Financial Services User Group's (FSUG)

opinion

on the use of Alternative Dispute Resolution (ADR)

8 April 2011

FSUG c/o European Commission
Internal Market and Services DG
SPA2 4/69, BE-1049 Brussels
markt-fsug@ec.europa.eu

FSUG response to the consultation on the use of Alternative Dispute Resolution (here: ADR schemes in financial services) to resolve disputes related to commercial transactions and practices in the EU

EXECUTIVE SUMMARY

FSUG strongly recommends that the following aspects to be provided for:

- The recommendations of 1998 and 2001 must be turned into a binding directive which clearly sets out the rules and terms of reference that a professional ADR scheme has to follow.
- FIN-NET principles must be adapted accordingly.
- Main principles for ADR schemes must be:
  - The independence and neutrality of the ADR scheme must be guaranteed.
  - ADR schemes must come to decisions that are binding on providers (not on consumers).
  - Consumers must be able to take recourse to court action at any time and they cannot be obliged to first go into an ADR procedure.
  - Consumer complaints must be decided without undue delay.
  - During the time of the dispute resolution the limitation period has to be suspended.
  - A continuous evaluation and monitoring of the work of the ADR scheme is important for a consistently high quality process.
  - With regard to the funding of ADR schemes various options should remain possible allowing differences in Member States; preferably ADR should be free of costs to consumers.
  - Consumers should not only be informed generally by an information campaign about the possibilities, the chances of success or failure and the risks of starting an alternative dispute resolution procedure both before and at the time of signing a contract, but also by the provider in the case of a bilateral dispute.
- The transparency and quality of ADR schemes will be strong incentives for consumers to make use of them.
- The Commission approach in the area of redress has to be consistent and also has to contain work on collective redress.

INTRODUCTION

Consumers' confidence in financial markets should be considered as a key factor for stability and sustainable growth by public authorities, federations and providers. There are several elements for fostering this confidence – some of them being civil law and civil procedure law, collective redress and individual redress by efficient ADR schemes. In some Member States like Romania little proper attention is paid to consumers and their problems; nor are consumers treated adequately taken into account their lower degree of financial literacy. Within the general economic crisis context there is in Romania an avalanche of disputes, clients' switching from one provider to another and a grave general mistrust in the financial system.

Consumers' confidence should be built up on solid grounds: an institutional framework, properly equipped with law enforcement institutions, market supervision, complaints handling systems and adequate redress means; transparent, clear, simple and enforceable procedures; continuous awareness raising and information provision.

Given the above mentioned matters and the importance of ADR schemes to address consumers' problems, the Commission's initiative to launch this public consultation is highly welcomed by FSUG. The expansion of ADR schemes would make an important contribution to enforcing consumers' legal rights. There is without doubt an intensive need for out-of-court settlement procedures as can be seen from the number of complaints subsequent to financial crisis. For instance, the Austrian Chamber of Labour registered 46 000 inquiries of complainants in financial services in 2009. In Austria, large banks have voluntarily installed Ombudsstellen. Only a few large undertakings offer policy holders the possibility of resolving complaints by means of an Ombudsmann (Ombudsbüro). But in particular, investment consultants and investment companies do not meet consumers' needs in a credible fashion because the installed Ombudsmann of financial services providers is supposed to play a subordinate role. On its homepage there is not even a full description of his competence to be found. Summing up the situation in Austria, freely installed Ombudsstellen show a lack of comprehensive rules and clear descriptions of the settlement of consumer complaints.

With regard to Germany, Greece, the Czech Republic, Spain, Romania, the Netherlands, Italy and Poland there are case studies in Annexes 1-8.

GENERAL CONSIDERATIONS

EC Study on ADR schemes 2009

The conclusions and results of this important study are based on the information collected from Member States. Regarding these collected data and the ADR situation on the Romanian financial market there is a case study in Annex 5.

Mandatory or voluntary?

Due to the different forms of ADR bodies and rules of procedure in Member States, the principles for ADR schemes and the manner in which they should work have to be developed at EU level. There are good reasons to install ADR schemes on a mandatory basis in order to achieve high coverage, binding results and a reliability of the system. In contrast, ADR schemes installed on a voluntary basis will require great effort and expensive, frequent information campaigns aimed at providers focussing on the possible advantages to them of participating in the scheme. However, many consumers would still be without an ADR scheme to turn to. A mandatory scheme with good and binding rules of procedure will result in:

- A higher consumer confidence that will be increased by showing evident interest for sustainable solutions for consumer problems.
- Less burden of work as the effective managing of consumer complaints within ADR bodies will take the burden of work away from branch office staff by channelling the consumer complaints.
- Advantages coming from a better quality management. Having an ear to the ground, learning from complaints and seeing market developments are effective measures of quality management systems. Financial services providers may ameliorate their processes of service distribution after having identified the lack of quality of services provided.

FSUG response to the consultation on the use of Alternative Dispute Resolution (here: ADR schemes in financial services) to resolve disputes related to commercial transactions and practices in the EU

Several factors influence the effectiveness of ADR schemes:

- legal structure independent from industry/industry federations
- professionalism
- active presentation and information on the company's documentation and website showing how to make contact and the scope of competence of ADR scheme
- clear definition of the ADR competence and rules of procedure (coverage, mandatory participation, instruments to solve a case, binding nature of decisions on providers, timeframe for decision determination, transparency (annual report, consultative committee), suspension of the limitation period)
- public, transparent annual reporting (including all figures of incoming complaints, open settlements and completed solutions)
- indication of further possibilities if an alternative dispute resolution is not possible
- for an efficient analysis it is also worth considering that the main actors in the enforcement process (claimant, lawyer, judges, associations, public authorities, self-enforcers) should be given optimal incentives to guarantee enforcement which, in turn, induces the (potential) wrongdoers to comply and not to violate the law.

