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DIRECTORATE FOR SCIENCE, TECHNOLOGY AND INDUSTRY COMMITTEE FOR INFORMATION, COMPUTER AND COMMUNICATIONS POLICY COMMITTEE ON CONSUMER POLICY

Working Party on Information Security and Privacy

# DRAFT SYNTHESIS OF MEMBER COUNTRY RESPONSES TO THE QUESTIONNAIRE ON LEGAL PROVISIONS RELATED TO BUSINESS-TO-CONSUMER ALTERNATIVE DISPUTE RESOLUTION (ADR) IN RELATION TO PRIVACY AND CONSUMER PROTECTION

This document is submitted for discussion under Item 6A of the Draft Agenda of the 12th Meeting of the Working Party on Information Security and Privacy, to be held on 5-6 March 2002; and for discussion as well under Item 9A(ii) of the Draft Agenda of the 62nd Session of the Committee on Consumer Policy, to be held on 13-14 March 2002.

This version of the draft was originally placed on the Alternative Dispute Resolution EDG on 22 January 2002. Comments were received from Australia, France, Japan, Sweden, United Kingdom, United States and BIAC. These comments are currently being incorporated into the text and a revised document will be issued at a later stage.

Delegates will be invited to discuss this document at their upcoming meetings and decide on any further direction for wrapping up the current work programme on ADR, including the possibility of requesting declassification by written procedure of the revised version of this document.

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#### DRAFT SYNTHESIS OF MEMBER COUNTRY RESPONSES TO THE QUESTIONNAIRE ON LEGAL PROVISIONS RELATED TO BUSINESS-TO-CONSUMER ALTERNATIVE DISPUTE RESOLUTION (ADR) IN RELATION TO PRIVACY AND CONSUMER PROTECTION

#### I. INTRODUCTION

1. This document contains a synthesis of Member country responses to the Questionnaire on Legal Provisions related to Business-to-Consumer Alternative Dispute Resolution (ADR) in relation to Privacy questionnaire The was developed and Consumer Protection. and posted on OLIS (DSTI/ICCP/REG/CP(2001) as part of the joint work programme of the Working Party on Information Security and Privacy (WPISP) and the Committee on Consumer Policy (CCP). The aim of the questionnaire was to measure whether and how existing legal provisions impact recourse to ADR in relation to electronic commerce.

2. The Secretariat received twenty-eight responses. This included 24 responses from Member countries, and four responses from other stakeholders, including two online ADR providers.

3. This document, compiled by the Secretariats for the CCP and the WPISP, provides background on the development, the methodology and aims of the questionnaire. It includes some main points, a synthesis of the responses received, and a short conclusion.

#### Background

#### Development of the questionnaire

4. As a first step to gain a better understanding of the role ADR can play in enhancing user and consumer confidence in e-commerce, the OECD, ICC and HCOPIL organised in December 2000 in The Hague a joint conference on online ADR in relation to privacy and consumer protection. This conference explored the use of online ADR systems for disputes involving small values and/or low levels of harm that arise between businesses and consumers online. The primary focus was on informal, flexible systems that allow for the necessary balancing between the type of dispute and the formality of the process for resolution.

5. At their February 2001 and March 2001 meetings, the WPISP and CCP approved a joint work programme on ADR that aimed at encouraging the development of and recourse to fair and effective B2C online ADR. This programme of work included three elements: an updated inventory of ADR mechanisms, a list of questions for potential parties to ADR, and a questionnaire on legal issues.

6. The questionnaire on legal issues was developed by the Secretariat with input from WPISP and CCP delegates participating via an electronic discussion group. In June 2001, the questionnaire was finalised, posted on OLIS [DSTI/ICCP/REG/CP(2001)3], and sent to Member States and stakeholders for response.

7. The Secretariat received responses to the questionnaire from twenty-four Member countries, including Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Hungary, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Slovak Republic, Spain,

Sweden, Switzerland, Turkey, United Kingdom and the United States. Responses were also received from The Research Centre for Computer and Law, University of Namur, Belgium (CRID), *Confcommercio* (The Italian Retail Association<sup>)</sup>, and two online ADR providers, TRUSTe and Square Trade.

#### Methodology and aims

8. The objective of the questionnaire was to generate an overview of the national legal regimes applicable to ADR in Member Countries, with a view to understanding if and how existing legal provisions impact recourse to ADR. The questions aimed to elicit:

- Factual information on the content of legal provisions (both general and specific) applicable to ADR; and
- Information on the general interpretation of these rules in an on-line B2C-situation, both in national and cross-border situations.

