How well placed is the optimism surrounding the new ADR/ODR proposals?

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The importance and status of the European consumer has reached new levels: their skill and capability are now recognised as representing an *intangible stock of capital* such that empowered consumers will boost competition and innovation, they will force businesses to strive to deliver value and they will strongly influence economic growth and sustainability.¹ Now, to further motivate this intangible stock of capital we have the new ADR and ODR proposals² that set out to broaden the opportunity for non-litigious consumer redress. The rhetoric accompanying these proposals is overwhelmingly positive, particularly in the impact assessment, which is confident that ‘consumers will get to know about ADR’ with the inevitable result that its more frequent use will increase their confidence to buy goods and services online and cross-border.³

According to the impact assessment, the new measures will have ‘a positive social impact’; they will allow *all* consumers, including the vulnerable ones, to refer their disputes and to be compensated. Reallocated in the internal market, the recovered losses will contribute to economic growth and the ODR platform will promote the willingness of businesses to offer goods and services across borders. Busi-

nesses will be more willing to engage in e-commerce activities; consumers will have access to a wider range of goods and services; markets will become more competitive, and prices will fall. So effective will be the use of ADR/ODR schemes, suggests the impact assessment, that a *virtuous circle* will be created ‘from which businesses which are reluctant to adhere will be excluded and bear a reputational risk’. Conversely, those businesses using ADR schemes will maintain their business reputation and build good relations with their clients ‘... for all online, off-line, domestic and cross-border goods and services ...’.⁴

The *virtuous circle* of low cost dispute resolution; enhanced trader reputation; improved product and service quality, and reduced consumer detriment presents a model of the consumer market based on a pursuit of self interest tempered with behavioural fairness, from both trader and consumer. A model in which, according to the impact assessment, consumers will be able ‘to address *all* their disputes to an ADR scheme...no matter the business channel of purchase or the country where the product or service was purchased from.’⁵ Clearly, economic nirvana may be but a directive and regulation away, but a little cynicism at this point may also prove valuable.

Consumer redress is a complex area in which the effectiveness of the consumer outcomes is shaped by norms of consumer behaviour, influenced by tradition, individual competence and confidence, and shaped by social demographics as much as by market forces and the legislative *acquis*. The European Parliament has warned, with good cause, that too many different ADR schemes may confuse the consumer and deliver mixed results: we find over 750 European schemes already in existence but with little aware-

¹ Special Eurobarometer 342, Consumer Empowerment 5 and 6, available at: <ec.europa.eu/consumers/consumer_empowerment/docs/report_eurobarometer_342_en.pdf>.

² Proposal for a directive of the European Parliament and the Council on alternative dispute resolution for consumer disputes and amending Regulation 2006/2004/EC and Directive 2009/22/EC (Directive on consumer ADR) COM (2011) 793 final and Proposal for a regulation on online dispute resolution for consumer disputes (Regulation on consumer ODR) COM (2011) 794 final.

³ SEC (2011) 1408 final 66.

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⁴ SEC (2011) 1408 final 67.

⁵ SEC (2011) 1408 final 65.

ness of their presence amongst consumers or businesses. The schemes are diverse, established by public authorities or by industry; they may be located in the public sector, industry or in consumer organisations; their funding may be private, or public or a combination of both; geographical coverage may be national or it may be provided at a regional or local level; schemes may be sector-specific or multi-sectoral; decisions may be made collegially or by individuals and may be mere recommendations or may be binding.⁶

If we take a sectoral perspective, we can see that the legislation of the Third Energy Package, obliged Member States to provide for ADR⁷ yet there remains a ‘persistent’ gap in coverage, a lack of awareness by consumers and businesses, and a failure to respect the core principles set out in two Commission Recommendations.^{8,9} While there may be shortcomings with the implementation of these sectoral schemes, they do require *additional* measures to protect vulnerable consumers, a distinction not drawn in the new ADR and ODR proposals.

Consumer behaviour may also serve to temper the optimism accompanying the new proposals: the *preference* to shop in person, out of loyalty to shops or merely out of habit. Around forty percent of consumer problems are satisfactorily resolved between consumer and trader, whilst in just under a quarter of cases consumers feel that the value of the detriment is too small to pursue redress. Even with over

750 schemes operating, eight percent of consumers do not know that ADR exists and around twenty five percent suggest that they would not turn to ADR because it would be *too much effort, too expensive or take too long*.¹⁰ Demographic analysis shows a significant variation in consumers’ perceptions and behaviours towards ADR, both between Member States (cultural consumer tradition) and within Member States (socio-economic status). The most vulnerable of consumers, the oldest, the least well educated and particularly those who have never used a computer and who don’t use the internet are the least empowered, the most likely to suffer consumer detriment, *and* the most likely to say that they would never use ADR.¹¹

The new proposals suggest the provision of a generic solution to reduce consumer detriment in a somewhat idealised and sanitised model of the consumer redress environment. Existing ADR schemes are so diverse, entrenched and potentially incomplete as to dilute any potential for conformity in the implementation of any residual scheme, or alternative, at Member state level and consumer behaviour indicates that the rhetorical optimism accompanying the proposals is overstated. Undoubtedly such schemes can bring significant benefit to consumers, businesses and market opportunity,¹² but will *these* new proposals deliver the virtuous circle in which consumer and trader self interest leads to the common good?

⁶ See SEC (2011) 1408 final 10 and 16.

⁷ Art 3 Para 13 Directive 2009/72/EC and Art 3 Para 9 Directive 2009/73/EC.

⁸ Working Group Report on Alternative Dispute Resolution in the Energy Sector 2, available at: <ec.europa.eu/consumers/citizen/my_rights/docs/energy_adr_report_en.pdf>.

⁹ See Commission Recommendations 98/257/EC 31 and 2001/310/EC 56.

¹⁰ Special Eurobarometer 342 (fn 1) 210.

¹¹ Special Eurobarometer 342 (fn 1) 225.

¹² SEC (2011) 1408 final 7, 172.