



**EUROPEAN COMMISSION**

**Alternative Dispute Resolution  
For Consumer Transactions in the Borderless Online Marketplace**

**Department of Commerce/Federal Trade Commission Invitation to  
Comment and Public Workshop**

**Comments by the European Commission**

**30/5/2000**

**Introduction:**

1. The services of the European Commission welcome the opportunity to comment on the Alternative Dispute Resolution for Consumer Transactions in the Borderless Online Marketplace.
2. The development of a global electronic marketplace has brought the question of consumer confidence to the top of the agenda for business, consumers and governments. Governments, business and consumers around the world face similar challenges. The need for international co-ordination and consensus building among stakeholders is stronger than ever in order to ensure compatible solutions that will foster the development of a global and truly competitive market.
3. Cross-border consumer transactions unavoidably raise questions about what jurisdiction and what applicable law will govern the transactions. Clearly a border-less marketplace requires the development of an appropriate international legal framework that will generate consumer and business confidence by taking into account the interests, concerns and fundamental rights of all stakeholders. We are confident that such a global framework will develop and are keen to continue working with governments from around the world to this end. The right to redress, is one of the key consumer rights that should be guaranteed by this legal framework. We are, nevertheless convinced that more should be done to raise consumer confidence in e-commerce.
4. The services of the European Commission share the views of the the Federal Trade Commission and the Department of Commerce and others that alternative means of dispute resolution have an important role to play here, although we recognise that more work is required to promote such schemes and to ensure their use in the on-line environment. Neither public authorities nor private agents have much experience in this new and rapidly evolving environment. International co-operation and consensus is crucial to ensure that the various on-line ADRs that are emerging meet the needs and respect the values shared by our respective societies.
5. We were pleased with the interest shown by US stakeholders in the workshop on ADR we hosted on 21 March 2000 in Brussels on out-of-court dispute settlement in trans-border electronic commerce. The input we received has helped to take forward our thinking on this matter. We believe that the results from that workshop also provides a valuable input for US work in this area, not least the workshop that will be hosted by the FTC and DoC on 6 and 7 June 2000. Such co-operation is, in our view, the best way to ensure the most rapid development of practicable on-line dispute resolution systems that meet the interests and concerns of all interested parties.

## **Background**

6. The potential benefits of electronic commerce are enormous. It is helping to break down trade barriers, open markets and is revolutionising spending habits. It offers business substantial efficiency gains and consumers greater choice, better service and lower prices. Business-to-consumer ("b-to-c") e-commerce is driving the "new economy" trend towards a more consumer-oriented service culture, which is the hallmark of the new economy. To compete in the global electronic market place, the companies will have to put the consumer first.
7. The key challenge for policy makers is to create an environment – legislative and non-legislative – that encourages sustained consumer demand for on-line services as well as stimulating the development of a competitive global online market. In particular, SME's could be stifled, and e-commerce limited to established brands and retailers unless we can overcome the confidence barrier in the minds of consumer.
8. Currently the level of consumer trust is far too low to allow b-to-c e-commerce to deliver its potential, especially in cross border trade. This is clear from studies carried out in both the US and Europe. This arises for a number of reasons, for example:
  - Concerns over performance of the contract, in particular, fulfilment.
  - Uncertainty about how to complain and seek redress.
  - The consumer usually bears all the transaction risk because payment tends to be made before receipt.
  - The security risk of transmitting financial and personal details.
  - The e-commerce site is less tangible and more difficult to identify than a "bricks and mortar" shop.
  - Poor design and lack of transparency on many commercial web sites.
9. The key to a thriving competitive e-commerce sector is to enable business to generate consumer confidence in e-commerce itself. Mechanisms are required to help business to encourage consumers to make repeated purchases on-line. They should enable the e-commerce sector to demonstrate that the overwhelming majority of on-line transactions will be trouble free. It should then permit businesses to reassure consumers that, if a problem were to arise, it can be resolved quickly and effectively. The e-commerce sector needs to reassure consumers that, if they encounter a serious problem and a business uninterested in resolving a dispute, a credible way to seek redress exists. If the e-commerce sector is not in a position to reassure consumers in these ways, consumer-business e-commerce will remain a minor retail medium, fragmented along regional lines.

## **Addressing the Solutions**

10. Boosting consumer confidence is central to the effective development of b-to-c e-commerce. Unless the confidence gap is bridged, its potential will not be fulfilled. Regulation will always have a part to play in boosting confidence. It is

the crucial safety net in the back of consumers' minds. However, traditional regulatory instruments are not always effective in this fast-moving field and ineffective regulations will hamper development. Therefore market based solutions to consumer confidence are in many instances considered the most effective way to get consumers to shop on-line. Alternative Dispute Resolution (or 'ADR') is one aspect of this but it is inextricably linked to other elements of "e-confidence," which include codes of conduct and enforcement/accreditation measures. Current practice has shown that trustmarks and codes of conduct, which seek to prevent disputes before they occur, make an equally important contribution. ADR should, therefore, not be viewed in isolation, or as the starting point for creating consumer confidence, but as part of a chain of mutually reinforcing measures to enhance certainty and confidence in the minds of both business and consumer. The question of redress arises only when other measures have failed to prevent problems arising. ADR is clearly integral to an overall solution but is not *the* solution in itself. If we focus only on ADR, we might give the impression that problems are inevitable. This does little to encourage e-commerce. The point of departure for boosting confidence should be the development of effective codes of conduct and trustmarks. The relationship between codes and ADR schemes also needs to be addressed. These mechanisms are mutually reinforcing and together can give a powerful boost to consumer confidence.