9. There are limitations in the conclusions that can be drawn from the answers to the questionnaire. Several Member countries noted that it was difficult to respond to the broad range of questions in the questionnaire in a completely definitive way. In particular, for countries with legal systems in which competence over ADR is shared by national and regional or local authorities, providing a definitive analysis of all relevant regulatory measures was not always possible. Similarly, the fact that legal provisions that relate to ADR are not typically grouped together as a unique legal specialty made comprehensive responses difficult. Finally, comparisons between countries was complicated by the fact that definitions of ADR terms (e.g., mediation or arbitration) vary.

10. Despite these limitations, a number of main points emerge from the more detailed analysis of the answers given by Member states are highlighted below. A common theme echoed throughout the responses is the importance Member countries attach to ADR. In the majority of countries, policy initiatives recognising the potential benefits of ADR have been developed. These initiatives aim at increasing the availability of effective, timely and cheap mechanisms as an alternative to formal court-based dispute resolution.

#### Main points

#### • Member countries have no overarching framework regulating formal and informal ADR

11. Member countries have no overarching framework regulating formal and informal ADR. Although many countries regulate arbitration, informal types of ADR remain largely unregulated. Some European Union countries have developed regulations to implement the principles for out-of-court settlement of consumer disputes (involving a third party who issues a decision) developed by the European Commission.

#### • Most Member countries provide for some form of Government-based formal or informal ADR.

12. Government-established ADR schemes are common in Member countries. They vary from consumer-ombudsmen to arbitration boards to conciliation courts. The scope of their competence is usually limited to either a particular type of dispute or a specific sector. Recourse to these schemes may be mandatory or encouraged.

## • There is little regulation or case law that deals with informal B2C online ADR. As a result, the development of such mechanisms is not hampered at the national level.

13. Recourse to informal ADR in B2C is not subject to specific legal limitations, whether on- or off-line. In most countries, parties are free to agree to ADR on a contractual basis, subject to the restrictions that apply generally to contracts (e.g. non-waivable rights, or clauses unfair to an individual or contrary to public policy/statute). The only legal instrument specifically targeting on-line ADR is the EU-directive (2000/31/EC) on electronic commerce.

#### II. OVERVIEW OF LEGAL PROVISIONS RELATED TO ADR

14. No Member country reported the existence of an overarching regulatory framework for B2C ADR. A small number of Member countries did, however describe some particular provisions that appear to apply broadly to B2C disputes in specific contexts.

## A. Regulation providing rules for specific methods of ADR, or specific types of disputes, or for disputes in specific industry sectors

#### Specific ADR methods

15. Some Member countries have legal provisions broadly addressing a specific method of B2C ADR, e.g. arbitration (including Japan, Germany, Hungary, The Netherlands, New Zealand, Spain, the United Kingdom and the United States<sup>1</sup>). For example, Spain noted that its Arbitration Act is an Act of broad application to 'all matters and scopes thereof' concerning the submission to arbitration of any matter capable of being freely decided between the parties.

#### Specific types of disputes

16. Some Member countries also have provisions applying broadly to the use of ADR in particular types of B2C disputes, e.g. privacy disputes (Australia, Canada, Finland, Korea and New Zealand). Aside from privacy, legislation regulating the ADR of consumer warranty disputes (United States<sup>2</sup>) was mentioned. Tenancy disputes were most frequently mentioned to be the subject of special provisions.

#### Specific industry or service sector

17. Some Member countries reported legislation to apply to all B2C disputes in a particular industry or service sector, for example Financial Services (Mexico<sup>3</sup>) or disputes over defective motor vehicles (United States).

<sup>1.</sup> Note: the United States *Federal Arbitration Act* only applies to inter-state transactions. Aside from this Federal legislation, many states in the U.S. have enacted general arbitration statutes a number of which adopt the recommendations of the *Uniform Arbitration Act* which serves as a guide to promote uniform arbitration legislation in the U.S at the state level.

<sup>2.</sup> *Magnusson-Moss Warranty Act,* requiring the FTC to establish minimum requirements for dispute resolution procedures in written warranties.

<sup>3.</sup> *Law for the Protection and Defence of the Financial Services User* contains a chapter on conciliation and arbitration proceedings mandating that claims must be presented before the National Commission for the Defence of Financial Services Users.

#### B. Government-established ADR mechanisms

18. Most countries provide for some form of B2C ADR, varying from government-run complaints bodies court-annexed or court-referred ADR, 'Courts of Conciliation'<sup>4</sup>, industry/sectoral bodies etc. Sometimes, these ADR schemes blend public and private elements.