ANSWERS TO THE SPECIFIC QUESTIONS OF THE CONSULTATION

1. What are the most efficient ways to raise the awareness of national consumers and consumers from other Member States about ADR schemes?

Awareness should be raised in different ways:

- With a widespread public campaign the consumer could be informed about ADR schemes, their existence, function, procedural guarantees, availability and possible costs.
- The information on a competent ADR scheme should be part of the provider's pre-contractual and contractual information obligation, and it should also be available on the provider's website.
- A specific provision could be made for e-commerce transactions, for example, that compulsory information has to be given prior to the contract being accepted.
- Even more important: consumers need concrete information from the provider in the case of a dispute where the consumer is complaining to the provider who does not remedy this complaint. The provider should be obliged to explain the consumer's right to address the dispute to the ADR body.
- Another action that could help raise awareness among consumers would be to draw up and publish a list of all ADR schemes available in the EU and their coverage and competence.

In the end, however, ADR will only succeed if consumers have trust in alternative dispute resolution as a means of effectively resolving contractual disputes instead of having to go to court.

2. What should be the role of the European Consumer Centres Network, national authorities (including regulators) and NGOs in raising consumer and business awareness of ADR?

These players could be given more information about the possibilities of using ADR to resolve disputes. Information campaigns would be one way to provide this information. Players in direct contact with consumers could make ADR part of their standard information package on dispute resolution.

ECCs should be more visible through various events, through updated and complete information and through partnerships with other institutions. ECCs should be in a position to organise conferences, have interventions in press and on TV in matters concerning the correct and prompt information to consumers on various topics of utmost importance for them. ECCs should be used by EC as contact points for surveys and for consultations and funded in this respect. ECC should also offer more substantial support to consumers in formulating and addressing cross-border complaints.

3. Should businesses be required to inform consumers when they are part of an ADR scheme? If so, what would be the most efficient ways?

(See also Q1) Obligatory information would be a welcome step. This information should be provided:

- before the contract is signed, in pre-contractual information or contract offers
- in the contract
- the provider can display the information at its business premises and on the website
- providers should be required to inform consumers of the existence of an ADR scheme in every case where they themselves are unable to resolve a consumer complaint.

4. How should ADR schemes inform their users about their main features?

There should be information at a central place (in the given Member State and EU-wide) and on websites. Every ADR scheme should have a website. To ensure that access is not hindered by language barriers, each EU citizen should be able to retrieve at least basic information in his or her national language. Leaflets should inform the users about the main features of the scheme.

After the consumer has sent his complaint to the ADR scheme it shall confirm the reception of the complaint and inform the complainant in general form about the further procedure.

5. What means could be effective in persuading consumers and traders to use ADR for individual or multiple claims and to comply with ADR decisions?

The main prerequisites (which FSUG recommend be set out in a binding directive) are the following:

- For providers, participation must be legally mandatory; they must inform the consumer about the ADR scheme in a highlighted form in every case they turn down the consumer's complaint.
- Easily available and cost-free access to a competent ADR scheme.
- Timely, impartial, independent decisions are guaranteed.

- ADR schemes should be advantageous not just for consumers but also for providers as they can be an effective way of taking care of complaints.
- The activity of ADR schemes must be transparent and the public should be informed of ADR activities in periodical reports (listing the number of complaints, initiated proceedings and include the number of completed proceedings, outcome of these arbitration processes).
- Furthermore acceptance can be fostered by installing involvement of market stakeholders such as consumer representatives (e.g. in a consultative committee).

6. Should adherence by the industry to an ADR scheme be made mandatory? If so, under what conditions? In which sectors?

All providers should be required to take part in an ADR scheme. This would raise awareness substantially and increase consumer trust in out-of-court dispute resolution schemes. Providers should be given the chance to offer an internal complaints procedure to settle the conflict themselves beforehand. Consumers will in most cases access this procedure first.

All providers must be obliged to participate in an ADR scheme and in any concrete dispute resolution procedure. In the case of a civil law scheme the members participating have to declare their participation in a self-binding way. When an ADR scheme is concerned where participation is foreseen by law this has to be regulated in the law itself including sanctions and enforcement.

7. Should an attempt to resolve a dispute via individual or collective ADR be a mandatory first step before going to court? If so, under what conditions? In which sectors?

It would not be sensible to require the parties in dispute to attempt resolve that dispute first by means of ADR. That would only lead to further time delays. There are cases in which it is clear from the outset that no out-of-court solution is possible and only a court trial can resolve the issue. In such cases, a duty to turn first to an ADR scheme would unnecessarily tie up the resources of the ADR scheme.

8. Should ADR decisions be binding on the trader? On both parties? If so, under what conditions? In which sectors?

Decisions have to be binding on the provider. This is the only way consumers will be able to achieve trust in ADR schemes. The decisions should not be binding on consumers because this would cut off their access to law and court action and restrict the parties making use of ADR mechanisms.

FSUG believes the decision of an ADR scheme should be binding on the provider at least up to a certain monetary value, and if it goes beyond that value the decision should be of a recommendation character. When it comes to the validity or termination of contracts the final decision must also be binding on the provider.

9. What are the most efficient ways of improving consumer ADR coverage? Would it be feasible to run an ADR scheme which is open for consumer disputes as well as for disputes of SMEs?

