

Response to EU Green Paper on ADR

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Commission of the European Communities

Green Paper

on alternative dispute resolution in civil and commercial law

response by

Centre for Effective Dispute Resolution ("CEDR")

of London, United Kingdom

1. Introduction

- 1.1 This response to the Green Paper is presented by the Centre for Effective Dispute Resolution ("CEDR"), Exchange Tower, 1 Harbour Exchange Square, London E14 9GB, United Kingdom.
- 1.2 CEDR is an independent non-profit organisation supported by multinational business and leading professional bodies and public-sector organisations. As a registered charity, we have a board of trustees drawn from professional firms, business and the public sector, and our Chairman is The Right Honourable Lord Hurd of Westwell CH CBE PC, the former British Foreign Secretary.
- 1.3 Our mission is to encourage and develop mediation and other cost-effective dispute resolution and prevention techniques in commercial and public-sector disputes and civil litigation; and we work in partnership with business, governments and the judiciary, both in the UK and internationally, to develop effective dispute resolution practice. We have been instrumental in helping to bring mediation into the heart of business practice and into the judicial system in England and Wales.
- 1.4 CEDR was one of the principal pioneering institutions in the European Union for ADR in commercial and civil litigation, having been launched in 1990 with the support of the Confederation of British Industry.
- 1.5 We operate across three major areas:
 - Promotion of the practice of effective dispute resolution ("EDR"): In 2002 we launched the CEDR Exchange offering a learning and information network for any individuals interested in the field of mediation and ADR. We also work with a number of sector and advisory groups including, for example our

Judges' Forum composed of the senior English judges across different court divisions, chaired by the Master of the Rolls, Lord Phillips.

- Training of users and third party neutrals: We have trained over 1000 commercial mediators, and accredited some 700 in the UK and overseas. Our mediation accreditation is internationally recognised as a standard of excellence and our continuing professional development scheme for mediators aims to ensure that the high standards set in the CEDR mediator training continue beyond accreditation.
- Delivery of EDR services through our dispute resolution and prevention service, CEDR Solve: We enable business to cut the cost of conflict by providing a world-class mediation service and a range of professional dispute resolution, training and consultancy solutions using the foremost practitioners in the field. Our services include facilitation and independent intervention, mediation, expert determination and adjudication services. Our caseload currently involves over 400 cases a year, including some of the largest cases to have gone through the English courts, as well as schemes for universities, charities, an ombudsman service, companies and professional bodies, and a major regulator the Financial Services Authority. We are also currently advising on administration of the Court of Appeal mediation scheme.

1.6 From the outset we have operated internationally also, in terms of seminars, lobbying, training programmes and services. We have been involved with the early developments or training initiatives of many European Union and other countries - for example, Holland, Belgium, Italy, France, Germany, Ireland, Gibraltar, Malta, Finland. We are currently acting as consultants on civil justice reform to the Russian and Slovakian governments. We were responsible for the first European Union survey of ADR developments across Europe (funded by DGXXIII), and we also participated in the recent Project Grotius review of ADR in 2001.

1.7 CEDR therefore brings to this response not only considerable experience of commercial and civil litigation ADR in the UK, but also of equivalent experience across many Member States. We believe that we are, therefore, well placed to assist the Commission in this area, and we would be happy to share our experience with the Commission in any other way that the Commission would find helpful.

2. General Observations

2.1 We welcome this comprehensive overview by the Commission of recent alternative dispute resolution (“ADR”) developments in the European Union, and the generally supportive tone of the review. The review embodies many of the major developments which have taken place in ADR practice across Europe, and highlights many of the critical questions relating to the legal framework and practice of ADR in a variety of sectors.

2.2 However we would set out as general observation some critical comments on the approach adopted.

Forms of ADR

2.3 The review makes a distinction, which is sensible, between binding and non-binding forms of ADR. However, the distinction between ADR in the context of judicial proceedings and “conventional ADR” does not necessarily hold up in practice. Parties often use ADR in anticipation of litigation, without any court involvement but with litigation in mind. In a high proportion of such cases, a settlement is reached and no litigation is initiated. But if settlement is not achieved, or only partial settlement achieved, then the parties are free to move on to litigation for the unresolved aspects of their dispute. Similarly, some court ADR is not significantly different from out-of-court ADR. Thus, for example, a court may suggest ADR and suspend action for a short time to allow ADR to take place. If full settlement is achieved then, in some types of action, the court may need to endorse the settlement reached in the ADR process. If no settlement is reached, then the matter returns to litigation.