#### Cross-sectoral mechanisms

19. In many Member countries, the task of the statutory ADR bodies, e.g. consumer complaint bodies, is not restricted to dealing with disputes from a specific sector. A variety of statutory ADR bodies have been established in Member countries to deal generally with B2C ADR. Consumer complaints boards have been established in Denmark and Finland and a variety of other related mechanisms have been established in other Member countries including Australia, Germany, Hungary, Japan, Korea, Mexico, New Zealand, Spain, Sweden, Switzerland and Turkey.

20. As regards court-annexed or court-referred ADR, Australia, Canada, France, Germany, Italy, Japan, the United Kingdom and the United States outlined different schemes. As an example, France mentioned a scheme that provides for judicial conciliation under which a judge may designate a conciliator to assist in amicable dispute resolution with the agreement of the parties to the litigation. The conciliator is mandated to hear the submissions of the parties and at the end of the procedure, to inform the judge of the outcome of the process. If an agreement is reached, it is submitted to the judge for formal approval, otherwise, the case continues before the court.

21. Poland described a somewhat different ADR scheme which is a more formal or 'court-like' ADR body, the Court of Conciliation. This ADR body was established by the Act on Trade Inspection and involves a formal process commenced by filing a motion before the court. The parties submit to the court's processes voluntarily, but once the authority and procedures of the court are accepted, its decisions are binding equally to the verdicts of common courts and there is no right of appeal. Again, as a different approach, in the Slovak Republic, legislation entitles non-governmental consumer associations to mediate disputes arising between consumers and business. There are two umbrella consumer associations operating in the whole of the Republic as well as several regional organisations. Slovak distance and doorstep selling legislation also entitles consumer associations to mediate disputes in that sector.

#### Mechanisms for particular sectors or particular kinds of complaints

22. A number of Member countries also have established government-run B2C ADR schemes or bodies that deal only with consumer complaints from a particular industry or sector or particular kinds of disputes. For example, in Mexico the National Commission for Medical Arbitration has been established to deal with the arbitration of disputes related to the provision of medical services. In Canada, the Financial Services Commission of Ontario has been established with a mandate to resolve motor vehicle insurance disputes through mediation and arbitration. Other such government-run schemes or bodies were also reported in Australia, Austria, Canada, Finland, Germany, Italy, Korea, The Netherlands, Spain, Sweden, and Switzerland.

<sup>4.</sup> Poland.

#### Mixed public sector/private sector ADR schemes

23. Many countries reported the existence of private-sector ADR bodies, but far fewer noted ADR schemes resulting from a mix of public sector/private sector initiatives. One country that did describe such an approach was Australia, which has legislation through which an industry-developed code of conduct (which often incorporate ADR provisions) can be made mandatory. For example, an Australian franchising code of conduct provides for the referral of franchising disputes to the Office of the Mediation Adviser.

#### C. Regulation of ADR outside the B2C realm

24. Although not a key focus of this research, the questionnaire also asked Member countries to comment on the extent to which the ADR of other types of disputes is regulated. Some Member countries briefly discussed regulation in these contexts and referred to specific provisions applying to the ADR of B2B, C2C, B2G, and C2G disputes.

25. In particular, the majority of countries noted legislation that addresses commercial B2B arbitration. These countries include Australia, Czech Republic, Denmark, Finland, Germany, Hungary, Italy, Japan, Mexico, New Zealand, Poland, Slovak Republic, Spain, Sweden, United Kingdom and United States.

26. In fields other than B2B arbitration, examples of other regulatory initiatives pertaining to ADR were provided by Australia, Austria, Finland, France, Italy, Korea, Sweden and Switzerland. For example, in Switzerland, some Cantons (regional administrations) have established ombudsman systems for resolution of C2G disputes and disputes between government employees and superiors. Further in Korea, a number of sectoral bodies have been established to manage a range of disputes involving different stakeholders including the Construction Dispute Settlement Committee (B2B disputes), the Environment Dispute Resolution Committee (B2G disputes), the Administrative Appeals Committee (C2G disputes) and the Ombudsman of Korea. Also, in the particular context of rent and leasehold disputes, tribunals have been established in Sweden to mediate disputes between tenants and owners/landlords which it was noted commonly involves the ADR of B2B, B2C and also C2C disputes.

