Chapter 39
Consumer Redress: Ideology and Empiricism

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Abstract This chapter examines the means by which redress can be delivered to consumers. Public and private enforcement has been a continuous interest for Hans Micklitz, and this chapter is offered to him with deep admiration and appreciation for his support and friendship.

The analysis adopts a strictly empirical approach. It starts by asking what subject matter C2B claims comprise, and how much money they involve, before reviewing the evidence on the extent to which the main procedural options for processing them satisfy consumers' and businesses' needs. It notes that traditional assumptions that providing consumers with 'the means to take matters into their own hands' through enforcing rights to compensation through private or collective litigation in courts crumble when viewed against empirical evidence, and that new structures are being built in the EU for the resolution of consumers' claims with traders (C2B claims). It identifies recent developments that private enforcement in Europe has been overtaken by what has been called 'Consumer ADR' (CDR) and public enforcement as more effective and efficient means of consumer redress. The goal of providing 'access to justice' for consumers and extensively increasing consumer redress is now realizable through the adoption of fresh techniques.

39.1 The Nature of Consumer Claims

The analysis has to be grounded on the nature of C2B claims. What are they about, and how much money do they involve? It is only if we know the answers to those questions that we can consider what process might best resolve them. The data show that most consumer problems are about very simple issues, and each issue typically

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involves a small amount of money. That finding should suggest that procedures to resolve such issues have to be simple, cost-effective, cheap and quick.

A British survey in 2008 found that the goods or services for which consumers reported the highest proportion of problems were telecommunications, domestic fuel and personal banking.[1] Fifty-five per cent of such problems resulted in a financial detriment below five pounds. Only 4 % of problems led to detriment levels higher than £ 1,000.[2] A further British survey in 2012[3] found that a fifth of consumers (22 %) had experienced one or more problems with goods or services purchased in the last 12 months. The average financial loss that a consumer incurred from a problem with a product or service was £ 196. This rose to £ 464 for problems in the professional and financial services sector. Consumers took action to resolve two-thirds of problems (66 %). But only half of problems were resolved (50 %), while over a third (36 %) were not considered to be resolved at all. Half of all problems were connected with purchasing household fittings and appliances and other household requirements, and just over a third (37 %) were with essential regulated services such as energy, water, postal services and communications including fixed landline telephones, mobile telephones, internet and broadband providers and broadcast services.

The European Consumer Centres (ECCs) handle inquiries from consumers who experience problems while purchasing goods or services from a trader located in another Member State. In 2012, they received 72,000 contacts, of which 32,000 were complaints and 26,399 were requests for information.[4] The most frequent reasons for complaining to ECCs in 2012 concerned non-delivery of the product or service (16.9 %), the product or service having defects (12.1 %) or not conforming with the order (9.1 %) are linked to distance purchases, which are all issues associated with distance purchasing. Other important issues concerned the rescission of the contract and the additional charging of supplements. Together, these problems accounted for almost half of all complaints (Fig. 39.1).[5]

The sectoral breakdown of 2012 complaints to ECCs (Table 39.1)[6] shows that around 60 % of complaints concerned e-commerce. If complaints are split by sectors, the transport sector was highest, attracting about one third of all cross-border complaints, of which 22 % concerned air transport.

The average value of consumer losses was estimated by the European Commission 2011 survey to be € 375, and median € 18.[7] The nature of an issue will, of

[1] Office of Fair Trading, *Consumer detriment.Assessing the frequency and impact of consumer problems with goods and services* OFT992 (2008), http://www.oft.gov.uk/shared_oft/reports/consumer_protection/oft992.pdf.

[2] ibid.

[3] TNS BMRB, *Consumer Detriment 2012*, www.consumerfocus.org.uk/files/2012/10/TNS-for-Consumer-Focus-Consumer-Detriments-2012.pdf.

[4] ECC, *Help and Advice on your Purchases Abroad. The European Consumer Centres Network 2012 Annual Report*, http://ec.europa.eu/consumers/ecc/docs/report_ecc-net_2012_en.pdf.

[5] *The Consumer Conditions Scoreboard 2013*, http://ec.europa.eu/consumers/consumer_research/editions/docs/9th_edition_scoreboard_en.pdf: quoting source as ECC Network.

[6] ECC, Annual Report 2012, 13.

[7] European Commission, *Special Eurobarometer 342. Consumer empowerment* (2011), http://ec.europa.eu/consumers/consumer_empowerment/docs/report_eurobarometer_342_en.pdf 175.

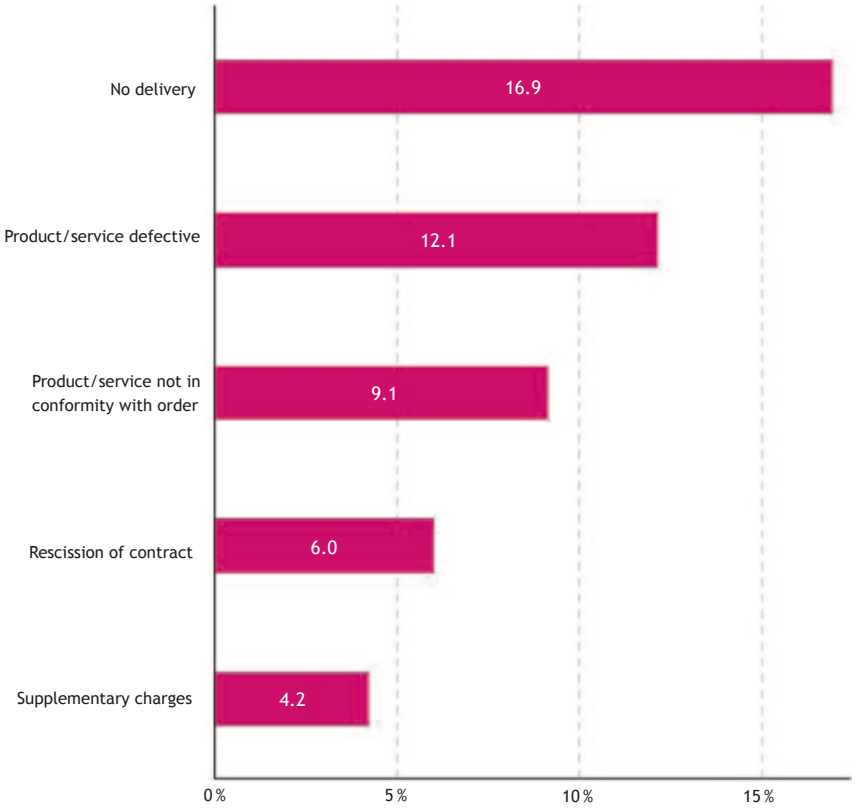

Fig. 39.1 Normal complaints and disputes referred to ECC 2012—by nature of complaint. (Only the main categories are included)

Table 39.1 Complaints to ECC-Net in 2012 by sector

Main economic sectors concerned by complaints	Percentage
Transport, of which:	32.1
Air transport (including problems with luggage)	21.6
Car rental	3.4
Timeshare related products and package holidays	7.4
Recreational, sporting and cultural services	7.0
Furnishing, household equipment and routine household maintenance	6.8
Audio-visual, photographic and information processing equipment	5.6
Health	5.1
Communication	4.7
Clothing and footwear	4.5
Hotels and restaurants	4.5
Personal care goods and services	3.0
Financial services and insurance	2.5

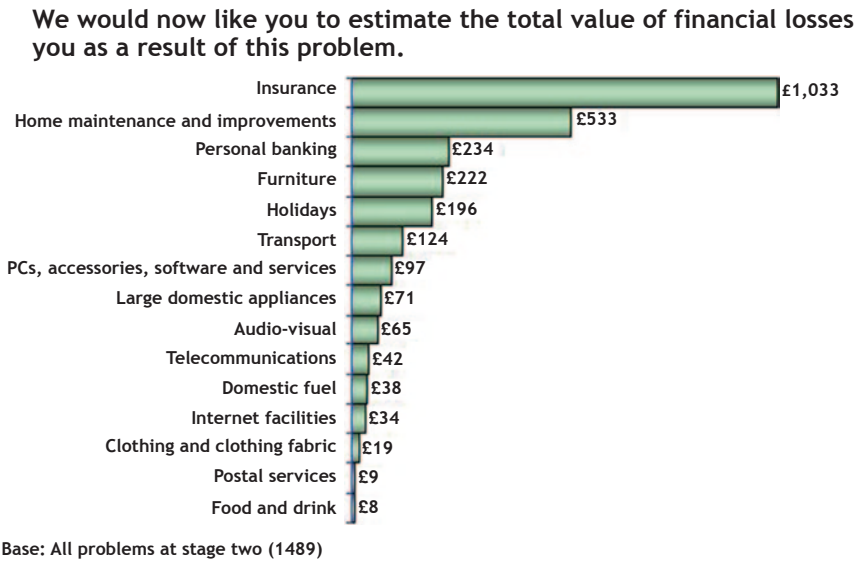

Fig. 39.2 Highest and lowest average consumer detriment by type of goods or service category

course, give rise to variation in the inherent complexity between different types of claim, and their value. A 2008 UK survey[8] shows these variations (Fig. 39.2). The highest average financial detriment per problem occurred in insurance problems, followed by home maintenance and improvements and personal banking. The inherently low level of average detriment can also be seen, with all categories apart from two being under £ 235, and several under £ 100.

