



**COMMENTS OF THE U.S. CHAMBER INSTITUTE FOR
LEGAL REFORM ON THE CONSULTATION PAPER OF THE
DIRECTORATE GENERAL FOR HEALTH AND CONSUMERS ON
ALTERNATIVE DISPUTE RESOLUTION**

The U.S. Chamber Institute for Legal Reform (“ILR”) is pleased to submit these comments to DG SANCO on its Consultation Paper on the use of alternative dispute resolution (“ADR”) as a means to resolve disputes related to commercial transactions and practices in the EU. ILR is a not-for-profit public-advocacy organization affiliated with the U.S. Chamber of Commerce, the world’s largest business federation, which represents the interests of more than three million businesses of all sizes and sectors, as well as state and local chambers and industry associations. ILR’s mission is to ensure a simple, efficient and fair legal system. Since ILR’s founding in 1998, it has worked diligently to limit the incidence of litigation abuse in U.S. courts and has participated actively in legal-reform efforts in the United States and abroad.

Due to ILR’s members’ business activities in Europe, ILR is deeply invested in the orderly administration of justice and in the evolution of European legal regimes. ILR has previously provided comments to DG SANCO in connection with DG SANCO’s consultation paper and green paper on consumer collective redress, and has frequently provided comments to numerous Member State governments on topics related to legal reform, including ADR. ILR is thus uniquely positioned to participate in DG SANCO’s current consultation.

I. Introduction

ILR generally supports greater use of ADR as a fair and efficient alternative to litigating consumer claims. By and large, ADR is a far superior mechanism for resolving disputes than in-court litigation. ADR is efficient, flexible, and can be tailored to address the specific needs of the parties or the complexities of the case. As a

result, ADR tends to be lower cost for all the parties involved. From the point of view of consumers, this makes it a more accessible avenue for resolving disputes. From the point of view of business, it often results in less time and expense being incurred than in court-based litigation. In this regard, the element of finality provided by binding ADR mechanisms is beneficial but ILR also recognizes the value of non-binding mechanisms. Ultimately the choice of whether binding or non-binding ADR is most appropriate in any given case should be left to the parties. Finally, since ADR can be a low-cost and efficient dispute-resolution mechanism, it is often less susceptible than court proceedings to abusive practices by parties.

As DG SANCO considers means to promote the continued evolution and growth of ADR in Europe, however, ILR believes it is important simultaneously to ensure that certain fundamental principles are preserved and consider the implementation of safeguards that will protect the rights of ADR participants and prevent ADR from becoming a forum for frivolous proceedings.

II. Consent and Control: The Underpinnings of ADR

A broad array of ADR schemes currently exists in Europe. A 2009 DG SANCO study regarding the use of ADR in Europe found that 750 business-to-consumer ADR schemes were in place across the EU, providing services at the national, regional and local levels.¹ Some of the ADR schemes were established by government action (i.e. law or regulation), and others are private schemes established by particular industries for their members.² The availability of highly tailored mechanisms is a great strength of ADR and ILR hopes that any initiatives in this field will promote flexibility and diversity rather than attempt to harmonize ADR in a manner which would undermine the ability of parties to agree to an ADR mechanism suited to their needs.

The fundamental difference between an ADR scheme and traditional litigation is that the parties to ADR agree to less formal procedures than would be expected in a court of law. In doing so they achieve certain benefits, including flexibility, efficiency and streamlined dispute resolution. ADR is most successful where the decision to adopt less formal procedures is taken voluntarily. Moreover, the parties must maintain control over the dispute resolution process. Thus, the key to a successful ADR regime is that the parties must agree to engage in dispute resolution – and to the form of dispute resolution in which they engage. Of course, what the parties agree to differs based on the type of ADR involved. But even binding arbitration

¹ DG SANCO, Study on the Use of Alternative Dispute Resolution in the European Union, Final Report, 30-31, 33, Oct. 16, 2009, http://ec.europa.eu/consumers/redress_cons/adr_study.pdf.

