross-border cases. In effect, it obliges courts to suggest mediation to parties only after their dispute has been brought before the court. It does not require Member States to provide for mediation mechanisms where consumers could seek recourse when dealing with a claim against a business located in another Member State.

As far as the injunctions procedure is concerned, the intervention of a court (or, as the case may be, an administrative authority), is still required to put an end to the infringement. Even if the infringement could be stopped through the process of consultation prior to lodging a cessation order, the injunctions procedure still only protects the collective interests of the consumers and does not offer any individual remedy for the consumer. In such a case, the consumer still would have to lodge a claim with the court to seek individual redress (e.g. compensation).

Considering that ADR, by definition, aims to offer an alternative to settling disputes through judicial litigation, the three EU legislative instruments do not provide for an ADR mechanism. They can be considered as complementing cross-border ADR schemes, but they cannot serve as effective substitutes.

5.2 The need for a specific EU legislative instrument to facilitate or mandate cross-border ADR

From our analysis in Chapter 3, we can conclude that the main barrier to the use of ADR schemes in cross-border situations is incomplete coverage across the EU. Coverage is lacking in several aspects: geographical, sectoral, as well as specific types of transactions,

particularly e-commerce. Related problems are those of funding, consumer and trader awareness of existing ADR schemes, and adherence of traders to ADR procedures and outcomes, among others. In cross-border situations, additional challenges arise due to language barriers, the consumer's physical absence from the trader's Member State, and questions of applicable law, jurisdiction, and enforceability.

Absent a specific EU legislative instrument to facilitate or mandate cross-border ADR, it is up to national governments and stakeholders to improve access to ADR. While self-regulation (and co-regulation, as in the Netherlands) have developed in some Member States, this appears to be more an exception than the rule. Furthermore, existing ADR mechanisms relying on self-/co-regulation typically do not encompass the full range of traders in a particular sector; the involvement of smaller traders in ADR is reported by some stakeholders to be particularly problematic. Also, ADR is currently most accessible in more regulated sectors where there is a legislative basis. As previously noted, EU legislation encourages or requires Member States to ensure consumer access to ADR in specific sectors.[388] Based on data provided by ADR schemes with the highest caseloads, it is obvious that these sectors indeed have an overall broader ADR coverage and a higher use of ADR by consumers.

However, these sector-based legislative interventions have not sparked a notable expansion of ADR into other, less regulated, sectors – some of which (i.e. e-commerce in goods) likely will have more relevance for cross-border ADR in the foreseeable future than sectors such as financial services.

Therefore, a specific EU legislative instrument mandating cross-border ADR across sectors could build on previous (sectoral) legislative requirements, which have proven to encourage the establishment of ADR schemes in Member States.

An EU legislative instrument either could specifically address cross-border ADR or be a legislative measure for ADR in general (i.e. covering both domestic and cross-border ADR). However, a narrow focus on cross-border ADR has significant disadvantages in practice. As the analysis of existing legislative instruments indicates, a narrow scope of an EU legal instrument can lead to different procedures for domestic and cross-border issues, as occurred with the Mediation Directive in some countries, increasing complexity for consumers and businesses and reducing transparency. Further, issues of national and cross-border ADR are closely intertwined. It would be difficult to tackle sectoral gaps for cross-border ADR without addressing shortcomings in coverage within a Member State.

Furthermore, given that the underlying goal is to strengthen the consumer internal market, attempts to separate cross-border issues from those arising within Member States would likely be counter-productive, as they would not lead to a situation in which it makes no difference for consumers to shop in their country of residence or cross-border.

Finally, tackling cross-border ADR along with domestic ADR (and simultaneously strengthening ADR schemes for dealing with all types of cases) could arguably lead to improved efficiency of outcomes. Large schemes with higher numbers of cases are often better known to consumers and can offer them services, such as the multilingual capacities

[388] As previously noted, the E-commerce Directive, the Postal Services Directive and the Markets in Financial Instruments Directive are examples of legislative instrument which *encourage* Member States to ensure access to ADR. On the other hand, the EU legislative frameworks regarding the telecom sector and the energy sector, as well as the Consumer Credit Directive and the Payment Services Directive *require* that access to ADR be available to consumers. See European Commission 2011, para. 13.

of the Financial Ombudsman Service in the UK, which smaller schemes do not offer. Thus, attempting to enhance access to cross-border ADR without strengthening ADR for domestic cases is not likely to yield efficient and effective outcomes.

It should be noted that some ADR schemes interviewed for this study are rather skeptical about new EU legislation because they fear that harmonisation could interfere with their current operating mechanisms and principles, which are often well-developed and have a long-standing tradition with high acceptance of stakeholders. Any EU legislative measure would need to take into account the multitude of ADR approaches in the EU, many of which are well-suited for the specific contexts in which they are put into practice. Further, any EU legislative measure should focus on outcomes (with Member States enabling consumer access to effective ADR) rather than procedural aspects. The scope of such a legal instrument would therefore need to be carefully considered. Legislative measures could be complemented by other policy measures, such as issuing non-binding guidance on ADR best practices.

5.3 Possibilities for improving cross-border ADR

As indicated in previous sections, improving cross-border ADR is closely related to improving domestic ADR schemes. Here we highlight aspects that could be considered when adopting legislative or non-legislative measures at the EU level regarding both domestic and cross-border aspects.