One requirement for improving ADR coverage is to ensure that it has sufficient financial resources. Every provider must refer to and subscribe to an ADR scheme so that consumer's access is guaranteed.

SMEs can have problems similar to consumers at least in sub-segments such as banking services. Running an ADR scheme open to both SMEs and consumers would be fundamentally feasible in certain areas where SMEs face the same or similar problems as consumers.

10. How could ADR coverage for e-commerce transactions be improved? Do you think that a centralised ODR scheme for cross-border e-commerce transactions would help consumers to resolve disputes and obtain compensation?

A centralised ADR scheme would certainly be conceivable in e-commerce although problems would arise like language barriers.

11. Do you think that the existence of a single entry point or umbrella organisations could improve consumers' access to ADR? Should their role be limited to providing information or should they also deal with disputes when no specific ADR scheme exists?

Creating a single entry point or umbrella organisations would improve access because consumers would only have to turn to a single place to find out whether there is an ADR scheme they can turn to for their specific problem ("less is more").

In the UK, the Ombudsman service is well known. 96 per cent of consumers having used this service said that it was very simple to get the contact information. 86 percent said that they had already heard of the service although they had not used it so far. The reasons for those results, on the one hand, are that it is the one and only competent Ombudsman authority in the area of financial services and, on the other hand, that financial services providers are obliged to inform consumers about this service.

This shows that it is possible in the area of financial services to provide for such a harmonised access; however, it might not be that easy in all Member States. Should there be different ADR schemes in the market there definitely must be one first contact point for consumers. For banking issues there should be one ADR scheme in each Member State. The Polish case (annex 8) shows very clearly that a fragmented, inconsistent ADR scheme is ineffective and inefficient.

12. Which particular features should ADR schemes include to deal with collective claims?

It is important that ADR schemes are given sufficient personal and technical resources to handle and resolve a large number of cases in a timely manner. However collective redress claims are quite different from individual redress cases and both cannot be mixed or exchanged in many cases.

13. What are the most efficient ways to improve the resolution of cross-border disputes via ADR? Are there any particular forms of ADR that are more suitable for cross-border disputes?

The only option in cross-border disputes is usually a resolution based strictly on an examination of written documents. The language barrier is a common hurdle that has to be taken. It would be helpful if the ADR scheme at the consumer's place of residence is put in charge and the consumer's native language is used for arbitration. Regulation (EC) No 44/2001 already contains a rule to this effect stipulating the consumer's residence as the place of jurisdiction. The exceptions provided for in that Regulation pose a glaring problem and should not be taken over. The exception regarding the carriage of goods, in particular, means consumers cannot enforce their rights at all or only with great difficulty in an area that is playing an ever greater role in cross-border trade.

It has to be ensured that at least one ADR is responsible. Ombudsman-type ADR schemes seems to be more appropriate as they don't require the presence of the involved parties and their resolutions should be compulsory for providers.

In UK the Ombudsman only is in charge if the consumer lives in the UK. German Ombudsmen are only in charge for national providers with national contracts after national law. Generally a minimum standard of scope and conditions should be adopted as now within FIN-NET even in one country depending on the financial branch a different range of ADR is offered (from mediation to arbitration or a decision binding both sides).

An alternative could also be an online ADR scheme (ODR). Cross-border disputes are difficult to be resolved mainly because the consumer's access to information on foreign ADRs is limited. Thus, an ODR may be able to avoid this lack of information. Though problems remain to be solved, the ODR could even act as a common platform where the consumer's domestic ADR can have resort to and seek for a dispute resolution. This way, consumers won't be obliged to look personally for access to the ODR itself.

14. What is the most efficient way to fund an ADR scheme?

Government financing would be the best way to ensure impartiality, but this need not necessarily be the case. We have examples where industry-funded schemes work well such as the German Insurance Ombudsman scheme. A variation of government funding would be advanced government financing where the costs would subsequently be passed on proportionately to the traders whose cases were resolved. That way the dispute resolution organisations would be financed by traders not willing themselves to remedy consumer complaints to a reasonable degree. This aspect would have a preventive effect.

15. How best to maintain independence, when the ADR scheme is totally or partially funded by the industry?

It all depends on the terms of reference and specific structure of the scheme and the legal principles governing the scheme including sanctions and enforcement.

In any case the scheme must be independent from the provider side and must strictly be neutral. Work must be accompanied by a consultative committee whose voice has some impact even on the financial mechanism of the ADR scheme. Industry funding must not play a role with regard to possible conflicts of interest.

If industry is involved in the funding of an ADR scheme, safeguards should be put in place in order to ensure the independence and impartiality of the decision making body. A good example could be the mediation service Banks-Credit-Investment from Belgium, which is funded by the financial sector, but is composed of the Ombudsman nominated by the financial sector and a representative of consumer organisations.

Funding must not imply dependence of the entity on the funding party. There are positive experiences with partial or complete funding of ADR bodies by industry sectors in some Member States. In Denmark for instance, where private complaints boards are totally funded by business, no problem results from this fact, as the Danish Consumer Council and the business in question share decision-making and cooperate in the running and organisation of the ADR body. It is however vital that even if the scheme is privately funded, it is independently run.

16. What should be the cost of ADR for consumers?

Costs are a barrier to access so consumers should incur no costs in this procedure. Professionally working schemes will be able to filter out abusive cases or consumers by themselves so that there is no need to charge a fee to consumers.