² *Id.* at 33.

is premised on consent because the parties must agree to be bound by the arbitrator's decision.

For this reason, ILR does not support attempts to compel parties to use ADR, either by way of government regulation or otherwise. ILR understands that some jurisdictions and industries have mandatory ADR schemes in place already and does not address those schemes here. But any expansion of ADR should recognize that ADR works best when the parties control the process – and participate by choice.

Importantly, preserving the consensual nature of ADR need not restrict its growth. Parties have plenty of reasons to prefer ADR over traditional litigation; after all, ADR can be flexible, low-cost, quick and tailored to the parties' particular needs. Any expansion of ADR can – and should – result from broader recognition of its inherent benefits, rather than any program that compels parties to use it.

As discussed further below, there are two important corollaries that flow from the fundamental principle that ADR works best when the participating parties control the process. First, third parties must not have a stake in the ADR outcome because they threaten to wrest control from the parties to the proceeding. Accordingly, the involvement of entities like private consumer associations in ADR schemes should be limited and treated with caution, and third-party financing companies should not participate in ADR proceedings. Second, ILR notes that collective ADR is not yet well developed³ and it is therefore difficult to assess the kinds of cases in which it might be appropriate. To the extent that initiatives are contemplated to promote collective ADR (and, as discussed below, ILR does not believe a case has been made for it), ILR submits that such proceedings must be opt-in only. It is only in procedures where consumers must take active steps to participate that they can affirmatively consent to have their claims addressed in an ADR proceeding. In addition, it is vital that where consumers take steps to participate they are fully informed of the way in which the rights of the class (and not necessarily their rights as individuals) will be represented.

III. Responses to Specific Consultation Questions

The themes discussed above – that ADR works best when it is premised on the parties' willingness to use it and where they retain control of the process – gener-

³ ILR notes that 18% of the schemes which responded to DG SANCO's 2009 study provide collective procedures, defined as "*procedures aimed at providing redress to multiple consumers who have similar claims against the same seller of goods/provider of services*". One third of those schemes, however, were part of the same system of Spanish arbitration boards. See DG SANCO, Study on the Use of Alternative Dispute Resolution in the European Union, at 49-51.

ally inform ILR's comments to the specific questions set forth in the Consultation Paper.

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

Raising awareness and understanding of ADR is important to ensuring that the parties are able to give consent to participate in ADR and to control the ADR process. ILR believes that the most efficient way to raise awareness about ADR is to publicize it in places where consumers who may benefit from ADR are most likely to look. In ILR's view, one of the first places consumers who feel they have been aggrieved should look for information is on the websites of public bodies, national enforcement authorities or the European Consumer Centres Network. These sites should provide consumers with links to information about ADR schemes. For example, the UK and Irish European Consumer Centres Network sites already provide such links.⁴ ILR supports these existing public-information endeavors and believes more should be done to raise their profiles with consumers. Businesses that are members of ADR schemes also may provide information about ADR on their websites, as well as on documents provided to consumers during transactions.

Raising awareness is a worthwhile goal because it should *enable* greater use of ADR in appropriate cases. However, ILR would raise a note of caution regarding the statistics sometimes cited regarding the use of ADR mechanisms. The Consultation Paper notes that according to a Flash Eurobarometer published after the consultation was launched, “[o]f consumers who complain to a trader and are not satisfied with the way their complaint is dealt with, 46% take no further action.” DG SANCO also notes that “[i]n 2009, only 3% of European consumers who did not get a satisfactory reply from the trader took their case to an ADR scheme.” Based on such statistics, DG SANCO concludes that “the problems which consumers encounter are frequently left unresolved.” ILR respectfully submits, however, that this conclusion does not necessarily follow from the statistics cited in the Consultation Paper. Without detailed information concerning the nature of consumers' complaints and the reasons why consumers chose not to pursue them further, it is difficult to draw any reliable conclusions about whether there is a significant volume of complaints which would be dealt with (and should be dealt with) via ADR but for a lack of consumer awareness. While ILR welcomes increased information and access to ADRs, it should not be an ambition of the Commission to cause disagreements to escalate to a point where dispute resolution (alternative or otherwise) is required. Success in any ADR-related initiative should be measured in terms of whether access is improved