Simplified access to ADR

The current fragmentation of ADR in many countries often makes it difficult for a consumer to find the right ADR scheme for his or her complaint. Possible improvements include national umbrella organisations for ADR schemes, which exist in some countries. These are either regional (cross-sectoral) ADR schemes operating under one national coordinating body, or consist of several sectoral schemes working along similar procedures under one organisational umbrella. Alternative approaches include signposting mechanisms (such as a national website and/or hotline).

A recent Commission consultation paper suggests the idea of a single entry point – an "organisation [that] could help consumers and SMEs to access the ADR schemes competent to deal with their dispute, or deal with the dispute when no specific ADR scheme exists".[389] A simple access point for all consumer disputes is compelling, because without interfering with the preference of a particular Member State for a certain type of dispute resolution mechanism, consumers would benefit from an integrated single entry point in each jurisdiction. Ideally, a single entry point would work as an independent 'single desk' where consumers could file any type of complaint (other than criminal complaints) in B2C matters.

The key function of the single entry point would be to channel the dispute to the most appropriate dispute resolution venue, including ADR, national small claims procedures, the European Small Claims Procedure, or other paths of redress. In addition, the single entry point could offer first-line assistance and guidance, record data on complaints and disputes,[390] and generally assist in registering and handling a complaint, among other services. Single entry points could be state or private entities

[389] European Commission 2011, p. 10.

[390] If single entry points are established, one of their key tasks would be to record data on consumer complaints across all sectors and redress mechanism used, which currently is not available and would provide significant benefits for monitoring markets in a consumer perspective and identifying and addressing most important consumer problems.

(subject to public procurement), or be implemented through public-private partnerships, involving organisations that currently address consumer complaints, such as national consumer organisations.

Access to ADR in cross-border cases

ECC-Net and FIN-NET play a vital role in handling cross-border complaints by providing a network of consumer centres (ECC-Net) or specialised ADR bodies (FIN-NET), and by bridging language gaps (especially ECC-Net). To a certain extent, ECC-Net already functions as single entry point for (non-financial) cross-border complaints (see case study for ECC-Net).

ECC-Net has already implemented several steps to improve the efficiency of handling cross-border complaints:

- Using a standardised multilingual complaint form, which is available online;[391]
- Using an IT-tool to handle and transfer cases to the network;
- Using only one language as the main network language (English);
- Trying to solve cases informally before involving ADR, which reduces the number of formal steps and has led to a high number of cases resolved (about one-half, as mentioned in the ECC-Net case study).

It is very likely that any future single entry point would need to build on ECC-Net's experiences with cross-border complaints, or use ECC-Net as its 'channel' for cross-border complaints to contact traders in other Member States to informally reach a solution; to provide access to ADR mechanisms in other Member States; and to support a consumer to use the European Small Claims Procedure if the specific circumstances of a case make using ADR less likely to succeed (e.g. if the trader is known not to adhere to ADR decisions).

Handling cross-border complaints would be even more efficient if a standard form for these complaints (such as used by ECC-Net)[392] could be also used to transfer cases to a relevant ADR scheme. To achieve this, a EU legal instrument could require each Member State to have at least one ADR scheme in each sector (or a cross-sectoral scheme) that accepts complaints submitted in the standard form in English, and to issue their decisions in cross-border cases in English.

Awareness

Many ADR schemes cite a lack of consumer awareness of ADR as a major problem. However, this has not been reported to the same extent by larger and more centralised ADR schemes, by schemes working under a national umbrella organisation, or by powerful schemes with mandatory participation and binding decisions. In some countries, strong sectoral schemes are complemented by an additional requirement for businesses to inform consumers on the existence of ADR.

[391] Available via the websites of national ECCs. See, for example, http://www.ecc-netitalia.it/DocumentazioneVaria/modulo%20pdf%20per%20invio%20reclami.pdf and http://www.eccireland.ie/downloads/ares_PROD_eccnet_normal_complaint_35.pdf

[392] Developing a standard form for cross-border complaints on basis of the one used by the ECC-Net also has the potential to directly facilitate EU-wide online dispute resolution, as the ECC IT-Tool could be further developed as an electronic platform to forward cases electronically from ECCs to relevant ADR schemes.

Taking into account fragmentation and gaps in coverage of existing ADR schemes, simply taking promotional measures (such as national campaigns to advertise ADR) is unlikely to increase awareness. Rather, this could lead to disillusioned consumers who were informed of an option that in practice is often not accessible for solving a particular dispute.

First, a cross-sectoral and coordinated ADR infrastructure in Member States has to be established, possibly complemented by a single entry point (see above). An ADR system will become known to consumers within a short timeframe once it provides easy and effective dispute resolution. This could be supported by requiring businesses to provide information on ADR to consumers, along with other promotional measures.

Financial resources

A lack of financial resources can undermine the operation of ADR schemes. This occurred with the Internet Mediator, a successful scheme in France with a significant share of cross-border cases that closed down because its funding was discontinued. Infrastructures of financially sustainable ADR schemes are often financed by the government, by businesses through their association and/or through a levy on industry. This can be complemented by a mandatory case fee imposed on businesses that must be paid regardless of the outcome of the procedure. Such fees not only help to ensure that ADR schemes are sufficiently funded, but they also provide a strong incentive for businesses to settle cases before they reach ADR, as was reported by several schemes.

Any EU legal instrument needs to require Member States to ensure sufficient funding for their ADR system to operate effectively, especially in cross-border situations that have higher transaction costs due to translation services. As indicated, the question of who ultimately pays for ADR schemes (and a possible single entry point) can be answered in many ways, including the government, traders that face claims, service users, and industry sectors. Regardless of each country's choice, a key consideration will be ensuring that independence is not curtailed by the source of funding.

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