#### III. THE IMPACT OF ADR REGULATION ON SPECIFIC ADR ISSUES

#### A. Measures impacting recourse to ADR

#### Provisions that encourage/require recourse

27. Some Member countries have specific provisions under their national ADR regimes that require or encourage parties to have recourse to ADR for certain types of disputes. For instance, in Germany, some regional governments have legislated that for disputes relating to property law, involving small claims for compensation, neighbourhood law and claims over damage to personal reputation, an attempt must be made at conciliation. Further, in the United Kingdom, pre-trial protocols for defamation, personal injury, clinical disputes, professional negligence and construction and engineering matters encourage recourse to ADR. Also in Austria and Switzerland, tenancy law mandates that tenancy disputes should be taken to a specific ADR administrative body. As well as these, further provisions which encourage recourse to ADR for certain disputes also exist in Australia, Canada, Italy, Japan, and New Zealand and the United States.

28. Some countries also have legislation that allows courts or tribunals to order, require or encourage parties to go to ADR in appropriate circumstances for matters within their jurisdiction (rather than on the basis of the nature of the dispute itself). Countries that referred to such provisions include Australia,

Canada, Italy, Japan, New Zealand and the United States. For example, in Australia the *Fair Trading Tribunal Act 1998* expressly encourages the use of ADR in resolving disputes brought before the tribunal and similarly in the *Tenancy Tribunal Act 1994* mediation is adopted as a first method for dispute resolution between parties seeking the intervention of the tribunal.<sup>5</sup> As a further example, in Canada, state based legislation requires all parties to civil disputes to attend a mediation session at the close of pleadings before any further step can be taken in the case. In a similar development, the Netherlands noted that it has recently initiated court-annexed mediation projects on an experimental basis in five different Courts throughout the country. As part of the program, Judges can request that parties try and reach a solution with the help of a mediator in specific administrative and civil (including family-mediation) cases.

29. Aside from legal provisions, a majority of countries also referred in responses to general policies of encouraging consumers to have recourse to ADR, particularly where government schemes have been made available.

#### Provisions that prohibit/limit recourse

30. Some countries have prohibited recourse to ADR for certain disputes, but this relates only to processes conducted through mechanisms established under national ADR schemes. This is the case in Denmark, Finland, Germany, Hungary, Korea, The Netherlands, Poland, Spain, Sweden and Switzerland. For example in the Netherlands certified complaints boards are not able to deal with a range of disputes including those relating to death, physical injury or illness. The United States and Mexico also referred to legal provisions that mandate that certain matters brought before the court may not be referred to ADR.<sup>6</sup> France, Germany and Italy also noted a broad restriction in that parties can not generally seek to resolve disputes involving inalienable or non-disposable rights through ADR (e.g. divorce, familial disputes etc).

#### B. Measures addressing the exhaustion of ADR remedies

#### Provisions that encourage/require exhaustion of ADR

31. In most Member countries there are few provisions that would specifically require disputants to go to ADR first before seeking traditional legal remedies. However, as noted above, a number of provisions do exist which serve to generally encourage recourse to ADR under national regimes or permit courts or tribunals to refer matters to ADR before they are heard.

32. Conversely, countries which do have provisions that explicitly require parties to exhaust ADR in some circumstances prior to seeking judicial remedies include Austria, Canada, France, Germany, Italy, Japan, New Zealand, United Kingdom and the United States. For example, in British Columbia, Canada, a mandatory settlement conference conducted informally by a judge is part of Small Claims Court initiatives. In France if agreement cannot be reached on rent when a lease is being renewed, the parties must refer the

<sup>5.</sup> The Commonwealth *Courts (Mediation and Arbitration) Act* 1991 also provides a legislative framework for the introduction of ADR in matters within the jurisdiction of the Federal Court of Australia. Voluntary codes of conduct (which can be made mandatory) also often have ADR clauses (e.g. the Franchising Code of Conduct which provides for referral of matters to the Office of the Mediation Adviser and includes provision for mediation).

<sup>6.</sup> In the United States, the Alternative Dispute Resolution Act states that courts can not refer parties to ADR after litigation has been filed if the dispute is based on constitutional rights, concerns equal rights protection and voting or the relief sought consists of money damages of an amount greater than \$US150,000. In Mexico, in civil matters, article 615 of the Federal Civil Procedures Code establishes that certain types of disputes can not be solved by arbitration such as familiar conflicts, divorces, parents' feed obligations and any others expressly forbidden by law.

matter to the *Commission Dèpartementale de Conciliation* before applying to the courts.<sup>7</sup> Further, in the United States, pursuant to a range of legislation, some State and Federal Courts require litigants to exhaust ADR first as a matter of course, after a complaint is filed, before the trial can continue.<sup>8</sup>

#### The effect of contractual agreements related to exhaustion of ADR

33. Few Member countries report having specific provisions that would affect the validity of a contractual agreement to exhaust recourse through ADR prior to seeking redress through the courts.