Annex 1: ADR in Germany

There are numerous banking Ombudsman systems as there are many banking federations and groups. As a result it is sometimes difficult for the consumer to identify the competent ADR scheme as marketing for these schemes is poor. Furthermore internal rules of procedure and transparency often do not meet professional expectations apart from consumer involvement within a consultative committee or alike. These schemes work with a close cooperation with the banking federation and without any stakeholder involvement whereas the Insurance Ombudsman (Versicherungsombudsmann e.V.) – responsible for handling consumer complaints in all insurance and insurance mediation aspects except private health insurance - can be seen as the best practice in Germany and works on a very different basis. It is organised in a legal form that is separated and independent from the insurance federation. Its rules of procedures and terms of reference were discussed with consumer organisations before it came into operation. It is funded completely by the insurance industry and there is a consultative committee including all market participants (providers, society, NGOs and policy). Its decisions are binding on an insurance company up to EUR 10 000, but not for the consumer, and between EUR 10 000 and EUR 100 000 the Ombudsman makes non binding recommendations. The complaints procedure is cost-free for the consumer; the period of limitation is suspended during the complaint's procedure. Insurance companies have to accept the rules of procedure and have to inform the consumers pre-contractually about the existence of the Ombudsman scheme. There is an annual report striving for transparency as the regular meetings of the consultative committee. There are certain loopholes though in the coverage: Entry to the Ombudsman scheme is restricted to members of the German insurance federation (GDV); consumers that have contracts with insurers outside of GDV do not have access to ADR. If the Ombudsman is competent for handling consumer complaints he can only solve insurance problems (e.g. problems with life insurers dealing with loans cannot be solved by the scheme – furthermore banking ombudsmen are not competent either because insurance companies are not members of banking federations; so these disputes remain unsettled). The obligatory ADR for all insurance intermediaries has a lower level of consumer protection. The procedure is not binding on intermediaries. The Ombudsman only responds to the consumer on his complaint; there is no arbitral verdict and no suspension of the period of limitation.

Annex 2: ADR in Greece

There are 3 ADR schemes in Greece:

- Hellenic Consumers' Ombudsman
- Hellenic Ombudsman of Banking-Investment Services
- Insurance Ombudsman.

The Hellenic Consumers' Ombudsman is an independent administrative body introduced by Law in 2004 dealing with national and cross-border consumers' disputes. In every Greek prefecture, there are Commissions for the amicable settlement of consumer disputes providing mediation services for B2C disputes (the 54 Amicable Solutions Committees), which are supervised by the Consumers' Ombudsman. It is funded by the Ministry of Development and it dealt with 4 254 cases in 2009[1].

The Hellenic Ombudsman of Banking-Investment Services (HOBIS) deals with disputes arising from banking and investment services. It was created and financed by the Hellenic Banking Association. It covers consumers, professionals, small enterprises (annual turnover of less than EUR 1 million) that conduct businesses with banks (except those active in the areas of agriculture, forestry, fishing and transport) and investors (individuals and legal entities) that conduct businesses with investment companies, provided it is not related to their professional activities. It deals with disputes arising from the provision of banking services and investment services by banks and investment service providers, which are established in Greece and are participants in or associates of the HOBIS scheme. It also deals with cross-border disputes as a member of FIN-NET. 1.971 cases were processed in 2009, of which 1 053 were resolved, 509 in favour of the complainants, 474 in favour of the banks and 70 by conciliation. The percentage of complainants' satisfaction, expressed as sum of complete satisfaction and conciliation was 54.99 %[2].

Last, the General Secretariat of Consumer Protection and the Directorate of Insurance Enterprises of the Ministry of Development, although not formally an ADR scheme but supervisory authority, practically mediates when receiving complaints by consumers.

In general, there seem to be sector gaps concerning the availability of ADR schemes. For example, the European Consumer Centre considers that ADR schemes are inexistent in some sectors of industry, namely construction and games of chance.

The main barrier regarding the expansion of the ADR initiative in Greece seems to be the lack of awareness, which is below EU average, according to DG Health and Consumers' ADR study[3]. Transparency does not seem to be a big issue. Especially for the Consumer's Ombudsman and the Ombudsman of Banking-Investment Services, there are annual reports that present a wide range of information from number of phone calls to common complaints and selected cases. This information is not accessible for the Insurance Ombudsman.

1 *2009 Annual Report*, Hellenic Consumer's Ombudsman.
2 *2009 Annual Report*, Hellenic Ombudsman of Banking-Investment Services.
3 *Final Report of the Study on the use of Alternative Dispute Resolution in the European Union*, DG Health and Consumers, European Commission, 2009.

FSUG response to the consultation on the use of Alternative Dispute Resolution (here: ADR schemes in financial services) to resolve disputes related to commercial transactions and practices in the EU

Annex 3: ADR in the Czech Republic

In CR there has been implemented one general model of ADR covering in theory all the sectors of products/services. There coexist in parallel some sectoral systems.

In April 2008 started implementation of the project run by the Ministry of Industry and Trade (MIT) concerning out of court settlement of consumer disputes. During solution of this task the Ministry of Industry and Trade as executor and guarantee of this project have cooperated with the Ministry of Justice, the Ministry of Finance, the Czech Chamber of Commerce, the Arbitration Court at the Czech Chamber of Commerce and the Agrarian Chamber of the Czech Republic, the Association of Mediators of the Czech Republic and consumer organisations.

The first two years of realisation of the project was drawn up as the pilot stage. The model was developed as the 'global' one covering at least in theory all the sectors of products and services.

