

<p style="text-align: center;"><b>Summary of responses to the Green Paper on alternative dispute resolution in civil and commercial law</b></p>
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### General comments

1. To date, the Commission has received more than 160 responses to the Green Paper. The breakdown by country and sphere of activity of the organisations and individuals who have responded is fairly balanced: governments of Member States and third countries; generalist or specialist providers of ADR - individuals or grouped into associations; structures for training and information in ADR; academic circles; judges; bar associations and solicitors' firms; chambers of commerce; professional federations; commercial companies; consumers' associations. The European Economic and Social Committee has also given its opinion on the Green Paper. A number of responses have yet to reach the Commission but should do so in the near future, such as the opinion of the European Parliament and the official replies from some of the Member States.
2. Generally speaking, the Green Paper has been welcomed, both for its main message (ADR is useful in and of itself and does not necessarily have to be considered as a response to problems of access to justice) and for the approach taken (taking stock of the situation in the field of ADR, and launching a broad consultation process to determine the practical measures needed to develop ADR).
3. There is general agreement on the fact that this is both a technical and a social subject, and that the debate is consequently not just legal but also political. This no doubt explains why the various positions taken sometimes diverge - between Member States, between different spheres of activity within a particular Member State, or between respondents within a single sphere of activity. Indeed it should be noted that, as far as the specific content of the answers to the various questions posed in the Green Paper is concerned, no real majority around one or other position really emerges; rather, there is a great diversity of points of view and positions taken.
4. A number of comments were made on the approach taken by the Commission in the Green Paper:
  - The Commission took an overarching approach in the Green Paper as far as its scope is concerned (it covers both civil and commercial law). Most respondents support this approach, noting that similarities between ADR in the different domains exist and that, furthermore, the progress achieved in certain fields should be able to benefit others. Some, however, regret that the approach was as overarching as it was, arguing that it is difficult in this context to give responses which are truly workable and coherent, and that it would have been better to limit the work to one particular field.
  - The Commission also took an overarching approach to the actual definition of ADRs. While only this broad definition can avoid terminological obstacles (the same words do not correspond to the same reality in all countries), it is true that some of the questions in the Green Paper refer to all forms of ADR while others do not. The distinction between ADR in the context of court proceedings and conventional ADR is considered theoretical by some and therefore of no practical interest. Others, by contrast, clarify the definitions by distinguishing, for example, between four criteria: the point at which recourse is had to ADR (pre-court proceedings, post-court proceedings, appeal), who decides on the recourse to ADR (the law, the parties, the judge, a specialised body), the operator of the ADR (judicial or non-judicial body), the way in which the operator proceeds (formal adoption of position or not). The measures to be taken could thus be broken down by following this classification. It was also proposed that both the debate and subsequent initiatives should be confined only to those forms of ADR, often called mediation, in which third parties do not take a formal position on a solution to the dispute but simply help the parties to reach agreement.

**Question 1: Are there problems such as to warrant Community action on ADR? If so, what are they? What is your opinion on the general approach to ADR that should be followed by the institutions of the European Union, and what might be the scope of such initiatives?**

1. A large majority agree that ADR is not well enough known among those involved in court proceedings - both individuals and companies - or among legal practitioners.
2. A number of responses to the Green Paper testify to the diversity of the situations on the ground in the different Member States. The need for ADR to be developed is least acute in the Member States in which court proceedings are neither slow nor excessively costly. However, in those Member States which are facing a crisis in the effectiveness of justice, but in which ADR is not highly developed, Community action in the field of ADR is perceived as a necessity to ensure, for example, better dissemination of good practice or other regulatory initiatives. Exchanges of experience and research in legal matters are highlighted as particularly useful activities from this point of view.
3. It is therefore recommended that efforts be pursued at European level, or new initiatives launched, with the aim of raising awareness of ADR among those involved in legal proceedings and legal professionals. The information could be disseminated via the already existing channels such as the European Judicial Network in Civil and Commercial Matters. As far as training is concerned, it is proposed that universities should somehow be encouraged to provide specific teaching so that ADR becomes a reflex for members of the legal profession. It was also proposed that a dedicated European ADR website be set up, or even a European ADR institute with a general educational and promotional role with regard to ADR.
4. Many respondents recognise that particular efforts must be made as far as extra-judicial resolution of cross-border disputes is concerned.
5. Some criticise the Commission's approach, which they consider too narrow because it appears to emphasise regulatory aspects and underestimate the cultural and social dimension of ADR. It is pointed out that ADR is in a critical phase of its development and that action taken by public authorities must therefore be primarily educational. Hence legislation on ADR (whether framework legislation or ad hoc amendments to the existing legislation based on the questions raised in the Green Paper) may be premature. Some also question the feasibility of legislative intervention in ADR, in the light of the great diversity of the process and the imperative need to preserve its flexibility.
6. On the question of whether or not legislation should be drawn up, opinions diverge considerably, with some firmly opposed and others arguing in favour of minimum rules ensuring greater homogeneity of ADR processes between Member States. Such minimum rules appear particularly appropriate for ADRs where the stakes are not high. It was also pointed out that it would be useful to align the legislation of the Member States on certain questions relating more particularly to civil law, notably the rules on confidentiality, which could be applied under the *lex fori* where court proceedings are launched after the failure of ADR.
7. If there is to be a legislative initiative laying down, for example, minimum rules, some respondents would prefer a recommendation and others a directive, which could then be supplemented by the amendment of certain existing texts such as the Brussels I Regulation. It was also proposed that a recommendation be drawn up in the first instance, and then, in the light of the results of the implementation of that recommendation, a directive could if necessary be drawn up later on. The question of the legal basis was raised.
8. A great many respondents considered that, if legislation is harmonised, it must respect the legal structures and mechanisms in the Member States. It is considered fundamental that the initiatives should not undermine what has already been achieved at national level in ADR, nor should they compromise the contractual freedom of parties.

