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Criteria for successful ADR

20 years ago I worked as a lawyer in the Federal Ministry responsible for Consumer Protection, and one of my first activities was to compile a list of ADR-mechanisms available to consumers in Austria.

It looked like an easy task: I thought of all the ADR-schemes I had heard of, in my legal education, in my private life, and in my daily work in consumer protection. There were a few complaints or conciliation boards, and I contacted them one by one to find out more about their work. Were they successful? Should we encourage consumers to make use of ADR? Could we publish a directory?

To be honest, I never completed my list. Though each and every person I talked to was convinced that ADR was a good thing, when it came down to a few basic facts, the issue became rather elusive. Number of Cases? Unknown. Rate of successful dispute resolution? Unknown. Due to the ad hoc-character of most ADR-mechanisms, even telephone number and contact address often could not be ascertained.

It seemed that ADR was all virtues, but no reality.

Twenty years on, ADR again is a buzz word resounding not only in the world of consumer protection.

For the Austrian Federal Ministry of Social Security, Generations and Consumer Protection we have done some research on organisational aspects of consumer protection in Austria and last year we specifically looked at ADR-mechanisms and the conditions they need in order to be successful.

I am grateful for the organizers of this workshop to have given me the opportunity to present a summary of our findings to this very expert audience, and I look forward to an interesting discussion.

Before we address the criteria for successful ADR, we need to think about what does success mean in the field of ADR for consumer cases?

Is it the number of cases, the amount of money in dispute, the amount of money "saved" for the consumer? Is it the effect as a "deterrent" for bad business practices? Is it its effectiveness in enforcing consumer law? Is it the number of cases that do not go to court?

Based on many expert interviews and research, we concluded that there is no clear, one-dimensional indicator of success for ADR in consumer disputes. To be considered successful, an ADR-mechanism has to be seen – by consumers and business – as a real alternative, compared to litigation, but also to other means of handling a conflict. It has to provide a reasonable chance to settle a dispute in

a fair and equitable manner and to achieve a sustainable solution that takes the interests of both sides adequately into account and will most likely be followed in practice.

To be seen as successful, an ADR-mechanism also has to be able to show a track record of successful cases, so there has to be a sufficient number of (successful) cases, although there is no direct link between caseload and perceived success.

So what does an ADR mechanism need to be successful? I will briefly sketch the main criteria we identified.

ADR has to be tailored to the problem

ADR mechanisms have to adapt to the specific requirements of certain industries and problem types. There is no "one size fits all"-ADR.

ADR schemes for "small claims" have to be lean and follow very simple procedural rules. Elaborate mechanisms for such issues will only frustrate all parties involved. If, however, from the consumer's perspective the amount in controversy is substantial – e.g. in cases concerning construction work – any successful ADR mechanism requires an in depth examination of the merits of the case, if necessary including "on site" inspection.

In addition, in such cases relevant and reliable technical expertise has to be readily available either with the ADR process owner or in his or her immediate environment.

ADR mechanisms need prominence with their target groups

An ADR scheme that is unknown to the consumer cannot offer an alternative. However, it is not realistic to expect the general public to be constantly aware of all ADR schemes. Many times, a consumer organisation or some opinion leader - for instance a union representative or community leader – might be approached by the consumer before a conflict evolves. Targeting information to these groups – rather than trying, necessarily in vain, to reach out to everyone – is of vital importance for the success of an ADR scheme.

This does not imply that information for the individual consumer is not a key to the success of an ADR scheme; but it is not general information delivered "just in case" that is needed, but rather very specific information delivered at the "point of conflict". This can be secured by express legal obligations or by self regulatory measures of an industry sector, for instance in a code of conduct, provided it is widely followed. This information has to be presented on a routine basis – without the consumer having to actively ask for it – each time a conflict may arise.

Of course raising general awareness of ADR as a means to resolve disputes should also be supported by each ADR body, but this is typically an issue that goes beyond the means of any single institution.

