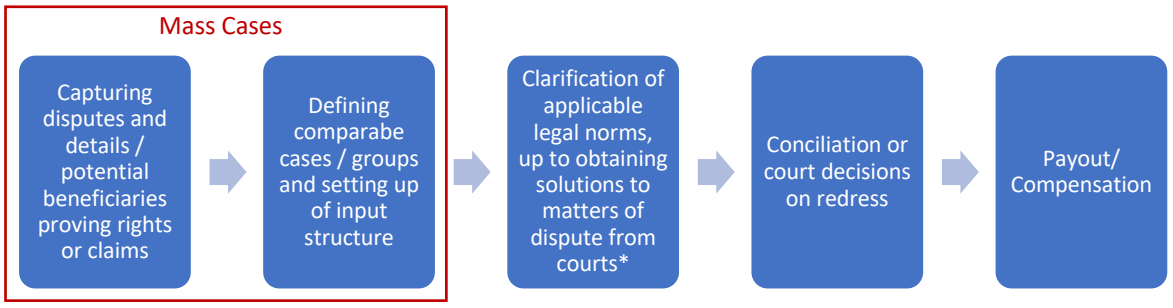
Contribution to the European Commission Public Consultation on "Resolving consumer disputes out of court"[1]

European Justice Forum (EJF) has a long tradition of advocating that a holistic view should be taken of consumer dispute resolution (CDR). In this context we refer to the EJF contributions that have been provided as part of previous consultations[2] [3]. The earlier EJF submissions continue to be relevant for the current consultation and for the tasks ahead, particularly the vision of a reformed, integrated and holistic EU system for resolution of conflicts[4] which should be the ambition of the Commission when it reflects on the future of consumer dispute resolution in the Union.

Law enforcement as such, including consumer law enforcement, is a core task of any nation state and also of the EU. As a corollary to their monopoly of power in the area of law enforcement, the states and the EU need to resolve these tasks themselves and they should not privatise law enforcement.

The abstract structure of consumer dispute resolution

A company's non-compliance with consumer protection law requires almost always at an abstract level corollary the same steps to be followed: identify the problem situation, bring it to the attention of somebody who can help, clarify the applicable rules, propose or decide on a solution and finally – if justified – pay out compensation. In cases where many consumers are concerned (see below "Mass Cases"), an aggregation task is needed in addition to possibly define groups of sufficiently comparable claims.



* preliminary rulings by national courts or even ECJ – Art. 267 TFEU

[1] https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13417-Resolving-consumer-disputes-out-of-court-report-_en.

[2] Response by Christopher HODGES and Stefaan VOET to the Consultation by ENCJ and ELI on the Relationship between Formal and Informal Justice: the Courts and Alternative Dispute Resolution (Consultation Paper at https://www.juridice.ro/wp-content/uploads/2017/01/ELI_ENCJ_ConsultationPaper.pdf).

[3] Response by European Justice Forum (EJF) to the EU Consultation on 'Consumer policy - the EU's new 'consumer agenda' Legal Tech for Justice, Not for Profit – A new Governance for Consumer Law Enforcement in the Union Should Rely on Electronic Registries and Communication as State-of-the-Art Response, namely to insufficient provisions in the recent Representative Actions Directive', pages 9–12 for ADR/ODR.

[4] Call for evidence: EU regulatory framework for financial services, January 2016 which includes the article by Christopher HODGES "Verbraucher-Ombudsstellen: Bessere Regulierung und Beilegung von Streitigkeiten" from GPR 6/2015, 263-273 (English: https://www.researchgate.net/publication/276237544_Consumer_ombudsmen_better_regulation_and_dispute_resolution) – https://ec.europa.eu/eusurvey/publication/financial-regulatory-framework-review-2015

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Three decisive elements of an ideal and efficient solution

1) To bring about an efficient dispute resolution architecture, the input required for any resolution tool should, mathematically speaking, be pulled "before the bracket". This means the best solution would be to create an adequate **infrastructure to collect data on relevant situations for use by all the different methods for solving cases** – in particular collective damages cases. This infrastructure would need to be administered by a public authority that starts as early as possible to capture cases that are likely to develop into mass phenomena[5].