2.4 A key question is whether the parties fundamentally determine the design of the ADR process, or whether the court or other institutional agency determines the procedure. This may or may not relate to whether the case is in the context of legal proceedings.

2.5 The review does not mention some of the forms of ADR which have developed in the US and Australia and are likely to develop in Europe within the next decade. These would include, for example, what are sometimes called “consensus-building” techniques such as the use of ADR to manage planning and environmental development discussions. There is also “regulatory mediation” - where mediated dialogue between regulators and regulated takes place to assist in the development of new regulations. Another version of this takes place where mediation is used to determine what regulatory sanctions are applied to a regulated company (CEDR has developed a scheme along these lines with the UK’s Financial Services Authority). Finally there is also an application of ADR in some jurisdictions in relation to restorative justice or victim-offender dialogue.

- 2.6 We mention these areas to reinforce not only the need to support ADR exploration, but also our comment, in answering many of the Commission's questions, of the importance of recognising that effective ADR is often field-specific; in other words, the structure and management of ADR must often be specific to meet the needs of the specific types of issue being dealt with.

Approach of the Green Paper

- 2.7 We must express one important reservation in relation to the approach of the Green Paper. We feel that many of the questions indicate a particular theoretical perspective which may not do best justice to development of a healthy ADR community of practice across Europe. In particular, most of the questions are geared to the underlying question "what do we need to regulate or legislate for in order to ensure ADR quality?"

- 2.8 We strongly believe this to be a fundamentally wrong perspective at this stage of ADR development:

- First, it adopts a lawyer's perspective rather than a social action perspective (perhaps because of some continuing ambivalence about the value of ADR?). The latter is far more important at this stage of ADR's development.
- Second, it tends towards treating "ADR" as a fixed form of process when it varies significantly according to type of case, parties, context, etc. For this reason, CEDR last year began to talk about Effective Dispute Resolution, or EDR, rather than ADR. We chose this partly to escape the negative and inappropriate labelling of mediation as "alternative" rather than "mainstream" which we see as its future. Litigation is also "Effective Dispute Resolution" for certain cases and times. It would be inappropriate therefore to start from a presumption that there can be a simple set of regulations or ethical guidelines for EDR - ADR is little different in our view.

- 2.9 The purpose of the Green Paper is stated (on page 4) as being to initiate a broad consultation of those involved in a certain number of legal issues. We believe that this focus on legal issues is too narrow a view to take at this stage of consultation.

- 2.10 It is also disappointing that the summary (on page 5) gives three reasons for growth of interest in ADR but omits, in our view, some of the most important reasons. They are the speed, flexibility, confidentiality and cost/effectiveness of ADR methods in resolving commercial and other disputes when compared to the option of litigation. Access to these benefits adds to the commercial effectiveness of the European Union both internally and in its trade outside its borders.

- 2.11 Our experience shows that commercial contracts in dispute that are brought to ADR are frequently resolved successfully through a combination of legal, commercial and sometimes moral or emotional discussion and debate. Mediation in particular allows the parties to explore, on a without prejudice basis, a wide range of factors and potential outcomes of a dispute. Eventually, the ADR process does have to be put into a legally recognised framework. However, to confine the debate to legal issues alone at this early stage may exclude a better understanding of the needs of business, commerce, not-for-profit organisations, trades unions and many other individuals and organisations that have already benefited from the use of ADR process in resolving their disputes. A better understanding of the commercial, intellectual, emotional, moral, and other needs of users and potential users of ADR may allow a better-drafted legal framework.