The official report on the model says that out of court settlement of consumer disputes is effective and accepted form. The model of ADR will continue, based on three pillars i.e. qualified advice, mediation and arbitration procedure with use of existing possibilities of institutional safeguarding and with legislative and non-legislative adaptations of processes of disputes settlement. It is based on voluntary principle of participation of disputed sides which is undoubtedly main weakness of the model. Under our experience majority of the business side deny to participate.

Some numbers related to the first two years of the project implementation (2008-2009). Involved:

- 22 contact points in various towns (14 under the Czech Chamber of Commerce ČR, 8 under NGOs)
- 45 mediators
- 59 arbitrators

Cases according to subject of the dispute:

Products	1 720	72.6 %
Services	587	24.8 %
Financial services	63	2.6 %
Total	2 370	

The low number of cases related to financial services may be caused because of existence of the institute of Financial Arbitrator in the CR.

The Financial Arbitrator has jurisdiction to decide on disputes between institutions (such as banks or institutions issuing electronic payment instruments) and their clients regarding transfers of funds, settlement adjustments, collection forms of payment or use of electronic payment instruments. The Financial Arbitrator institute was established as of 1 January 2003, as part of harmonisation of the Czech national law with the EU Member States.

Proceedings before the Financial Arbitrator are instituted upon request by the claimant. Such request (petition) may be lodged using the form issued by the Financial Arbitrator. A template petition form is posted on the web pages. The Financial Arbitrator shall decide on a dispute by issuing his award without undue delay, In an award, granting, albeit partly, the request by the claimant party, the arbitrator shall at the same time impose a penalty on the institution, equal to 10 % of the amount such institution is liable to pay to the claimant under the award, the minimum penalty being CZK 10 000.

The Financial Arbitrator has jurisdiction to decide the above disputes providing they arose after the effective date of the Financial Arbitrator Act, while the amount constituting the subject of dispute did not exceed €50,000 as at the petition lodging date. A dispute would typically include an instance of unauthorised debit card use at the vendor or ATM, unauthorised transfer via Internet banking or unauthorised transfer of funds from an account.

Jurisdiction of the Financial Arbitrator, on the contrary, does not include disputes on mortgages, loans, building and loan plans or disputes originated outside the EU Members and other states constituting the European Economic Area.

Annex 4: ADR in Spain – A well functioning scheme for general consumer claims, but a mere marketing tool for the financial industry

ADR or Alternative Systems of Conflict Resolution have been incorporated into the law of many countries. In Spain include essentially the arbitration, conciliation and mediation. The latter has special characteristics in relation to consumers, having recently been regulated by Royal Decree 231/2008 of 15 February on the Consumer Arbitration System.

In Spain, despite the European guidelines, mediation and ADR are limited in scope:

Mediation in the field of consumer:

The path of mediation to the area of consumption is found in Article 51 of the Constitution, saying "1. The public authorities shall guarantee the protection of consumers and users, protecting, by means of effective, safety, health and legitimate economic interests them." It is precisely this constitutional requirement of effective protection of consumer interest that justifies the need for mediation, since it appears as a procedure that can be achieved in certain cases and under certain circumstances, a more appropriate response than traditional procedures which cannot face with new situations, circumstances and needs created by society.

From this constitutional recognition, numerous laws regarding the protection of the rights and interests of consumers have been enacted, they are really few references to mediation in the same, although in recent years has been showing a growing interest in this figure.

The mediation of consumption in Spain is developing integrated into other ADR, arbitration, so that mediation appears as a performance characteristic of the arbitral bodies and in the arbitration system. As an express reference to this ADR state-wide, is remarkable only Article 38 of Royal Decree 231/2008, of 15 February, which regulates the Consumer Arbitration System, which says: Mediation in the arbitration: 1. Where there are no grounds for rejection of the request for arbitration to try to mediate the parties to reach an agreement to end the conflict, but expressed opposition of any party or where it appears that the mediation has been tried without effect. 2. The mediation is governed by the law on the subject that is applicable, corresponding, however, the secretary of the Consumer Arbitration Board to record in the arbitration of the start date and end of mediation as well as the outcome of this. 3. In any case, the person acting as a mediator in the arbitration proceedings in its action is subject to the same requirements of independence, impartiality and confidentiality required of arbitrators.

The Consumer Arbitration System: The arbitration system is currently governed by the Arbitration Act 60/2003, of December 23, and the Royal Decree 231/2008, of 15 February, which regulates the Consumer Arbitration System. This Royal Decree is to amend, for the first time since its publication, the Royal Decree 636/1993, of 3 May. The need for this change was evident in Law 44/2006 of December 29, improving the protection of consumers and users, which required the government to undertake major reforms.

Among the main novelties introduced by the Royal Decree 231/2008 include:

1. Facilitates dispute resolution below EUR 300, acknowledging the possibility that a single arbitrator – and not three as usual – resolves the conflict.

2. Governs the arbitration of collective consumption and the electronic arbitration.

3. Creates the Commission on Consumer Arbitration Boards and the General Council of the consumer arbitration system.

4. Collect a specific reference to the mediation in arbitration in Article 38.

Mediation bodies developed in the consumer arbitration system: The consumer arbitration system is structured through the Consumer Arbitration Boards and arbitral bodies. The first are permanent while the latter are formed with a view to resolving the contentious issue which they are subjected. We have to distinguish the National Arbitration Board and Regional boards; the latter formed through the collaboration agreement between the Administration and the National Consumer Institute, and consist of a Chairman and a Secretary appointed by the Administration which depends on the Arbitration Board. Consumer Arbitration Board directs the arbitration to get the consumer arbitration system to function properly, finding among the functions entrusted to the mediation of conflicts. Mediation is developed by the Consumer Arbitration Board before initiating the arbitration proceedings.