2) The next important element is to **create a hierarchy of tools** to be applied: first an **Ombuds service** should have the opportunity to pacify/solve the conflict, but if this proves unsuccessful, **regulatory redress** should be attempted where available – both resolution methods should have access to the data captured in the uniform IT support (central electronic register, see 1).

3) Only if a resolution cannot be found by using the above two tools, should a court action ***become*** possible at all – i.e. it should be made a *conditio sine qua non*, a necessary, unavoidable **condition for collective court actions to become admissible that such attempts have already been made, and failed**[6].

Such a landscape for collective redress on a national basis could look as follows:

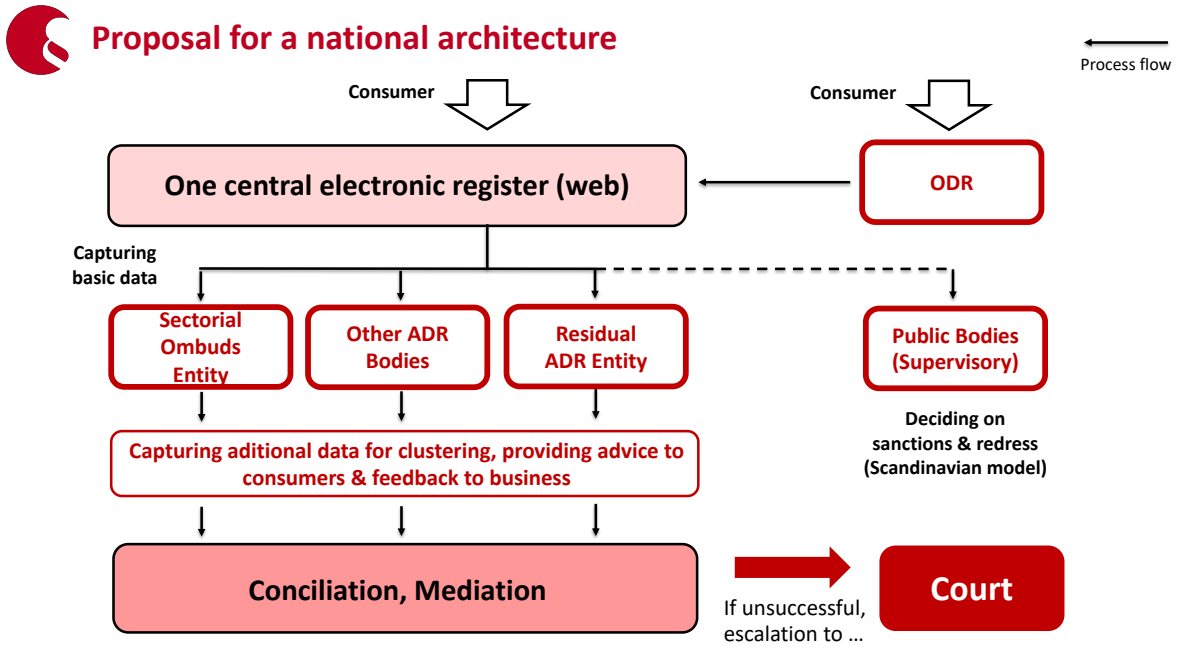

Table 1: Proposed national architecture

Additional details: lessons should be learned from the bad experience in Germany where a centralized register for the Model Declaratory Action was created by the Federal Office of Justice but no validation of entries was carried out when people applied to be considered as potential beneficiaries. In this context, certain elements of proof, to be validated by local lawyers for a small fee or by consumer protection advice offices (that often employ legal staff

[5] See again footnote 3.
[6] As recommended by the sources quoted in footnotes 2 and 4 above.

who could be authorized to fulfill such tasks[7]) should be adduced by claimants at an early stage in their registration.

The question of when there actually is a "dispute" that is worth being filed in the registry could be answered by stating that the consumer has tried to contact the trader to get a reply and that such contact could be established but remained unsuccessful or that there was no reply at all from the trader within a suitable time frame.

