

# CONSUMER DISPUTE RESOLUTION AND REDRESS IN THE GLOBAL MARKETPLACE

CONSUMER POLICY  
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## FOREWORD

This report *Consumer Dispute Resolution and Redress in the Global Marketplace* has been prepared by the OECD's Committee on Consumer Policy. It presents an overview of the work achieved by the Committee to foster the development of fair and effective mechanisms for consumers to resolve disputes and obtain monetary compensation for losses encountered. A particular focus of this work has been on ensuring that frameworks for dispute resolution and redress can meet the challenges of an increasingly global marketplace where consumers routinely engage in cross-border and online transactions.

The report is structured as follows:

- Chapter I provides an overview of OECD member countries' existing frameworks for consumer dispute resolution and redress. It covers the different mechanisms available to consumers to resolve disputes, from private complaints handling to alternative dispute resolution to court-based procedures such as small claims courts and collective action lawsuits. It also addresses the role that consumer protection enforcement agencies can play in obtaining consumer redress and considers ways to improve the effectiveness of monetary judgments in cross-border cases. The chapter was initially prepared as background for the *OECD Workshop on Consumer Dispute Resolution and Redress in the Global Marketplace*, held in Washington, DC on 19-20 April 2005.
- Chapter II contains a summary of the above workshop, which aimed to examine the advantages and disadvantages of different approaches to dispute resolution and redress mechanisms in OECD member countries, particularly in the cross-border context. The chapter includes the main points that emerged from the workshop discussions as well as a summary of each of the sessions.

Building on the conclusions of the workshop, the Committee on Consumer Policy agreed, at its October 2005 meeting, to develop a framework document that would articulate the elements of an effective and comprehensive dispute resolution and redress system and identify ways to better address the challenges posed by cross-border cases. This work represents an important further step by the Committee towards improving consumer access to remedies, thereby increasing consumer satisfaction and confidence in engaging in transactions in the global marketplace.

Within the OECD Secretariat, this work has been coordinated by Sarah Andrews. Chapter I was declassified by the Committee on Consumer Policy on 1 April 2005. Chapter II was prepared as an unclassified report and submitted to the Committee at its October 2005 session. The report is published under the responsibility of the Secretary General.

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## CHAPTER I: OECD MEMBER COUNTRY FRAMEWORKS FOR CONSUMER DISPUTE RESOLUTION AND REDRESS

**Abstract:** This chapter contains an overview of OECD member country frameworks for consumer dispute resolution and redress. Part I focuses on the different mechanisms that have been put in place to respond to the varying nature and characteristics of consumer disputes including: internal complaints handling processes; payment cardholder protections; alternative dispute resolution; small claims courts; private collective action lawsuits; legal actions by consumer associations; and government obtained redress. Part II examines the impediments to obtaining monetary remedies for consumers in cross-border cases. The chapter aims to identify the elements of effective domestic frameworks for consumer dispute resolution and redress, examine how these frameworks can better address cross-border cases, and consider how increased international cooperation could improve the effectiveness of judicial remedies across-borders.

## MAIN POINTS

### **Internal complaints handling procedures**

Internal complaints handling processes are an integral element of consumer dispute resolution and redress systems. The efficient and effective handling of consumer complaints at the earliest stage can bring benefits to businesses and consumers alike, alleviating the need for recourse to more costly and time-consuming external mechanisms in a large number of cases. Continued progress on the development and use of such mechanisms can be encouraged at the national and international level.

### **Payment cardholder protections**

Payment cardholder protections provide an important avenue for consumer redress in cases of fraudulent, unauthorized, or otherwise disputed charges on payment cards. These protections can enhance consumer confidence in the use of payment cards for online purchases and in the global marketplace more generally. At present, although consumers in most member countries are protected (through national laws or self-regulatory schemes) against unauthorised charges due to loss or theft, protections for non-conforming or non-delivery of goods and services vary greatly among member countries. These protections can be valuable to consumers when dealing with uncooperative businesses and play a particularly important role in distance and cross-border transactions where it may be difficult to communicate with or take legal action against the business.