The 2012 Oxford study of CDR entities (Hodges et al. 2012, 381) found the following examples of typical claims data for 2010:

- In France, the FFSA médiateur handled many cases valued at around € 100 and some as low as € 5. The average award of the national energy médiateur was € 373, the average amount in dispute in the cases of the médiateur of EDF was € 1,120 (with 23 % of cases over € 2,000).
- In Spain, the average value of an award in the consumer arbitration system was € 366.
- The average amount claimed in cases before the UK's Ombudsman Service: Communications was £ 587 and the average award was £ 198.
- In Germany, 86 % of claims made to the Insurance Ombudsman involved under € 5,000, and over 90 % were under € 10,000. A normal claim made to the transport ombudsman (Söp) was between € 10 and € 200.
- In the Netherlands, the average claim value for geschillencommissie cases varied between sectors, from € 206 for taxis and an average of € 5,980 for housing guarantees. In 2009, 9 % of the geschillencommissie claims were less than € 250, there was no claim involving a value of more than € 10,000, and the largest segment of claims (24 %) were for € 1,001–2,000.

[8] OFT, *Consumer detriment*.

These data suggest that consumer claims have intrinsically low value, and can involve simple issues and facts. If the rule of law is to be upheld then dispute resolution processes have to be able to attract and deal with them. That point leads to considerations of cost and cost-proportionality.

39.2 Consumers' Attitudes to Cost-Proportionality

Economists refer to a sum as constituting the break-even point above which the cost of taking action to enforce a right will exceed the risks, and below which the person whose right has been infringed will act with rational apathy in not taking action. The calculation is more complicated than that statement may seem, since the decision may be affected by issues that are difficult to quantify and compare, such as the accessibility or user-friendliness of a dispute resolution procedure.

The Commission's 2004 survey found that only 18% of EU citizens were prepared to go to court for amounts higher than € 500 and another 18% for amounts higher than € 1,000.[9] Only 29% of European citizens would be prepared to bring a claim of less than € 500 to court.[10] Studies conducted for the European Commission in 1995 and 1998 found that legal costs in all Member States exceeded the value of claims for all amounts of claim below 2,000 ECU[11] and that 'in most member states a dispute value of 50,000 ECU might be a reasonable value to pursue a cross-border dispute.'[12] On the basis of these data, the 2007 Leuven Report concluded that small claims procedures would generally only be used by European consumers if the amount involved exceeds around € 200.[13]

The Commission's 2011 survey found that the level of financial loss that would have caused people to go to court was given by the majority (53%) as between € 101 and € 2,500.[14] Only 5% said they would go to court for a loss of under € 20 and 3% would only go to court over a financial loss in excess of € 5,000. A relatively large proportion of consumers either refused or felt unable to answer this question (17%) and 8% said they would never take the business to court, no matter the sum involved.

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[9] European Commission, *Special Eurobarometer, European Union citizens and access to justice* (Oct 2004), 28.

[10] ibid.

[11] B Feldtmann, H von Freyhold and EL Vial, *The Costs of Legal Obstacles to the Disadvantage of Consumers in the Single Market, a Report for the European Commission* (1998), available at http://ec.europa.eu/dgs/health_consumer/library/pub/pub03.pdf, 277 f, referring to H von Freyhold, V Gessner, EL Vial and H Wagner, *Costs of Judicial Barriers for Consumers in the Single Market, A report for the European Commission* (1995), available at http://aei.pitt.edu/37274/1/A3244.pdf.

[12] Von Freyhold et al. *Costs of Judicial Barriers*, 276.

[13] J Stuyck, E Terryn, V Colaert, T Van Dyck, N Peretz, N Hoekx and T Tereszkiewicz, *Study on Alternative Means of Consumer Redress other than Redress through Ordinary Judicial Proceedings* (Catholic University of Leuven, 2007) 41, available at http://www.consum.cat/documentacio/9028.pdf.

[14] European Commission, *Special Eurobarometer 342*.

National variations exist on consumers' willingness to take action. The 2011 EU survey found that around a fifth of those in Greece, Estonia, Bulgaria and Austria maintain that they would never take a business to court, no matter how high their financial loss.[15] At least a third of consumers in five countries (Latvia, Lithuania, Poland, Slovakia and Spain) had quite low thresholds, claiming that they would take a business to court for sums lower than € 200. By contrast, relatively few people in Cyprus (7%), Malta (9%), Greece (11%) or Finland (12%) would consider going to court for such losses. The highest thresholds, where larger numbers of respondents would only go to court if their losses were above € 1,000, € 2,500 or even € 5,000, occurred in Cyprus (46%), Finland (40%), Denmark (38%), and Sweden (37%).

Socio-demographic analysis revealed that the highest percentages of those who would never go to Court were: the oldest respondents aged 55+ (12%), the lesser educated who left school aged fifteen or younger (13%), people who live alone (12%), house persons (11%), retired people (12%), widowed respondents (17%), and those who never use a computer (15%).[16] The question arises how such people, who have fallen into a 'justice void', could be enticed to bring forward their problems. Even filling in a form may be too off-putting for many.

The policy conclusion is that dispute resolution systems for C2B claims cannot involve a level of cost, or risk of cost liability, that is more than minimal. The economic 'rational apathy' threshold is very low for consumer disputes, before taking account of factors such as accessibility, the amount of effort and time needed. The lower the cost threshold and risk of adverse costs, the more consumer claims will be raised (and therefore identified) and resolved.

39.3 Evidence of Consumers' Behaviour in Claiming or Ignoring

The EU 2011 consumer survey found that more than one in five (21%) of respondents from 56,471 interviews 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.[17] The 'legitimate cause to complain' threshold meant that the nature of the problem was more than legally trivial and gave rise to a rational concern that rights had been infringed.

The 2011 survey found that more than three-quarters took some form of action in response (77%) while 22% took no action. Those who took action were most likely to have made a complaint to the retailer or provider (65%), with far fewer complaining to a public authority (16%), the manufacturer (13%), utilizing an ADR body (5%) or court (2%) (see Fig. 39.3). The most frequently cited reason

[15] ibid, QA38a, 217.

[16] ibid, 217.

[17] ibid.

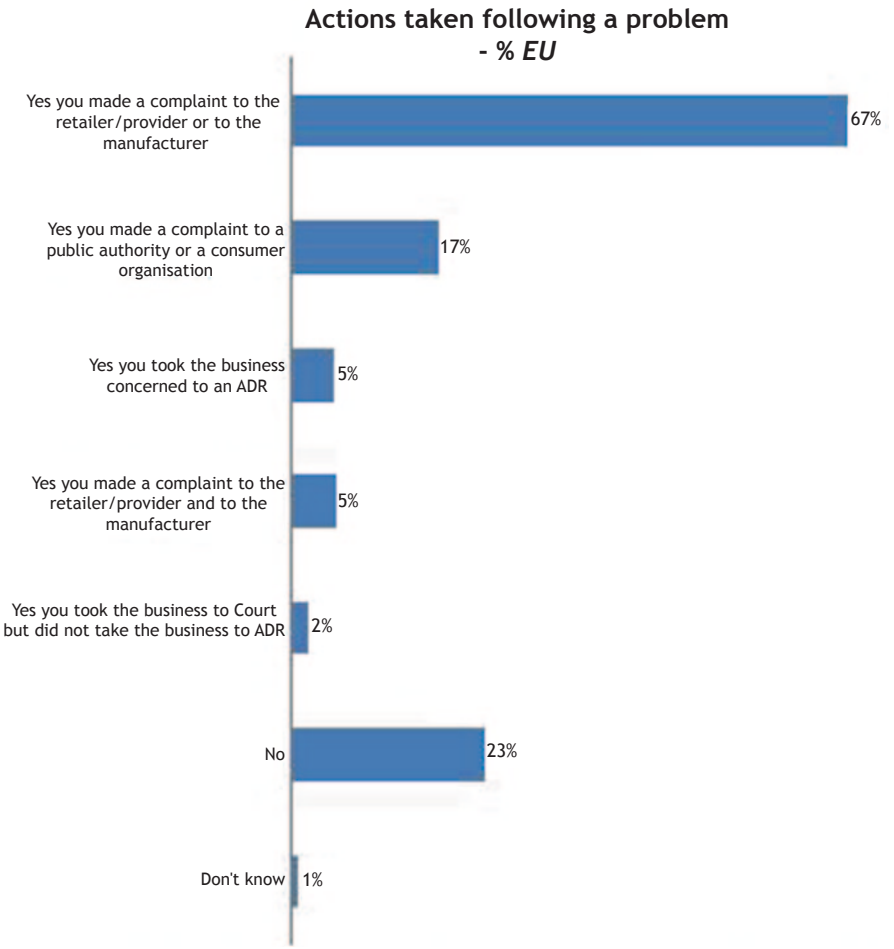

Fig. 39.3 Actions taken following a problem. (ibid, Table 5.4.4. Base: Respondents who experienced a problem (n = 10945))

for not making a complaint was that the individual had already received a satisfactory response from the retailer/provider (44%). (Earlier research found that 46% of consumers who complained to a trader and were not satisfied with the way their complaint was dealt with took no further action.[18]) The major reasons in 2011 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%), it would have been too expensive (13%)

[18] European Commission, *Flash Eurobarometer 299 on consumers' attitudes towards cross-border sales and consumer protection*, http://ec.europa.eu/consumers/strategy/docs/consumer_eurobarometer_2011_en.pdf, 21.

