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ADR and Justice in Consumer Disputes in the EU

Hodges, C.J.S.; Creutzfeldt, N.; Steffek, F.; Verhage, E.N.

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European Civil
Justice Systems

ADR and Justice in Consumer Disputes in the EU

Policy Brief

**Christopher Hodges, Naomi Creutzfeldt,
Felix Steffek, and Eline Verhage**

FLJS

www.fljs.org

The Foundation for Law, Justice and Society

in association with **the Centre for Socio-Legal Studies**
and **Wolfson College, University of Oxford**



European Civil Justice Systems

The European Civil Justice Systems programme aims to evaluate all options for dispute resolution in a European state, and to propose new frameworks and solutions. It encompasses a comparative examination of civil justice systems, including alternative dispute resolution and regulatory redress systems, including aspects of system design, procedure funding and outputs. It aims to analyse the principles and procedures that should, or do apply, and to evaluate effectiveness, in terms of cost, duration and outcomes in redress and achieving desired behaviour.

The programme also involves research into substantive EU liability law, notably consumer and product liability law, harmonization of laws in the European Union, and in particular the changes taking place in the new Member States of central and Eastern Europe.



Executive Summary

This policy brief reports on the main conclusions from the international conference held at Wolfson College, Oxford on 18–20 April 2016. Policy briefs from previous conferences and research are available at www.fljs.org.¹

- Consumer ADR (CDR) systems are continuing to evolve across Europe. Several traditional arbitration-like models have included mediation as a first stage (e.g., Denmark, Irish Financial Services Ombudsman).
- Implementing the EU Consumer ADR Directive has presented unexpected challenges for many Member States. Some have not yet done so, notably Spain.
- The Directive offers governments an opportunity to review and improve the functioning of their national dispute resolution landscapes, but few governments have yet had the opportunity to focus on this. Until this is done, significant opportunities for improvement of consumer dispute resolution — and of markets — remain unrealized.
- The European Commission and governments should now focus on these issues. One consideration is that single dispute resolution mechanisms do not exist in isolation but form part of a menu of possibilities actors choose from. However, there are clear advantages in creating a simple, integrated CDR landscape, both to encourage consumers to bring their complaints forward, and so that sufficiently large data sets are available to provide swift and clear information on market behaviour and trends.
- The research conducted on trust in Ombudsmen (Theme 2) and the various characteristics of the Ombudsman model (Theme 1) suggest that this specific model has particular strengths and may serve as a blueprint for CDR schemes in Europe.
- Maintaining the trust of consumers and traders in ADR entities is fundamentally important. Empirical research provides a benchmark for levels of trust in ombudsmen in several major Member States. The research shows that users have significantly more trust in leading ombudsmen who deal with consumer–trader disputes than they do in public ombudsmen who address complaints against the state.
- All forms of dispute resolution are currently undergoing revolutionary modernization: courts, arbitration, consumer ADR, online trading, small-business-to-business disputes, personal injuries (compensation schemes), and other types. Academic research will be essential to provide an accurate picture of these ongoing developments, since many people are unaware of the facts.
- The very plurality of forms of dispute resolution challenges traditional conceptions of what constitutes justice, or fair procedure, in dispute resolution. Constitutional principles that are applied to the courts may or may not be relevant for other types of dispute resolution. This conference made a significant contribution to opening up that debate.

ADR and Justice in Consumer Disputes in the EU

This conference addressed three critical and topical themes, bringing together representatives from seven governments, many ombudsmen, and a large number of expert academics. The three themes were: how has the consumer alternative dispute resolution (ADR) Directive² been implemented; what levels of trust in ombudsmen exist and what drives trust; and what is the relationship between ADR and justice?