How to Encourage ADR Growth

- 2.12 Another aspect of ADR development that is underestimated in the Green Paper is that many of the obstacles to ADR growth lie outside questions of legal framework, ethics or quality of ADR, etc. It is typified in CEDR's experience by the fact that so many lawyers or other professionals, once they understand ADR, become enthusiastic to train to be providers of ADR services. Yet at the same time many professional advisers are unwilling to bring their own clients into such services.
- 2.13 In other words, the real need for regulation refers to the social regulation and promulgation of the social environment necessary to enable growth of ADR referrals, not the regulation of ADR practice that is at the heart of the Green Paper's questions.
- 2.14 This growth can be achieved by encouragement of business, court and government policies, or regulation of professional services which are directed at penalising failure to adopt structured negotiation approaches such as mediation where proven to bring additional benefits to traditional practice. CEDR is happy to share with the Commission its experience of such obstacles and some of the routes to overcoming them.
- 2.15 In summary, we would encourage the Commission, and the Council, to adopt a different starting point from the Green Paper. ADR is a new field of social innovation in the area of conflict and social justice. It needs to be treated as a "sensitive plant" which needs nourishment, active support, and care. Direct regulation at an early stage of its practice does not necessarily provide such support when compared to possible alternative actions such as funding provision, initiatives to encourage sharing of best practice, experiment in ADR practice by European Union institutions themselves (compare the UK Government Pledge on ADR issued in 2001), and training of professionals and litigants to encourage appropriate use of ADR.

- 2.16 The most fundamental question should therefore be to determine as a starting point *“what are the action programmes which would have greatest impact on the acceleration of take-up of effective ADR usage?”*
- 2.17 It would be worthwhile conducting a cost-benefit analysis of the likely outcomes from the answer to this question as compared with some of the legislative reforms outlined in the Green Paper which we believe are likely to have minimal impact on ADR development (and may perhaps be harmful in some cases).
- 2.18 We would encourage the Commission to support a workshop built around this question as a next stage before proceeding further with legislation. CEDR would be very happy to be involved in working with the Commission to design such a programme(s). One of such sessions could relate the question to *“action programmes on the legal framework”* which would encompass many of the questions set out in the Green Paper.
- 2.19 We would be pleased to advise the Commission on other possible areas of Commission activity that might encourage greater ADR usage.

3. Responses to the Commission's Questions

Question 1:

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?*

Response:

- 1.1 We would distinguish between the ostensible problems attributed to ADR and the real problem - it is the latter which should be the principal focus of Community concern and action. See our section of General Observations above.
- 1.2 The ostensible problems are intellectually based - how to ensure intellectual coherence of ADR practices; how to justify non-court based intervention; how to establish effective quality of mediators, etc.
- 1.3 We believe many of these questions to be "later-stage" questions in the development of ADR, often being raised as means to inhibit first-level reform. The first question that the Commission should address is how to encourage a new social practice that is inherently resisted by many existing social and professional institutions despite its proven capacity to release more flexible and improved social justice achievements as set out in the first part of the Green Paper. Quite apart from active resistance, ADR development is also inhibited by the normal inertia facing any new social practice.
- 1.4 The key problem the Commission should therefore address is: how can it best support explorations and experimentation in ADR, including development of an effective infrastructure for ADR awareness raising and delivery, and removal of barriers to growth?
- 1.5 Funding of such initiatives at national level is a particularly difficult question, as there are limited social groups with any interest in resourcing a new element of civil justice and commercial practice.
- 1.6 Much of this can be done without efforts at regulation of ADR, which may only serve to inhibit the flexibility of ADR processes and their ultimate development.
- 1.7 The flexibility of ADR means that the scope of Commission involvement in these terms could potentially be very wide - from labour and consumer disputes, commercial relations, court procedures, family relations, etc.

- 1.8 In summary, the Commission can best tackle ADR problems by supporting funding of exploratory initiatives, by creating communities of ADR support across the Community, by encouraging the sharing of information and best practice. See the comments in the introductory section of General Observations.

Question 2:

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?*

Response:

- 2.1 ADR practice tends to cluster into several distinct groupings - consumer, family, labour, non-family civil and commercial. The reasons for this are to do with the significantly different social negotiation process, outcomes and contexts associated with these areas, albeit that there are some general similarities to be detected in ADR practice across the fields.
- 2.2 We therefore advocate strongly that the Commission should work on a field-by-field basis in respect of support or legislation. To do otherwise will be less clear, less effective and possibly harmful. The Green Paper already suffers from trying to embrace all of these distinct fields in its commentary and questions.

Question 3:

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 the differentiation?*

Response:

- 3.1 Online dispute resolution is a tool for a process rather than a process in itself (although of course technology can sometimes change the quality of a process). We do not see the need to treat ODR as worthy of separate application although it is tempting to do so on the grounds of fashion or because of its close (but by no means exclusive) association with electronic commerce disputes, particularly in the consumer sector.