Summarising the articles and submissions that are quoted above, the ADR legislation should be improved by ensuring that the following **functions** become privileged parts of future EU CDR provisions:

- **Inclusion of further data including proof** should be required (e.g. elements of proof like contracts or notifications or proof of losses suffered, data for an automated pay-out process like the IBAN of the beneficiary);
- **Structuring of data** (building of case clusters for later collective treatment in CDR, which would possibly also be useful for admission and judgement in a future collective court action should that become necessary as a step of escalation);
- **Feedback loops**: through their collection of data and qualified feedback from identifying similar cases, businesses can learn, adapt and build trust, also with regulators (this allows consumers to feel they are part of the system, that their concerns are dealt with quickly and thus worth raising);
- Legal **advice to consumers**, particularly where claims raised are the result of misunderstanding and not legitimate grievances;
- An active role for Member States' compulsory **residual ADR entities** (as per Art. 5 paragraph 3 of the ADR Directive) to be automatically recognized without any further designation procedure as **Qualified Entities** under the Representative Actions Directive.

These observations would suggest that **the toolbox available to the Consumer Dispute Resolution entities** in an improved ADR/CDR Directive should be **expanded** for the purposes of purely domestic procedures.

The cross-border dimension

In times of increasing mass damages and market integration, **cross-border situations** require particular attention in order to facilitate dispute resolution. A new legislative initiative might create real EU value by tackling important issues related to transparency, structure/architecture and procedures[8]:

- Are the **national sectorial ombuds-entities and other ADR bodies** (e.g. national general residual ADR bodies, European Consumer Centres) **effectively interlinked including cross-border**? Are they connected to a single transparent platform?
- Are different national communication channels considered where individuals can complain, i.e. how are sectorial ombuds-entities and other ADR bodies **linked with national regulatory/supervisory authorities** to detect and capture systemic problems?

[7] See Woopen, Kollektiver Rechtsschutz, Ziele und Wege, in NJW 2018, 133, 135-136.
[8] See also again EJF contribution quoted in footnote 3.

- At the EU level, is there an **interface for ADR/ODR with and between cross-border platforms** like **CPC-Net and ECC-Net**? How do we achieve a stringent architecture between these EU-wide acting bodies, including regulatory authorities?
- If a unique infrastructure is intended as we deem advisable, which IT systems should be used for **communication between public authorities and Ombuds/CDR bodies** (e.g. the Internal Market Information – IMI-System), and would they connect seamlessly – when escalation may become required – with court support systems like e-Codex or REACT)? Such solutions need to be identified and mapped out, demonstrating clear roles, tasks and links that would provide guidance to consumers in the most effective way from both a top-down and bottom-up perspective.

A potential solution to be rolled out can be seen in nucleus in the somewhat hidden tool of a "Self Test" on the Online-Dispute Resolution Platform ODR[9]. This access to ADR/ODR platforms on the Commission site is available in 25 languages[10].

