



# ALTERNATIVE DISPUTE RESOLUTION FOR ANTITRUST DAMAGES

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## PART I

# INTRODUCTORY NOTE ON ALTERNATIVE DISPUTE RESOLUTION FOR ANTITRUST DAMAGES

Litigation is in most cases very costly, long and time-consuming and damaging for a company's image. Alternative Dispute Resolution (ADR) can provide a cheaper, shorter and less confrontational avenue to address disputes.

This is particularly relevant in the context of the debate on collective redress ongoing over the last years, where BUSINESSEUROPE has been promoting the concept of ADRs which has met strong interest within the EU Institutions.

This paper outlines BUSINESSEUROPE's views on the possible application of ADR to antitrust damages cases and on how an ADR scheme could work in practice in this field, especially in the context of the ongoing transposition of [Directive 2014/104/EU on Antitrust Damages Actions](#). Articles 18 and 19 of the Directive contain provisions facilitating consensual dispute resolution processes concerning damages linked to antitrust violations.

On the one hand, the limitation period for bringing an action for damages will be suspended for the duration of any consensual dispute resolution process. National courts seized of an action for damages may suspend their proceedings for up to two years where the parties are involved in consensual dispute resolution concerning the claim covered by that action for damages. Competition authorities may also consider compensation paid as a result of an ADR and prior to their decision imposing a fine to be a mitigating factor.

Importantly, following the ADR, the claim of the settling injured parties is reduced by the settling co-infringer's share of the harm they suffered. Any remaining they might have can be exercised against co-infringers not having taken part to the ADR. In addition, in most cases companies talking part in the ADR will be shielded by non-settling co-infringers attempts to recover contribution for the remaining claim.

## Disclaimer

This document does not replace expert knowledge and legal assistance where appropriate. Its overall objective is providing a description of one possible concrete way to address antitrust damages cases through an ADR without going to court. BusinessEurope takes no responsibility whatsoever for misuse of the information provided in this document.



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## OBJECTIVE

The overall objective of the initiative is providing, whenever possible, a way to address antitrust damages cases without going to court. The availability of a non-judicial route is particularly important for business as well as consumers. In addition, private actions for damages in general (and not just class/collective actions) are likely to be more frequent than has been the case until today.

The ADR should be specifically targeted at **proposing a fair and effective outcome**, on a just and equitable basis, acceptable to all parties, and providing a speedy resolution of claims at low procedural cost.

The ADR process should provide an accessible form of redress for consumers across Europe.

While the draft scheme is **designed to target B2C cases it can also be adapted for B2B cases**. Additional procedural details could be further analysed at a later stage.

## POSSIBLE ADVANTAGES AND INCENTIVES

The ADR process achieves a common, public policy goal of minimising costly, protracted litigation and the use of court resources. In addition, it can offer specific **advantages to all parties**:

- **Consumers** could receive compensation for their claims sooner and at lower cost than through a judicial action.
- **Companies** can deal with their liabilities earlier and at lower cost, freeing them to focus on future opportunities rather than past problems.
- **Competition authorities** would enhance consumer welfare and achieve a policy objective of enabling victims of an antitrust infringement to obtain redress. There would be no cost to the authority or direct involvement in delivering the redress.

Other fundamental incentives for companies to use the ADR are: finality (reduced risk of facing judicial actions); reduced reputational damage; shorter time and limited legal expenses; possible reduction in fines.

## FINALITY OF THE ADR'S OUTCOME, REDUCED RISK OF FACING JUDICIAL COLLECTIVE ACTION

- The companies launching the ADR decide whether the award by the Panel would be non-binding, binding on the companies or binding on all parties. By accepting, the claimant agrees to waive all legal claims and rights of action against the companies proposing the ADR.
- If the claimant does not accept the offer, there is the option of a participating in an individual or group legal action against the defendants. This is likely to be an unattractive route as some irrecoverable legal costs could result in reduced compensation. Compensation would also be delayed by over 12 months, perhaps much longer. In awarding costs a court would be likely to take account of what was available under the ADR process and whether the claimant had acted reasonably in pursuing litigation.

## REDUCED REPUTATIONAL DAMAGE, SHORTER TIME AND LIMITED LEGAL EXPENSES

- In a follow-on case, where the responsibility of the infringement has already been declared by the competition authority, companies would have a business interest in drawing a line under the affair and restore their reputation by making direct redress to their affected customers. They would at the same time avoid being entangled in lengthy litigation and limit drastically the legal fees as compared to a court case. Where allowed under national law and when compatible with the specific case, the principles of the Dutch settlement law could also be applied so that a judge would approve the settlement's fairness which would then become binding on claimants.

## ADDITIONAL POSSIBLE CONDITIONAL REDUCTIONS IN FINES

- Although the ADR scheme has an intrinsic value even if there would be no discounts in possible applicable fines, **fine reductions could be justified by a public interest in facilitating compensation through incentivising the ADR**. The condition would be that part of the fine is put into an escrow account to be applied to consumer claims over a set period. Any surplus would be paid to a relevant public recipient.