### **Alternative dispute resolution**

Alternative dispute resolution (ADR) is widely regarded as holding great promise for the low-cost and efficient resolution of consumer disputes, especially cross-border disputes. In the majority of member countries, policy initiatives recognising the potential benefits of ADR have been developed. These initiatives aim at increasing the availability of effective, timely and cheap mechanisms as an alternative to formal court-based dispute resolution. In some countries, state-run ADR mechanisms are very well developed, offering dispute resolution services for a wide range of consumer disputes. In many other countries, state-run ADR schemes are available only on a sector or industry wide basis. Despite efforts to encourage the development and use of private-sector ADR for business to consumer disputes, there is evidence that the provision of such services remains patchy. These findings suggest that there is still room for improvement in the development, promotion and use of fair and effective ADR services for business to consumer disputes, especially for cross-border disputes.

### **Small claims courts**

Where informal methods outlined above are not successful, or in cases that are not conducive to informal resolution (*e.g.* cases involving fraudulent or illegitimate businesses), small claims court procedures can offer consumers access to the court system at a cost and burden not disproportionate to the amount of their claim. Twenty respondent countries reported to have some form of court procedures available for claims under a certain monetary threshold. These procedures vary significantly from country to country in terms of type of procedure; type of dispute and claim that may be heard; monetary thresholds; financial costs to parties; and overall accessibility to consumers (“consumer friendliness”).

### **Private collective action lawsuits**

In some countries there are procedures available allowing collective action lawsuits to be filed by groups of private individuals who have suffered similar harm as a result of the wrongful actions of the defendant. These kinds of procedures are particularly useful where large numbers of consumers have each

suffered small losses. In such cases, although the cost to each individual consumer may be small, the aggregate cost and the impact on consumer welfare is large. These procedures can play an important role in addressing such market failures and providing consumers with access to remedies in cases where they would not have an incentive to act individually. Procedures for private collective action are currently available in nine respondent countries and are under consideration in a further three countries.

### **Legal actions by consumer associations**

In a large number of countries consumer organisations have the authority to file lawsuits on behalf of an individual consumer or, more frequently, a group of consumers. Like private collective action lawsuits, collective legal actions by consumer organisations are particularly useful in cases of widespread consumer harm, providing a mechanism to prevent or remedy wrongful conduct by a defendant that may otherwise go unchecked. The type of legal action which may be taken by consumer associations varies greatly from country to country. Very often, the remedies available in actions by consumer associations are limited to conduct, as opposed to monetary, remedies. Procedures for collective action by consumer associations are available in twenty respondent countries and are under consideration in one other country.

### **Government-obtained redress**

The authority of government consumer protection agencies to recover monies wrongfully obtained by a trader for return directly to consumers can be an important means to alleviate consumer injury and to deter wrong-doing. Mechanisms for government-obtained redress can be particularly useful in cases of fraudulent or deceptive practices affecting large numbers of consumers, especially in cross-border situations. Due to the complexity of such cases, the costs to any individual consumer of taking private legal action will usually far outweigh the harm suffered. As government consumer protection agencies have at their disposal investigative and other enforcement powers that are not available to private litigants, they are often in a unique position to tackle such cases and secure compensation for consumer victims. At present, government consumer protection agencies in only nine respondent countries have the authority to secure monetary redress for consumers. Proposals to introduce such powers have been made in a further two countries.

### **Improving the effectiveness of judicial remedies in cross-border consumer cases**

In order to be effective, judicial remedies obtained by a consumer from the courts of one country must be enforceable against the defendant, wherever located. At present, there are serious obstacles to ensuring that monetary judgments obtained in cross-border consumer cases ultimately result in compensation to consumers. It is only possible to obtain provisional pre-judgment measures, such as asset freezes, in a few countries. These measures can help ensure that there will be money left to fulfil any final monetary judgment awarded in a consumer case. In addition, in most member countries, it is very difficult or even impossible to enforce monetary judgments in the courts of another country without a treaty or other substantial arrangement in place. International and bi-lateral arrangements to facilitate judicial cooperation in these areas could increase the effectiveness of consumer remedies in cross-border cases.