- 3.2 We accept that a coherent legal environment is required for ODR to be effective, particularly as regards matters such as law, jurisdiction and enforcement. However, the key questions raised by ODR would also be covered in other respects by developments in the application of general contract law.
- 3.3 Again, however, there may be scope to consider how to share and extend best practice or give support to technical experimentation, but this would relate better by consideration within the context of the specialist fields of practice listed in Question 2 rather than be generic to technology itself.

Question 4:

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

Response:

- 4.1 Again, the core question here is how to make ADR, given its inherent advantages, best become an accepted social procedure in the difficult circumstances of family breakdown.
- 4.2 We shall leave specialist family mediation organisations to make their own submissions in this area. However we would encourage the Commission to review recent developments in legislation of English divorce law where attempts at regulation of mediation practice appear to have been in fact harmful to the development of family mediation.

Question 5:

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

Response:

- 5.1 There is clearly value in harmonisation of legal practice across the Community so long as this does not stifle innovation and flexibility. In particular certain issues are worth an early review - the legal status of mediation agreements, confidentiality, limitation periods, enforceability of settlement agreements.
- 5.2 However, whilst we would encourage the Commission to keep these under review, we would suggest that it might be premature, at this stage of ADR development, to take action on harmonisation.

Question 6:

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?*

Response:

- 6.1 There may be reason to limit validity in certain circumstances. However, reflecting our comments in response to question 2, we believe that this is best approached on a field-by-field basis rather than as a general discussion.

Question 7:

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

Response:

- 7.1 We find it difficult to answer this for the same reason as in Question 6 - it will depend on the social context of the clause. In general, as the Green Paper limits itself to non-binding ADR, we believe there should be a presumption in favour of application of ADR clauses unless, when compared to alternative remedies, there are onerous requirements associated with the clause (e.g. of cost or time for consumers).
- 7.2 We would emphasise the phrase "*when compared to alternative remedies*" in this response. Whereas paragraph 62 of the Green Paper suggests that ADR clauses may, in certain circumstances, affect the right of access to justice and thus potentially have ECHR implications, it is our experience that in the vast majority of occasions the availability of ADR actually increases access to justice in that it leads to the opportunity for swifter resolution of disputes than would be available through the courts. ADR clauses have the ability to kick-start inter-party discussions that may not otherwise have happened, or at least may not have taken place until the parties came together "on the steps of the court room".

Question 8:

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?*

Response:

- 8.1 We believe that the English system may have more merit (i.e. that the court has power to take into account unreasonable conduct in the use/non-use of ADR in its findings on costs in determining the case). However, this approach may not be available in all jurisdictions where legal costs may not be recoverable fully from another party, whether unsuccessful or unreasonable in litigation conduct.

Question 9:

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 the courts?*

Response:

- 9.1 While there is value in harmonisation, there could equally be harmonisation to ensure that resort to ADR does not suspend limitation without all parties' agreement. We believe the latter may be a better provision. It enshrines the voluntarist nature of ADR, and avoids ADR being seen as a means of delaying an outcome if parties have been subject to a binding ADR contract clause. Such an approach also avoids the problems of definition identified in paragraph 70 of the Green Paper. It also avoids any anomalous harmonisation of a point of detail in relation to limitation periods without first having harmonised the broader principles (e.g. the length of limitation periods, generally).
- 9.2 In any event, it is not our experience that recourse to ADR procedures, even where they are ultimately unsuccessful, is likely to cause parties difficulty with regards to limitation periods. Firstly, the duration of the majority of non-binding ADR processes is relatively brief when compared to limitation periods; and, secondly, it is not uncommon for ADR and litigation processes to continue in parallel - the act of embarking upon an ADR process does not necessarily prevent a party from continuing its progress towards the courtroom.

Question 10:

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

Response:

- 10.1 As explained in the Green Paper (at paragraph 37), both of these Commission recommendations relate to the resolution of consumer disputes. Although it is stated in paragraph 39 that the recommendations *"have had considerable influence in the Member States"*, CEDR has not been aware of the impact in practice of these provisions, no doubt because the consumer sector is not our primary area of activity. We would suggest that this lack of over-spill of Commission recommendations in one area into other practice areas confirms the analysis set out in our response to Question 2.