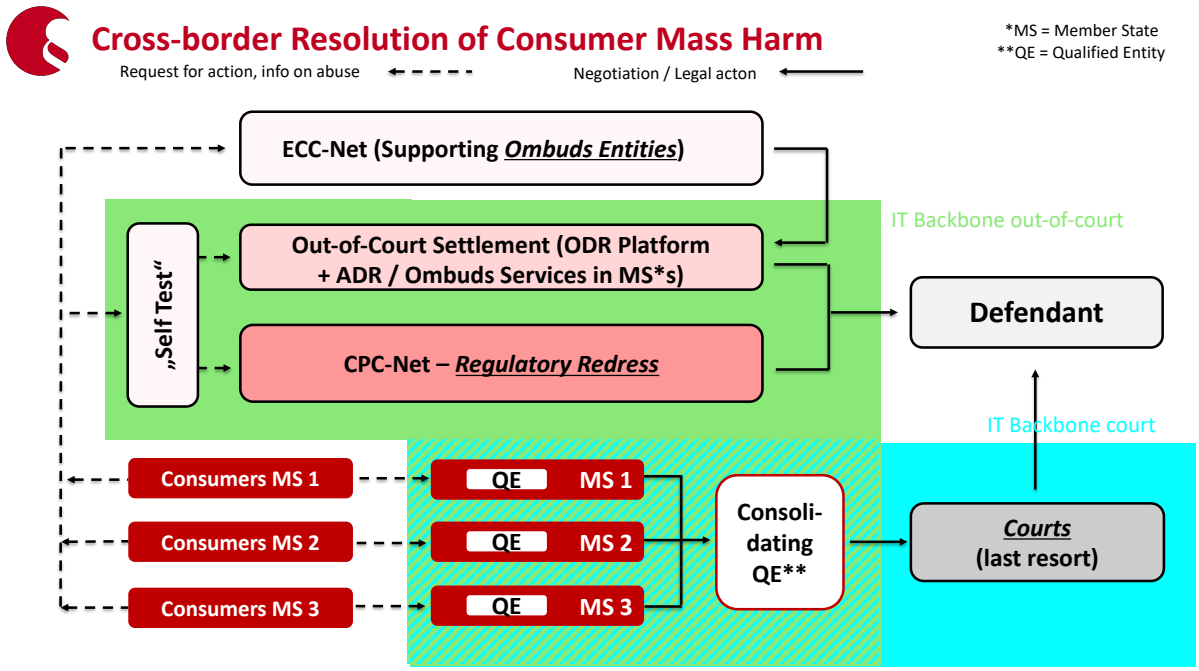

Table 2: Model for EU cross-border architecture

The collective dimension

Such state-of-the-art IT solutions are absolutely indispensable to tackle mass consumer harm. The coordination across EU jurisdictions can then be done via the CPC bodies running under

[9] https://ec.europa.eu/consumers/odr/main/?event=main.home.selfTest.
[10] https://europa.eu/youreurope/business/dealing-with-customers/solving-disputes/online-dispute-resolution/index_en.htm.

public law[11] (see CPC-Net in Table 2) as well as via the European Consumer Centres (ECC-Net)[12]. As mass claims are an issue of public interest, the process also needs to be built on a comprehensive public infrastructure (capturing and structuring data, data access, communication/coordination, funding, etc.). Thus, the model of public aggregation and coordination in a cross-border context can already be seen in Table 2, as well, including the desirable overlap of infrastructures when residual ADR entities as per Art. 5 para 3 of the ADR Directive (general ombuds services) of Member States are designated as Qualified Entities (Scandinavian Model).

The advantage of a comprehensive EU-CDR network would be that profit seeking private infrastructure providers (LegalTech, Debt Collectors or Third-Party Litigation Funders) would have less opportunities to team up with law firms to build their private collective case solutions based on skimming-off sizeable percentages of the beneficiaries' redress (an average of 30-40%)[13].

Conclusion:

The solutions advocated above are now within reach thanks to the significant technological progress that has been made in the area of digitalization. We call on the Commission to now bring forward both legislative and non-legislative initiatives to give ombuds bodies and regulatory redress authorities the priorisation they merit as shown in the research conducted by Christopher HODGES and Stefaan VOET. The legal basis for such action already exists:

Article 81 TFEU (that seems to have become an object of neglect in recent legislative acts) should be prominently mentioned here. It reads as follows (parts relevant for this consultation and emphasis added):

> "1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States. 2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when **necessary for the proper functioning of the internal market**, aimed at ensuring: ….. **(g) the development of alternative methods of dispute settlement**".

Thus, Article 81(2)(g) TFEU grants the EU a *specific legislative competence to legislate on ADR.* The particular charm of this approach in the view of EJF is that it embraces the results of the research conducted by Christopher HODGES: resolve conflicts – with a clear emphasis on quick, easy and low cost redress procedures, either by ombuds services or by regulatory redress authorities. What has been missing so far is a **collective procedure for ADR**, and this is exactly what is required now, based on the existing but neglected legislative competence of the EU.

[11] See https://ec.europa.eu/info/live-work-travel-eu/consumer-rights-and-complaints/enforcement-consumer-protection/consumer-protection-cooperation-network_en as well as https://wikis.ec.europa.eu/pages/viewpage.action?spaceKey=CPC&title=List+of+Single+liaison+officers+and+competent+authority+-+CPC+Network.

[12] https://www.evz.de/en/ecc-net.html.

[13] EPRS (2021), Jérôme Saulnier, Klaus Müller with Ivona Koronthalyova, https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662612/EPRS_STU(2021)662612_EN.pdf, P. 25.