Opinion of the European Economic and Social Committee on the 'Proposal for a Directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR)'

COM(2011) 793 final — 2011/0373 (COD)

(2012/C 181/17)

Rapporteur: **Mr PEGADO LIZ**

On 13 and 14 December 2011 respectively, the European Parliament and the Council decided to consult the European Economic and Social Committee, under Article 114 of the Treaty on the Functioning of the European Union, on the

Proposal for a Directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR)

COM(2011) 793 final — 2011/0373 (COD).

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 9 March 2012.

At its 479th plenary session held on 28 and 29 March 2012 (meeting of 28 March), the European Economic and Social Committee adopted the following opinion by 121 votes to 11, with 8 abstentions.

1. **Conclusions and recommendations**

1.1 The EESC is pleased that, following innumerable calls from European consumer organisations, and from the EESC in several of its opinions, the Commission has at last turned its Recommendations 98/257 and 2001/310 into a coherent legal instrument.

1.2 However, the EESC believes that the most appropriate legal basis would be Article 169(2)(b) and (4) of the Treaty and not just Article 114, as well as Articles 38 and 47 of the Charter of Fundamental Rights of the European Union.

1.3 The EESC recommends that a 'European compliance mark' be created, based on common structural principles, not only to be conferred on ADR mechanisms that meet the requirements of the proposal, but which also identifies traders adhering to those mechanisms, in a harmonised fashion and without cost to the trader.

1.4 The EESC takes note of the option allowing for ADR procedures to cover collective disputes, as a first step towards establishing an EU collective legal redress mechanism, but recommends that this possibility be clearly stated in the directive and the scheme duly defined.

1.5 However, the EESC wishes to restate its view that there is an urgent need for the EU to have a harmonised judicial instrument for Community-level group action, which is in no way replaced by extending these ADR schemes to collective disputes.

1.6 The EESC agrees with the principles set out in Articles 7, 8 and 9 of the proposal, but recommends that, for the sake of certainty and clarity, the definitions featuring in the recommendations of the principles of the adversarial system and of representation be maintained, explicitly guaranteeing the possibility of the parties concerned being represented by lawyers or third parties, specifically consumer associations.

1.7 The EESC also recommends that the principle of independence not be replaced by the vague notion 'principle of impartiality', which has other, less specific content and is different in nature.

1.8 The EESC is reluctant to agree that these mechanisms should also cover complaints from traders against consumers. However, taking into account the provisions of the SBA (Small Business Act), micro- and small enterprises should have the possibility to solve disputes with consumers by applying the ADR schemes in clearly-specified cases and under conditions that need to be set.

1.9 The EESC would stress that this proposal must never undermine systems which Member States have in place or create of an obligatory nature, in accordance with their own legal traditions.

The EESC only accepts the idea that ADR decisions may not be binding on the parties if there is an express guarantee that the parties will not be prevented from lodging an appeal with the competent ordinary courts.

1.10 The EESC recommends that this proposal contain a text identical to the one in the proposal for a regulation on ODR on the clear prevalence of the right of access to justice, according to which ADR is not a replacement or a real 'alternative' to the role of the courts, but rather a valuable, complementary means of dispute settlement.

1.11 The EESC recommends that the issue of funding these systems be addressed explicitly and head-on, given that consumer associations and some Member States cannot afford the increased costs of setting them up, and this issue is crucial to ensuring the system's impartiality and independence.

1.12 The EESC believes that the wording of some requirements should be revised and can be improved to make them clearer and less ambiguous and their provisions more effective, and recommends that the Commission take account of its specific comments.

2. **Gist of the proposal**

2.1 Whereas a substantial proportion of European consumers encounter problems when buying goods and services in the internal market, these problems are often left unresolved;

Whereas implementation of Recommendations 98/257/EC [1] and 2001/310/EC [2] has not been effective: there are still gaps in the coverage, a lack of consumer and business awareness and uneven quality in alternative dispute resolution procedures;

Having regard to the content and conclusions of a number of studies commissioned over the years on this matter;

Having regard to the results of the most recent public consultation, launched in January 2011, and the impact assessment SEC(2011) 1408 final of 29 November 2011;

The Commission, with its current proposal for a directive, intends to:

a) ensure that all disputes between a consumer and a trader arising from the sale of goods or the provision of services in any economic sector can be submitted to an Alternative Dispute Resolution (ADR) entity, whether the plaintiff is the consumer or the trader;

b) ensure that consumers can obtain assistance when they are involved in a cross-border consumer dispute;

c) ensure that ADR entities respect the 'quality principles of impartiality, transparency, effectiveness and fairness', as well as the tendency for them to operate 'free of charge';

d) entrust a single authority in each Member State with responsibility for monitoring the functioning of all ADR entities;

e) ensure that Member States lay down effective, proportionate and dissuasive penalties for infringements of the provisions relating to consumer information and information to be notified to competent authorities;

f) ensure Member States are not prevented from adopting or maintaining in force procedures for disputes between traders;

g) ensure Member States are not prevented from maintaining or introducing ADR procedures dealing jointly with similar disputes between a trader and several consumers.(collective interests);

h) encourage Member States to develop ADR entities that also cover traders in other Member States.