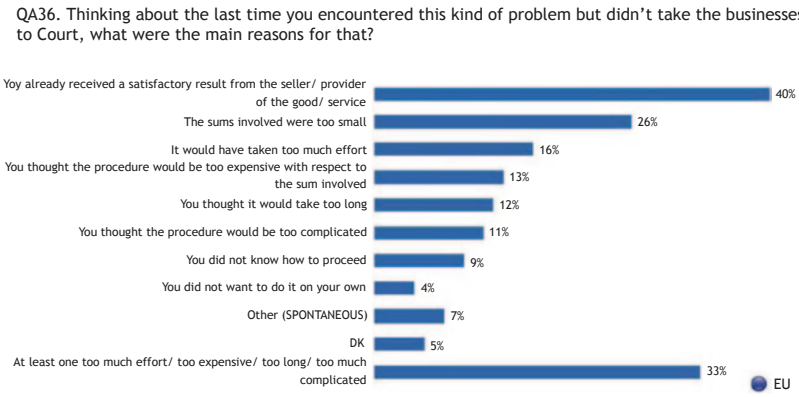

Fig. 39.4 Reasons for not pursuing a court claim. (ibid, QA36, p. 204)

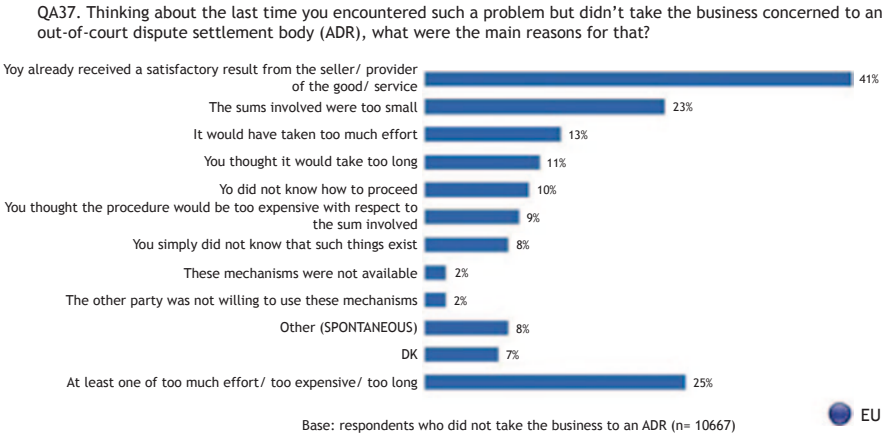

Fig. 39.5 Reasons for not pursuing a claim with an ADR body. (ibid, QA37, p. 210)

or too long (12%) (Fig. 39.4). In total, 78% of European consumers did not take their dispute to court because they thought it would be too expensive, lengthy and complicated.[19] This clearly does not indicate that court processes are attractive and responsive to consumers' needs.

In comparison, the reasons for not taking a complaint to an ADR body were similar to, but had lower numbers than, courts, apart from the fact that 8% said they were unaware of an ADR body (Fig. 39.5). Importantly, 41% said they had already received a good result from the trader: this is something to be celebrated

[19] European Commission, *Special Eurobarometer 342*, 204.

but expanded. However, another way of looking at the data is that 71% were not attracted to CDR for a series of different reasons, and the CDR community should aim for that figure to zero.

Looking at CDR from the business perspective, the Commission's 2009 business report found that on average only 8% of retailers in the EU had used ADR mechanisms to settle disputes with customers in the past two years.[20] The figure increased to 9% by 2011.[21] In some countries, such as the Nordics and the Netherlands, it is close to 100%, so this is a problem that arises as a potential challenge on a national basis in some Member States. However, satisfaction with CDR is high amongst those who have used it. Over three-quarters (76%) of retailers in the 2009 survey who had used ADR mechanisms in the previous two years reported that the outcome of their most recent such case had been successful. Use of ADR and ODR has been increasing. EU figures were 410,000 in 2006 and 530,000 in 2008.[22] Equally, disputes related to cross-border transactions have increased. The volume of cross-border complaints received by the ECC network reached 35,000 in 2009, an increase of 55% compared with 2005. By 2012 it had reached 72,067. The share of complaints on e-commerce transactions was greater than 55% in 2009 and 2010 and had doubled since 2006.[23] In 2012, the 56 members of FIN-NET reported 1854 cross-border cases, comprising 992 in the banking sector, 518 in the insurance sector, 315 in the investment sector and 29 which were not attributed to any particular sector.[24]

39.4 The Economic Rationale for Taking Consumer Claims Seriously

How seriously should we take C2B claims? How important is it that we should provide a mechanism that is effective in enabling consumers to raise their concerns and disputes about business practices and to obtain actual redress? As noted above, more than one in five (21%) of respondents across the EU had encountered

[20] European Commission, *Flash Eurobarometer 278. Business attitudes towards enforcement and redress in the internal market. Analytical report*, http://ec.europa.eu/consumers/strategy/docs/Fl278_Analytical_Report_final_en.pdf.

[21] European Commission, *Flash Eurobarometer 300 on business attitudes towards cross-border trade and consumer protection*, http://ec.europa.eu/consumers/strategy/docs/retailers_eurobarometer_2011_en.pdf, 76

[22] Civic Consulting, *Assessment of the compliance costs, including administrative costs/burdens on businesses linked to use of alternative dispute resolution (ADR)* (2011) 8.

[23] ECC, *2010 Annual Report*, 12, http://ec.europa.eu/consumers/ecc/docs/2010_annual_report_ecc_en.pdf

[24] FIN-NET, *FIN-NET activity report 2011*, http://ec.europa.eu/internal_market/fin-net/docs/activity/2011_en.pdf.

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.[25]

Even if individual losses may be small and relatively insignificant for each individual who suffers them, the aggregated total illicit profit for traders may add up to a significant sums, the retention of which is not only offensive to maintenance of the rule of law but also a drag on the legal redeployment of the money on other legitimate trading. The loss to European consumers because of problems with purchased goods or services was estimated by the Commission at 0.4% of Europe's GDP.[26] The detriment related to cross-border shopping was estimated at between € 500 million and € 1 billion.[27]

The importance of maintaining consumer satisfaction and confidence lies at the heart of the EU's strategy for economic growth in the single market. The 2010 Monti report on the new strategy for the internal market[28] emphasised the need to place consumers and consumer welfare at the centre of the next stage of the Single Market, notably through enhanced means of redress. The 2011 Single Market Act identified establishing an effective pan-EU CDR function as one of the twelve levers to boost growth and strengthen confidence.[29] Its purpose is 'to establish simple, fast and affordable out-of-court settlement procedures for consumers and protect relations between businesses and their customers. This action will also include an electronic commerce dimension'. Providing an EU-wide online redress tool for e-commerce is stated in the flagship initiative 'Digital Agenda for Europe'[30] to be essential so as to build up consumers' and businesses' confidence in the digital market.

The 2011 Impact Assessment estimated potential savings for European consumers at around € 20 billion, corresponding to 0.17% of EU GDP, if they can refer their dispute to a well functioning and transparent ADR scheme.[31] Estimated losses due to the lack of efficient ADR dealing with disputes linked to cross-border e-commerce were estimated to amount to around € 2.5 billion, corresponding to 0.02% of EU GDP, and to be likely to increase due to further development of the digital retail internal market and more competitive markets in the products and services sectors.[32]

Savings for businesses through use of CDR instead of going to court were conservatively calculated as ranging from € 1.7 billion to € 3 billion.[33] Time saved

[25] European Commission, *Special Eurobarometer 342*.

[26] Commission Staff Working Paper.*Impact Assessment.Accompanying the document:Proposal for a Directive of the European Parliament and of the Council on Alternative Dispute Resolution for consumer disputes (Directive on consumer ADR) and Proposal for a Regulation of the European Parliament and of the Council on Online Dispute Resolution for consumer disputes (Regulation on consumer ODR)*, SEC(2011) 1408 ('CDR Impact Assessment').

[27] ibid.

[28] 'A new Strategy for the Single Market—At the service of Europe's economy and society', Report to the President of the European Commission (9/5/2010).

[29] Commission Communication 'Single Market Act', COM(2011) 206, 9.

[30] Europe 2020 flagship initiative: A Digital Agenda for Europe, COM(2010) 245, 13.

[31] CDR Impact Assessment, Annex II.

[32] See Annex II for the calculation method.

[33] CDR Impact Assessment, Annex XII.

through using CDR was estimated at up to 258 days.[34] Other calculations[35] indicated that handling a domestic dispute in court could cost on average € 25,337,[36] in which case the savings for businesses would then vary from a minimum of € 3 billion to a maximum of € 13 billion. In contrast, the costs for businesses for handling a domestic dispute via ADR amounted to € 472.[37]

Dissatisfaction with traders is reflected in levels of consumer trust. The 2013 Consumer Scoreboard found trust in online purchases showed a high degree of variation across the EU.[38] When averaging the percentages of consumers who felt confident buying online domestically and from another EU country, the highest values were seen in Ireland (71%), Denmark (67%), the United Kingdom (62%) and Luxembourg (61%), compared to 29% in Croatia, 34% in Estonia and 35% in Hungary and Italy. Outside the EU, Norway also registered a high level of trust in online purchases (66%).