Apart from the regulation contained in Royal Decree 231/2008, we note that also can mediate the Municipal Offices Consumer Information (OMIC), whose main functions are to inform consumers on how to make their claims and inform consumers about the arbitration system. OMICS those who wish, may mediate disputes between consumers and companies before commencing arbitration or judicial complaint.

Arbitral bodies may have as individual or collegiate. Be one-person when the parties agree or as otherwise established by the President of the Arbitration Board, provided that the amount in question is less than EUR 300 and the lack of complexity of the advice.

Colleges will in other cases, constituting the Arbitration Panel, which will consist of three arbitrators, elected from among those proposed by the Administration, consumer and user associations and business and professional organisations. Among the functions attributed to these arbitral bodies to urge is the reconciliation of the parties. In general, the agreement reached in mediation is recognised the effectiveness of a settlement.

Consumer Arbitration: Its purpose is the resolution, binding and enforceable, of conflicts concerning legal consumers' rights. Through this system resolution of disputes are resolved by an impartial third party, college consumer arbitration, disputes concerning acts of consumption among consumers who have purchased goods or services for final consumption by entrepreneur, professional or service provider.

There is the possibility of setting objective limits to arbitration in the public offer to arbitrate or the acceptance made by the employer (as it is the case of insurance companies, usually establishing limits of EUR 3 000 for the amount claimed). If the company completes a public offering of submission shall necessarily mention the 'scope of supply'. The law does not specify what should be the content of the offer. Indeterminacy that allows employers to set limits to the scope of all types of supply, for example, impose such conditions procedural or set limits on the amount claimed or set boundaries. But it could also set limits on the matters subject to arbitration. Users have to regret that any Spanish bank, and only one saving bank, have complete a public offering of submission, thus banks´ users must fill their claims through the non-independence 'client's defender' (which every financial institution is obliged to have since 2004, position which is usually occupied by a person of the bank's trust). If the resolution issued by the client's defendant is not satisfactory for the user, then he can fill his claim in the Bank of Spain Claims Service. The decision of this service is, however, not enforceable, and if bank do not voluntarily accomplish with the report (which usually happens) user will not have other remedy than suing at court.

The possibility of setting objective limits also exists when there is no public offer of submission, but that the consumer makes a request for arbitration. In this case, the Consumer Arbitration Board shall notify the request for arbitration the employer claimed, who 'must accept or reject it'. Given the silence of the norm, nothing prevents the employer makes a limited acceptance objectively.

Consumer Arbitration Boards received 58 504 requests for arbitration, 65 577 in 2004, 52 333 in 2005, 56 476 in 2006, and 61 759 in 2007.

Annex 5: ADR in Romania

Some issues have to be raised:

- Are complaint-handling systems considered ADR schemes? If yes, the complaint-handling systems of all financial authorities and of the financial institutions should be included (the study contains, at least in Romania's case, only two authorities that handle complaints while the reality is different). This could have an important impact on the statistics presented in the study on the number and geographical coverage of ADR schemes.
- Are territorial offices of an authority to be reported as separate complaint-handling systems and, eventually, ADR schemes? If yes, the real situation is different, at least in Romania's case.
- In case of mediation, in Romania there are a regulating and supervision authority (Mediation Council), thousands of mediators of which several hundred active and tens of mediators' associations. If all of them are to be reported as ADR schemes, the statistics on the country would look different. But neither mediators nor their professional associations are specialised in a specific area, the Council of Mediation opposing to specialising as a banking mediator.

Regarding the methodology used to gather data, it can be argued that, in order to ensure the relevancy and reality of the presented data, European Consumer Centers should be seen as one of the primary source of data and should be used as a hub in consumer-related surveys.

Some considerations have to be made on Romanian financial market and the redressing and ADR mechanisms for consumers. In solving their disputes with financial service providers, consumers have the following options:

- In general financial institutions have their own complaint handling mechanisms in place but there is no evidence on their effectiveness (the institutions' professional associations don't perform this kind of surveys and neither financial institutions are publishing data or statistics).
- Financial supervision authorities have also implemented complaint handling procedures and they could take measures against financial institutions; an exception to this is National Bank of Romania that chose to give up financial consumer protection in favor of the National Authority for Consumer Protection (though they made an exception under Payment Service Directive, assuming the payment-related complaints).
- Legal proceedings in court are very lengthy, there are no specialised courts, but a recent amendment to the Civil Code allows simplified procedures for disputes in amounts of up to RON 2 000 (about EUR 500).
- Mediation is at its inception stage and consumers are not very aware of the mediation process. Currently, mediation doesn't look advantageous for any of the involved parties: for consumers, it might look too expensive (the fee could be around EUR 100 per mediation session and there can be several sessions for solving a dispute) and too complicated (they should get, through direct communication with financial institutions, to a solution but they feel vulnerable in relationship with the other party due to information asymmetry); for financial institutions – it is a matter of internal procedures, of mandate to their representatives and of assuming responsibilities by their representatives; for mediators, the low number of mediated cases makes it inefficient. In addition, many lawyers negotiate with banks on clients' behalf.
- Conciliation is more used by and more appropriate for businesses.

- There are two arbitrage courts with the Stock Exchange and with the National Union of the Romanian Insurers, but being formal, with long and quite complicated procedures and high costs, they are not effective; up now any consumer didn't address these arbitrage courts.
- Independent Ombudsman – this institution is missing in the landscape.