2.2 To this end, the Commission proposes converting the aforementioned recommendations into a directive, thus making their provisions binding and using Article 114 TFEU (completion of the internal market) as the sole legal basis.

2.3 The directive would not, however, prescribe that participation of traders in ADR procedures be mandatory or that the outcome of such procedures be binding on traders.

2.4 The proposed directive shall prevail over any EU legislation containing provisions intended to encourage the creation of ADR entities, unless such legislation ensures at least an equivalent degree of consumer protection.

2.5 This directive should cover any entity that is established on a durable basis and offers the resolution of a dispute through an ADR procedure, including official arbitration procedures not created on an ad hoc basis.

3. **General comments**

3.1 In a number of opinions over a period of years, the EESC has repeatedly called for Recommendations 98/257/EC and 2001/310/EC to be converted into coherent legislation and can therefore only welcome this Commission initiative, but, further to the points we make in the comments below, we believe that it has arrived late. The question could also be raised as to whether - in order to achieve greater certainty and security - the instrument selected could/should be a regulation rather than a directive.

3.2 Again concerning the legal basis, the EESC considers that beyond the mere completion of the internal market, what is at stake here is also an instrument to protect consumers, and the most appropriate legal basis, if Article 81 is not adopted, would therefore be Article 169(2)(b) and (4) of the Treaty and not just Article 114, as well as Articles 38 and 47 of the Charter of Fundamental Rights of the European Union.

3.3 The Committee welcomes the exclusion of procedures that are misleadingly presented as amicable consumer dispute settlement procedures when in fact they are nothing more than a marketing ploy, since the entities responsible are employed by and in the pay of the trader and their impartiality and independence cannot therefore be guaranteed. The EESC suggests that, in order to remove any doubt, a 'European compliance mark' be created, not only to be conferred on ADR mechanisms that meet the standards required by the proposal (similar to the 'trustmark' that exists in Spain), but which also identifies traders adhering to those mechanisms, in a harmonised fashion and without cost to the trader, thereby ensuring consumer confidence in them.

[1] OJ L 115, 17.4.1998, p. 31.
[2] OJ L 109, 19.4.2001, p. 56.

3.4 It welcomes the extension of the concept of the consumer, in line with the new Directive on Consumer Rights ([3]), to cover dual purpose contracts, where the trade purpose is not predominant in the overall context of the contract, but would like to see this concept appear explicitly in the text of the directive.

3.5 The EESC is pleased to note the concern to extend the operation of the scheme to cover cross-border disputes and hopes that the Commission will strive to ensure conditions are in place for ADR procedures to deal effectively with such cases, specifically through on-line dispute resolution (ODR) and by stepping up administrative cooperation between Member States ([4]). The Committee would also suggest that the Commission, similarly to what is provided for under Article 6(4) of the proposal for an ADR regulation, hold a meeting, at least once per year, of the competent national authorities mentioned in Article 15 of the proposal for a directive, in order to exchange best practices and discuss any problems arising from the operation of ADR schemes.

3.6 It endorses the option allowing for ADR procedures to cover collective disputes, as a first step towards establishing an EU collective legal redress mechanism, but would have liked to see this possibility clearly stated in the directive and the scheme duly defined, rather than leaving it to Member States' discretion. In this regard, the EESC wishes to renew the call it has been making for a number of years in different opinions, concerning the urgent need for the EU to have a harmonised judicial instrument for Community-level group action, which is in no way replaced by extending these ADR schemes to collective disputes.

3.7 The EESC acknowledges the need to ensure that those responsible for the management and operation of ADR, including staff as well as mediators and arbitrators, possess the necessary knowledge, skills, experience and personal and professional qualities to perform their duties competently and impartially and that they are guaranteed conditions in which they can work independently and impartially. The EESC would therefore have liked to see these conditions stipulated in detail in the text of the proposal, in order to ensure harmonised standards across the EU.