In 2012, 60% of complaints registered by ECCs were related to online purchases. This proportion has been growing over the years in line with the general development of e-commerce. As noted above, the major problems with goods purchased via the Internet are non-delivery and late delivery. Delays affect almost a third of respondents (29.7%) who have made domestic online purchases and 19.3% of those purchasing from other EU countries. Non-delivery is reported for 8.2% of domestic and 5.8% of EU cross-border online purchases. Higher incidence of problems in domestic transactions may be at least partly due to the fact that consumers on average conduct more online transactions with domestic rather than with foreign sellers. This clearly indicates that swift ODR procedures are called for.

39.5 Pathways for Resolution of C2B Disputes

The traditional means by which modern states enable breach of a person's rights to be rectified is through providing a system for individual citizens to institute actions in the state's courts. This gives rise to rhetoric such as 'enabling consumers to vindicate their rights', 'take the law into their own hands, enhancing autonomy, individual freedom and choice' and 'expanding access to justice'. However, a number of alternative techniques are available to personal litigation. Viewed mechanistically,

[34] See Annex XII for the calculation method.

[35] *The Cost of Non-ADR—Surveying and showing the actual costs of Intra-community Commercial Litigation*. Funded by the European Union (specific programme Civil Justice 2007-2013), implemented by a consortium led by ADR Center, in collaboration with the European Company Lawyers Association (ECLA) and the European association of Craft, Small and Medium sized Enterprises (UEAPME).

[36] Based on a domestic dispute in the EU for a value of € 200,000. However, in Annex XII a more conservative approach regarding the cost and time-savings is considered for the calculations (i.e. € 7,000).

[37] Civic Consulting, *Assessment of the compliance costs*. However, in Annex XII of the CDR Impact Assessment the more extreme figure of € 854 was used for the calculations, since this was the cost for dealing with ADR for the first time.

[38] Consumer Scoreboard 2013, 14.

the optional pathways for enforcement of legal rights can be broadly grouped into three pillars: personal (civil) litigation, public (criminal or regulatory) enforcement action, and the relatively recent approach of alternative dispute resolution (ADR).[39]

The first pillar comprises not just personal litigation but two developments that have attempted to respond to problems posed by the existence of barriers to bringing small claims, namely 'small claims procedures' that aim to reduce costs and formality, and collectivisation of multiple similar claims into a single aggregated procedure. The latter aggregated approach has traditionally been known under its American name of a 'class action' but European debate on such mechanisms has adopted the name of 'collective action'.

The second, public pillar comprises two broad techniques. Firstly, citizens may 'piggy-back' on a criminal investigation (saving costs on investigation and avoiding any adverse costs risk) and have their civil claims dealt with as a second stage after the conviction of any defendants, or make use of the evidence produced publicly in separate civil proceedings. This *partie civile* method is available in many European states, and was originally designed to benefit the victims of violent or fraudulent crime. It is only in those jurisdictions where the criminal court is required to adjudicate on the civil claims, as opposed to having discretion to adjudicate them, that the procedure has been of particular use for consumers. The mandatory approach applies in Belgium, where a series of large mass harm cases have been processed through the two stages of criminal then civil liability.[40]

Secondly, public regulatory authorities in some states have been given powers to order or oversee mass redress. The leading examples are Denmark and the United Kingdom. In Denmark, the national enforcement authority for consumer protection (the Consumer Ombudsman) has the power to initiate a class action but sole power to request the court to order that the class action be operated on an opt-out basis. (In contrast, any class member may initiate a class action but only on an opt-in basis.) In the United Kingdom, almost every public regulatory authority that deals with consumer or environmental law enforcement now has a duty in taking enforcement action to ensure that redress is made by an entity that has broken the law.[41] Some authorities have been given express powers to impose redress schemes, such as those responsible for financial services[42] or energy.[43]

These regulatory redress powers have proven to be highly effective in delivering swift mass redress. Their effectiveness lies not just in their intrinsic nature as requiring (maybe through a court order) payment of mass compensation but the fact that

[39] N Creutzfeldt, 'The Origins and Evolution of Consumer Dispute Resolution Systems in Europe' in C Hodges and A Stadler (eds), *Resolving Mass Disputes: ADR and Settlement of Mass Claims* (Cheltenham, Edward Elgar, 2013).

[40] S Voet, 'Public Enforcement & A(O)DR as Mechanisms for Resolving Mass Problems: A Belgian Perspective' in Hodges and Stadler (eds), *Resolving Mass Disputes*.

[41] Pursuant to a requirement on regulators under the Legislative and Regulatory Reform Act 2007, s 22 (2) and (3) to comply with the Regulators' Compliance Code, made under s 22 of that Act, which includes the aim of eliminating any financial gain or benefit from non-compliance.

[42] Financial Services and Markets Act 2000, as amended, ss 383 and 404.

[43] Energy Bill 2013.

they can be deployed as one tool amongst others that comprise the comprehensive toolbox of a public regulatory authority's enforcement armoury. It is the collective use of all relevant enforcement tools at the same time that achieves efficient and effective enforcement. Thus, traders are incentivised to negotiate agreements that resolve all (criminal, regulatory and civil) aspects of a problem at the same time. The Danish Consumer Ombudsman invokes his mass redress power regularly, but has so far not had to initiate a collective court action, since he has resolved every issue through agreement. He finds that companies prefer to seek to resolve redress issues as a priority, since that may give them the opportunity to seek lower public sanctions or to seek reputational benefits by announcing that they have voluntarily agreed to repay everyone. The similar technique has a shorter history in the United Kingdom but initial evidence is very similar to that in Denmark. The result is that payment of redress can be achieved in weeks rather than in the years that class actions would often take. The European litigation systems intentionally exclude the massive financial incentives that exist in the United States of America where they promote settlement of virtually every class or multi-district action that passes the certification stage.

This chapter is primarily focused on compensatory redress but it is useful to note that injunctive enforcement of general consumer protection law on unfair commercial practices can be by public or private sector bodies (harmonized by the Injunctions Directive).[44] The enforcement architectures of Member States differ in this respect. Thus, for example, the model in the United Kingdom places primary emphasis on enforcement of unfair contract terms and public authorities (the Office of Fair Trading, reformed from 2014 as the Competition and Markets Authority, and at local level Trading Standards Departments of local authorities), whereas the model in Germany and Austria is based on self-regulatory activities by trade bodies and consumer associations (respectively Wettbewerbszentrale and Verbraucherzentralen). It is only where private sector associations have significant funding that they are prepared to undertake extensive litigation and the associated private regulatory role. Thus, the German trade association has extensive business funding, and the German consumer associations are largely funded by public funds. The result is that such bodies are not only acting in the public interest when they carry out these regulatory functions but the consumer associations' public funding means that they function largely as a privatised public authority, even if in carrying out some other functions it is more of a private sector consumer policy lobbyist.

A further example of privatised public regulation exists in many Member States in relation to regulation of misleading advertising, which is widely carried out by private entities largely funded by businesses.[45] Such bodies often demonstrate a two-tier regulatory structure. Most or all of the self-regulatory activities are undertaken by the private entity, but it functions particularly well if there exists a public

[44] Dir 2009/22/EC on injunctions for the protection of consumers' interests.

[45] F Weber, *The Law and Economics of Enforcing European Consumer Law. A Comparative Analysis of Package Travel and Misleading Advertising* (Farnham, Ashgate, 2014).

authority that has wide criminal enforcement powers as a superior back-stop and as a watchdog over the activities of the private entity.

The Commission's 2008 Report on the Injunctions Directive[46] 'shows that the mechanism created by the Directive which enables qualified entities of one Member State to act in another Member State has clearly not been as successful as it was hoped.'[47] But it confirmed that whilst injunctive actions are rarely used for cross-border infringements, several Member States and consumer associations stated that these actions are used fairly successfully by consumer associations for national infringements, such as misleading advertising or unfair contract terms.[48] Instead, the more promising enforcement mechanism for cross-border cases is that which involves the network of public regulatory authorities (the first pillar), under the 2004 Consumer Protection Cooperation Regulation.[49] 'In certain sectors, such as financial services, transport, telecommunications and energy, regulators play an important role in market surveillance.[50] It should be noted though that these mechanisms often do not foresee compensation for harm suffered by consumers.'[51] However, as noted above in discussing the first pillar, redress powers are used effectively by public enforcement authorities in Denmark and the United Kingdom, and it would be advisable for other Member States to adopt this technique.

Reverting to the first, litigation-based, pillar, the evidence suggests that the two reforms made to try to address the access to justice barrier preventing the bringing of small claims have failed. First, small claims mechanisms operate in most Member States, but on different bases, such as regarding whether a fee is charged and whether there is a loser pays rule. The extent to which consumers use such national small claims procedures varies, influenced by factors such as variations in costs (lawyers and courts) and duration.[52] The European Small Claims Procedure (ESCP) applies to cross-border claims with an upper limit of € 2,000.[53]

The second attempt to address the access to justice barrier for small claims rests on aggregating them so as to achieve economies of scale by bringing a single representative or collective procedure. As noted above, where the collective procedure seeks an injunction remedy, it appears that a single action brought in the general

[46] Report from the Commission concerning the application of Directive 98/27/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interest, COM(2008) 756 final.

[47] CDR Impact Assessment, 14.

[48] eg Bulgaria, Czech Republic, Germany, France, Italy, Latvia, Austria, Sweden, Slovakia and the UK.

[49] Reg (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, [2004] OJ L 364/1.