Concluding, Romanian financial market doesn't offer consumers a full range of options for solving their disputes with financial service providers. ADR schemes in Romania are not known by consumers and are not perceived as simple, affordable and effective for consumers. Romanian consumers prefer to approach authorities for solving their problems with financial institutions because they trust them to issue compulsory decisions and because this bears zero costs to them. The recently promoted mediation cannot be for now successful because of the information asymmetry between financial consumers and institutions (consumers don't trust that they could reach fair solutions especially given the mistrust in the financial institutions). Given the market development in Romania, Financial Ombudsman seems to be the most suitable ADR as it is free of charge or with low fees, it has procedures not requiring physical presence of involved parties, it could issue binding decisions to both parties and thus could be similar to authorities' complaint-handling systems.

Annex 6: ADR in the Netherlands

Since 2007 the structure of the alternative dispute resolution in the area of financial services has changed considerable. Accordingly, the existing ADR schemes have merged into a new institution called Klachteninstituut Financiële Dienstverlening (here and after KiFiD) or the Financial Services Complaints Tribunal, as it is called in English. The KiFiD provides on one hand a mediation link to an ombudsman function and on the other hand a settlement of extrajudicial disagreements link to judgmental function. The KiFiD is a private law ADR scheme, established by all market parties by self-regulation, within the framework of legal requirements in the Financial Services Act. Hence it is mandatory for all license holding financial institutions. The minimum value of dispute is EUR 100 and the maximum value for banks and insurance companies is EUR 250 000, for intermediaries EUR 100 000.

Each complaint is first handled by the Ombudsman (recommendation, not binding on either party). If the result of the mediation is accepted by the parties the case will be closed. If not, a mostly binding decision can be asked from the tribunal. The effect of the decision is that it is binding on both the financial institution and the consumer, at least regarding those affiliated institutions that opted for binding decisions.

Moreover, a common complaints body for the entire financial services industry seems to have some key advantages. Basically because it enhances its investigative and compensation powers when dealing with dispute resolution. For instance a complaint can be launched with one authorised body regardless the nature of the product, rather than having to choose among various organisations dealing with the settlement of disputes. Nevertheless, one should bear in mind that the basic principle of extrajudicial dispute settlement in the field of financial services is the ‘bottleneck model’: the complaint is being passed on through various phases, i.e. the administrative phase, the mediation with the ombudsman and the phase in which the dispute is resolved by the disputes committee. However the existing complaints body does not offer the possibility of appeal. Given the fact that this ‘bottleneck model’ offers accessibility to the ADR scheme, it is logical that it also tries to handle better its administrative costs-one additional reason why ADR schemes should not be mandatory as a first step before going to the Court.

Annex 7: ADR in Italy

After decision n. 275 of 29 July 2008 of the Inter-ministerial Committee for Credit and Savings (CICR), Article 128-bis of the Italian Consolidated Banking Law provides for a ADR procedure before the Arbitro Bancario Finanziario (ABF - Banking and Financial Arbitration Body), not to be confused with mediation or conciliation (see below).

It is an out-of-court litigation mechanism applicable to disputes arising between banks or intermediaries and customers in the context of banking and financial services (with the exclusion of investment services). The procedure applies to all bank-customer litigation irrespective of whether the customer qualifies as a 'consumer'; only clients that are financial intermediaries themselves are excluded from the procedure. The new procedure applies to all disputes relating to rights and obligations regardless of the monetary value of the underlying contractual relationship. However, if the litigated matter involves a pecuniary request, the procedure only applies if the requested sum does not exceed EUR 100 000.

Access to the procedure is entirely voluntary for customers but it is mandatory for the bank or intermediary concerned. The procedure is managed by an Arbitration Tribunal which comprises five arbitrators, one each appointed by intermediaries' and consumers' associations respectively, and three (including the President) by the Italian Central Bank (Bank of Italy). So far, three tribunals have been constituted in Milan, Naples, and Rome. The jurisdiction is defined on a territorial basis.

The action may only be initiated by customers and it may start only after a written complaint to the bank or intermediary. If the bank fails to respond within 30 days or if it does not uphold the claim, then the procedure follows a typical litigation path before the ABF.

The form and supporting evidence may be transmitted to the ABF via ordinary post, fax, or email.

The litigation is limited to the claims brought by the customer and the bank or intermediary may defend itself but it cannot advance counterclaims.

The decision is taken within 60 days of receipt of the complaint from the customer.

If the ABF upholds the customer's complaint, it orders the bank or intermediary to comply with its decision within a fixed date; after the expiry of the given deadline, in case of non-compliance by the bank or intermediary, the law provides for a sanction to the reputation of the bank/intermediary. It consists of the public disclosure of the failure of the bank or intermediary to comply with the decision. This occurs via both the ABF's website and two national newspapers at the intermediary's own expenses.

The law does not expressly provide for any appeal against the ABF's decisions. It does provide, however, that the decision does not prevent either party from disputing the same matter in Court or before any other applicable dispute resolution system. However, where arbitration is sought through the ABF, the customer will not be required/obliged to follow the mediation or conciliation procedure that may be indicated in the contract with the bank or intermediary in the event that s/he decides to pursue litigation in Court.

For the out-of-court resolution through conciliation or mediation of any dispute arising from or in connection with banking contracts, considering the obligation to pursue alternative dispute resolution before initiating litigation in the court system pursuant to Legislative Decree No. 28 dated 4 March 2010, the customer and the bank may refer the dispute for mediation or

conciliation to the Conciliatore Bancario Finanziario (Banking and Financial Conciliator) or another alternative dispute resolution body registered with the Italian Ministry of Justice and specialised in banking and financial matters.