⁴ See <http://www.eccireland.ie/topic.php?topic=11>; and <http://www.ukecc.net/sub.asp?id=193>.

and whether, for example, the availability of quick and easy dispute resolution leads over time to an improvement in levels of consumer satisfaction as businesses receive better information about legitimate consumer concerns and can adapt more quickly. There may be many reasons why consumers choose not to submit their complaints to dispute resolution procedures so adjusting statistics regarding the use of ADR (such as those mentioned above) should not be a goal in itself.

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

ILR believes that the European Consumer Centres Network, national authorities and ADR schemes themselves should bear primary responsibility for raising awareness of ADR, through their respective websites and other public outreach means.

Public organizations that operate at the EU level or are coordinated across the EU Member States (such as the ECC-Net) have a particularly valuable role to play in raising consumer awareness. Those organizations are well positioned to monitor and gather information on the provision of ADR in all 27 Member States. They are therefore best placed to inform consumers of the ADR schemes available and, as appropriate, advise them on which may be most suitable to their case.

Although private representative organizations can play a valuable societal role, their work often involves advocating for the interests of particular groups, interests or causes, and in some cases seeking money from public and private sources to do so. This can apply to bodies such as consumer organizations and some NGOs. For that reason, primary responsibility for raising consumer and business awareness should not be delegated to representative organizations, which might provide information on ADR with a view toward recruiting claimants to highlight particular causes. Thus, while some representative organizations will no doubt choose of their own accord to raise awareness of available ADR schemes, it is in the public interest that the burden should principally fall on neutral public bodies and the ADR schemes themselves.

Finally, ILR submits that an overriding objective of any organization that plays a part in raising awareness about ADR should be to ensure that all parties, including consumers, are aware of their rights. Greater awareness of rights not only will assist in identifying legitimate cases of grievance, but will also assist consumers in making informed judgments about whether or not their rights have actually been infringed and, on that basis, decide whether they have a legitimate claim that ought to be resolved, through ADR or otherwise.

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

Businesses already have a strong commercial interest in handling consumer complaints in a satisfactory and timely manner in light of the fact that dissatisfied customers are likely to take their business elsewhere. ILR does not believe there would be any benefit in legally requiring businesses to inform consumers when they are part of an ADR scheme. Rather, the advantages the ADR scheme should be what encourages both parties to use it and businesses to ensure that consumers are made aware of their membership.

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

In order to ensure that potential users of ADR understand how their case may proceed, what benefits they may receive and what rights they may be waiving, ADR schemes should inform potential users in writing about their main features. In this regard, ILR endorses the principle of transparency, as set out in the Commission's 1998 recommendation,⁵ and suggests that it could be built upon by encouraging ADR schemes to make information about their main features available on their websites in a user-friendly style. This information should be available to a potential party *before* he or she decides to use ADR (or otherwise enters into a transaction that would bind the party to the use of ADR) in order to allow for an informed decision.

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

Both consumers and businesses have numerous incentives for preferring ADR over court-based litigation and ILR does not believe they require further "persuading" to use ADR. Again, ILR supports the principle of consent. It should ideally be for consumers and businesses to decide whether and to what degree they should be bound by the outcome of the ADR mechanism in which they choose to participate. The ability to decide *not* to comply with the outcome of a non-binding ADR is a strong draw for parties to participate in the first instance, and in a great many cases, non-binding ADRs are successful. ILR notes that DG SANCO's 2009 study reported a median compliance rate of 90% for ADR schemes issuing non-binding recommendations.⁶ ILR does not believe it would be appropriate to pressurize consum-

⁵ Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, OJ L 115, 17.4.98, p.31.

