

To: Joint Collective Redress TF
From: Single Market & Social Affairs department
Single Market Committee; General Liability SG; Legal Expenses SG;
CC: Public Affairs Group
Date: 14 December 2012
Reference: SMC-COL-12-073

Subject: Outcome of trialogue agreement on ADR

Summary

Members are advised that an agreement on the proposed Directive on ADR was reached in the third trialogue concluded on 5 December 2012 (trialogue text in SMC-COL-12-074). The final text remains to be formally approved by the EP Plenary and the Council before being finally adopted and binding.

The main observations to be made, in the context of Insurance Europe's previous concerns contained in the position paper (SMC-COL-12-010), comments on IMCO's compromise amendments (SMC-COL-12-061) and comments contained in Insurance Europe's recent letter to the Cypriot presidency (SMC-Col-12-069) are as follows:

- **Recital 5b: Non-economic services**
 - In line with Insurance Europe's view, disputes arising from *non-economic services* are excluded from the proposal.
- **Recital 7 & Article 2.1: Scope of complaints covered**
 - The EC's proposal originally provided for the proposal to apply to complaints relating to contractual disputes made by both consumers against a trader and complaints made by the trader against its consumer. Insurance Europe objected to this.
 - The final text explicitly excludes such a wide scope, limiting application of the proposal only to complaints made by the consumer against a trader. The proposal explicitly excludes disputes between traders.
- **Recital 12: In-house mediation activities**
 - In line with Insurance Europe's views, prejudging in-house mediation as raising a conflict of interest has been loosened and amended to permit Member States to decide that such procedures may be recognised nationally as forming an ADR procedure. This is caveated by the requirement that Member States must ensure that such ADR systems are *impartial* and *independent* as provided for in the proposal.
- **Recital 16 (new a): Publicity of final decisions of an exemplary nature**
 - Insurance Europe's concerns about the possible publication of final decisions has been removed from the final text and has, instead, been diluted to require Member States to ensure that *any systemic or significant problems that occur frequently* are published.
 - Insurance Europe had objected on the basis that such publication would have been contrary to the objective, supported by Insurance Europe, of ensuring that ADR procedures preserve confidentiality and privacy as a key *prerequisite*.

- **Recital 17 & Article 2.2(a): Impartiality and funding of ADR procedure**
 - In line with Insurance Europe's emphasis that funding by the industry of ADR procedures does not *per se* prejudice the independence or impartiality of the procedure but rather indicates the industry's commitment, the final text of recital 17 and 17 (new a) acknowledge this, imposing an obligation to *disclose any circumstances that might affect independence and impartiality or give rise to a conflict of interest with either party* to the dispute before them for resolution. The specific provisions relevant to procedures set up by the industry are set out in Recital 17(b).
 - Recital 17(c) of the final text introduces a new quality standard of requiring a *general understanding of law*.
 - The secretariat notes the introduction, at Recital 21(d), of a new text providing as follows: *"...this Directive should not affect the possibility for business or ...organisations to fund ADR entities"*.
 - The final text of Article 2.2(a) permits Member States to allow procedures funded by the industry to be covered under the proposal provided requirements on *transparency* and *independence* are met (as set out in Article 6.3).
- **Recital 19 & Article 8(d): Time frame for resolving disputes remains**
 - Contrary to Insurance Europe's representations, the 90 days' timeframe for resolving disputes remains and has not been extended to, say, 120 days, the timeframe has been clarified as being 90 *calendar* days.
 - The timeframe however now counts only from *receipt of a complete complaint file, including all relevant documentation pertaining to that complaint*. This is in line with Insurance Europe's earlier requests.
 - Contrary to Insurance Europe's request for clarification as to the meaning of "complex" disputes and clarity that insurance disputes would be likely to be included under such a heading, the final text tightens further the types of disputes that may be resolved under an extended timeframe. The text fails to provide further clarification on *complexity*. The reference included in the final text now is to *highly complex* disputes, as opposed to *complex* disputes. Lack of certainty therefore remains.
- **Recital 20 & Article 8(c): Ensuring cheap access to ADR procedures**
 - In line with Insurance Europe's support for access to ADR procedures, the final text for the proposal explicitly provides that it should be *accessible, attractive and inexpensive* for consumers, and that if any cost is applied, this should be *nominal*.
- **Recital 21(a) (formerly Recital 21(b)) & Article 9(new a): Liberty**
 - Contrary to Insurance Europe's previous position, the principle of liberty remains in the final text. Insurance Europe previously objected to this on the basis that the proposal ensures this elsewhere, e.g. at Recital 23 and Article 2.
- **Recital 21(b) (formerly Recital 21(c)) & Article 9(b): Legality**
 - Insurance Europe previously objected to the introduction by IMCO and JURI Committees' compromise amendment of the principle of legality. The objection was based on the observation that the law applicable to contractual disputes is already subject to specific rules and, in relation to cross-border disputes, the rules are as set out in "Rome I".
 - Contrary to Insurance Europe's assertion, legality in an amended form remains in the final text.
- **Recital 22 & Article 10.2: Information provision of ADR procedures**
 - Insurance Europe has supported the need for clear and understandable information for consumers, however, has in the past objected to the requirement that such information should be made available not only on traders' websites and in pre-contractual documentation but also on *invoices and receipts*.
 - In line with Insurance Europe's comments, references to *invoices and receipts* are removed from the final text, and instead, a more flexible approach has been adopted whereby traders *should have the possibility* to include information on the ADR procedure on their websites and in the T&Cs of *the relevant contracts*.

- **Article 2.2(b): Internal complaints handling systems remain excluded**
 - In line with the EC's original text, the final text excludes from the proposal internal complaints handling procedures operated by the trader in question. This is also in line with the emphasis placed on dialogue between the trader and consumer *before* commencing and ADR procedure (as set out in Recital 23). Insurance Europe has previously emphasised its support of this exclusion.
- **Article 5.3(b): Management of ADR procedure**
 - The sections in the final text relating to the management of claims retain the ability of the trader to refuse *frivolous* or *vexatious* claims.
 - However, the *14 calendar day* period to set out the basis on which a case has been dismissed has been replaced by a *three week period*. The period thus remains short.
- **Article 14.2: Concern over maintaining confidentiality and secrecy**
 - Despite the final text retaining an element of the EC's original text on mutual exchange of information, which Insurance Europe objected to on the basis that it may jeopardise privacy and confidentiality, the final text includes a new Article 14.3(a) which seeks to ensure these principles are observed in reference to national laws on this.
- **Article 15 & 17.5(d) : Over-regulation by introduction of overseeing authority**
 - Contrary to Insurance Europe's previous calls for a removal of a *designated competent authority*, the concept remains in the final text.
- **On two separate points**, the secretariat welcomes the following inclusions in the final text:
 - **Recital 23** – where the emphasis is explicitly on encouraging bilateral discussion between the consumer and trader *before* commencing an ADR procedure. The final text underlines that in many cases, such bilateral discussions would allow consumers to settle their disputes swiftly and at an early stage.
 - **Deletion of Recital 27(a)** – where references to “quality labels” have not been incorporated in the final text.

Next steps

- **Jan/Feb 2013 (Poss.)** Vote in EP plenary
- **Feb 2013 (Poss.)** Adoption in the Council