[50] For example, the recently adopted EU legislation in the energy sector reinforces regulators' powers and duties in monitoring the development of competition and ensuring enhanced customer protection and information. The regulators will have new powers, such as the power to issue binding decisions, carry out investigations and impose effective, proportionate and dissuasive penalties. See Dir 2009/72/EC and 2009/73/EC, [2009] OJ L 211/55 and 94.

[51] CDR Impact Assessment, 14.

[52] Stuyck et al. *Study on Alternative Means of Consumer Redress*, 214-222.

[53] Reg (EC) No 861/2007 establishing a European Small Claims Procedure, Art 2(1).

public interest is a successful technique when operated nationally but not on a cross-border basis. However, where the collective action seeks damages, the evidence from the Member States that have such procedures is not impressive.

The most recent pillar for resolution of consumer disputes is that based on CDR. ADR techniques have been introduced to operate within or alongside the litigation pillar, such as with the requirement that mediation options shall be available in civil procedure systems.[54] In contrast, CDR systems have links with litigation, by being alternative means of resolving both individual and mass disputes, but also have string links with public regulatory systems, by providing the means of collecting extensive data on the trading activities of trading and traders, which is then passed back to traders and passed on to the public and to regulatory authorities for them to respond to the behaviour that is revealed. Hence, the dual nature of CDR systems justifies them being classified as having their own distinctive pillar, between private and public enforcement. CDR schemes deploy familiar ADR techniques of triage, mediation/conciliation, and a decision, but operate within their own unique architecture of CDR bodies that are separate from courts and (in most cases) regulatory authorities.

39.6 A Preliminary Evaluation of the Pillars: Cost, Duration and Accessibility

Having mapped the pillars and general techniques, we now turn to a preliminary evaluation of evidence on which of them best satisfies the criteria that are essential for responding to and solving consumer issues, namely low and proportionate cost, overcoming the risk of liability for adverse and especially uncertain costs, taking too long to resolve simple problems, and not being sufficiently user-friendly, accessible, simple and attractive enough to entice consumers to use them.[55] It is stressed that the evidence summarised here is not as complete as would be wished, but it is enough to form clear preliminary hypotheses.

39.6.1 Costs and Levels of Usage

It is well established that standard court procedures involve some cost, and that some national systems can be expensive.[56] Lawyers' fees vary per Member State but in most Member States the hourly amount paid to a lawyer is between € 100 and

[54] Dir 2008/52/EC on mediation in civil and commercial matters.

[55] It is interesting that many analyses of the merits of private enforcement omit the basic criteria of cost, duration and outcomes: see a recent analysis by SB Burbank, S Farhang and HM Kritzer, 'Private Enforcement' (2013) 17 *Lewis & Clark Law Review* 637.

[56] C Hodges, S Vogenauer and M Tulibacka, *The Costs and Funding of Civil Litigation. A Comparative Perspective* (Oxford, Hart Publishing, 2010).

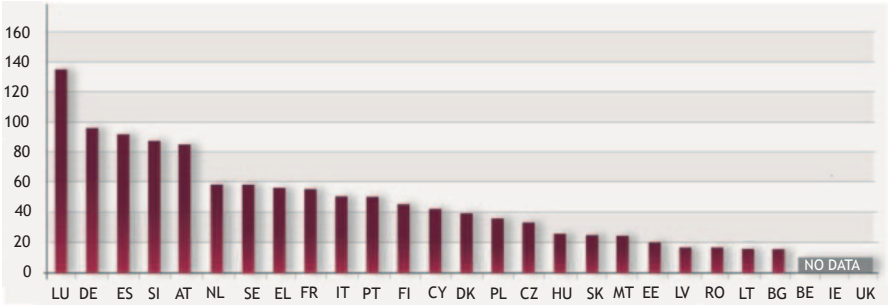

Fig. 39.6 Budget for courts (in EUR per inhabitant)

€ 300. In a few Member States it can even exceed € 700.[57] Courts are also a cost to governments, as shown in Fig. 39.6[58].

The 2010 CEPEJ data found a large variety between the states or entities with respect to the financial amount of disputes handled in national small claims courts, between extremes of € 72.41 in Lithuania and € 15,985 in Norway.[59]

The ESCP was 'intended to simplify and speed up litigation concerning claims in cross-border cases, and to reduce costs'[60] but appears to have been a significant failure.[61] It prescribes standard forms and time limits for service of documents and

[57] European Commission for the Efficiency of Justice (CEPEJ), *European judicial systems Edition 2010 (data 2008): Efficiency and quality of justice* (2010), available at http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2010/JAReport2010_GB.pdf, 159.

[58] EU Justice Scoreboard : A tool to promote effective justice and growth, COM(2013) 160 final, 13, Fig. 20, citing CEPEJ 2012. The annual approved (not the actually executed) public budget allocated to functioning of all courts (civil, commercial and criminal courts, without the public prosecution services and without legal aid), whatever the source of this budget. For the EU Member States whose total annual approved budget allocated to all courts cannot be separated from the figures for the public prosecution department (BE, DE, ES, EL, FR, LU, AT), the chart reflects the total figure (for BE, ES and AT the figure also includes the legal aid). Where appropriate, the annual approved budget allocated to the functioning of all courts includes the budget both at national level and at the level of regional or federal entities.

[59] CEPEJ, *European judicial systems Edition 2012*, http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2012/Rapport_en.pdf, ch 5.

[60] Reg (EC) No 861/2007 establishing a European Small Claims Procedure, Art 1.

[61] See C Crifò, 'Europeanisation, Harmonisation and Unspoken Premises: The Case of Service Rules in the Regulation on a European Small Claims Procedure (Reg. No. 861/2007)' (2011) 30 *Civil Justice Quarterly* 283: 'an ungainly juggernaut', 'the legal landscape appears, far from simplified, further complicated'; XE Kramer, 'Small Claim, Simple Recovery?' (2011) 1 *ERA Forum* 119; XE Kramer and EA Ontanu, 'The Functioning of the European Small Claims Procedure in the Netherlands: Normative and Empirical Reflections' (2013) 3 *Nederlands Internationaal Privaatrecht* 319: 'the number of cases handled in the ESCP is limited. (…) Apparently consumers still find it difficult to find their way to this procedure (…) the duration of the procedure is on average three to five months'.

response by parties and the court, which may end up making the process inevitably longer than a CDR procedure. Importantly, a loser pays rule applies.[62]

A survey by the ECC-Net found a series of inadequacies in the functioning of the ESCP.[63] Judges were not aware of the ESCP in 47 % of courts surveyed. The relevant forms were not made available on the premises or the websites of 41 % of the courts visited. Consumers found it difficult to fill in the forms on their own, while in 41 % of cases, assistance in filling in the forms and starting the procedure was not available to consumers. In 76 % of cases reported, the ESCP was free of charge for consumers but not in 24 %. Court fees ranged from € 15 to about € 200. Although a lawyer is not required, it is not known how many people used lawyers, and at what cost. The ECCs found that consumers faced practical problems that called for advice. Language was a significant problem (cited by 35 % of survey respondents), no assistance is foreseen and certified translators are usually too expensive.[64] Difficulties were found in determining the competent court, as well as with the execution of decisions. The ECCs cited problems of lack of awareness, information or support to consumers (courts not making forms available) and lack of effective enforcement of judgments. ECCs indicated that their caseload used the ESCP in less than 1 % of all handled cases.

Inherent cost and duration problems with a cross-border court procedure lie in the need to go through court proceedings in two jurisdictions. It was said in 1998 that use of the cross-border exequatur procedure would only rationally produce potentially positive economic effects for claims valued over 2,000 ECU.[65] Despite the abolition of the exequatur from January 2015, the system will still require a suit in the consumer's state, followed by obtaining a certificate there and then taking enforcement action in the state of the trader.[66]

The theory that collective actions for damages enhance access to justice by enabling economies of scale has basically not occurred in Europe in relation to mass consumer claims. This is because it is necessary to incentivise intermediaries who are necessary to organize and especially to fund a large action. The paradigm class action or multi-district action in the United States (mirrored to some extent in Australia and Canada) consciously provides significant incentives to intermediaries (attorneys and latterly also third party litigation funders) through mechanisms such as a no loser pays rule, large fees paid by defendants (both of which factors largely avoid the need for claimants to provide funding or security against loss), an opt-out

[62] Reg 861/2007, Arts 16 and 10.

[63] ECC-Net, *European Small Claims Procedure Report* (2012).

[64] EA Ontanu and E Pannebakker, 'Tackling Language Obstacles in Cross-Border Litigation: The European Order for Payment and the European Small Claims Procedure Approach' (2012) 5(3) *Erasmus Law Review* 169.

[65] N Reich, 'Jurisdiction and Applicable Law in Cross-Border Consumer Complaints.Socio-Legal Remarks on an Ongoing Dilemma Concerning Effective Legal Protection for Consumer-Citizens in the European Union' (1998) 21 *Journal of Consumer Policy* 315, 318; summarising V Gessner, 'Pursuing Cross-Border Claims in Europe' (1998) 21 *Journal of Consumer Policy* 334.