Question 11:

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?*

Response:

- 11.1 The list of principles set out in paragraph 74 of the Green Paper is clearly unobjectionable, and no doubt the majority of ADR providers in the UK would consider that they already adopt such principles either implicitly or explicitly through a code of conduct. However, there is a substantial difference between stating a general proposition (e.g. "fairness") and articulating detailed legislation.
- 11.2 We would be reluctant in principle to see an indiscriminate extension of rules that are intended to apply to a specific social context (e.g. because of power imbalance considerations) to ADR negotiations in environments that need less regulation or cannot be justified for similar reasons of power imbalance. General contract law should be sufficient for such environments, while best practice can also be promulgated rather than regulation encouraged.
- 11.3 Similarly it is premature to apply recommendations to court-annexed ADR until there is sufficient experience across the Community to reach reliable conclusions on what provisions may be most effective for quality of practice. This also relates to our belief that ADR is best approached on a field-by-field basis to achieve the most reliable analysis.

Question 12:

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

Response:

- 12.1 See Response to Question 11.

Question 13:

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?*

Response:

- 13.1 As we have already indicated, any progress towards harmonisation should be on a field-by-field basis rather than by reference to "regulated" areas, where the negotiation environments may vary considerably; for example, the environment in family or consumer matters will be very different from, for example, telecommunications or media regulation.
- 13.2 We would also caution that the fact that an area of law is regulated does not necessarily require that it is appropriate that ADR practice in that area is regulated - as we have noted in response to Question 4, regulation of mediation practice in UK family law has had a detrimental effect on development of that field.

Question 14:

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?*

Response:

- 14.1 The role of third party neutral is a sensitive and privileged one, not least as it requires parties to place very considerable trust in the individual with regard to their handling of confidential information and, more generally, with regard to the neutral's integrity, impartiality and neutrality. We accept absolutely the need for a clear ethical framework, and to this end our own CEDR Code of Conduct for Mediators and other third-party neutrals gives clear guidelines on the neutral's role and responsibilities. This is included as Appendix I. Broadly similar guidelines and codes of practice have been produced by other professional bodies.

- 14.2 In the circumstances, we suggest that this area is not a priority for Commission involvement in terms of the regulation of ADR, although it is of intellectual interest. One possible alternative approach would be to organise a series of workshops amongst ADR practitioners as a means of exchanging views and establishing benchmarks of best practice regarding ethical rules.

Question 15:

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

Response:

- 15.1 In summary, our view is that the legal environment should provide the opportunity for confidentiality where that is what the parties have mutually agreed that they require. We would suggest, however, that this objective can often be achieved by way of general contract law rather than by way of specific legislation with regard to ADR.
- 15.2 Confidentiality would be a useful area to examine and identify current variations in national jurisdictions, with a view to seeking harmony (although, as detailed in our response to Question 16 below, we do not accept that legislation will be appropriate in all instances).
- 15.3 Our current view is that Articles 10 and 13 of the UNCITRAL Model legislative provisions on international commercial conciliation (19 September 2001 draft) and the arguments supporting those Articles in the UNCITRAL Draft guide to enactment (draft dated 12 October 2001) are broadly the approach that is correct and most effective.

Question 16:

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

Response:

- 16.1 Confidentiality is typically regarded as important in ADR for two separate reasons:
- First, where negotiations are assisted because parties feel able to be frank about their needs - this may relate to communications in private to the mediator, or to communications to the other party compared to statements that might be later made to a legally binding forum of judgment.
 - Second, in some cases parties feel a benefit of mediation is that any outcome can be kept confidential.
- 16.2 The latter should be available if both parties are in agreement on this quality, and national law allows this in direct party negotiations. However it is not an essential feature of all ADR cases, and there are many cases where it is not required by the parties or, in any event, cannot be achieved - for example because a public court has to endorse the outcome, or because the dispute is already in the public domain. Therefore guarantees of confidentiality are again best considered in relation to the specific fields of dispute.
- 16.3 As regards confidentiality to encourage frankness, this again should reflect the legal protection given to direct negotiations - we are conscious this may not be in harmony across all EU jurisdictions at present.