**Question 2: Should the initiatives to be taken be confined to defining the principles applicable to one single field (such as commercial law or family law) - field by field - and in this way discriminate between these different fields, or should they as far as possible extend to all the fields governed by civil and commercial law?**

1. A majority agree that the different fields should be dealt with separately. Distinctions should therefore be made not only on the basis of field but also the different characteristics of the different types of ADR ("one size does not fit all").
2. Others, however, declare themselves in favour of a comprehensive approach for all fields and propose to draw up general principles to which specific rules for each field could be added.

**Question 3: Should the initiatives to be undertaken deal separately with the methods of online dispute resolution (ODR) (an emerging sector which stands out because of its high rate of innovation and the rapid pace of development of new technologies) and the traditional methods, or on the contrary should they cover these methods without making any differentiation?**

While some consider that it is too soon to judge, given the slow development of ODR, most take the view that ODR and other types of ADR should be dealt with in exactly the same way, with only the technical requirements of ODR being considered separately.

**Question 4: How might recourse to ADR practices be developed in the field of family law?**

1. A number of respondents warn against Community action in this field.
2. Not everyone shares this view: some propose that international and particularly Community legislative instruments should take greater account of ADR: these instruments could encourage ADR or make it mandatory to attend an ADR session, while this would be free of charge and without any obligation to continue the process.
3. It is suggested that a database be set up at European level recording past cases, i.e. describing the substance of the dispute and the strategies for resolution applied.

**Question 5: Should the legislation of the Member States be harmonised so that in each Member State ADR clauses have the same legal value?**

**Question 6: If so, should the validity of such clauses be generally accepted or should such validity be limited where these clauses appear in membership contracts in general or in contracts with consumers in particular?**

**Question 7: What in any case should be the scope of such clauses?**

**Question 8: Should we go as far as to consider that their violation would imply that the court has no jurisdiction to hear the dispute, for the time being at least?**

1. Some respondents consider that Community intervention on this point is not justified, at least at the current stage of development of ADR.
2. It was also pointed out that the question raised in the Green Paper does not really apply since ADR clauses are in fact persuasive rather than mandatory, since even where recourse to ADR is obligatory, the ADR process itself remains voluntary, and the parties can at any point end their negotiations and turn to a judge or arbitrator.
3. Some respondents consider that the ADR clauses which appear in consumer contracts could be categorised as unfair clauses within the meaning of Directive 93/13/EEC.
4. Many support harmonisation of the legislation of the Member States so that ADR clauses acquire a similar legal value in all the Member States. However, opinions are divided as to the exact scope of the recognised legal value of these clauses.

5. Proposals were made by a number of respondents for certain clauses to be inserted into contracts. For example, it was proposed that ADR clauses be confined to governing the modalities of the ADR process in the event that the parties actually decided to use ADR. It was also suggested that the clause should make it obligatory to hold an initial information meeting on ADR, which would be free of charge, i.e. funded by the State or the company.
6. It was noted that the question of ADR clauses arises not only in cases that are referred to the court, but also in cases of recourse to an arbitrator. Thus, case practice covers numerous types of ADR clauses which vary in scope and which ought to be standardised. There are two approaches which differ in the relative importance they assign to the consensual nature of ADR and the mandatory nature of the ADR clause. Some respondents would make the ADR clause mandatory: the case can only be referred directly to the judge or the arbitrator if ADR has been initiated and one of the parties decides they no longer wish to pursue it. Others, by contrast, would make the ADR clause voluntary: ADR is only initiated if one party proposes and the other accepts.