[66] Reg (EC) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

rule, the possibility of punitive damages or triple damages for antitrust actions, as well as collectivisation of individual claims. Theoretical justification for these features can be claimed through a national policy of emphasising private enforcement not only of private rights but also of public norms,[67] through encouraging activity by 'private attorneys general'[68] that has a strong element of regulatory in addition to compensation goals, backed by a theory that large financial penalties will deter corporate wrongdoing[69] and a belief that public agencies are captured and unreliable.[70]

In contrast, European legal theory and architecture adopts a clearer division between the nature and means of enforcement of public and private law, and relies far more on public enforcement of public and administrative rules, even if some of the actors operate within self-regulatory structures. There is a general preference for a loser pays rule, and mistrust that funding by intermediaries and large or contingent fees may produce conflicts of interest and abuse.[71] The thesis of this chapter is that empirical evidence suggests that private enforcement mechanisms of small claims, whether individually or collectively, simply does not work in Europe. The evidence from national class actions in those eighteen or so jurisdictions that have had them is relatively recent but indicates a general pattern of low usage and, importantly, cases that are complex, take years and have high transactional costs.[72] The high costs and

[67] H Kalven Jr and M Rosenfield, 'The Contemporary Function of the Class Suit' (1941) 8 *University of Chicago Law Review* 684; S Issacharoff and I Samuel, 'The Institutional Dimension of Consumer Protection' in F Cafaggi and H-W Micklitz (eds), *New Frontiers of Consumer Protection. The Interplay between Private and Public Enforcement* (Antwerp, Intersentia, 2009); C Hodges, 'Objectives, Mechanisms and Policy Choices in Collective Enforcement and Redress' in J Steele and W van Boom (eds), *Mass Justice* (Cheltenham, Edward Elgar, 2011).

[68] JC Coffee Jr, 'Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is not Working' (1983) 42 *Maryland Law Review* 215; B Garth, IH Nagel and SJ Plager, 'The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation' (1987–88) 61 *Southern California Law Review* 353; LM Grosberg, 'Class Actions and Client-Centered Decision-making' (1989) 40 *Syracuse Law Review* 709.

[69] G Becker, 'Crime and Punishment: An Economic Approach' (1968) 76 *Journal of Political Economy* 169; GJ Stigler, 'The Theory of Economic Regulation' (1971) 3 *Bell Journal of Economics and Management Science* 3; M Faure, A Ogus and N Philipsen, 'Curbing consumer financial losses: the economics of regulatory enforcement' (2009) 31 *Law & Policy* 161.

[70] R Baldwin and M Cave, *Understanding Regulation: Theory, Strategy, and Practice* (New York, Oxford University Press, 1999); SP Huntington, 'The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest' (1952) 61 *The Yale Law Journal* 467; Stigler, 'The Theory of Economic Regulation'; ME Levine and JL Forrence, 'Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis' (1990) 6 *Journal of Law, Economics, & Organization* 167; J-J Laffont and J Tirole, 'The Politics of Government Decision-Making: A Theory of Regulatory Capture' (1991) 106 *The Quarterly Journal of Economics* 1089; PJ May and S Winter, 'Regulatory Enforcement and Compliance: Examining Danish Agro-Environmental Policy' (1999) 18 *Journal of Political Analysis and Management* 625.

[71] Strong statements against the 'abusive' nature of US-style class actions were made by European leaders over several years, culminating in the European Parliament Resolution of 2/2/2012 'Towards a Coherent European Approach to Collective Redress' 2011/2089(INI)and Communication from the Commission 'Towards a European Horizontal Framework for Collective Redress' COM(2013) 401/2.

[72] C Hodges, 'Collective Redress: A Breakthrough or a *Damp Sqibb*?' (2014) *Journal of Consumer Policy* forthcoming.

loser pays rule mean that those who are required to fund in mass litigation have to undertake risk assessments before investing, and will choose cases with the best returns, low risk (such as cartel follow-on damages actions) and limited complexity. These factors make cases that involve multiple small amounts of damages inherently unattractive as investment propositions, since the potential profit compared with the administrative cost is unattractive, especially if liability is not completely clear. Capital is also likely to be committed for some years, and the prospect of an early and favourable settlement is unclear, unlike the position in the United States, where almost all class actions that pass certification stage will be settled.[73] So collective litigation for consumer damages turns out not to be the Holy Grail that it was thought to be but a cruel mirage. Accordingly, other mechanisms have to be found.

Turning towards ADR techniques, 48% of European consumers think it is easy to resolve disputes through arbitration, mediation or conciliation.[74] Consumers are more willing to resolve disputes through CDR rather than court (note the figures quoted above of 5% for CDR and 2% for courts). On the business side, 54% of businesses prefer to solve disputes through ADR rather than in court,[75] 82% who have already used ADR would use it again in the future,[76] and of those who used ADR 76% found it a satisfactory way to settle the dispute.[77]

The Commission's 2009 and 2011 CDR studies found that the vast majority of the CDR procedures are *free of charge* for the consumer, or of moderate costs (below € 50).[78] The 2012 Oxford study confirmed that CDR schemes are free to consumers in France, Spain and Sweden, and in almost all of the schemes in Germany and the United Kingdom (save for those post-conciliation arbitration stages of many private schemes, for which a charge is imposed). An exception applies in the Netherlands, where consumers pay a registration fee that varies depending on the sectoral Board, and generally ranges between € 25 and € 125.[79]

A distinction can be drawn in relation to cost between different types of ADR models. In general, ombudsmen systems are free to consumers. CDR systems that involve a mediation stage are usually free and those that involve arbitration can involve modest access costs. However, the costs are low and are intentionally kept attractive in comparison with the cost of court fees for small claims procedures.

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[73] Garth et al. 'The Institution of the Private Attorney General'.

[74] Eurobarometer 299, 30.

[75] CDR Impact Assessment, 21.

[76] Eurobarometer 300, 79. This evidence is further reinforced when looking at the satisfaction of businesses; of those who used ADR, 76 per cent found it a satisfactory way to settle the dispute European Business Test Panel, http://ec.europa.eu/yourvoice/ebtp/consultations/2010/adr/index_en.htm.

[77] European Business Test Panel, http://ec.europa.eu/yourvoice/ebtp/consultations/2010/adr/index_en.htm.

[78] Civic Consulting, *Study on the use of Alternative Dispute Resolution in the European Union. Final Report* (2009), 41; Civic Consulting, *Assessment of the compliance costs*. See also CDR Impact Assessment, 21.

[79] C Hodges, I Benöhr and N Creutzfeldt-Banda, *Consumer ADR in Europe* (Oxford, Hart Publishing, 2012) 381.

Nevertheless, if consumers choose to instruct a lawyer, even in relation to a small claims procedure, their cost will increase. Based on the finding that free CDR is the general rule, the 2013 Directive specifies that CDR services shall be either free or available at a nominal fee to consumers, and access does not require retaining a lawyer.[80] This should make CDR more attractive than courts. The word 'nominal' is significant: it does not connote full cost recovery by CDR entities. Some CDR bodies charge consumers a fee because in some types of case it can assist by encouraging some consumers to evaluate the basis and quantum of a claim in an objective manner. In short, it can help refocus annoyance at, for example, an unsatisfactory holiday into a level of compensation that is more realistic than an exaggerated sum.

Are operational costs of CDR schemes cheaper than lawyers and courts? Cost data is not fully available, but the Oxford study found that cost varies with the nature of the case type and whether a CDR scheme includes a triage-mediation stage or just a decision stage. In relation to differences arising from the nature of case types, a pension case may clearly involve more time and expertise than a simple non-delivery of goods case. Thus, the cost per case in 2010 for UK Pensions Ombudsman was roughly £ 3,000, and the inherent complexity was apparent from the longer average duration of his cases than some other schemes. In contrast, the cost for Ombudsman Services in 2012-13 was £ 66 per contact or, £ 411 per complaint resolved (thus including the cost of handling contacts), which covers a range of different complaint types for several sectors.[81] The cost per case in Sweden in 2010 was € 300 and the Netherlands perhaps € 900, but these are very general figures, averaged across many different types of cases. Comprehensive cost data is not available from Spain, but the average cost per case was over € 400 in 2010, whilst the average value of awards was only € 366.

The Dutch geschillencommissie system and the Nordic arbitration systems are notably cheap. In 2013, DGS has only 45 administrative staff, supporting 53 sectoral Boards. In 2010 its administrative cost was € 5.5 million. The Dutch system has historically used the arbitration model but it is to pilot the addition of a mediation stage in 2014 in relation to disputes involving kindergarten. It will probably use a panel of external mediators, paid on an hourly basis. An alternative would be to use a module fee, so parties have full predictability of cost, although different fees might have to be set for different types of case.

In examining the cost of CDR entities, account should be taken of the fact that CDR bodies perform functions additional to dispute resolution, by providing free advice to many consumers and provide the source of aggregate statistics on traders and trading problems that are highly valuable for markets and enforcement officials. The inquiry may be 'This has happened, is the trader in the right, or do I have grounds to complain?' The consumer could ask a lawyer this question, but there would often be a cost, or could ask an advice body, which might be free, but many such questions are directed to CDR bodies. Consumers may use the CDR body as a source of expert advice in consumer law and specialist sectoral rules, what is

[80] Directive on consumer ADR, Art 8(b) and (c).

[81] Ombudsman Services Limited, *Annual Report and Accounts 2012-2013* (2013), reporting gross turnover £8,088,517, 122,589 contacts and 19,639 complaints resolved.

acceptable market practice, and whether there might be cause for complaint, as well as a source of dispute resolution.