Accessibility

An ADR scheme that is not easily accessible to the consumer cannot offer an alternative. To be successful, ADR bodies have to be accessible in a way appropriate for their field of activity. Whereas ADR schemes for disputes arising from online transactions will make use (only) of electronic means of communication and not operate local or regional offices, ADR mechanisms for instance for building contracts or health care issues will need to be physically available to the consumer near his or her place of residence. In any case, all relevant information on the ADR scheme (including the information required by the EU recommendations) has to be easily accessible online and – on request – offline.

“Critical mass”

No cases, no significance. A large caseload in itself does not make an ADR scheme successful, but any ADR scheme needs a proven and documented track record of cases handled and problems solved to demonstrate capacity, capability and credibility – towards consumers as well as towards business.

An ADR body that resolves only a few disputes each year cannot provide consistency and will not gain a respected status in the relevant business community or with consumer organisations. I hesitate to state a specific minimum caseload, because that may vary according to the industry sector or type of problems handled. But in general I would say that anything less than one case per week on average could not be called an ADR mechanism, but rather would be something like an ad hoc dispute resolution.

Successful ADR schemes therefore choose a field of activity – industry sector, geographical coverage, specific problems – that is not too narrow in order to provide a consistent service to consumers.

Speed

Who helps fast, helps twice. Fast track solutions are one of the advantages most often attributed to ADR mechanisms. In order to be successful, ADR bodies have to live up to this promise and demonstrate their ability to react while the consumer is still close to the problem. If meetings of conciliation boards are few and far between, the ADR process starts to resemble a court procedure. In general, an ADR mechanism that takes longer than three months to resolve a problem does not constitute an attractive alternative for consumers.

Experience / Expertise / Credibility

For a successful ADR body, its independence, its impartiality, and – where necessary – its technical expertise has to be beyond dispute. Of course it helps to have a widely respected personality of outstanding merit as chair of an ADR body, but also the integrity and expert knowledge of every other member for instance of a conciliation board is crucial for the public perception and thus the success of the respective ADR scheme.

Consumers must have confidence in the ability and willingness of the ADR body to assess each case solely on its merits, and the best way to overcome doubts is to appoint persons who have a professional reputation to lose.

Successful ADR bodies have to be close to their subject matter; often they draw on the expertise of business representatives and rely to a large extent on (technical) information given by the companies affected by consumer complaints. Whilst complete impartiality has to be aimed at, in practice the experience and expertise from the business side often is the best one can get within a reasonable timeframe and for an acceptable cost. However, it is a fine line between making use of the resources provided by the business parties and being subjected to “industry capture”.

ADR mechanisms associated with public institutions – for instance regulatory authorities – usually can command credibility for their technical expertise and impartiality. Judging from the obvious success of such ADR schemes it might be interesting to explore further possibilities to tap into the expertise available at public authorities for ADR purposes.

Acceptance by business

The success of an ADR mechanism ultimately is determined by the ratio of disputes that are actually resolved in a satisfactory manner, which includes the implementation of any decision or recommendation. It is of no use to the consumer to obtain a decision or recommendation of an ADR body that the business party concerned will not accept. So if a significant number of decisions or recommendations is not followed up by business, the ADR scheme in question obviously cannot command the necessary respect in the relevant business community and consumers will lose confidence.

ADR must be not perceived as a paper tiger, even if its decisions are formally non-binding. To that end “sanctions” for companies not cooperating with the ADR mechanism can include “naming and shaming” in an annual report or on a website. Also, non-cooperating companies can be specifically targeted by consumer organisations in (collective or individual) court cases.

While these sanctions do not depend on specific legal provisions or contractual agreements, it is advisable to seek more formal instruments for compliance. A first step is the obligation for business to cooperate in the proceedings, especially to provide evidence and to engage in good faith negotiations for a settlement of the conflict. A further step is a binding agreement, obliging the members of a business association (or individual companies who sign the agreement) to adhere to recommendations or decisions by the ADR body. This usually goes hand in hand with some sort of quality mark that serves to highlight the commitment.