34. A number of countries indicated that, aside from specific legal provisions, the general approach is that parties can enter such contracts in principle but that they may be set aside or declared invalid by the court either under contract law (as containing an 'unfair contract term' or some other irregularity such as undue influence) or as generally against public policy if such contracts work to restrict consumer access to ordinary legal remedies. Australia, Canada, Germany, Japan and the United States reported this approach.

35. The majority of European Union countries referred to a similar approach referencing the EC Directive on Unfair Contract Terms and national enabling legislation as further bases on which a contract could be invalidated if its effect were to restrict access to ordinary legal remedies. For instance Austria noted provisions in its Consumer Protection Act which declare invalid a contract that deprives a consumer of his/her right to bring a matter before court. Similarly, Italy referred to its Civil Code which states that any clauses in B2C contracts that concern or entail exceptions to the competence of judicial authorities are presumed to be abusive. Other countries to reference national legislation on unfair contract terms or the EC Directive in this context included Denmark, Finland, France, Italy, the Netherlands, Sweden and the United Kingdom. In a similar approach, Mexico noted that its Federal Consumer Protection Law also invalidates clauses that are generally 'against consumers rights'. In contrast to the general Member country approach, Korea, New Zealand and Spain indicated that contracts to exhaust ADR would, in practice, be likely to be enforceable.

#### C. Are contractual agreements regarding ADR binding and effective?

36. In most countries there are no specific provisions that deal with the question of contractual agreements between parties to be bound by ADR. However, in parallel to the above, the general practice appears to be that, while freedom of contract is recognised, a contractual provision which binds parties to an ADR outcome may be regarded as an 'unfair' contract term or contrary to public policy if it restricts consumer access to ordinary legal remedies. Countries which supported this approach included Australia, Austria, Canada, Denmark, Finland, Italy, Japan, the Netherlands, Spain and Sweden.

37. In similar approaches, New Zealand and the United States noted that, in practice, a consumer is free to consent to be bound by ADR and but that contract law will apply to ultimately determine the validity of a contract to engage in and be bound by ADR. Also, in Mexico agreements to be bound by ADR are generally regarded as valid unless they are found to be contrary to statute. Further, France and Italy noted that, particularly in the case of agreements signed at the conclusion of an ADR process, contractual autonomy is recognised and agreements signed by the parties will be binding according to contract law.

<sup>7.</sup> Article 17, Act of 6 July 1989 concerning leases of dwelling houses.

<sup>8.</sup> For example, in Maine, in all civil cases except for a few limited subject areas, after filing a dispute in court, parties must schedule an alternative dispute resolution procedure to try to resolve the dispute (Maine Rules of Civil Procedure, Rule 16B).

38. Some countries have specific legal provisions that apply in the context of arbitration. Australia, Canada, Germany, Italy, Japan, the United Kingdom and the United States noted that, generally, parties are permitted to be bound by arbitral outcomes unless such outcomes are otherwise unenforceable. Other countries have provisions that relate specifically to the validity of arbitration clauses entered prior to a dispute. In this context, legislation in Sweden and France for example mandates that consumer contracts entered prior to a dispute containing an arbitration clause are automatically invalid as unfair. Similarly, in the United Kingdom, an arbitration agreement is automatically void as unfair for consumers specifically if it relates to a claim for a small amount. Conversely, the *Federal Arbitration Act* in the United States indicates that such provisions are valid, irrevocable and enforceable except where the contract would otherwise be invalid under contract law. Legislation in Japan also indicates that an agreement to refer future disputes to arbitration is valid as long as it relates to determined relations of right and disputes arising therefrom.

39. In terms of legal limits on the implementation of ADR outcomes, few countries have specific legislative limits. General practice appears to be that ADR outcomes can be implemented in most Member countries unless they are contrary to law, public policy or equity and fairness considerations. Countries to indicate this approach include Australia, Canada, Italy, New Zealand and the United States.