⁶ DG SANCO, Study on the Use of Alternative Dispute Resolution in the European Union, at 55.

ers or traders to comply with non-binding ADR decisions. Indeed, such pressure would undermine the very point of such ADR proceedings.

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

As noted above, ILR understands that certain industry sectors are already subject to mandatory ADR schemes in some jurisdictions. Nevertheless, ILR believes the key to a successful ADR scheme is the voluntary consent of the parties utilizing it. Accordingly, ILR does not believe that adherence by industry to an ADR scheme should be made mandatory by any external authority. In particular, ILR believes that publicizing the benefits of ADR to consumers and businesses would give them ample reason to choose ADR over court litigation, without any need for compulsion.

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

ILR does not rule out the possibility that making ADR a mandatory first step before going to court could have some merits in some instances. This follows from ILR's endorsement of ADR as a more efficient, cost effective alternative to court-based litigation. If a fair proportion of disputes can be resolved via ADR thus obviating the need for expensive litigation then that is to be encouraged. Equally, however, ILR believes that ADR works best where parties submit to it voluntarily. The fact that parties participate willingly in ADR increases the likelihood of a positive outcome and in consensual forms of ADR it is essential for the parties to engage in the process if it is to operate effectively.

ILR is concerned, however, that when consumers and businesses have agreed as part of the terms of a sale to use ADR in the event of any dispute, the parties' agreement should be enforceable provided this does not result in consumers being treated unfairly. ILR understands that under Council Directive 93/13/EEC of 5 April 1993,⁷ ADR provisions in consumer contracts may be unenforceable against consumers if disputes later arise. In other words, consumers may consent to ADR once a dispute arises, but consent contained in a consumer contract prior to the dispute

⁷ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993, p.29.

might not be binding on the consumer.⁸ In some cases this mechanism may serve to protect consumers' interests. In other cases, however, the use of ADR may benefit both parties by providing a cheaper and more efficient means for resolving their dispute. Those benefits may be unrealized if the parties cannot have confidence in the agreement to use ADR or face the possibility of the resulting award being set aside. It would therefore be a positive step if Council Directive 93/13/EEC could be amended, or the Commission were to publish guidance, so as to clarify the steps businesses could take to ensure that ADR agreements entered into at the time of a sale are considered to be fair. Alternatively, it might be possible for certain ADR schemes to be endorsed as having sufficient safeguards in place for them to be identified in consumer ADR clauses without those clauses being considered to be unfair. ILR is confident that such steps could be taken without undermining consumer protections. Such steps could also offer significant encouragement to investment in ADR schemes.

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

Again, the core issue here is the parties' control, and the answer to the question depends on the sort of ADR in which the parties have agreed to participate. If the parties agree in advance to a binding form of ADR, such as binding arbitration, then the arbitrator's decision must be binding on both parties. If the parties agree to a non-binding form of ADR, such as mediation, then the mediator's recommendations are not binding on them. In no event should ADR decisions be binding on one party but not the other, unless the parties have agreed on such a form of ADR in advance. For instance, ILR opposes ADR schemes where a final decision is binding if it is in favor of the consumer but if it favors the business then the consumer remains free to take action through the courts. This kind of asymmetry appears to suggest that a consumer's right to redress ranks above a business's right to defend itself.

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

The most efficient way to improve consumer ADR coverage would be to ensure that any measures taken in relation to ADR preserve the flexibility of ADR and

⁸ ILR also understands that some Member States have adopted laws which go further still. In the UK, for example, arbitration clauses in consumer contracts are automatically deemed to be unfair in so far as they relate to monetary claims which do not exceed £5,000. See section 91(1) of the Arbitration Act 1996 (the amount of £5,000 is specified in the Unfair Arbitration Agreements (Specified Amount) Order 1999, SI 1999/2167).

the freedom of parties to choose the ADR mechanisms most appropriate for resolving their disputes. As long as this freedom remains and ADR is accessible at lower cost than court-based litigation then both businesses and consumers will be drawn to ADR.