## INTRODUCTION

### Context

Fostering the development of effective, low cost ways for consumers to resolve their disputes and obtain monetary compensation for losses sustained is a key consumer policy objective. The particular features of consumer disputes require tailored mechanisms that can provide consumers with access to remedies that do not impose a cost, delay and burden disproportionate to the economic value at stake. This is particularly true in the cross-border context, where the obstacles to receiving swift and inexpensive resolution of low value disputes are even greater. The costs involved in pursuing a case against a business located in another country are often prohibitively high for the average consumer and are complicated by different languages and unfamiliar legal systems.<sup>1</sup> In addition to the financial and practical obstacles, there are often significant legal barriers to resorting to courts in disputes resulting from cross-border or online interactions. Of particular significance are challenges in identifying which court has jurisdiction to hear the case; which law will be applied to decide the case; and whether the ultimate result will be enforceable in the country where the defendant is located. In most OECD countries, mechanisms for consumer dispute resolution and redress were developed to address domestic cases and are not always adequate to provide consumers with remedies across borders. While this chapter does not address empirical evidence of cross-border consumer complaints, there is reason to believe that these kinds of disputes will form a significant proportion of consumer complaints in coming years.<sup>2</sup> Ensuring that effective mechanisms are in place to resolve consumer disputes across borders will be a crucial factor in promoting consumer trust and confidence in the global marketplace.<sup>3</sup>

The OECD's Committee on Consumer Policy (CCP) has been working in the area of dispute resolution and redress for a number of years. The *OECD Guidelines for Consumer Protection in the Context of Electronic Commerce* ("OECD E-commerce Guidelines") developed by the CCP in 1999 state that consumers should be provided with "meaningful access to fair and timely dispute resolution and redress without undue cost or burden" and recognise the need to devote "special attention to the development of effective cross-border redress systems." The guidelines call on businesses, consumer representatives, and governments to develop fair, effective and transparent procedures for resolving consumer disputes, with particular attention to cross-border transactions. Likewise, the 2003 *OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practice Across Borders* ("OECD Cross-Border Fraud Guidelines") recognise the importance of consumer redress in limiting the incidence of fraudulent and deceptive commercial practices against consumers, calling on member countries to include within their domestic frameworks "[e]ffective mechanisms that provide redress for consumer victims of fraudulent and deceptive commercial practice." Furthermore, the 2003 Guidelines recommend that member countries jointly study the role of consumer redress in combating fraudulent and deceptive practices, devoting special attention to the development of effective cross-border consumer redress systems.

Other international instruments on consumer protection encourage the development of effective consumer dispute resolution and redress mechanisms. For example, the *United Nations Guidelines for Consumer Protection* ("UN Guidelines"), developed by the United Nations Conference on Trade and Development ("UNCTAD"), call on governments to "establish or maintain legal and/or administrative measures to enable consumers or, as appropriate, relevant organizations to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible" (UN, 1999).<sup>4</sup> In the cross-border

context, the International Consumer Protection and Enforcement Network (ICPEN)<sup>5</sup> aims to enhance the ability of consumer protection enforcement agencies to ensure effective consumer remedies. In a survey conducted in 2000, it studied the legal and practical limitations of consumer protection agencies in this area and recommended possible future options to address these limitations (ICPEN, 2000). In February 2005, the Organization of American States (OAS)'s Committee on Juridical and Political Affairs approved a draft resolution containing a proposal for the development of a model law on monetary redress for consumers.<sup>6</sup>

## **Purpose and scope**

This chapter was prepared as background for participants to the OECD Workshop on Consumer Dispute Resolution and Redress in the Global Marketplace, held in Washington, DC on 19-20 April 2005. It summarises responses to a CCP questionnaire on dispute resolution and redress, distributed to OECD member countries in July 2004. Twenty-five responses to the questionnaire were received from member countries. The responses to the questionnaire were supplemented by existing CCP reports and independent Secretariat research.