Question 17:

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 for a period for withdrawal after the signing of the agreement? Should this question be handled instead within the framework of the ethical rules to which the third parties are subject?*

Response:

- 17.1 There should definitely not be any mandatory "cooling-off" period after completion of all settlement agreements, as this would allow parties to abdicate regularly from decisions and bring ADR into disrepute.

- 17.2 However this approach may be justified in specific fields, or more likely in specific disputes. For example, in areas such as consumer disputes or other situations of possible inequality of arms this approach is already well recognised as valid for reasons of imbalance of influence. It is also well established within the special circumstances of family mediation. However, it would in our experience be highly unusual (and generally unnecessary) for a settlement agreement in a dispute between two well-represented commercial enterprises to contain any provision that might permit subsequent retraction of their agreement.
- 17.3 It follows from the above that it would also be inappropriate to include this question within any general ethical codes for third party neutrals. We have no difficulty with the concept of parties voluntarily agreeing to a period of reflection, if that is what they mutually require. However, the primary function of the ethical code in this regard should be to militate against the various concerns of "extracting an unfair agreement" identified in paragraph 83 of the Green Paper.

Question 18:

18. *Is there a need to make ADR agreements more effective in the Member States? What is the best solution to the question 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?*

Response:

- 18.1 As a general rule, we believe that an agreement reached through a proper ADR process ought to have the same force and effect, and receive the same recognition and enforcement under the law, as any agreement reached by direct negotiation. Within the English civil and commercial context, this is generally achieved by recording settlement agreements in writing in such a form that they become fully binding as enforceable contracts. If litigation proceedings have been commenced, terms of settlement reached between parties can also be given the force of a court order by using a Consent or "Tomlin" Order to impose a stay on the proceedings, except for the purposes of enforcing the terms of settlement. The advantage of such an order is that, depending on the way it is phrased, its terms can be enforced through the court as if it were a judgement without the need for starting a fresh action.
- 18.2 We believe that the English system is effective in achieving the enforceability of settlement agreements within the English jurisdiction. However, as is evident from paragraphs 85 to 87 of the Green Paper, there is a wide diversity of approach within the European Union. There might well, therefore, be an argument in favour of greater harmonisation, although given the diversity of the underlying legal systems this may well be difficult to achieve.

- 18.3 This is a complex area, and the first stage of any review should be a more comprehensive assessment of the status of ADR settlement agreements in current national jurisdictions, and the circumstances in which they become enforceable. This would undoubtedly relate to different fields of practice again, and be easier to manage conceptually if discussed in those specific contexts rather than as a general rule of ADR.

Question 19:

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

Response:

- 19.1 Plainly it is essential to the continued development of ADR that third party neutrals are properly trained, both in the techniques involved and in the related ethical framework. However, our view is that there are already sufficiently well developed facilities available for the training of third party neutrals, and thus Community support is unnecessary. Certainly there is no shortage of mediators in England and Wales, a great many of whom have been trained and accredited by specialist bodies such as CEDR, the ADR Group and, in the family law context, various bodies approved by The UK College of Family Mediators. All of these bodies were established, and have generally flourished, without the need for government support.
- 19.2 We do not, therefore, believe that training of third party neutrals is an area that requires Community support. However, the Commission could encourage workshops or practitioners and providers to share best practice.
- 19.3 In our view, the greatest area of need for support is in the training of legal advisers and those who may be in a position to refer cases to ADR - for example, lawyers, courts, business associations, and officials of the Commission itself.
- 19.4 In our General Observations, we suggested that the fundamental question which should be asked was what programmes would have the greatest impact on the acceleration of take-up of effective ADR usage. In our view, one such programme would be greater awareness-raising of the benefits of ADR amongst its potential users, and greater training of legal advisers on the options available and the ways they might assist their clients in their effective use.