As suggested in response to Question 7, uptake of ADR could also be improved by amending Council Directive 93/13/EEC in such a way that businesses can have confidence that ADR provisions will be enforceable.

With respect to the second part of the question, ILR sees no impediment to opening an ADR scheme to both individual consumers and small and medium sized enterprises. Just as trial courts offer streamlined small-claims procedures to claimants with simple cases, an ADR scheme could offer tailored procedures to potential parties based upon the complexity of the case and the nature of the parties involved.

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

ILR does not believe a special ADR regime for online sales is necessary. Online business does not differ fundamentally from sales through traditional channels. Accordingly, the same dispute resolution concerns and principles should apply.

Online dispute resolution (“ODR”) may be effective for disputes that are amenable to summary disposition on established legal or factual grounds, or where the low value of the claim militates against an in-person proceeding. But ODR is not suitable for complex claims that would require testing the parties’ evidence or legal theories.

ILR is not clear as to the meaning of the term “centralized” ODR as used in this question. It is worth emphasizing, however, that the main value of ADR is its flexibility, which enables parties to engage in an ADR mechanism that best suits them and their circumstances. If the term “centralized” connotes a one-size-fits-all dispute resolution mechanism, ILR would likely have strong concerns about its propriety and efficacy.

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

In its answer to Question 2, ILR expressed concern that where representative organizations play a role in helping to educate the public about available ADR

schemes they may do so with a view toward recruiting claimants to highlight particular causes. ILR is concerned that some representative organizations could act as vehicles for the self-interested (and even profit-motivated) pursuit of claims. The same is true for “single entry points” or “umbrella organizations,” some of which, like representative organizations, may have their own aims in promoting specific types of ADR. On the other hand, there may be advantages in having publicly funded (and therefore presumably neutral) single entry points or umbrella information services, such as the European Consumer Centres Network or national ombudsmen’s offices, bring together those in dispute and facilitate dispute resolution on a neutral platform.

In addition, ILR questions what DG SANCO means by asking whether such entities “should . . . also deal with disputes when no specific ADR scheme exists.” If DG SANCO means that representative organizations could take the place of an ADR scheme, ILR does not believe that is an appropriate role for them, for at least two reasons. First, as noted above, many such entities would have their own agendas and thus could not serve as neutral arbiters or intermediaries for resolving disputes. Second, as discussed above, the core element of ADR is consent. Where a business has not consented to an ADR scheme, and where individual consumers have not consented to have their claims addressed in an ADR scheme, such a scheme should not be imposed on them by a single-entry-point or umbrella organization.

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

ILR urges the Commission to exercise great caution in relation to collective ADR and, as a threshold issue, does not believe that the case has been made for expanding ADR schemes to include collective claims through any form of EU initiative.⁹ Since collective ADR is not well developed in any Member State it is not clear which specific features any collective ADR scheme should include.

The need for caution is heightened by the potential for abuse in collective ADR and the vulnerable position in which participating consumers may find themselves. Collective proceedings in general are susceptible to abuse – whether they occur in litigation or as part of an ADR scheme – because the potential liability involved once multiple claims have been aggregated can be huge. This creates incentives for third parties, including lawyers and third party funders, to take control of the proceedings for their own gain.

⁹ As ILR has previously explained, it strongly opposes the expansion of collective proceedings in the litigation context as well. Moreover, the safeguards discussed below are also critical in the litigation context for similar reasons.

If collective ADR mechanisms are to be utilized, certain safeguards must be put in place to prevent abuse. One of the most important safeguards against abuse of a collective redress regime is to establish a “certification” standard by which a court or ADR body can assess whether a proceeding is appropriate for aggregate resolution. Specifically, courts or ADR bodies must decide – before a matter is allowed to proceed on a collective basis – whether the group members’ claims implicate the same facts and the same law. Only under that circumstance would proceeding on a collective basis be appropriate.