40. In some countries there is specific legislation that prohibits implementation of ADR outcomes but only in the context of arbitration or outcomes awarded by particular statutory ADR bodies. For example, in Japan, under the Law of Conciliation of Civil Affairs, either disputant can apply for the annulment of an award if one of a number of circumstances exist, including for instance, if the award requires a party to undertake an act prohibited by law. Under UK Arbitration legislation, an arbitration agreement can be 'set aside' if the court is satisfied that the agreement is 'null and void', inoperable or incapable of being performed. Further, in the Netherlands, when the outcome of an arbitration or binding advice procedure is manifestly in conflict with public morals or public policy, its implementation will be affected.<sup>9</sup> Other specific legislative provisions exist in Czech Republic, France, Mexico, Poland, Switzerland and Turkey.

#### D. Judicial enforcement of ADR outcomes

41. The majority of Member countries indicated that some ADR outcomes can be judicially enforced in some circumstances. However, the types of ADR and the situations under which outcomes can be enforced vary from country to country and appear to relate only to the resolution of disputes arising in the national or domestic context<sup>10</sup>. Conversely, Denmark, Finland, the Slovak Republic and Sweden indicated that ADR outcomes cannot be enforced under any circumstances.

42. Of the countries which indicated that ADR outcomes can be judicially enforced, a number indicated that this is often only in the case of arbitration. Countries which described a regime under which

<sup>9.</sup> For arbitration procedures, Code of Civil Procedure art 1065.1.e and for binding advice procedures, Civil Code book 7 art 902.

<sup>10.</sup> All Member country responses commented on the enforceability of ADR outcomes awarded or agreed domestically. It therefore remains unclear, in the B2C cross-border context, whether an ADR outcome facilitated, for example, through an online ADR mechanism involving nationals from different countries, would be enforceable. In the case of arbitration of B2B disputes, a number of countries highlighted the application of the New York Convention and noted regimes for the enforcement of foreign B2B arbitral awards.

arbitral awards can be enforced include Japan, the Netherlands, Mexico<sup>11</sup>, New Zealand, the United Kingdom and the United States<sup>12</sup>.

43. The enforceability of outcomes from other ADR processes (mediation/conciliation etc) appears to vary. In some countries, the enforceability of ADR outcomes, as usually contained in an agreement between the parties, will depend largely on the law of contract. This is the case in Japan, New Zealand, the United Kingdom and the United States.

44. Other countries have specific legislative provisions that provide mechanisms for the enforcement of domestic ADR outcomes. For instance, in the Netherlands, agreements reached after a mediation procedure can generally be brought to court to be confirmed by a Judge. Further in France, in cases of non-judicial conciliation, if the parties agree, the court may be asked to give binding force to their agreement.<sup>13</sup> Also, in Austria, it was noted that, if the parties consent to an arrangement at the end of an ADR process, it will constitute an 'executory title' and be binding.

45. Some countries indicated that ADR agreements made during the course of proceedings (for example in the context of court-annexed ADR), can be given the status of judgements on application to the Court if both parties consent. Australia, France, Japan, and the United Kingdom referred to this approach. For instance, in France, the courts have a general conciliatory role such that if the parties reach settlement during a procedure, they may at any time ask the court to record their agreement or the court can itself prepare a conciliation agreement to be signed by the parties. Canada also indicated similarly that an ADR outcome can be enforced with the consent of the parties in which case an ADR agreement forms the basis of a consent order issued with the same status as any other court order.

46. A number of countries commented primarily on the enforceability of ADR outcomes awarded by bodies operating under national regimes. For example, in Denmark and Finland the decisions or recommendations of Consumer Complaints Boards are not enforceable or binding. Conversely, under ADR regimes in Austria, Korea, Germany, Hungary, Italy, Mexico, Poland, Spain, Switzerland and Turkey ADR outcomes can be enforced in some circumstances. For example in Mexico, under the Federal Consumer Protection Law, outcomes issued or agreements approved by PROFECO (the Consumer Protection Attorney's Office) under its conciliation and arbitration procedures have the nature of final judgements and must be fulfilled by the parties or enforced by the courts. Also in Austria, an outcome delivered by the relevant ADR body concerning Landlord and Tenant Law constitutes an 'executory title' and as such is therefore enforceable provided the dispute isn't pursued in court within four weeks of service of the ADR outcome.

#### E. Measures imposing procedural safeguards

47. In some Member countries there are legal provisions that require certain procedural safeguards to be in place but only in specific cases including arbitration processes, court-annexed ADR or processes conducted by statutory ADR bodies. Aside from these provisions, there are few countries that have legislation that imports safeguards into ADR processes generally.

<sup>11.</sup> Note, the Federal Commercial Code which provides for the enforceability of arbitral awards, relates only to B2B arbitration.

<sup>12.</sup> Aside from Mexico, these regimes appear to apply generally to the enforcement of arbitral awards (including awards in the context of B2C disputes).