Every CDR body receives more inquiries than formal claims. One observation made in the Oxford study was that in countries where there is a strong and effective consumer advice function, the number of requests for post-purchase advice and complaints received by the national CDR body appears to be remarkably low. Thus, in 2010, the ARN in Sweden received on around 11,000 cases, although a relatively small number of sectoral CDR bodies also received an unidentified but seemingly modest number of cases.[82] The Swedish system is intentionally designed to provide effective pre- and post-purchase advice to consumers, and clearly does so. Design features that invest in advice systems do appear to produce more effective purchasing, and give rise to fewer complaints. This means providing good sources of independent pre-contract advice, and fully transparent information on products and services.[83] Both the advice system and the complaint system should operate within structures that are as simple as possible, so they can be easily understood by consumers, and hence maximise access.

39.6.2 Duration

The Council of Europe Project on European Justice (CEPEJ) has reported on data from national governments, recording that the average time in 2010 for resolution of litigious civil and commercial cases across 39 European jurisdictions (including EU Member States but also others) was 287 days.[84] The EU Justice Scoreboard 2013 drew on the CEPEJ data[85] to focuson Member State performance.[86] The figures showed a range from 55 days for Lithuania to 849 days for Malta, with the highly efficient German civil procedure system at 184 days. A significant number of Member States' court procedures took around 200 days to resolve civil and commercial cases (Fig. 39.7[87]), with 12 States above that figure up.

Of course these figures are averages and cover many types of claims, but the message of the length of court proceedings generally is clear. The Commission concluded that the figures

> show important disparities in the length of proceedings: at least one third of Member States have a length of proceedings at least two times higher than the majority of Member States.[88]

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[82] F Weber, C Hodges and N Creutzfeldt-Banda, 'Sweden' in Hodges, Benöhr and Creutzfeldt-Banda, *Consumer ADR in Europe*.

[83] Encouraged by, for example, Dir 2011/83/EU on consumer rights.

[84] CEPEJ 2012, n 57 above, Fig. 9.12, http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2012/Rapport_en.pdf.

[85] CEPEJ, Study on the functioning of judicial systems and the functioning of the economy in the EU Member States (2012), available at http://ec.europa.eu/justice/index_en.htm.

[86] EU Justice Scoreboard 2013.

[87] EU Justice Scoreboard 2013, Fig. 2, citing CEPEJ 2012.

[88] ibid, 7.

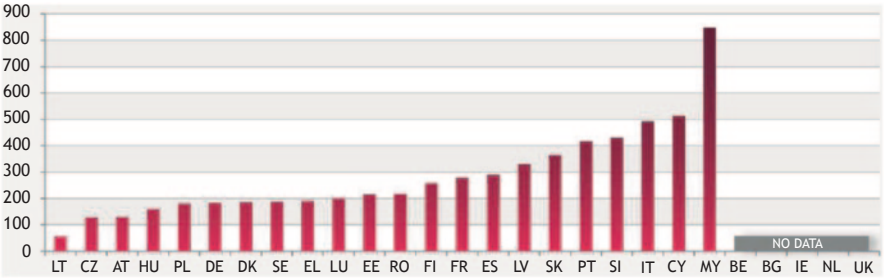

Fig. 39.7 Time needed to resolve litigious civil and commercial cases (in days)

> Certain Member States combine unfavourable factors: lengthy first instance proceedings together with low clearance rates and/or a large number of pending cases. Such situations merit special attention and a thorough analysis as they could be indicative of more systemic shortcomings for which remedial action should be taken.[89]
>
> The reduction of the excessive length of proceedings should be a priority in order to improve the business environment and attractiveness for investment.
>
> Alternative Dispute Resolution methods help to reduce the workload of courts.[90]

Almost all CDR bodies can achieve faster performance than courts. Some CDR services are capable of resolving issues very quickly. Most CDR cases are decided within 90 days.[91] The Directive adopted that benchmark and provides that the maximum time for CDR procedures shall be 90 calendar days, extendable for highly complex disputes.[92] Many CDR bodies achieve under that period. The Oxford study found the data set out in Table 39.2 for CDR bodies.[93] U.K. Ombudsman Services resolved 34% of complaints in 2012-13 (6,500) using early resolution and mutually acceptable settlement, by which it contacts both parties, preferably by phone, to discuss the complaint and its resolution and try to reach agreement. It cited the following case study:

> We received a call from a complainant at 2.50 pm and by 3.17 pm the same day the company and the complainant had agreed to a resolution. The customer had cancelled her contract but it had mistakenly rolled over—a simple shortfall in customer service. The complainant verbally accepted our account of the complaint and agreed to send across supporting evidence. When we spoke to the company it acknowledged the error it had made and agreed to the proposed resolution.[94]

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[89] ibid, 11.

[90] ibid, 17.

[91] Civic Consulting, *Assessment of the compliance costs*, 8. Litigious civil (and commercial) cases were defined to 'concern disputes between parties, for example disputes regarding contracts and the insolvency proceedings. By contrast, non-litigious civil (and commercial) disputes concern uncontested proceedings, for example, uncontested payment orders.'

[92] Dir on consumer ADR, Art 8(e).

[93] Hodges, Benöhr and Creutzfeldt-Banda, *Consumer ADR in Europe*, 381.

[94] Ombudsman Services Limited, *Annual Report and Accounts 2012-2013*, 13.

Table 39.2 Average duration per case in months by country and CDR scheme

France	Telecoms: 3	Insurance: 3–6	Banks: 6	Investment	GDF/ SUEZ: 2 National Energy mediator: 6	Travel: 2–4
Germany	Telecoms: 4	Insurance:4.1	Banks: no data			Travel: 3
Poland	Telecoms: no data	Consumer arbitration tribunals: 0.5–2	Banking: 1.1	Trade inspection consumer: no data	Energy: no data	
Spain	Telecoms: no data	Insurance / pensions: 4	Banking: 4–6	Investment: no data	Energy: 2	
UK	Telecoms: 6 or less	Pensions: 10.9	Banks/ Insurance: 2.2	FLA: 2	Energy: xx	Travel: 2–2.5

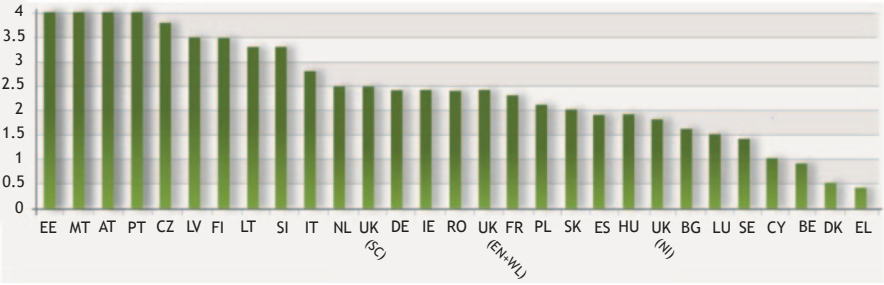

Fig. 39.8 Electronic communication between courts and parties (weighted indicator—min = 0, max = 4). (EU Justice Scoreboard 2013, Fig. 14, quoting source as CEPEJ)

39.6.3 User-Friendliness and Accessibility

It is clear from the consumer survey data quoted above that the extent to which it is easy to make a complaint or, conversely, it involves hassle, especially for elderly or young people, affects whether a consumer will expend the effort in lodging a complaint about a matter that has a low value. Some national court procedures, and especially small claims and money claims procedures, permit lodging claims online and have adopted electronic facilities for regular communications (Figs. 39.8, 39.9, 39.10 and 39.11). Online facilities for money claims are positive innovations and increasingly used.[95]

[95] In England see https://www.moneyclaim.gov.uk/web/mcol/welcome.

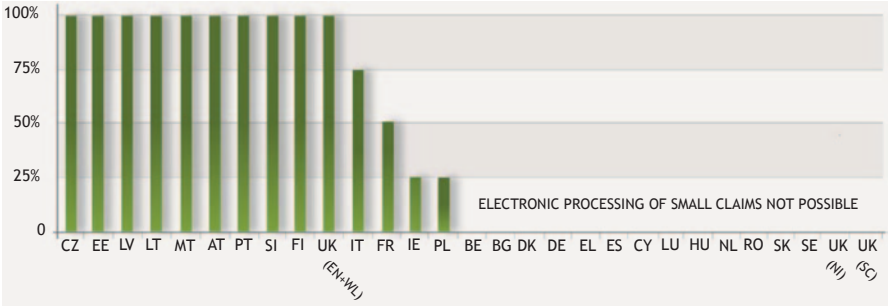

Fig. 39.9 Electronic processing of small claims (0 = available in 0% of courts; 4—available in 100% of courts. (EU Justice Scoreboard 2013, Fig. 15, quoting source as CEPEJ. The descriptor 'small claims' was stated to indicate a civil case where the monetary value of the claim is relatively low, the value varying among the Member States.)

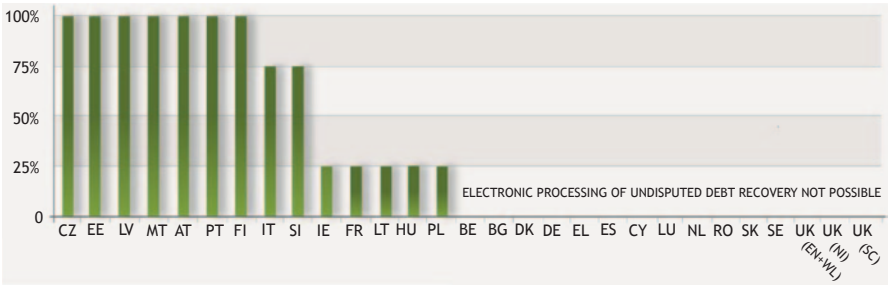

Fig. 39.10 Electronic processing of undisputed debt recovery (0 = available in 0% of courts; 4—available in 100% of courts. (EU Justice Scoreboard 2013, Fig. 16, quoting source as CEPEJ)

The Commission noted in 2011:[96]

> Very few ADR schemes (e.g. ECODIR,[97] Risolvi-online,[98] Der Online Schlichter[99]) handle the entire process online where consumers, traders and ADR schemes communicate during the whole procedure through a web-based system in order to resolve disputes.[100] About half

[96] CDR Impact Assessment.