Theme 1: Implementation

Eline Verhage (Leiden University, Netherlands) presented an overview of a study made with the assistance of the European Consumer Centres Network into the implementation by Member States of the EU Consumer ADR Directive. Implementation of that Directive has given rise to a number of unexpected technical obstacles in many Member States, and governments have had to focus on meeting the implementation deadlines (although several remain outstanding) but were not yet able to address some fundamental issues over possible structural reform of national consumer dispute resolution (CDR) landscapes. The design of national CDR mechanisms varies considerably, yet there has been some notable innovation and interesting developments.

Belgium is a front runner on the implementation, since it has created a unified Consumer Mediation Service, even if gaps remain in the operational structure. The concern in Denmark that its arbitration-based national complaint board would not meet the ninety calendar days' time limit inspired the introduction of a Norwegian-style mediation function (as an initial stage, but technically as the only notified stage). Italy may be the hidden gem of the implementation process, as

many initiatives are currently in progress; for example, the *conciliazione paritetica* (joint conciliation) procedure, under which volunteer consumer representatives represent claimants in negotiations with participating companies. This works well, but is far from universal (and not an ADR scheme). Regulators for financial services, communications, and energy have developed good sectoral ADR arrangements, but there is no coherent approach, despite significant innovation. Malta and Cyprus have established a financial ombudsman. The Netherlands, which has an intrinsically good system, is debating the quality vs effectiveness of the CDR process and (future) funding for residual coverage of consumer disputes. In the UK, ADR is treated as a market, with different ADR/ombudsmen models and an expansion of providers. It raises issues over quality and confusion, undermining the existing high level of confidence in the Ombudsman brand. In contrast, Scotland intends to have a single Consumer Ombudsman. In Portugal, CDR has been geographically localized in big cities; and the growth of the existing single national CDR body might be the way forward.

CDR could be improved in every Member State. There is a clear trend to introducing mediation into more arbitration-like models, since cases can be resolved more quickly and more cheaply. Such models are already operating effectively in Norway, the Netherlands, and UK Ombudsmen, and have been introduced to Denmark and the Irish Financial Services Ombudsman.

There is considerable variation across the models regarding how legally binding are the outcomes they produce. However, even if recommendations are not binding, many systems have high levels of adherence as a result of cultural factors, incentives, and penalties.

Ombudsmen models have clear advantages over dispute resolution models, since the former can advise consumers (resolving many issues swiftly) and aggregate data from multiple claims, which can then be fed back to identify and improve market practice (a strong regulatory function). Various Ombudsmen noted that they are able to communicate important messages to traders, regulators, and governments, and to do so in low-key but authoritative ways that would not be possible by other means.

It is recommended that Member States should move forward by reviewing CDR landscapes and modernizing CDR techniques. This is no time to stand still. The wider use of IT in courts systems (e.g. Italy, the Netherlands, and the UK) only confirms that people still need a personal contact in order to receive the level of advice that they can trust.