Cost advantages / Financing

In Austria, all established ADR mechanisms in consumer cases are available free of charge to the consumer. Taking into account the relatively small amounts in dispute, it is not realistic to expect an ADR scheme for consumers to be able to

fully cover its own cost from contributions of the parties to the conflict. Nobody we talked to knew of any practical experience with an ADR-mechanism involving consumers where contributions of consumers paid for a significant part of the budget.

Any successful ADR mechanism for consumer cases therefore requires consistent and reliable outside funding. This does not have to be by public institutions, but could just as well come from business organisations investing in their reputation.

Providing special expertise at exceptionally low or even no cost is a key to the success of ADR mechanisms, especially in technical or medical fields. Contributions “in kind” – such as expert opinions by members of a business or professional organisation – are a valuable asset for ADR schemes. Even if complete independence and impartiality should be aimed at, it is evident in practice that consumers are interested also in the opinions of experts who are not independent of business interests, as long as they credibly convey personal integrity.

Case specific equity

ADR mechanisms are not a suitable forum for fine judicial argument. They stand for practical solutions rather than precedents. To clarify complex legal questions, there is no alternative to the regular court system. ADR mechanisms are successful if they provide case specific solutions that are judged by the consumers to give them a better cost/benefit-ratio than the alternative of going to court (or simply of not pursuing the claim further).

This is sometimes criticised by consumer representatives because consumers might settle for less than they could lay claim to. Still, in practice consumers are not as interested in the advancement of consumer law as in achieving a quick solution that reduces the risks and uncertainties of an escalating conflict in court, even if they do not get everything they wanted.

Involving other affected parties

If two parties argue, there may be a third one who is also affected. Another key to the success of ADR mechanisms is to involve everyone who is important for the decision-making of the immediate parties of the conflict or who may be – directly or indirectly – affected by any settlement reached between them. For instance in conflicts concerning building contracts involving the whole family of the future house owner seems to raise the likelihood of a sustainable settlement. And ADR concerning medical malpractice claims can only function satisfactorily if the insurance company of the doctor or hospital concerned cooperates in all proceedings.

Cooperation with interest groups

Aside from the dispute resolution systems of regulatory authorities in Austria most ADR mechanisms involve interest groups or representatives from consumer and business organisations. This helps to spread information on the ADR mechanism in the respective organisations, facilitates access to the system, and

is important to develop a common view between the interest groups on the problems in the relevant field of activity. Thus it opens up possibilities of joint action to remedy problems that transcend a specific case.

Consumer (and sometimes business) organisations also serve as “gatekeepers” to ADR systems, since they advise consumers on whether or not to make use of these options and may select certain cases to “test” the ADR scheme. So even for ADR mechanisms that do not formally involve consumer and business organisations it is important to cooperate with them to ensure smooth operation of the system.

Supportive framework

The success of ADR mechanisms also rests on their flexibility, and on the possibility to make creative use of the freedom of contract. Further regulation of ADR in consumer cases does not seem necessary, as long as it strictly remains an alternative option for the consumer and the possibilities to go to court are not curtailed. So even if ADR flourishes in an environment largely devoid of specific regulations, it is important to stress the necessity of keeping up the general framework of consumer protection legislation that serve as a reference point for the ADR mechanisms and as a “backup system” when ADR fails.

It is a common error to expect success of ADR mechanisms where there is no success of the “regular” system of dispute resolution. So it is extremely important to note once again, that ADR cannot compensate for shortcomings of the “regular” judicial system. If, as seems to be the case in transborder transactions, the judicial system cannot yet guarantee a satisfactory handling of consumer cases, ADR cannot offer a solution. Only when judicial cooperation and coordination amongst the member states is improved – and there has been substantial progress recently – the importance of ADR can grow alongside.

So let me come to my conclusion:

Some of the criteria for the success of ADR schemes may sound very basic, but they have to be stressed nevertheless: there is no use in theoretical discussions on all the possible virtues and advantages of ADR mechanisms if, just for instance, no one is willing to pay for them. There is no doubt that ADR can work, but then again, there is also no doubt that in order to be successful, there has to be outside funding, an adequate range of expertise, and very substantial acceptance in the industry, to name just a few basic criteria.

We know about the virtues of ADR, we need more of the reality.