<sup>13.</sup> Article 9 of the Decree of 20 March 1978.

48. In terms of arbitration, countries which referred to provisions on general safeguards included Canada, Czech Republic (only B2B), Japan, Mexico (only B2B), Netherlands, New Zealand, and United Kingdom and the United States. For example, in New Zealand, the *Arbitration Act* 1996 contains a number of procedural requirements and provides that agreements may be set aside if the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case.

49. A number of countries also referred to safeguards applicable to ADR in the judicial context (or court-annexed ADR). These included Australia, France, Japan and the United States. For example, in France there are safeguards imported in the procedures of conciliations undertaken by judicial conciliators and mediation proceedings conducted by court appointed mediators. These safeguards guarantee the confidentiality of the proceedings and the impartiality of third-party conciliators or mediators.

50. Other countries including Australia, Austria, Denmark, Finland, Italy, Korea, Mexico, The Netherlands, Poland, Spain, Sweden and Switzerland indicated that some safeguards must be observed during processes conducted by particular authorities/bodies that have a role in various national or state-based ADR schemes. For instance, in Korea, there are legal provisions that outline some procedural safeguards that apply to the ADR processes conducted by the Consumer Dispute Settlement Committee.

51. In terms of general regulation of ADR processes, the United States cited some provisions. There are, for example, some state based regulations which uphold the right to representation in mediation negotiations and others that ensure confidentiality.<sup>14</sup> Further, in the particular context of written warranties, the Magnuson Moss Warranty Act requires the US Federal Trade Commission to establish minimum requirements for disputes resolution procedures. As such, any consumer dispute resolution mechanism under the Act must, *inter alia*, be able to settle disputes independently, without influence from the parties involved; follow written procedures; and provide each party an opportunity to present its side, to submit supporting materials and to rebut points made by the other party

52. Aside from legal provisions, some other regulatory initiatives that seek to import safeguards into ADR were noted. Both the EC 'Commission Recommendation on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes' and Benchmarks for Industry Based Dispute Resolution (a co-regulatory initiative) in Australia were cited in this context.

53. New Zealand and the United Kingdom also noted that some procedural safeguards may be introduced into ADR processes in a de facto sense given that mediators, conciliators and other third party neutrals are often required to adhere to professional codes of conduct.<sup>15</sup>

#### F. Measures relating to the confidentiality of ADR proceedings

54. Few Member countries reported legal provisions that could require disclosure of ADR proceedings or an ADR outcome which the parties otherwise would like to keep confidential. Countries which did cite specific provisions relating to ADR include Mexico and the United States. Mexico noted that, under the Federal Consumer Protection Law, authorities, ADR providers and consumers must provide PROFECO, the Consumer Protection Attorney, with any information needed for legal procedures. Further,

<sup>14.</sup> For example the Alaska and North Dakota statutes prohibit a mediator from excluding an attorney.

<sup>15.</sup> For instance, in New Zealand most ADR is undertaken by lawyers who are subject to ethical requirements and disciplinary procedures which may serve to introduce some procedural safeguards, particularly around independence, impartiality and transparency.

the United States noted that under draft legislation, The Draft Uniform Mediation Act, a number of specific exceptions to mediation confidentiality are enumerated.<sup>16</sup>

55. However, several Member countries indicated that, in practice, parties may be compelled under some circumstances to provide information in relation to an ADR proceeding (for example under court order or statutory demand if criminal or other illegal acts are revealed), regardless of whether the parties have agreed to keep the proceedings confidential. Australia, Canada, France, Italy, The Netherlands, Mexico and New Zealand, Switzerland and the United Kingdom outlined this approach<sup>17</sup>. However, Australia and Canada noted further that the Court appears to have a general discretion in this context: it may respect confidentiality on the grounds of public interest or the common law principle of 'without prejudice' but equally, may decide that public interest considerations override the confidentiality agreement. Parties to the ADR process may also be able to claim an exemption or privilege from disclosure depending on the rules of evidence.<sup>18</sup>

56. Confidentiality rules under national ADR schemes vary. In Sweden the existing ADR body is a public authority such that all processes are usually public but a decision can be made confidential if it contains delicate personal or business information. A similar approach is taken in Poland where Court of Conciliation cases are public unless it would be against public policy or state/business secrets would be revealed. Conversely, in Switzerland, arbitration procedures in state-run bodies are usually confidential but if a party appeals against a decision, the authority is entitled to all relevant information on the ADR process. Similarly, in Denmark, Finland, and Korea legislation aimed at ensuring public access to public processes applies to government run ADR bodies to override any agreement as to confidentiality.<sup>19</sup> Further, in Japan, conciliation cases are confidential but a party can request a copy of the proceedings unless perusal would obstruct the keeping of the record or the functions of the court.