3.8 It agrees with the operating principles for ADR set out in Articles 7, 8 and 9 of the proposal, that reiterate some of the principles already contained in the recommendations referred to above. There are questions, however, as to the reason for omitting fundamental principles that featured in these recommendations, such as legality and freedom. It recommends that, for the sake of certainty and clarity, the independent definition of the principles of the adversarial system and of representation be maintained, making a clear reference to the possibility of the parties concerned being represented by lawyers or third parties, specifically consumer associations (rather than being addressed in a more hidden fashion in Articles 8(a) and 9(1)(a)).

Finally, the EESC does not agree that the principle of independence should be replaced by the vague 'principle of impartiality', which has other, less specific content and is different in nature.

3.9 The EESC is reluctant to agree that these mechanisms should also cover complaints from traders against consumers, not only because this runs counter to the tradition of the systems that exist in most Member States and to the entire approach in the stances adopted by the Commission and the European Parliament on this matter over the years. The main reason for the EESC's disagreement is that this would turn ADR mechanisms into bodies for settling disputes relating to non-payment, bypassing the system set up by the EU for small claims and causing the ADR system to drown in an avalanche of cases, paralysing systems that do not have adequate response capacity.

However, taking into account the provisions of the Small Business Act, micro- and small enterprises should have the possibility, under conditions that need to be defined and clarified, to use the ADR schemes in respect of their disputes with consumers on the failure to collect orders, failure to collect repairs or failure to show when reservation has been made.

3.10 The Committee believes that this proposal should not, under any circumstances, undermine any obligatory systems which Member States have in place or create, in accordance with their own legal traditions.

3.11 The EESC can only accept the suggestion that ADR decisions should not be binding on the parties if the fundamental principle is expressly guaranteed that consumers or traders should be able to lodge an appeal with the competent ordinary courts. If this is not the case, in addition to denuding ADR of all its added value in terms of its credibility and effectiveness, it is hard to understand the claim that the system that is set up will also cover rulings handed down in official arbitration or other similar mechanisms, that are in effect genuine judicial rulings.

3.12 The EESC is disappointed that, in this proposal, the Commission has not adopted an identical formula to the one considered in the proposal for a regulation on ODR on the clear prevalence of right of access to justice, according to which

([3]) Directive 2011/83/EU (OJ L 304, 22.11.2011, p. 64); EESC opinion: OJ C 317, 23.12.2009, p. 54.

([4]) With specific regard to Regulation 2006/2004 on cooperation between national authorities, cf. EESC opinion, OJ C 218, 23.07.2011, p. 69.

ADR is not a replacement or a real 'alternative' to the role of the courts, but rather a valuable, complementary means of dispute settlement ([5]).

3.13 The Committee is surprised that the issue of funding these systems is not addressed explicitly and head-on, in this proposal's explanatory memorandum or in the Programme for 2014-2020, given that in the consultations that were held, consumers' representative associations definitely deemed this to be essential. Some Member States cannot afford the increased costs of setting up new bodies, training mediators and other support staff, providing information and assistance for consumers, the drawing up of expert reports and new administrative posts. This issue was considered across the board to be crucial to ensuring the system's impartiality and independence ([6]).

3.14 The EESC would furthermore advise the Commission to, if it has not already done so, carry out an assessment of the Member States' main regulatory approaches to implementing Directive 2008/52/EC ([7]) on mediation in civil and commercial matters (Article 12), as suggested by the European Parliament ([8]).

4. **Specific comments**

4.1 *Article 2.2, point (a)*

The phrase 'employed exclusively by the trader' is vague and its meaning ambiguous. It should be replaced by 'hold or have held in the last three years a professional, economically dependent relationship or other relationship likely to affect their independence'.

4.2 *Article 4, point (e)*

The definition is too vague and not specific enough. It should be accompanied by a clear reference to respect for the principles that should guide its operation, and by certification to the effect that it belongs to the network of recognised entities.

4.3 *Article 5(3)*

The EESC fails to understand the precise scope of this rule, but fears that it might not be as effective as is desired. Instead of promoting the required harmonisation by integrating the operations of all ADR mechanisms at European and national level, adopting the same approach of common and identical systems, it would actually enable Member States to retain their current structures and, as a formality, only set up a default mechanism. In practice, this would not solve today's geographical and sect oral problems.

4.4 *Article 6*

The EESC would like to see, when the requirements for skills and impartiality are drawn up and checked, guarantees for the active involvement of trade and consumers' organisations, especially in the procedures for selecting and appointing individuals responsible for dispute resolution. This task should not be left to bureaucrats and civil servants from Member States' official bodies.

4.5 *Article 7*

In addition to the requirements laid down regarding means, the proposal should also lay down requirements regarding results, so as to ensure that the action of these mechanisms produces quantifiable results both in the sectors where most complaints are made and as regards the quality of the services provided by traders, adopting an active approach to promoting confidence in their use.

