CHAPTER 12

Private Law Enforcement and ADR: An Arranged Marriage

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1 The Development of ADR

For a long time, ADR thrived under the access to justice paradigm. The idea was to provide a cheaper, quicker and less formal remedy for cases which otherwise would never reach the judicial system. In the recent past, ADR has picked up an additional function that was traditionally seen as the domain of courts of law, namely, law enforcement (Section 2. below). For Europe, the arrival of Directive 2013/11/EU on Alternative Dispute Resolution for Consumer Disputes may be seen as marking a shift in the dominant perspective, with the new paradigm placing law enforcement, instead of amicable dispute resolution, at the centre of ADR.

In light of the long-standing tradition of European law on consumer protection, namely, to insist on strict enforcement through penalties that must be “effective, proportionate and dissuasive” (Section 3. below), it is remarkable that the EU law-makers are prepared to put their faith in anything less than judicial dispute resolution. This is not to say that the civil justice systems of the Member States work perfectly—they do not, and there are significant differences between jurisdictions. However, Directive 2013/11/EU does nothing to improve national court systems, but instead forces Member States to set


up another system that allows parties to avoid the judicial resolution of disputes altogether (Section 4. below). The mechanisms of ADR designated to pick up a substantial part of the courts’ function in the area of consumer law may be attractive tools for a cheap and swift resolution of disputes on a more or less amicable basis. However, they are not designed to serve the goal of law enforcement. The tension between the goals of substantive law, calling for strict enforcement, and essential features of ADR mechanisms is strongest in the case of mediation, as this tool purports to facilitate the resolution of conflict by the parties themselves, rather than to resolve the dispute for them by deciding the case under the applicable law (Section 4.3. below).

As a closer analysis reveals, the effects of ADR on the level of law enforcement are complex and difficult to predict (Section 5. below). However, it seems unlikely that ADR helps to raise enforcement levels, and it may even lower the rate of enforcement in Member States whose judicial systems work properly, even with regard to small claims. In evaluating the likely effects of ADR, the purview must not be limited to bilateral, i.e., one-on-one litigation in court. It rather needs to include mechanisms of collective redress, i.e., mechanisms that aggregate multiple claims so that they can be enforced in a single lawsuit (Section 6. below). As will be pointed out, collective redress provides a valid alternative, particularly in the area of consumer law, where disputes often involve claims that are, individually, for trivial amounts only.

2 The Importance of Law Enforcement

2.1 Forms of Law Enforcement

The law, as it is laid down in statutes, cases, and other authoritative texts, remains without consequences if it is not put into practice. There are various ways for accomplishing this, i.e., in order to make individuals and firms to comply with the law. The government may send out the police and force the individual to do what the law requires. Pertinent examples involve the shutting down of a dangerous factory or other installation and the seizure of firearms or other weapons. As these rather drastic examples suggest, law enforcement through the exercise of police power is sometimes necessary, although it remains uncommon. Even totalitarian systems of government have proven to be unable to rely on the exercise of direct force in large measure, not least because of resource constraints: the higher the percentage of the population charged with the surveillance and control of the citizenry, the lower the number of people engaged in productive activities. For Western