Unlocking Justice and Markets: 
The Promise of Consumer ADR

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1 The Realities of Consumer Problems and Matching Access to Justice

What does a consumer do when faced with a surcharge levied by a bank or telecom provider that is higher than a reasonable sum, or when an online supplier fails to deliver a book purchased online, or a gas installer or servicer fails to do exactly what was expected? The consumer might contact the trader’s customer care department, but what would he or she do if the trader rejects the complaint? If the amount of money involved is small, and if it is disproportionate to the contract sum, and if the consumer does not have the time to consult a lawyer or start a small claim, the consumer would act rationally in simply not bothering to start court proceedings. The amount of money involved might be small on an individual basis, but if the same trader is benefiting from similar behaviour in relation to many other consumers, and the activity is illegal, the illicit profit could add up to a significant amount. Would it be rational for consumers to aggregate individual disputes into a collective action, assuming that a collective procedure is available? Perhaps, many consumers would not realise that the trader’s activity is questionable. Perhaps, they have no funds or time to seek expert advice.

The European Commission believes that total detriment from uncompensated consumer trading in the EU adds up to about 0.4 per cent of EU GDP, and that the detriment suffered by European consumers on cross-border shopping is estimated at between €500 million and €1 billion.1 This 0.4 per cent

* Centre for Socio-Legal Studies, University of Oxford and Erasmus University, Rotterdam. Research funding is received from the Swiss Reinsurance Company Limited, the European Justice Forum, and the international law firm CMS.

could have been spent in rewarding good businesses. In 2011, more than one in five (21%) of consumers surveyed across the EU had encountered a problem with a good, a service, a retailer or a provider in the previous 12 months, for which they had a legitimate cause to complain.² More than three-quarters took some form of action in response (77%) while 22 per cent took no action. Those who took action were most likely to have made a complaint to the retailer or provider (65%), 16 per cent complained to a public authority, 13 per cent to the manufacturer, 5 per cent contacted an ADR body, and only 2 per cent started court proceedings.³ The most frequently cited reason for not making a complaint (in any manner) was that the individual had already received a satisfactory response from the retailer/provider (44%). The major reasons for not making a court claim were that the individual had already received a satisfactory response from the retailer/provider (40%), the sum involved was too small (26%), it would have taken too much effort (16%), or it would have been too expensive (13%) or too long (12%).⁴ Thus, 67 per cent of the sample thought that a court process was unattractive and unresponsive to their problems.

Many consumer disputes involve small sums. EU 2011 figures estimated the average value of consumer losses as €375, and median €18.⁵ The Oxford study found that 2010 claims varied by type of claim, from as low as €5 handled by the French financial médiateur to many claims valued at €1,001–2,000 handled by the Dutch Geschillencommissie system, which had 9 per cent of claims involving less than €250 and an average of €5,980 for housing guarantee claims.⁶

Even in those Member States, such as Germany and Austria, which enjoy efficient civil procedure systems, consumers may choose not to seek legal advice and/or commence court procedures. It is to answer these questions that consumer ADR has been created. A 2007 study concluded that small-claims procedures would only be used by European consumers if the amount involved

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³ Ibid.
⁴ Ibid., QA36, p. 204.
⁵ Ibid., 175.