#### G. Measures relating to who can provide ADR services

57. Most Member countries indicated that there are legal provisions that specifically regulate the activities of statutory ADR bodies or court-annexed/court-referred ADR but that ADR services and providers are otherwise largely unregulated.

58. Countries referring to regulation in the context of court-annexed/court-referred ADR include Australia, Canada, France, the Netherlands and the United States. For example, in France, the Code of Civil Procedure lays down requirements for judicial conciliators and mediators (including for example that conciliators must have at least 3 years experience in law) but there are no mandatory general conditions for non-judicial services. In the context of regulation of the activities of statutory ADR bodies, Austria, Denmark, Finland, Germany, Hungary, Italy, Korea, Mexico, Poland, Slovak Republic, Spain, Sweden, Switzerland and the United Kingdom cited provisions. For instance, in Denmark, the legislation

<sup>16.</sup> These exceptions include waiver; communications relating to the ongoing or future commission of a crime, record of a signed agreement, meeting and records open by law and public policy mediations; evidence of child abuse and neglect; evidence of professional misconduct or malpractice by the mediator; evidence of professional misconduct or malpractice by a party or representative of a party.

<sup>17.</sup> Australia and Canada also noted that duty of care may mean that ADR practitioners (mediators, etc.) are ethically obliged to disclose certain information if that were necessary to prevent serious harm.

<sup>18.</sup> Legislation in some countries actually deems information arising from an ADR process as inadmissible as evidence. For example, in Australia the *Federal Court Act* provides that evidence of anything said, or of any admission made at a court-annexed mediation session is inadmissible in any court or proceedings.

<sup>19.</sup> For example in Denmark the 'Open Administration Act' would apply such that information regarding the proceeding of an ADR or an ADR outcome can be given to a third party on demand.

establishing the Consumer Complaints Board has provisions that detail how the board is to be composed (and therefore who can act as an intermediary) and the rules for the cost of the ADR process to the disputant, but there are otherwise no general provisions regulating ADR providers.

59. However, there does appear to be more general regulation of ADR services in a small number of Member countries. Australia referred to state/territory legislation that deals with accreditation of mediators. Japan reported that competent ministers must certify organisations that intend to settle privacy/personal information disputes. Japan also reported that people who engage in ADR 'for profit' must be qualified as lawyers. In the United States, ADR providers are largely unregulated but there are some voluntary guidelines for providers conducting ADR for B2C disputes. Further, under draft US *Uniform Mediation Act* mediators must disclose their qualifications in mediating disputes but there are no specific requirements made of mediators in this regard. Finally, New Zealand noted that practising lawyers usually provide ADR and are subject to professional disciplinarily action such that the activities of ADR providers in New Zealand are regulated to an extent. Czech Republic and Mexico also cited provisions applying in the context of arbitration.<sup>20</sup>

#### IV. CONCLUSION

60. The results of the questionnaire highlight a number of areas where the existing legal framework does not provide clear guidance to parties to an online ADR – particularly in a cross-border context. For example, there appears to be uncertainty regarding the validity of agreements to submit to ADR, the procedural principles for use during an ADR, confidentiality and security of proceedings, validity of settlement agreements arising out of an ADR, and the availability of enforcement mechanisms. In some instances this uncertainty stems from differing requirements in national laws, and in others from gaps in the existing legal framework. For some users this lack of legal guidance may have a negative impact on recourse to ADR. Stakeholders in Member countries could help build confidence in the likelihood of obtaining fair and effective redress through ADR online through increased co-operative efforts to address these difficult issues in appropriate fora.

61. As regards the OECD, the focus of the work on ADR is only a subset of the overall ADR realm: informal and flexible online ADR systems for B to C disputes involving small values or low levels of harm (*e.g.* assisted negotiation and mediation). It appears that consensus-building among stakeholders on minimum principles for fair and effective informal B2C online ADR would contribute to filling in the regulatory gaps and enhance confidence in the emerging cross-border B2C ADR online. Further co-operation between consumer and business representatives could be the best way forward to find such a consensus. OECD Member countries may want to help facilitate this dialogue. They may also want to pursue consensus in this area through the OECD.

20. For example in Mexico, the Federal Consumer Protection Law contains regulations for registration of independent arbitrators in consumer disputes.