**Question 9: Should the legislation of the Member States be harmonised so that in each Member State recourse to an ADR mechanism entails suspension of the limitation periods for the seising of courts?**

1. Several responses state that Community intervention on this point is not justified. The experience acquired by certain ADR providers shows that there are relatively few problems related to the expiry of the limitation periods for the seising of courts, either because of the speed of the ADR processes themselves in comparison with the limitation periods, or because of the fact that these ADR processes run in parallel with the court proceedings. It may be, moreover, that the fact that limitation periods are not suspended brings pressure to bear on the parties so that the ADR process moves ahead rapidly.
2. It was also stated that the question of limitation does not arise in the same terms as other questions raised in the Green Paper. Limitation is subject to the law governing the contract or non-contractual obligation itself and not to the *lex fori*, which means that the parties would be able to determine the period which they had at their disposal to refer the case to the court.
3. Many respondents, however, consider that it is essential to provide for suspension of limitation periods. Future legislation could equally well provide that use of an ADR mechanism does not involve suspension of limitation periods for the seising of the courts except with the agreement of the parties. If this rule is provided for, an objective, formal element must also be provided for, clearly setting the beginning and end of the limitation period.

**Question 10: What has been the experience of applying the Commission recommendations of 1998 and 2001?**

1. The Commission has gathered information on how the first (1998) recommendation has worked. However, there have been no comments on the implementation of the second (2001) recommendation.
2. It emerged that there had been no major difficulties in implementing the principles contained in the first recommendation (1998). However, it was proposed to modify or at least clarify some of the principles set out in the recommendation, such as the requirements of independence from third parties and transparency, and the provisions on the principle of legality.
3. Given the central role that the first (1998) recommendation plays in the functioning of the EEJ-Net and FIN-NET networks, it was suggested that the Commission should evaluate the implementation of the principles contained in this recommendation in all the Member States. It was also proposed that these recommendations, or at least the 1998 one, should be changed, in the field of consumer law, into binding instruments.

**Question 11: Could the principles set out in the two recommendations apply indiscriminately to fields other than consumer protection law and in particular be extended to civil and commercial law?**

1. While some respondents consider that these principles can be generalised because of their loose wording, others consider that they can only apply to the field of consumer protection, for which they were conceived.
2. Several respondents state that a transposal of these principles to fields other than that of consumer law could be envisaged, as long as there is a separate examination of each principle in relation to each specific field concerned.

**Question 12: Of the principles enshrined in the recommendations, which in your view could be incorporated in the legislation of all the Member States?**

The majority of those who consider that the principles laid down in the two recommendations can in fact be incorporated in the legislation of all the Member States recommend taking over all the principles.

**Question 13: In your opinion, should the legislation of the Member States in regulated areas such as family law be harmonised so that common principles may be laid down with regard to procedural guarantees?**

1. A number of respondents support this initiative. Reference was made to the Council of Europe's 1998 recommendation on family mediation and its implementation in certain Member States. The information on the implementation of this recommendation will, after the agreement of the people who have submitted it to the Commission is obtained, be forwarded to the Secretariat-General of the Council of Europe. However, it was pointed out that the Council of Europe's recommendation does not solve the difficulties relating to the differences between national laws.
2. A majority oppose this approach, arguing that there are already sufficient instruments at Community level which ensure the recognition and application of judicial transactions in family matters, such as ADR agreements submitted to the judge for official approval. However, it should be noted that the Community instrument in question is applicable only in a limited field: the scope of the "Brussels II" Regulation is confined to civil proceedings on divorce, legal separation or marriage annulment and civil proceedings in matters of parental responsibility for the children of both spouses on the occasion of the matrimonial proceedings for divorce, legal separation or marriage annulment.

**Question 14: What initiative do you think the institutions of the European Union should take, in close cooperation with interested circles, as regards the ethical rules which would be binding on third parties?**

1. Some respondents consider that, while the rules of sound ethical conduct should in theory be comparable in all the Member States, it is, however, preferable to leave the professional organisations and institutions free to set their own ethical rules.
2. Others declare themselves clearly in favour of a European code of ethics, an ADR charter, or at least a mediation charter.
3. It was also proposed that the Member States should be encouraged to set up a national professional body whose aim would be to draw up these ethical rules and monitor their implementation. There was also a proposal that a body should be set up at European level to analyse the existing rules and codes of conduct and attempt to bring them into alignment.