Theme 2: Trust in Ombudsmen

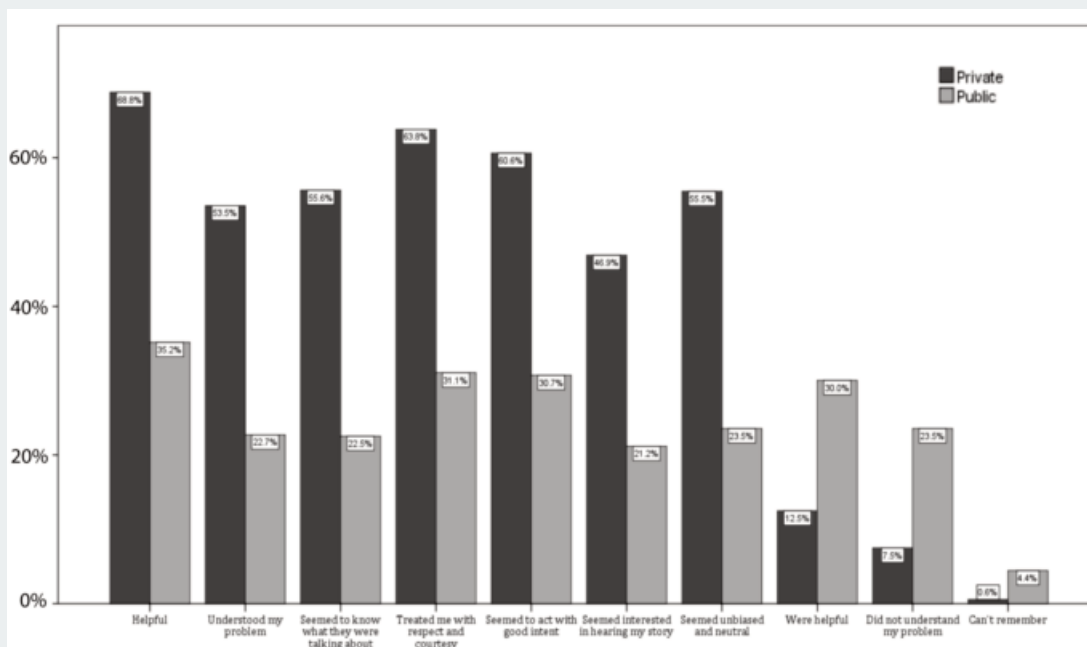
Naomi Creutzfeldt (University of Westminster) presented the empirical findings from her ESRC-

funded research project on *Trusting the Middle-Man: Impact and Legitimacy of Ombudsmen in Europe*.³

Some of the main findings are the following: (1) there seems to be a characteristic demographic that uses ombudsmen; (2) people who use ombudsmen in the UK are more satisfied with the private ombudsmen; (3) there are country-specific features of people's expectations of ombudsmen; (4) the first contact with the ombudsman is very important for people's perceptions of legitimacy and trust. The typical respondent to the survey (n = 3190) was male, over fifty years old, educated, and employed. The findings were as follows.

There were striking differences in the reported satisfaction in the UK sample (n = 1310) between public and private ombudsmen (see Figure 1). The public sector sample is made up of the Local Government Ombudsman and the Parliamentary and Health Services Ombudsman. The private sector sample includes: Ombudsman Services Energy, Property and Telecoms, Legal Ombudsman, and Financial Ombudsman Services (FOS).

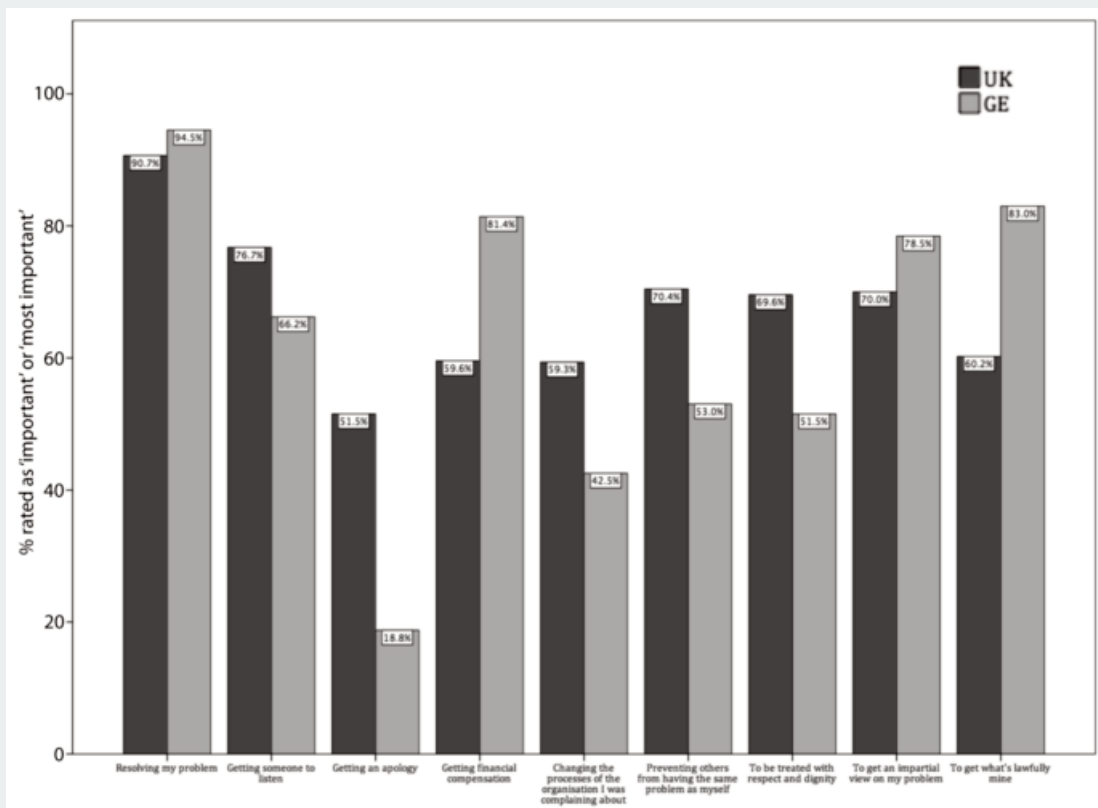
Figure 1: UK survey response to the question: What was your impression of the staff when you first contacted the ombudsman? (n = 1310)