In addition, any collective proceedings must be carried out in a way that does not vitiate the parties’ control over the ADR process. Five critical safeguards flow from this principle:

First, any collective proceeding must be “opt-in,” because each consumer must make the affirmative decision to join the claimant group and have his or her rights determined by that process. This is so even if the parties agreed to resolve their disputes through ADR at the time of the sale or other transaction, because a representative party does not possess the power to *institute* an ADR proceeding on behalf of others without their knowledge. In opt-out collective cases, only the representative claimant has made the affirmative decision to commence the case; the other members of the group have made no such decision and lack any control over the process. (Indeed, some members may not even know about the proceeding.) In other words, although they may have consented to resolve any *potential* dispute *they* have with a company through ADR, they have not consented to participating in any and all disputes that other parties purport to have with that company. No consumer could grant such consent at the time of sale because so many aspects of any potential collective claim would remain to be determined, and the consumers would lack sufficient information on which to base consent. Given this lack of consent, it would be unfair and improper to purport to bind these individuals to the outcome of an ADR proceeding that they did not affirmatively join.

Second, even where individuals do take affirmative steps to opt in, they must be made aware of the effect their participation could have on their right to have recourse to the courts further down the line. In representative collective ADR, they must also be made aware that the representative will act in the interests of the group as a whole and not necessarily in the interests of the individual.

Third, it must be ensured that where representative organizations are involved in commencing ADR procedures they do so at the behest of consumers rather than on their own initiative and in the course of the procedure they act in the consumers’ best interests at all times. Ideally, consumers themselves should act as representative claimants or they should be represented by public bodies (such as State-appointed ombudsmen) which can demonstrate a mandate from consumers.

Fourth, any collective ADR scheme must ensure that the ADR outcome is limited to those parties involved and – where appropriate – is final. In other words, if a consumer opts in to a collective binding ADR, he or she may legitimately be barred from later participating in any other ADR or judicial proceeding relating to the same claim. By the same token, if a consumer accepts an outcome in a collective ADR scheme that is non-binding, he or she may legitimately be prohibited from participating in subsequent proceedings arising from the same claim.

At the same time, any collective ADR outcome must be limited so as to apply only to the participants in the immediate proceeding. For example, if an arbitrator rules against a business and in favor of a group of consumers in a collective ADR proceeding which the parties agreed would be binding, that ruling should be recognized and upheld by the courts in the event that a party later re-opens the dispute in litigation.

Fifth, any evidence or arguments shared with the ADR body by any party during the proceeding must be protected from disclosure to non-parties and cannot be used by or against any party in any other ADR proceeding. The risk of such disclosure is particularly acute in the context of collective proceedings, because there may be numerous claimants receiving information about the case, most of whom do not appear personally before the mediator or arbitrator.

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

ILR respectfully submits that the most efficient way to improve the resolution of cross-border disputes would be to improve awareness and ensure that the parties are free to determine how their disputes should be resolved. The Commission could assist by working with ADR schemes to ensure that they are equipped to deal with the practical challenges of cross-border dispute resolution.

The key advantage of using ADR rather than court-based procedures for the resolution of cross-border disputes is that parties are free to agree how best to overcome issues that can give rise to significant cost and delay if they must be addressed in the courts. For example, subject to the terms of any ADR agreement entered into before their dispute arose, parties have greater flexibility to determine where, by whom and according to which laws their dispute will be resolved. Subject to the strict requirement that both parties give their consent, aspects of an ADR process may even be modified after it has been commenced, provided the modification is beneficial to all concerned.

For these reasons, ILR is not convinced of the need for the Commission to prescribe the adoption of particular rules or procedures in cross-border ADR. However, ILR does endorse certain aspects of the Mediation Directive,¹⁰ in particular the requirement that parties who agree to a written settlement via mediation should be able to request that it be made enforceable in court.