### **Trustmarks**

11. A prominent, recognisable and protected trustmark (or 'seal') is a visual representation of an e-tailer's adherence to a code of conduct, an effective tool for enforcement and a symbol of endorsement by a trusted third party. It provides consumers and also small businesses with a reference point to identify and assess the trustworthiness of an e-tailer or recognition for a small business who does not benefit from the recognition of a global brand. Such seals will play an important role in allowing e-tailers, especially smaller operations, to enter new markets where they have not had a presence providing consumers with some credibility and certainty.

### **Codes of Conduct**

12. These should aim at encouraging a market environment that rewards best business practice, thereby ensuring that most transactions are trouble free. They should add value to existing obligations and be meaningful by offering quality after sales services (e.g. refunds or money-back guarantees, and returning of goods). They should also include effective monitoring, sanctions and consumer complaint mechanisms. Most codes of conduct also include subscription to an ADR scheme, so that if a dispute does arise, a simple, cheap and informal channel for resolving matters is available.

### **ADRs**

13. As e-commerce grows, greater cross border consumption will invariably lead to an increase in disputes. This raises the obvious question of how such disputes are to be resolved. Traditional litigation is often complex and time consuming. Even if successful, difficulties may arise with enforcement, particularly for cross-border

transactions, which are likely to increase significantly. In such cases complex legal issues may arise concerning which court should hear the case, what law should apply to the contract and how a judgement will be enforced. Regardless of whether consumers can take action in their home court or in the business's home court, they will face difficulties in obtaining redress for problems arising from online transactions where the consumer and business are located in different jurisdictions. Such uncertainties in the legal framework may undermine consumer trust in this retail medium and inhibit them from purchasing products and services over the Internet. In addition, many e-tailers, especially SME's, may be deterred from entering the electronic market place because of the risk associated with litigation in an unknown forum.

14. Most consumer disputes involving e-commerce are usually characterised by the fact that b-to-c transactions have a low economic value compared to the costs of seeking a judicial settlement. ADR offers users the potential for simple, swift and inexpensive redress. Unlike traditional court action, ADR provides an affordable and more rapid means of solving disputes. The flexibility of ADR also allows greater discretion for the decision-maker and overcomes many of the difficulties associated with enforcement. ADR mechanisms often develop on a sectoral basis and respond to the particular requirements and characteristics of the individual sector. In other words, no single scheme will adequately meet the requirements of all sectors. Nevertheless, some minimum criteria may be common to all. Should online forms of dispute settlement be developed successfully, they will help to reinforce the benefits of ADR in settling both offline and online disputes and facilitate the settlement of disputes arising between businesses and consumers residing in different countries.
15. It should be noted that the phrase 'Alternative Dispute Resolution' covers a variety of processes that provide an alternative to litigation through the courts. ADR processes may include, but are not confined to, arbitration, early neutral evaluation, expert determination, mediation and conciliation. Other more formal mechanisms for resolving disputes such as the private sector ombudsman schemes, utility regulators, trade association arbitration schemes in certain trade sectors, and even tribunals can also provide alternatives to the courts in some circumstances. These various processes have different characteristics and are more or less effective depending on the circumstances. It is often unhelpful and confusing to group them together under one heading. A useful distinction is that between processes in which a neutral third party makes a decision and those where the neutral offers an opinion, and/or seeks to bring the parties to an agreement. Which of the above processes is most appropriate will depend on the nature of the dispute to be resolved.
16. All these processes have a valuable part to play in resolving consumer disputes. ADR techniques have evolved to meet perceived defects in more formal procedures. They therefore often reflect the principles that justice should be proportionate to the problem that it should be speedy, responsive and understandable to users generally, and to particular groups or sections of society. The effectiveness of ADR in ensuring wider access to justice has been demonstrated in the off-line world.