Question 20:

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

Response:

- 20.1 We accept that the establishment of formal training criteria and the accreditation of third party neutrals are essential for the development of the ADR field and for the protection of clients. However, we do not believe that this is an area that necessarily requires Commission intervention. As we have noted in response to Question 19, the UK experience has shown that a number of training providers, including ourselves, have established high standards of accreditation which are generally recognised within the marketplace.
- 20.2 We would also add that the marketplace is increasingly looking for progress beyond initial accreditation when seeking suitable third party neutrals, and again the providers have taken the lead without any need for regulation. CEDR was the first UK body to introduce a programme of Continuing Professional Development for mediators - this includes requirements both for ongoing training and education and for specific practical experience. Within the UK commercial mediation market, proven experience, backed up by verifiable client feedback, is now becoming one of the most relevant factors in identifying the most appropriate neutral for a particular dispute.
- 20.3 These established standards of accreditation and Continuing Professional Development are also being built upon by other professional bodies. Thus, for example, the Law Society in England and Wales, the regulatory body for solicitors, has now established its own lawyer mediator panel with a requirement that its members have undertaken recognised training - CEDR's mediator skills training and accreditation was the first course to be recognised for entry to the panel. In addition all solicitors who wish to practice as mediators - and more than half of the participants on our mediator skills training course come from the legal profession - will be bound not only by the code of conduct of their accrediting body but also by the Code of Practice laid down by The Law Society.
- 20.4 In the circumstances, we do not believe that there is any general need for the regulatory setting of minimum training criteria. The only possible exception to this might be in certain specialist fields of practice, such as consumer, medical or family mediations where it may be appropriate to establish some minimum standards for providers.

- 20.5 Finally, we would add that there is one related area where consideration might be given to establishing minimum training criteria. This concerns the question of professional advisers need to have a minimum training in order for them to be able to recognise when referral to ADR is appropriate.

Question 21:

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?*

Response:

- 21.1 CEDR's own model mediation procedure requires parties to agree that the third party neutral shall not be liable except for acts committed in bad faith. We believe there is a case for a similar provision across the European Union to protect neutrals who merely aim to facilitate negotiations rather than to adjudicate on issues between the parties. Again, however, we believe it may be premature to attempt regulation of this area until there is a greater body of experience across different fields of practice.
- 21.2 As indicated in response to Question 14, we accept that third party neutrals should subscribe to an ethical code. However we do not believe that this alone would be sufficient to provide protection against liability.

4. Conclusion

- 4.1 We very much welcome the Commission's interest in, and evident support for, the further development of the ADR field. However, we would respectfully suggest that, by focussing the Green Paper's questioning on the need for new regulation, the Commission is directing its attention in the wrong areas. At this stage in the development of the use of ADR, there is a great opportunity for the Commission to positively support harmonisation rather than risk stifling development through regulation.
- 4.2 The issues raised in the Green Paper are very familiar to us from our experience of promoting ADR in the UK over the past 11 years. However, they are not, in our view, the areas that are most likely to have a significant positive impact on the level of ADR take-up (and, indeed, in some respects may even have a detrimental effect).
- 4.3 In our view, the Commission's resources would be far more effectively directed towards further promotion of the benefits of ADR. As an initial step that would send a very positive message of endorsement of the benefits of ADR, we would encourage the Commission to follow the lead of the UK government in issuing a pledge to promote mediation and other forms of non-litigious dispute resolution in place of litigation when dealing with its own disputes - in March 2001, the Lord Chancellor's Department announced that, in future, government departments would only go to court as a last resort and mediation and other forms of non-litigious dispute resolution would be used in all suitable cases wherever the other party accepted it.
- 4.4 This single announcement has been one of the most significant recent developments in the ADR field, both as regards the UK government's own practice and more generally as the setting of an example. Although introduced only some 18 months ago, the pledge has already borne fruit in terms of savings to the public purse (the Treasury Solicitor's Department has estimated that it has already saved £2.5m in legal costs in the disputes it has been involved in) and it has provided a welcome catalyst for more detailed policy development work within individual departments.
- 4.5 There is an enormous opportunity for the Commission to support ADR through its own structures and institutions, and we would strongly commend this and other promotional and awareness-raising initiatives rather than the present regulatory, and potentially constraining, focus of the Green Paper. The Commission can help by:
- setting the right environment (for example through directing its attentions to removing barriers to the effective use of ADR, and through promoting greater awareness of the benefits of ADR amongst professional advisers);
 - supporting practice (for example through encouraging exchange of information between practitioners, and initiating studies of best practice);

- supporting the promotion of ADR (for example through supporting research to articulate the cost-savings and other benefits of ADR and, as noted above, through a statement of intent that the Commission and its constituent bodies will use ADR whenever appropriate in preference to litigation).
- 4.6 Through its pioneering role in the field, CEDR has considerable experience of the promotion and development of ADR, and we will be pleased to expand upon our responses to these questions, or to provide whatever additional assistance the Commission might require.