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

ILR recognizes that promoting access to justice must be a significant goal of ADR schemes. Schemes should aspire to make ADR available at low cost or free of charge but where that is not possible ILR encourages DG SANCO to review and consider all possible funding options. At the same time, however, ILR opposes any funding mechanism that would facilitate or encourage the filing of meritless claims. With these two principles in mind, ILR suggests a number of alternatives for DG SANCO to consider.

First, ILR believes that ADR may be funded jointly by consumers and businesses who utilize it. Businesses can pay a regular fee to maintain an ADR scheme, and a consumer wishing to utilize the scheme can pay a reasonable fee related to the consumer's particular case that equals some percentage of the marginal cost of the case to the ADR scheme, up to a reasonable cap. The consumer's fee could be payable up front, at the start of the case, if the consumer has the means to do so, or, if the consumer is unable to pay the fee but is successful in the proceeding, the fee could be deducted from the consumer's award.

Second, in addition to – or as opposed to – asking consumers to pay a fee to utilize an ADR scheme, DG SANCO should consider whether legal-aid schemes or other public funding sources/tax incentives are available to finance or support ADR schemes, especially given the potential for an increase in the use of ADR to reduce the burden on the courts. Consumer representative organizations also could pay fees for consumers who cannot afford to commence ADR proceedings on their own. In such cases, however, the representative organization must have no further interest in the outcome of the case – or control over the progress of the case. In particular, the consumer must not be bound to repay the representative organization out of any award to the consumer, because that would give the representative organization a direct financial stake in the outcome of the proceeding.

Third, in adversarial ADR proceedings where it can be established that one or other party has prevailed, the “loser pays” fee-shifting approach should be the start-

¹⁰ 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 L136, 24.5.2008, p.3.

ing point for determining who should bear the costs of the proceedings. If the parties so agree, liability for costs could be capped according to the value of the dispute or the rule could be otherwise modified in particular cases. Nonetheless, consumers with meritorious claims would have an incentive to agree to a “loser pays” regime because it would eliminate the cost to them of using ADR. At the same time, businesses should support a “loser pays” regime because it would reduce the likelihood that any consumer would file a frivolous claim.

In no event, however, should third-party litigation funding have any role in ADR schemes. Third-party litigation funding encourages the filing of more – often frivolous – suits in the litigation arena, and it would do the same in an ADR scheme as well. Moreover, the use of third-party funding in ADR would require consumers to cede control of their cases to a third party whose only interest in the dispute is financial. Encouraging strangers to invest in consumer disputes in the hope of turning a profit is directly contrary to the fundamental goals – and efficiency benefits – of ADR.

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

As a threshold issue, ILR disputes the suggestion that ADR independence is compromised when an ADR scheme is partially funded by businesses.

To ensure that ADR schemes operate, and are seen to operate, impartially the Commission could recommend “best practice” procedures for the selection of mediators or arbitrators. It might be recommended, for example, that the consumer and the business in dispute could each propose a slate of potential mediators or arbitrators. If one of the proposals is common to both sides, that person would be selected as the mediator or arbitrator. If the parties do not propose a common name, the mediator or arbitrator could be selected at random from among the parties’ slates. Additionally, each party could first have the opportunity to strike names from the other party’s slate before the random selection occurs.

ILR also notes that where the “loser pays” regime proposed above is applied, mediators and arbitrators would have no incentive to favor one side over the other, since either the consumer or the business might be responsible for paying the costs of the ADR.

16. What should be the cost of ADR for consumers?

ILR believes that a low cost framework for ADR is advantageous for both consumers and businesses alike. ILR endorses ADR as a means of resolving disputes where it can be undertaken at low cost to all parties concerned and the benefit this

confers on businesses should not be overlooked. ADR funding mechanisms should preserve the parties' access to justice but must be adopted and implemented in a thoughtful and careful manner to avoid inviting abusive practices or creating any other unintended consequences.