[97] ECODIR stands for 'Electronic Consumer Dispute Resolution' and is concerned with disputes for transactions between businesses and consumers taking place over the Internet; http://www.ecodir.org/fr/index.htm

[98] RisolviOnline (http://www.risolvionline.com) is a service offered by the Milan Mediation Chamber that allows the resolution of commercial Disputes and can be used be used both by individual consumers/users and by enterprises.

[99] The Online Schlichter (https://www.online-schlichter.de/de/ueber_uns/index.php) is competent for the handling of e-commerce disputes, i.e. disputes over contracts which were concluded online.

[100] For example, for a brief history and overview of ODR, including at the international level, see P Cortes, *Online Dispute Resolution for Consumers in the European Union* (London, Routledge, 2011).

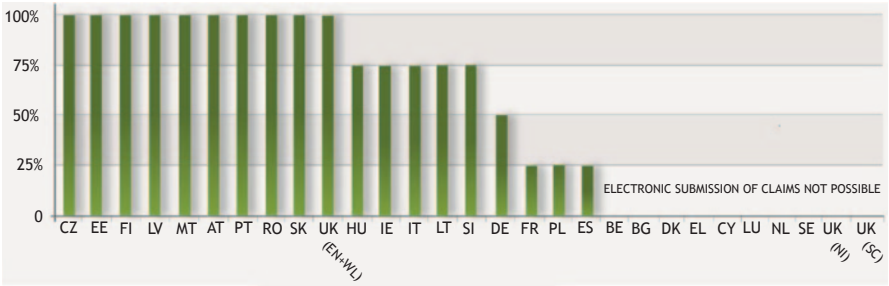

Fig. 39.11 Electronic submission of claims (0 = available in 0 % of courts; 4—available in 100 % of courts. (EU Justice Scoreboard 2013, Fig. 17, quoting source as CEPEJ)

> of the existing ADR schemes, however, provide for an online complaint form which can be submitted directly online or sent by post or email.[101] ODR is nevertheless perceived positively; about 60 % of businesses[102] and 64 % of consumers state that they would be willing to solve disputes with consumers through ODR.[103]

CDR systems increasingly accept online complaints, and some even decline telephone contacts so as to improve cost efficiency and make consumers focus on not wasting time by having to assemble the relevant documentation before just picking up the phone (such as the French telecom médiateur). In virtually every case, the procedure adopted by a CDR scheme will be more streamlined and less formal than normal court procedure. Small claims procedures have aimed to achieve the same goals, but cannot offer, for example, instant telephone advice and mediation. There could be a national portal, such as the Belgian national Belmed.[104]

ADR and CDR entities raise issues over the independence and impartiality of decision-makers,[105] but so do courts. Perceptions of judicial independence and of the independence of the judicial system vary across the EU and in no case reach full confidence (Figs. 39.12[106] and 39.13[107]).

[101] Civic Consulting, *Assessment of the compliance costs*, 100 and 143.

[102] European Business Test Panel results available at http://ec.europa.eu/yourvoice/ebtp/consultations/2010/adr/statistics_en.pdf

[103] Preliminary results on a study on the development of e-commerce in the EU, to be published in the second half of 2011.

[104] S Voet, 'Belgium' in Hodges, Benöhr and Creutzfeldt-Banda, *Consumer ADR in Europe*; Voet, 'Public Enforcement &A(O)DR'.

[105] These issued are addressed in Dir 2013/11/EU on consumer ADR, Arts 6-12.

[106] EU Justice Scoreboard 2013, Fig. 23, citing source as World Economic Forum. The survey was replied by a representative sample of firms in all countries representing the main sectors of the economy (agriculture, manufacturing industry, non-manufacturing industry, and services).

[107] EU Justice Scoreboard 2013, Fig. 24, citing source as World Justice Project.

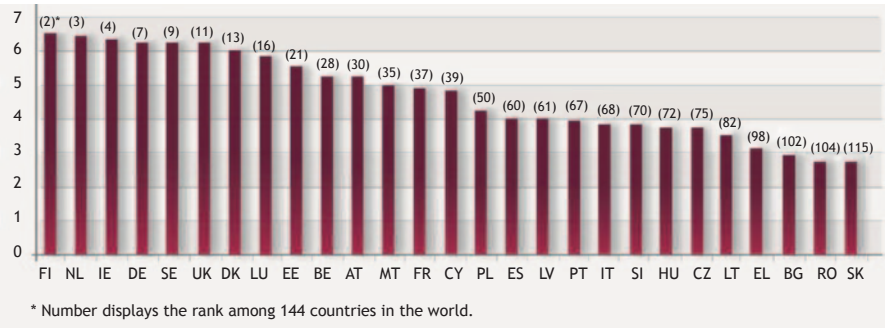

Fig. 39.12 Judicial independence (perception—higher value means better perception)

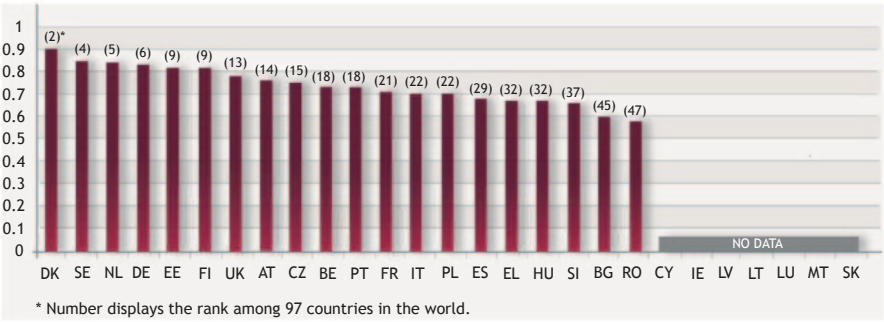

Fig. 39.13 Independence of civil justice (perception—higher value means better perception)

39.7 Conclusions

The data set out above suggest a series of conclusions. Firstly, the vast majority of consumer claims involve very low values. Thus, dispute resolution procedures must respond by providing cheap transactional costs, otherwise consumers will not raise such issues and some traders will distort the market by gaining illicit profits. Secondly, the vast majority of consumer claims are about matters that involve simple issues. Thus, dispute resolution procedures must enable simple means of resolution or adjudication, avoiding the cost and delay that will be inherent in overly complex procedures. Non-delivery, for example, needs minimal evidence: perhaps a couple of emails or documents evidenced by pdf, and perhaps a formal statement or delivery tracking record. Those cases that give rise to greater complexity, whether in terms of facts or law, should be identified and transferred to an appropriately proportionate track. Thirdly, even low cost court procedures are too expensive—and too off-putting—for many consumer claims. Fourthly, attempts at reducing overall cost through aggregation in collective court actions have not succeeded in Europe,

since the costs remain disproportionate and unattractive, leaving individual claimants with little or nothing, and duration is considerably lengthened.

Overall, the evidence is that consumers find lawyers, litigation and courts difficult to access, costly and slow.

> …when their rights are violated European consumers do not always obtain effective redress. This is because consumers believe court proceedings to be expensive, time-consuming and burdensome. Cumbersome and ineffective proceedings and their uncertain outcome discourage consumers from even trying to seek redress. In addition, consumers are not always aware of what their rights entail in concrete terms and therefore do not seek compensation when they are entitled to it.[108]

Consumers need rights. But expecting most consumers to be able to enforce those rights in almost all of the disputes that arise with traders is a political slogan that is illusory and unconnected with reality. The Commission summarised the position thus:[109]

> From the views expressed by consumers during the discussions some clear patterns emerge about what the characteristics of an ideal consumer redress mechanism would be. In general, consumers would prefer mechanisms which (in broad order of importance):
>
> - Are as low cost as possible
> - Resolve the issue as quickly as possible
> - Do not expose them to uncomfortable or distressing experiences
> - Are simple and straightforward to understand
> - Are demonstrably fair and fully transparent.

The evidence shows that the two techniques that can provide redress for consumer claims at speedy, low and proportionate cost are CDR and regulatory redress—particularly if both techniques are integrated so as to be used together. CDR itself offers enormous potential. It should be attractive for consumers to use, simpler, faster and inexpensive,[110] regimes that also regulate and improve market behaviour, and deliver collective redress far more quickly, cheaply and effectively than collective litigation. Overall, therefore, if they are designed and operated effectively, CDR schemes can offer advantages in relation to courts[111] of speed, accessibility, informality, expertise, lower cost to the state (but sometimes internalised cost to the sector), increased acceptability of decisions, potentially lower regulatory burden, and increased motivation. The age of actual consumer redress and fair trading standards is at last attainable.

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[108] CDR Impact Assessment, 5.

[109] ibid, 23.

[110] ibid, 20.

[111] CH van Rhee and A Uzelac (eds), *Civil Justice between Efficiency and Quality: from Ius Commune to the CEPEJ* (Antwerp, Intersentia, 2008).

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