The above approach would be in line with previous decisions where the European Commission granted fine reductions in recognition of the fact that the companies involved offered compensation to harmed parties (e.g. Commission decisions 1999/60/EC (Pre-Insulated Pipes Cartel) and 2003/675/EC (Nintendo)).

- The interaction with fine reductions foreseen by the leniency programme has to be taken into account to ensure leniency applications remain attractive. This is the main reason why the Commission and quite a number of other competition authorities have reservations on this point.

## PART II

# STRUCTURE AND PROCEDURE FOR ALTERNATIVE DISPUTE RESOLUTION FOR ANTITRUST DAMAGES

The present document is aimed at describing the main concepts of how an antitrust damages claim could be addressed by an out-of-court system.

### 1. OPENING OF THE PROCESS

- The ADR presented here is primarily intended for application to **follow-on** cases (but be open to other competition cases involving compensation).
- The process would be started on a **purely voluntary basis** by one or more of the companies concerned at the appropriate time. The ADR process could be activated by a single defendant.
- At the start of the ADR process, the **companies would agree whether the outcome would be non-binding, binding on the defendant companies or binding on all parties**.

### 2. POSSIBLE SETTING UP OF ADR PANEL

- The resolution scheme would be run by a recognised independent private provider of ADR services or other appropriate and equally competent body<sup>1</sup>, who convenes an Adjudication Panel normally composed by a chair and two assessors. A restricted list of high-level personalities of recognized reputation and qualifications would act as chairs and appoint the members of the Panel. The Panel chair could for example be someone with more than 10 years' experience of judicial office or chairing arbitrations.
- In consideration of the above, the composition of the panel normally would not need to be subject to the parties' approval. Parties could however agree otherwise.
- The participant companies invest the panel with a written **mandate**, which specifies the binding or non-binding nature of the award and other features for that specific ADR.

### 3. PROCEDURAL SPECIFICITIES

- A standard Charter applicable to all ADR cases establishes that the Panel must operate under the principles of fairness and equity and sets out the key criteria to be followed, such as:

1. An entity which manages dispute resolution or conflict management services. This may vary substantially in practice, depending on the member state's existing structures and traditions (e.g. a private organisation, an Ombudsman, a public agency at government or local level).

- The Panel seeks to provide redress to all affected claimants that opt-in for the ADR. In determining the appropriate level of redress the Panel gives due consideration to the evidence submitted.
  - The Panel follows procedures aimed at achieving the settlement of all claims submitted within the shortest possible time and at the lowest cost.
  - When opting in for the ADR, claimants undertake not to pursue the matter in parallel through other means/proceedings against the participant companies for the duration of the ADR process. Time-limits to claim damages in court should be suspended.
  - Unless agreed upfront that the outcome is binding on both parties, referral of the claim to the Panel does not affect rights under Article 6 of the European Convention on Human Rights. If the claim is not settled by agreement the claimant's right to a court proceeding remains unaffected.
  - If the parties agree that the Panel's determination requires acceptance, this act constitutes a legal waiver of claims against the defendants and will be enforceable as a binding contract.
  - The Panel should be an impartial body and its members should have no conflict of interest making them unsuitable to act as a Panel member.
- The Panel would set the most suitable procedure depending on the specific case and in accordance with the mandate received by the participant companies. This would cover matters such as the timetable, representation, submissions and publicity.
- For example, the Panel would decide about admissible and suitable authorised representatives, whether the parties would have to agree upon a common representative and define the minimum content of their mandate.

### 3.1. CLAIMS

- The Panel would issue **notices to the public** or groups of potential claimants through appropriate communication to reach as many claimants as possible, taking into account the relevant costs. This would invite affected customers who wish to **opt-in** to make claims using a claim form available from its website. It is made clear that claims must be supported by appropriate evidence (e.g. proof of purchase through a receipt or a copy of a debit on a credit card statement).
- All claim documents would be submitted to the Panel. The Panel would determine a reasonable time limit for filing claims (e.g. 2 months), before which the process should not start. This should establish a sufficiently large base of claimants and further claimants may be added later in the interest of dealing with all potential claims.
- The panel's mandate would cap the costs of publicity (and set the appropriate publicity channels) and of any additional administrative cost. The mandate would also define potential claimants, or groups of claimants, covered by the scheme. When possible, the participating companies would provide the Panel with data for the identification of claimants, so as to facilitate the outreach.

### 3.2. INFORMATION AND SUBMISSIONS

- The Panel obtains publicly available information from the competition authority on the duration of the infringement and estimated overcharge. Confidential case material from the authority must not be made available.
- The Panel issues requests for information and **submissions from all companies** on their involvement in the infringement, the amount of overcharge, the number of affected customers and profits gained.
- The panel may accept submissions and information by authorised representatives and by **relevant consumer or business associations**.
- The Panel may also invite a submission by a relevant **competition authority or other regulator**.
- The submissions by the various parties are kept **confidential** by the Panel and can only be disclosed to other ADR participants but not to third parties.
- The parties can present punctual comments on the others' submissions within a short time-limit.
- In the interest of the speed of the process, the panel will limit the number and volume of submissions and will only consider a limited amount of evidence.