A few striking differences in expectations are seen between the German sample and the UK (without FOS) sample. For example, when asked what were the most important factors in the decision to go to an ombudsman — besides resolving the problem — the primary concerns of the UK sample were to

receive an apology, to protect others from exposure to the same problem as themselves, and to be treated with respect. The most important factors reported by the German sample were to receive financial compensation and legal entitlements (Figure 2).

Figure 2: UK and German survey responses to the question: What are the most important factors in the decision to go to an ombudsman?



Staff procedural justice is very important in the ombudsman context. This means that if the complainant feels that they have a voice, are listened to, are treated with respect and dignity, and feel that the person they are dealing with is neutral, then the chances are high that they will accept the outcome, even if this is not in their favour.

As a general conclusion it is suggested that if complainants are treated according to procedural justice measures, particularly at initial contact, then the likelihood of decision-acceptance and building trust is high. Further, a continuous approach of managing expectations throughout the process will help to build trust. Project reports can be found at the project page of the Oxford Law Faculty.⁴

The invited ombudsmen that were part of the study from Germany, France, and the UK presented on the topic of trust. There were different opinions about what builds trust and those responsible for developing public trust in ombudsmen.

The German ombudsmen, retired judges, argued that trust rests with the individual ombudsman concerned. This person is responsible for continually earning the trust of those who approach the ombudsman for help. The independence of the ombudsman is an important factor in building trust.

The French ombudsmen observed that trust was dependent on several factors, the main being speed of decision-making, independence, transparency,

and neutrality. The importance of avoiding technical jargon and to promote good practices was also noted.

The UK public ombudsman posed the question as to why people do not trust the ombudsmen, suggesting that contributory factors include the context in which they work and how they remedy injustice. They typically deal with complex complaints involving many parties, and a rather extensive process. This context reflects a pre-existing lack of trust in the system.

The private sector ombudsmen argued for the importance of integrity among ombudsmen, and that they should be accessible and provide consumers with a fair and reasonable approach to solving their complaint. It seems that on the one hand consumers are more aware of their rights and are looking for independent help with their complaints, and on the other hand, they seem overwhelmed by the number of pathways available to resolve disputes outside of the courts.

Theme 3: ADR and Justice

The arrival of the European landscape of mediation (especially through the Mediation Directive),⁵ and now expanded types of consumer ADR, has been met with some push-back from some, who are concerned about maintaining the rule of law as constitutionally applied by judges in courts. There is already, in fact, wide diversity emerging in forms of dispute resolution, and this universe is continuing to expand. There are multiple different forms of CDR, while online trading is covered by online dispute resolution (ODR) in various different forms. Business-to-business forms are diversifying, not just with commercial arbitration, but now with Small Business Commissioners, a Groceries Code Adjudicator, and Pubs Code Adjudicator. For personal injuries, considerable variations in administrative (usually no-blame) administrative compensation schemes exist.