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APPENDIX

Code of Conduct for mediators and other third party neutrals

Introduction

- 1 This Code applies to any person who acts as a neutral third party ('the Mediator') in an ADR procedure (such as mediation or executive tribunal - 'Mediation') under the auspices of the Centre for Effective Dispute Resolution ('CEDR Solve').

Impartiality and conflict of interest

- 2 The Mediator will at all times act, and endeavour to be seen to act, fairly and with complete impartiality towards the Parties in the Mediation without any bias in favour of any Party or any discrimination against any Party.
- 3 Any matter of which the Mediator is aware, which could be regarded as involving a conflict of interest (whether apparent, potential or actual) in the Mediation, will be disclosed to the Parties. This disclosure will be made in writing to all the Parties as soon as the Mediator becomes aware of it, whether the matter occurs prior to or during the Mediation. In these circumstances the Mediator will not act (or continue to act) in the Mediation unless all the Parties specifically acknowledge the disclosure and agree, in writing, to the Mediator acting or continuing to act as Mediator.
- 4 Information of the type which the Mediator should disclose includes:
 - having acted in any capacity for any of the Parties (other than as Mediator in other ADR procedures);
 - the Mediator's firm (if applicable) having acted in any capacity for any of the Parties;
 - having any financial or other interest (whether direct or indirect) in any of the Parties or in the subject matter or outcome of the Mediation; or
 - having any confidential information about any of the Parties or in the subject matter of the Mediation.
- 5 The Mediator (and any member of the Mediator's firm or company) will not act for any of the Parties individually in connection with the dispute which is the subject of the Mediation while acting as the Mediator or at any time thereafter, without the written consent of all the other Parties.

Confidentiality

- 6 Subject to paragraph 8 below, the Mediator will keep confidential and not use for any collateral or ulterior purpose:
 - the fact that a mediation is to take place or has taken place; and
 - all information (whether given orally, in writing or otherwise) arising out of, or in connection with, the Mediation, including the fact of any settlement and its terms.
- 7 Subject to paragraph 8 below, if the Mediator is given information by any Party which is implicitly confidential or is expressly stated to be confidential (and which is not already public), the Mediator

shall maintain the confidentiality of that information from all other Parties, except to the extent that disclosure has been specifically authorised.

- 8 The duty of confidentiality in paragraphs 6 and 7 above will not apply if, and to the extent that:
- all parties consent to disclosure;
 - the Mediator is required under the general law to make disclosure;
 - the Mediator reasonably considers that there is serious risk of significant harm to the life or safety of any person if the information in question is not disclosed; or
 - the Mediator wishes to seek guidance in confidence from any senior officer of CEDR Solve on any ethical or other serious question arising out of the Mediation.

Commitment and availability

- 9 Before accepting an appointment, the Mediator must be satisfied that he/she has time available to ensure that the Mediation can proceed in an expeditious manner.

Fees

- 10 CEDR Solve will inform the Parties before the Mediation begins of the fees and expenses which will be charged for the Mediation or, if not accurately known at that stage, of the basis of charging and will not make any additional charges other than in exceptional circumstances.

Parties' agreement

- 11 The Mediator will act in accordance with the agreement (whether written or oral) made between the Parties in relation to the Mediation ('the Mediation Agreement') (except where to do so would cause a breach of this Code) and will use his/her best endeavours to ensure that the Mediation proceeds in accordance with the terms of the Mediation Agreement.

Insurance

- 12 The Mediator will take out professional indemnity insurance in an adequate amount with a responsible insurer.

Withdrawal of Mediator

- 13 The Mediator will withdraw from the Mediation if he/she:
- is requested to do so by any of the Parties (unless the Parties have agreed to a procedure involving binding ADR);
 - is in breach of this Code; or
 - is required by the Parties to do something which would be in material breach of this Code.
- 14 The Mediator may withdraw from the Mediation at his/her own discretion if:
- any of the Parties is acting in breach of the Mediation Agreement;
 - any of the Parties is, in the Mediator's opinion, acting in an unconscionable or criminal manner;
 - the Mediator decides that continuing the mediation is unlikely to result in a settlement; or
 - any of the Parties alleges that the Mediator is in material breach of this code.