**Question 15: Should the legislation of the Member States be harmonised so that the confidentiality of ADRs is guaranteed in each Member State?**

**Question 16: If so, how and to what extent should confidentiality be guaranteed? To what extent should guarantees of confidentiality apply also to publication of the results of ADRs?**

1. While all respondents recognise the importance of confidentiality at the negotiating stage, it being indispensable for the very survival of most forms of ADR, some consider that Community intervention on this point is not justified. The question of confidentiality must, in their view, be left to the discretion of the parties in agreement with the ADR providers.
2. Some of them highlight the difficulties in this field specific to cross-border conflicts: the parties must know right from the initiation of the ADR process whether or not absolute confidentiality is guaranteed in the event of judicial proceedings subsequently being launched in another Member State. The law applicable to judicial proceedings is in fact the *lex fori*. Many respondents support a Community initiative on this matter. Any Community initiative must be based on a prior examination of the legislation in the Member States on professional secrecy, refusal to testify and inadmissibility of evidence. Some respondents recommend amending the Money Laundering Directive, noting that the obligation of confidentiality should not be removed when the third party is bound to reveal certain information under the applicable law.
3. Most respondents recognise that publication of the results of ADR processes is unavoidable in certain scenarios, particularly when this result must be officially approved by the courts, or be enshrined in a deed. Transparency also seems to be the rule when the conflict has already been brought to the attention of the public, or where the conflict falls under consumer legislation. It was also pointed out that ADR providers cooperate with the supervisory authorities, thus enabling the public authorities to exchange valuable information on fraud cases. A proposal was made that published results of ADR could be fed into an anonymous database for statistical purposes and in order to identify practical problems.

**Question 17: In your opinion, should there be a Community rule to the effect that there is a period of reflection following ADR procedures before the agreement is signed or a period for withdrawal after the signing of the agreement? Should this question be instead handled within the framework of the ethical rules to which the third parties are subject?**

1. Such measures are considered useful in a number of hypotheses, for example when one of the parties does not have legal counsel. In this case, these measures would have a place in the code of good practice.
2. Some respondents consider, however, that Community intervention on this point is not warranted. In terms of the substance of the question, the point is made that periods of reflection or withdrawal are not always appropriate.

**Question 18: Is there a need to make ADR agreements more effective in the Member States? What is the best solution to the question of recognition and enforcement of ADR agreements in other Member States of the European Union? Should specific rules be adopted to render ADR agreements enforceable? If so, subject to what guarantees?**

1. Some respondents take a favourable view of efforts being made to strengthen the effectiveness of ADR agreements. For example, a proposal was made that ADR agreements should, under certain conditions, be assimilated with other documents liable to enforcement which could benefit from the simplified exequatur mechanism provided for by the Brussels I Regulation.
2. Others take the view that Community intervention on this point is not warranted. In terms of the substance, they do not consider it appropriate to provide systematically for ADR agreements to be enforceable. The existing provisions in the Member State in matters of contract law, as well as the

possibilities of recourse to official judicial approval or confirmation by deed, appear sufficient. The comment was made that such a measure would be an innovation which would not fit with the existing rules (Brussels I regulation) or the rules which are now being drawn up (proposal for a Regulation on a European Enforcement Order).

3. It was also proposed that the problem of implementing the agreements at worldwide, not just European level, should be further investigated.

**Question 19: What initiatives in your view should the Community institutions take to support the training of third parties?**

**Question 20: Should support be given to initiatives to establish minimum training criteria with a view to the accreditation of third parties?**

1. Some respondents give priority on this point to the exchange of experiences. In certain Member States, ADR quality assurance mechanisms have been set up. The initiatives to be taken at European level should therefore relate to mutual recognition of training and sharing of good practices.
2. Others, meanwhile, suggested that the minimum length of training should be standardised in all the Member States. This initial training, adapted to the subjects in which third parties have chosen to intervene, and necessarily accompanied by obligatory ongoing annual training, would thus be validated by associations which themselves would be approved at European level. The approval could be granted by a central European body responsible, in addition to other tasks (such as the drawing up of an ethical code), for setting the minimum criteria for training.

**Question 21: Should special rules be adopted with regard to the liability of third parties? If so, which rules? What role should ethical codes play in this field?**

1. Some respondents support European harmonisation on the extent of liability, notably with a view to protecting consumers: the third party could not be held responsible for ensuring that the agreement is balanced, but would have to ensure that dialogue is resumed and that matters are discussed calmly (1) if the person responsible for the ADR, acting in bad faith, concealed serious disadvantages of an agreement from one of the parties; (2) if the person responsible for the ADR, when it was clear that one of the parties was in a weaker position, allowed agreement to be reached under the effect of manifest psychological pressure by the other party; (3) if the person responsible for the ADR committed serious misconduct by failing to respect confidentiality.
2. Others take the view that Community intervention on this point is not warranted, as the current rules are sufficient. It would suffice simply to encourage third parties to take out third-party liability insurance, or even to oblige them to do so by means of ethical codes. In some ADR associations there exists the possibility of initiating a complaint procedure against one or other third party belonging to the association.