This expanding diversity raises many more fundamental questions regarding what is meant by 'justice'; whether there is — or should be — an

immutable normative concept of justice; whether particular dispute resolution schemes deliver different goods, outcomes, or values — and whether that is what people want, or should be challenged. The academic debate on justice in CDR so far is at an early stage, and has sometimes not benefited from wide understanding of exactly what is happening 'on the ground'. There is a need for more empirical academic research into the reality and diversity of ongoing developments.

In relation to CDR as it occurs in Europe, a set of quality criteria does exist in the EU Consumer ADR Directive, for which there is universal support, and which are regarded as constitutionally reliable.⁶ An extra criterion of user-friendliness is often overlooked, but is widely supported, and it explains why good CDR schemes succeed, particularly over other ADR or court mechanisms. There is also agreement on operational criteria such as speed, economic efficiency, and delivery of effective outcomes.

Criticisms of almost all CDR schemes as they currently exist in Europe on grounds of failure to deliver justice are misguided. CDR in Europe inherently delivers substantive access to justice (in some Member States to a far greater extent than courts are capable of) and fair and consistent outcomes. There is in fact no official or comprehensive statement of constitutional values or quality criteria for litigation, courts, or judicial decisions, merely reference to some individual principles, such as 'justice' and 'due process'.

CDR is distinct from civil litigation, and each should be valued for itself and not as substitutes for each other. Courts measure up well on quality criteria but poorly on other consumer principles of access, information, and value for money. In an expanding innovative universe, debate is to be expected, but a binary juxtaposition of courts and ADR is fallacious and polarizing.

Leading consumer ombudsmen aim to value humans' emotions, so that processes and outcomes feel fair and are objectively fair. The coming years will also see an increasing focus on assisting vulnerable people.

Notes

¹ See <http://www.fjjs.org/content/ec-head-representation-outlines-new-vision-consumer-dispute-resolution-across-europe>

² Directive 2013/11 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), L 165/63.

³ See <https://www.law.ox.ac.uk/trusting-middle-man-impact-and-legitimacy-ombudsmen-europe>

⁴ See <https://www.law.ox.ac.uk/trusting-middle-man-impact-and-legitimacy-ombudsmen-europe/project-reports>

⁵ Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters (Mediation Directive), L 136/3.

⁶ EU Consumer ADR Directive, Arts 6–11.



The Foundation

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Christopher Hodges MA PhD FSALS is Professor of Justice Systems; a Fellow of Wolfson College; Head of the Swiss Re/CMS Research Programme on Civil Justice Systems, Centre for Socio-Legal Studies, Oxford; and Honorary Professor, China University of Political Science and Law, Beijing.

Naomi Creutzfeldt is a Lecturer in Law at Westminster University; Associate of the Centre for Social-Legal Studies, University of Oxford; and a member of Wolfson College, Oxford. She holds a PhD in political science from the Georg August Universität, Göttingen, Germany.

Felix Steffek is University Lecturer in Comparative Commercial Law and Senior Member of Newnham College, University of Cambridge. He holds a LLM from the University of Cambridge, a PhD from the University of Heidelberg, and a Habilitation from the University of Hamburg.

Eline Verhage is PhD Fellow and Junior Lecturer in Civil Procedural Law at Leiden University. Her PhD research focuses on Consumer ADR/ODR (CDR) in the Netherlands.

For further information please visit our website at www.fljs.org or contact us at:

The Foundation for **Law, Justice and Society**

Wolfson College
Linton Road
Oxford OX2 6UD

T · +44 (0)1865 284433

F · +44 (0)1865 284434

E · info@fljs.org

W · www.fljs.org

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