It is also crucial that Member States guarantee that ADR entities disclose information on the services they provide (which specifically include information, mediation, conciliation and arbitration), financial performance (thereby guaranteeing the necessary transparency of these mechanisms and boosting consumer confidence) and the degree of user satisfaction with these bodies.

The EESC also considers that where paragraph 2 of this article is concerned, in addition to their annual activity reports, these bodies should also publish, through their normal channels of communication, their annual budget and a summary of the arbitration rulings they have issued. This would not be detrimental to the rules on the processing of personal data contained in national legislation transposing Directive 95/46/EC.

4.6 *Article 9*

Whilst the EESC acknowledges the relevance of the principle of fairness, it queries the omission principle of legality, as set out in the Commission Recommendation of 30 March 1998 ([9]). The absence of this provision from the directive's provisions could be detrimental to consumers in cross-border trade relations, especially when the law in the consumer's home country offers greater protection than the law in the Member State where the ADR mechanism is established. The EESC would reiterate the need to include the principle of legality in the scope of this directive, which would ensure that rulings handed down by ADR bodies do not deprive consumers of the level of protection guaranteed by the relevant legislation.

([5]) The proposal for a regulation on ODR states, verbatim: 'The right to an effective remedy and the right to a fair trial are fundamental rights guaranteed in Article 47 of the Charter of Fundamental Rights of the European Union. Online dispute resolution procedures cannot be designed to replace court procedures and should not deprive consumers or traders of their rights to seek redress before the courts. Nothing in this Regulation should, therefore, prevent parties from exercising their right of access to the judicial system'.

([6]) See the EESC opinion currently being drawn up (INT/608).

([7]) OJ L 136, 24.5.2008; EESC opinion: OJ C 286, 17.11.2005, p. 1.

([8]) Report on the implementation of the directive on mediation in the Member States A7-0275/2011, Rapporteur: A. McCarthy.

([9]) Which clearly states, with regard to cross-border disputes, that 'the decision taken by the body may not result in the consumer being deprived of the protection afforded by the mandatory provisions applying under the law of the Member State in which he is normally resident in the instances provided for under Article 5 of the Rome Convention'.

4.7 *Article 10*

The Committee is concerned that the ambiguity in this article might persuade consumers that a dispute can be resolved through an ADR entity when, in fact, traders are merely obliged to provide information on the existence of these mechanisms, and might not have actually signed up to one.

The EESC therefore calls on the Commission to ensure that the proposal guarantees that Member States will require traders to produce this information immediately prior to signature of a contract, which would enable the consumer to take a conscious, informed decision, knowing in advance whether or not the trader has signed up to an ADR body.

The EESC also takes the view that failure to comply or to comply fully with the obligation referred to in paragraph 2 should be deemed to be an unfair commercial practice and included in the list appended to Directive 2005/29/EC, irrespective of the sanctions provided for under Article 18 of the proposal.

4.8 *Articles 15 to 17*

The EESC is afraid that these rules might not prove sufficient to ensure that the bodies concerned fully meet the requirements, because they are still based on criteria flowing from self-assessment. It is therefore crucial that the Commission encourage direct civil society involvement in monitoring these mechanisms, through the respective representative organisations of the sectors concerned ([10]).

Brussels, 28 March 2012.

The President
of the European Economic and Social Committee
Staffan NILSSON

([10]) Along the same lines as in the energy sector in Italy: although that country has a public ADR body, it is overseen by representatives of consumers and energy companies, with the former playing an active part in training the specialists employed in this body.

APPENDIX

to the Opinion of the European Economic and Social Committee

The following points of the section opinion were modified to reflect the amendments adopted by the Assembly although more than one quarter of the votes cast were in favour of their retention in the original form (Rule 54(4) of the Rules of Procedure):

a) Point 1.8:

The EESC does not agree that these mechanisms should also cover complaints from traders against consumers.

b) Point 3.9:

The EESC does not agree that these mechanisms should also cover complaints from traders against consumers, not only because this runs counter to the tradition of the systems that exist in most Member States and to the entire approach in the stances adopted by the Commission and the European Parliament on this matter over the years. The main reason for the EESC's disagreement is that this would turn ADR mechanisms into bodies for settling disputes relating to non-payment, bypassing the system set up by the EU for small claims and causing the ADR system to drown in an avalanche of cases, paralysing systems that do not have adequate response capacity.

In accordance with Rule 51(4) of the Rules of Procedure the amendments were examined together.

Outcome of the vote on the amendments:

Votes in favour:	80
Votes against:	52
Abstentions:	19