The regulations of the conciliation body can be accessed on the website www.conciliatorebancario.it (there is a presentation in English on the website).

Annex 8: ADR in Poland – between conciliation and arbitrage

The shape of ADRs in Poland depends very much on financial industry (insurance, banking and investment). There are many differences that shows diverse attitude to the idea of alternative dispute resolution, dissimilar maturity and readiness for strict quality assessment.

In the insurance industry the Insurance Ombudsman was launched in 1995 by the new insurance law that was introduced just after a few insolvencies. The Insurance Ombudsman is representing consumers within legislation process and in disputes with insurance company. Within the claim procedure the Insurance Ombudsman is checking legal background of the complaints and if concludes that the law was violated, it should ask an insurance company to change its position, however it is not binding for the insurance company. So it is very similar to conciliation. However as the Insurance Ombudsman represents consumers there is a threat of the indictment that the statements are biased. The insurance company is obliged to answer the Insurance Ombudsman. The Insurance Ombudsman is financed by insurance industry. The activity of the Insurance Ombudsman is monitored by a board with representation of consumer organisations and trade unions. The overall activity of the Ombudsman is assessed very well and the awareness of existence is getting higher.

In the banking industry the Bank Ombudsman was launched by the Polish Bank Association in 2002. The person in charge is obliged to assure the impartiality and independence. It is a unique initiative within Polish financial market and quite successful example of self-regulation. Banks agree on voluntary basis on dispute resolution made by independent ombudsman and the agreement is valid for all complaints. Merely all of the market is covered by this scheme. The complaints can be stated by consumers who have to pay initial fee (up to EUR 12), that would be recoverable if the complaint was justifiable. The ombudsman's decisions are binding only for a bank and must be executed within 14 days. The maximum value of claim cannot exceed PLN 8 000, around EUR 2 000. The activity of the Bank Ombudsman is monitored by a board with representations of consumer organisations, supervisory authority and industry.

There is no particular ADR scheme within investment industry, however theoretically it is covered by the Arbitrage Court at the Polish Financial Supervisory Authority, that deals with all parts financial services, also dispute between intermediaries and financial services provider. The value of claim cannot be lower than 500 PLN. The second Arbitrage Court is located at Insurance Ombudsman and concentrate just on insurance. The value of claim cannot be lower than PLN 1 000 (the initial fee is about EUR 4, the arbitrage fee comes from 3 % to 5 %). These institutions were founded in 2008 and 2004 respectively as a part of new duties foreseen by insurance law. Just from the beginning these institutions has been obstructed by the financial industry, which has questioned impartiality and independence of these bodies. In theory quick and cheap arbitrage done by top-ranked experts should be better assessed than long-lasting civil process, at least by consumers. But due to lack of resources the costs and time framework are not competitive to public court, and it must be stressed that only few consumers are determined to sue against provider of financial services at public court.

Consumer dispute resolution in Poland

	Number of applications	**Number of approvals of financial services provider on arbitrage**	**Number of conciliatory agreements**
Arbitrage Court is located at Insurance Ombudsman (since 2004)	151	9	3
Arbitrage Court at Insurance Ombudsman and the Arbitrage Court at the Polish Financial Supervisory Authority (since 2008)	268	16	24
	Number of complaints	Number of complaints solved in favour of consumer or within agreement	Number of complaints out of the merit
Insurance Ombudsman (only 2010)	11 947	3 133	1 643
Bank Ombudsman (only 2009)	1 117*	245	556

* Number of claims proceeded in 2010; the total number of claims was 1 165.
Source: Annual reports of the Bank Ombudsman, the Insurance Ombudsman and the Polish Financial Supervisory Authority.

The table shows the real effectiveness of arbitrage court in Poland. Having in mind that all presented institutions belong to FIN-NET, it is clear that real chance of dispute resolution is provided only within the Insurance Ombudsman (but non-binding position) and the Bank Ombudsman. However in a proposal of new initiative of the Office of Polish Financial Supervisory Authority – the Consumer Arbitrage – the impartiality and independence of the Bank Ombudsman was questioned, but no ground has been provided as far.[4]

Although some of ADRs in Poland are relatively successful, the overall performance could be much higher if there is better transparency and clear distinction between consumer protection/representation, supervisory duties and impartial and independent dispute resolution. Homogenous approach for all financial institutions would be helpful as well. Both institutions responsible for consumer protection, the Insurance Ombudsman and the Polish Financial Supervisory Authority, are running arbitrage court, but without success. In the same time the Insurance Ombudsman is operating a quite successful massive conciliation like dispute resolution scheme and the Polish Financial Supervisory Authority is handling separate complaint procedure.[5] It is also quite clear that there is also lack of willingness to promote ADR by majority of financial industry. And last but not least the mentioned inconsistency makes any cross-border dispute quite difficult.

ADR is just the part of the institutional 'back-office' of the market and depends largely on existing institutional framework and market maturity. The successful ADR scheme required particular space within well design institutional surroundings. The number of reported claims and complaints is limited as many consumers don't recognise mentioned institutions. Institutional dispersion and diverse way of dispute resolution probably makes the perception even lower. The development of financial industry and quality oriented policy is also essential, but it very often is significantly diversified within one country.

4 *Alternatywne metody rozpatrywania sporów na polskim stan obecny, rynku finansowym – perspektywy*, Szymański, Ł, presentation at the conference "Standardy rozpatrywania reklamacji w instytucjach finansowych", Warsaw, 14.3.2011.

5 The aim of this complaints procedure is to collect data about bad practices; this evidence can be used as justification for fine mulct.