17. The development of Internet and web based technologies will allow the transfer of these methods to in the on-line environment. The experience gained off-line is essential for the effective deployment of on-line ADR systems. Many new schemes are emerging which incorporate a number of off -line methods but with the extra advantage provided by new technology. For instance, access is widened, speed is increased and control of the resolution process more firmly in the hands of the parties. We should not, therefore re-invent the wheel but, rather, base ourselves on the solid experience we have already gained. The main challenge is the technical one of ensuring that the systems established operate efficiently on-line.
18. Within this context we need to consider the overarching principles which these on-line systems should comply with. This does not mean prescribing in detail the working of such systems. What it does mean is identifying a set of principles that such systems should abide by in order to ensure a common minimum standard. Within the European Union, the European Commission has produced a Recommendation on the principles applicable to out-of-court procedures for the settlement of consumer disputes<sup>1</sup>. This establishes a number of minimum principles that ADR bodies should respect. These include independence, transparency, adversarial principle, effectiveness, legality, liberty and representation. Compliance with these principles is intended to guarantee to both consumers and traders that their cases will be treated with rigour, fairness and independence.
19. **These principles are limited to ADR mechanisms that have procedures whereby an active third party intervenes to impose or propose a formal solution to settle the dispute.** An obvious example of this is where an arbitrator makes a formal award to one of the parties after hearing evidence from both parties. However, the recommendation does not apply to bodies that merely bring the parties together to find a solution by common consent. An example of this procedure is 'mediation'. Consideration is now being given to developing some general principles to cover the latter also. Minimum standards will ensure that both e-tailers and consumers have confidence in an ADR, wherever it is located. This is a matter that should be addressed with some urgency. As a starting point in this exercise, the European Commission organised a workshop on 21<sup>st</sup> March, which focused on the cross-border application of ADR schemes in the online environment (<http://dsa-isis.jrc.it/ADR/>). The Commission is facilitating a dialogue between industry and consumer groups and will set up an online "e-confidence forum" to ensure that this consensus-building process is as inclusive as possible and especially encourage cross-border partnerships.
20. The various methods of achieving effective alternative dispute resolution outlined above should be clearly distinguished from another idea currently in circulation; which suggests that principles should be developed for a pure cyber or virtual system that falls outside any national jurisdiction and, therefore, consumer protection rules. This is unnecessary, confusing and could lead to a lowering of standards. It is unnecessary, since ADRs will usually assess a complaint on the basis of the code to which a supplier subscribes to and which will, in most cases, go beyond the minimum legal standards. In addition, a comprehensive alternative

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<sup>1</sup> 98/257/EC Official Journal L115/31, 17.04.98, p.1-16

to the courts, with the appropriate guarantees that this would entail, would inevitably be heavier and more bureaucratic than a normal ADR system. It would, therefore, fail to deliver the benefits provided by the latter. It is confusing, and potentially misleading, since private international law and international civil procedure rules will prevent circumvention of national rules in specified cases. Finally, to the extent that the virtual system led to lower standards, it would be to the detriment of fair competition since consumer protection rules exist not just to protect consumers but also to ensure fair competition between traders. They are, therefore, not just important for consumers but also for responsible businesses.

21. Effective ADR that comply with certain minimum standards provide a far more reliable, swift and inexpensive means of addressing cross border on-line disputes.

### **Relationship with legal framework**

22. Existing legal frameworks ensure a legal safety net which will underpin consumer confidence in shopping on-line cross-border. The value of the possibility of access to justice for consumers does not derive from its regular use by them. Its value is primarily a reassurance, now taken for granted in the off-line world, that businesses are influenced in their actions by the possibility of litigation. In the off-line world, where patterns of trust between consumers and business are long developed, it is still a vital underpinning to consumer-business relations. It is even more critical to e-commerce, which is still in its embryonic stage.

23. But ADR and legal redress are two separate issues. Access to the latter should not be made conditional on the use or even exhaustion of the possibilities offered by the former. The use of any exhaustion principles for ADR (i.e. requiring a consumer to agree to exhaust all ADR remedies before being allowed to start a court action) would be seriously undermine consumer confidence. An effective, fair and rigorous ADR scheme that gives consumers confidence will be used without the need for compulsion. The advantages to an efficient and well run ADR over court litigation are easy for anyone to see. By producing an agreement that gives with one hand and takes away with another is unlikely to fill a consumer with confidence. Indeed, if the ADR is not effective it could lead to unnecessary and protracted disputes. In addition, in many jurisdictions such compulsion would be viewed as unfair.

*no exhaustion*

### **Role of Public Authorities**

24. Many ADR schemes, Codes of conduct and trustmarks have sprung up over the recent past. Competition between them should ultimately produce ADRs and codes of conduct that best satisfy both consumers and business. However, this competition may only add to the confusion of consumers in the short term. To counter this, action is required to bring some order to this competitive process. Nevertheless, public authorities should not 'pick winners' among self-regulation initiatives.
25. They should not therefore develop ADRs or Codes of Conduct themselves. They can and should drive co-regulation initiatives bringing together all stakeholders whether they are public authorities, e-tailers, trade associations or consumer groups. The Commission has just begun such a process to address the need for

general principles covering codes of conduct, trustmarks and means of accrediting codes and, as already indicated, principles for mediation and conciliation ADRs. Industry should be encouraged not just to develop ADRs in isolation but to create a package of measures including the Trustmarks and Codes of Conduct. Public authorities must act as honest brokers in this process allowing standards to be established by consensus through the exchange and development of these stakeholders experience. Such a partnership will guarantee trust and boost confidence. Public authorities then have a role as the guarantors of these agreements overseeing the results.

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