

CONSUMER REDRESS AND FINANCIAL SERVICES

Summary: *Alternative Dispute Mechanisms offer a pragmatic and low cost scheme of consumer protection in cross-border financial services. They are not intended to substitute but to complement the full judicial process. Their importance arises in particular from the growing use of the internet as a means of buying and selling financial services.*

Context

Consumer trust is important in all markets but perhaps more so in financial services than others because of the debtor/creditor or long term nature of the relationship. This trust can be earned by financial institutions delivering on their “promises” but sometimes, for all sorts of reasons, this does not happen. In those circumstances consumers need to know that there is some mechanism in place to help them resolve their problems. Without this “backstop” consumers will be less likely to use new products or suppliers particularly from other countries, in which case the aim of a single market for financial services will become difficult to realise.

The Brussels and Rome Conventions and in due course the Regulations which will supersede them aim to decide the questions of which court and whose laws apply to cross border disputes. These are important issues which do need to be addressed, however, the rights which they aim to give to consumers are in reality illusory. The vast majority of dissatisfied consumers do not take their complaint to court because the process is too slow, not user-friendly and disproportionately expensive. When it comes to cross border complaints the position is even worse.

Alternative Dispute Resolution Mechanisms

A solution to this problem, much talked about at present, is the use of non judicial or out-of-court settlement procedures, also known as ADR; alternative dispute resolution. As well as being cheaper and much easier to use, such mechanisms often favour the consumer by applying a “fair and reasonable” test rather than adhering to the strict legal position. ADR schemes are not new having been developed over the years to address domestic, off-line, disputes. They now have the potential to adapt to new demands. ADR schemes take various forms across Member States and the Commission’s Recommendation 98/257 sets out principles applicable to bodies responsible for consumer disputes.

We welcome the work of Commission DG Markt in facilitating the development of a network of ombudsmen schemes across Member States in the field of financial

services. This network envisages decisions being taken and enforced by the scheme based in the same country as the supplier. Consumers will in the first instance make reference to the relevant scheme in their own country which will then take steps to put them in touch with the supplier's scheme. This approach enjoys the great advantages of building on schemes already in place, rather than attempting to build a single Europe-wide system de novo and of linking the decision making process closely with those best placed to enforce any award.

Such an approach will also be very flexible allowing it to develop as a whole and also on a series of bilateral bases to changes in the market place and to particular circumstances between pairs of Member States.

Legal and Practical Needs

There are a number of key issues relating to how the network might function to be considered. The first of these concerns the legal framework in which ADRs should operate. From a practical point of view it is important not to lose sight of the reasons for using ADRs rather than the courts - namely speed, cost and ease of access. It is therefore not reasonable to expect an ADR scheme to replicate the full judicial process. Accordingly it is important that consumers are always able to take their case to court should they be dissatisfied with the ADR scheme's decision. This is not an argument for saying that ADR schemes should disregard legal requirements. However it does suggest that it is more important that a satisfactory practical (cheap, quick and easy) solution is reached rather than a perfect legal one. Certainly some schemes put considerable effort into reconciling the parties so reducing the occasions on which the whole decision making process has to be completed.

The roles of the two schemes operators are also important. These could range from

- acting as mere conduits (simply passing the complaint to the relevant scheme)
- through some form of advisory role to either the consumer or the other scheme (or both)
- to taking joint action with the other scheme.

The ability to be flexible in the approach adopted to accommodate varying circumstances would seem to be important. It may, therefore, be best to allow for bilateral arrangements to be concluded between the suppliers and consumers scheme operators so long as these are transparent.

Funding

There is also the issue of how schemes should be funded. There would appear to be three basic options which could be combined in various permutations. Member States could fund the schemes out of general revenue, a levy could be raised on suppliers covered by the schemes or consumers using the scheme could be charged. As one of the main drawbacks of the existing legal systems is their cost to consumers the last option, unless restricted to a token amount, is not attractive. Nonetheless with different schemes operating in Member States, the ability to have a flexible funding approach is important.

Enforcement

Methods of enforcement also vary across schemes. At the lowest level there is moral pressure or the threat of poor publicity should the company not comply. The more reputable the company the more likely it is to be susceptible to this type of approach. At another level, particularly within financial services, the institution's regulator may take notice of findings against the institution and the steps which have been taken as a result. An unsatisfactory response could then trigger regulatory penalties which companies would be keen to avoid. Finally, decisions may be legally enforceable. Here too the ability to resort to a range of options to obtain the desired result for the consumer is what matters. It would be a rather pyrrhic victory if the consumer had to rely solely on enforcing findings through the courts.

On-line redress

Much of this debate has arisen because of the growing use of the internet and there is an assumption that ADR schemes should also be on-line. Certainly schemes should be capable of communicating with consumers and suppliers in their medium of choice including by e-mail.

There are two issues which this raises, one general the other specific to financial services. At a general level insofar as an ADR scheme is designed to produce an outcome acceptable to the parties, this can be easier to achieve by talking rather than by exchanging a long series of e-mails. Whilst privacy is an important issue generally, it takes on even more important dimensions in financial services where, say, sensitive personal data could be involved. Financial institutions take great care to ensure that their on-line product and service facilities are secure but this does not necessarily extend to the use of the internet for the exchange of "correspondence". Accordingly a degree of circumspection should be taken when assessing how far on-line schemes will be able to replace the existing off-line processes.

Conclusion

In conclusion trust is essential to promoting the supply and purchase of financial products and services the more so as trade across borders grows. The provision of relevant predictable and timely information about these products and services will help as will correct performance of their obligations by financial institutions. However, there will always be a need for a safety net and the existing legal systems being too slow, costly and inaccessible do not provide this. Domestic ADR schemes have developed to address this issue and the facilitation of a cross-border network is a useful response to new problems.

References:

- Commission Communication on out of court settlement of consumer disputes, COM (98) 198.
- Commission Working Document on the creation of a European Extra-Judicial Network, SEC(2000) 405 final.
- Europa.eu.int/comm/consumers/policy/developments/acce_just/index_en.html

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