### 3.3. POSSIBLE ADDITIONAL PROCEDURAL FEATURES (EXCEPTIONAL)

- By exception (to be foreseen in the mandate), if some matters are particularly controversial the Panel should have the discretion to hold a time-limited oral hearing on specific issues to receive further submissions and also conduct its own inquiries. Parties attending the oral hearing, such as a consumer association or representative of a class of customers should bear their own costs. There would be no right to require the Panel to hold an oral hearing.
- In exceptional circumstances (to be foreseen in the mandate), the Panel might seek independent expert advice to assist its determination of specific issues. This must be consistent with the objective of a speedy and low-cost system.

## 4. PANEL'S DETERMINATION

- The Panel makes a **determination of the amount of overcharge** by each company and also the average overcharge, shortly motivated. This would be done by the Panel based on a precise analysis of the information and submissions received, based on the understanding that it is neither necessary nor possible to have an exhaustive analysis of the exact overcharge.

- The Panel makes an **award of monetary compensation**. The award is the Panel's best estimate on its detailed assessment of the evidence submitted, applying the principles set out in the Charter. The panel may also conclude that the damage is negligible or non-existent.
- It would be open to the Panel to apportion the amount of compensation to be paid between the participating companies. This apportionment would take account of the time each company participated in the infringement, the number of its customers and the gross revenues received from the products concerned.

## 5. PROCESSING OF THE CLAIMS

- Following the Panel's determination, all **claims for monetary compensation are processed**. Claims are paid against each Company's account based on its specific overcharge and only to its customers (customers of free riders would not be compensated through the ADR scheme).
- Claims from cross-border customers within the EU are handled in the same way through electronic transfers to bank or credit card accounts.
- As cash claims are paid out, funds can be periodically withdrawn from the total amount held in escrow upon a certified notice from the Panel.

## 6. POSSIBLE OUTCOME

As specified, **participation to the ADR is purely voluntary, but the companies decide whether the Panel's award is binding or not** at the start of the process.

- Depending on the agreement reached by the companies at the start of the process, an award by the Panel could constitute an offer which is either:
  - **Non-binding**: both sides should accept or decline it within a fixed time limit (e.g. 2 months).
  - **Binding on the defendants**: it can be accepted by a claimant within the above fixed time limit. Once accepted by the claimant, the offer becomes binding on both parties.
  - **Binding on all parties**: no acceptance is required – the ADR decision is a contract (agreed at the start of the process) which can be enforced in national courts or throughout the EU.
- By accepting, the claimant agrees to waive all legal claims and rights of action against the defendants participating in the ADR. This is specified in the ADR standard Charter, in the panel's mandate and in the claim form submitted and signed by the claimant.
- The award becomes binding on all parties and is a contract which can be enforced in national courts or throughout the EU.

## 7. COSTS

The design of the adjudication panel should be simple and low-cost. It should not resemble court or arbitration proceedings. The costs would be much less than arbitration. One saving is that there would not be extensive submissions.

- The cost of the adjudication panel would be **met by the companies** responsible for the damage and that agreed to be part of the ADR process.
  - The cost of the third party administrator in handling the publicity and processing the claims would be in addition and might vary depending on the number of transactions.
  - Possible additional costs could come from the need to hire an independent expert and eventual publicity.
  - The cost of the panel does not include the expenses met by the parties for their submissions and participation in the process.

**The overall costs of setting up and operating the ADR are expected to be very limited compared to the corresponding litigation costs.**

## 8. THE “FREE-RIDER” ISSUE

This is where one or more of the defendants decide not to participate in the ADR scheme. This may be because they had decided to appeal or preferred to take their chances in any subsequent court proceedings.

- Introducing the option for companies participating in the ADR to compensate the free riders' customers would create a certain pressure to participate through the potential threat of contribution claims from the other defendants. However, in this case the panel would have to decide on issues related to non-participating companies. A suitable approach to this would need to be discussed further.
- A reduction in the fine would provide substantial incentive.
- Rules on contribution – i.e. on payment between defendants with joint and several liability to apportion liability – should be changed to (1) protect ADR participant companies against recovery demands from non-participant companies [in case of compensation paid by non-participants following judicial proceedings] and (2) make the ADR participant companies able to recover part of the compensation provided from the non participant companies. In particular:
  - Legislation would be needed, establishing an obligation to contribution and setting out the criteria (e.g. duration, relative turnover, relevant market shares).
  - The panel would produce a report which could be used as an expert opinion for subsequent litigation for contribution, covering matters such as relative turnover, overcharge and cartel's participation. The report would be confidential to the companies participating in the ADR and would only be produced in case litigation takes place.

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