The chapter is divided into two parts. Part I presents an overview of the different mechanisms that exist for consumer dispute resolution and redress in member countries, and examines how these mechanisms operate in practice, with a particular focus on the cross-border context. This part includes discussion of mechanisms that may be available to consumers to resolve their individual complaints: from informal attempts to resolve complaints directly with the company; to protections provided by providers of payment instruments; to alternative dispute resolution services; to formal legal action in small claims courts. It also examines legal actions that consumers can take collectively, and actions that may be taken on behalf of consumers by private consumer organisations or government consumer protection agencies.

Part II examines the impediments to pursuing monetary judgments for consumers in cross-border cases and to ensuring that such judgments ultimately result in compensation to consumers. It examines the ability to obtain orders from a foreign court to freeze or repatriate overseas business assets; the ability of consumer protection agencies to gather and share information about assets with foreign agencies; and international agreements for the recognition and enforcement of monetary judgements. These issues were specifically highlighted by Section VI of the OECD Cross-Border Fraud Guidelines as areas for the future joint study.

In terms of scope, this work is limited to dispute resolution and redress in cases involving business to consumer transactions that result in economic harm. It examines mechanisms to resolve disputes and obtain monetary compensation for consumers in small value claims arising out of transactions for the sale of goods and services, especially when those transactions occur across borders. Although they may overlap, it does not specifically cover dispute resolution and redress in cases between private individuals (*e.g.* personal injury, landlord and tenant, family, or employment law cases) or for cases involving commercial practices that damage the health and safety of consumers (*e.g.* product liability, product safety, or environmental law cases).

## PART I: MECHANISMS FOR DISPUTE RESOLUTION AND REDRESS

### A. Internal Complaints Handling

#### *Overview*

An effective process for businesses to handle consumer complaints internally can help alleviate the need for external resolution procedures, saving both consumers and businesses valuable time and money. A number of international consumer protection instruments have recognised the importance of effective processes for internal complaints handling. The OECD E-commerce Guidelines recommend that “[b]usinesses and consumer representatives should continue to establish fair, effective and transparent internal mechanisms to address and respond to consumer complaints and difficulties in a fair and timely manner and without undue cost or burden to the consumer. Consumers should be encouraged to take advantage of such mechanisms” (OECD, 1999). The *UN Guidelines* call on governments to “encourage all enterprises to resolve consumer disputes in a fair, expeditious and informal manner, and to establish voluntary mechanisms, including advisory services and informal complaints procedures, which can provide assistance to consumers” (UN, 1999). The Asia Pacific Economic Co-operation (“APEC”) *Voluntary Online Consumer Protection Guidelines* also state that businesses should “provide consumers with fair and timely means to settle disputes and obtain redress without undue cost or burden” and encourage the use of “internal mechanisms to address consumer complaints” (APEC, 2002).

From a business perspective, ensuring that disputes can be handled internally offers many advantages, by enhancing consumer satisfaction and loyalty, and avoiding more costly and time-consuming external dispute resolution procedures. From a consumer perspective, direct recourse to the company is also usually the most advantageous way to solve a dispute. Consumers are generally more interested in concrete solutions to their problems, by obtaining delivery, repair, replacement, or refund of a product or service they have purchased, than in asserting their legal rights (Ramsey, 2003, p. 38). In terms of time, expense, and ease of use, obtaining such solutions through internal processes, where possible, is preferable to recourse to external mechanisms. In addition, attempting to resolve disputes directly with the business is often a pre-requisite to being able to use third party mechanisms for dispute resolution and redress including payment cardholder protection schemes, and alternative disputes resolution services.<sup>7</sup> As with other informal mechanisms, however, recourse to internal complaints handling processes will not be effective in cases where consumers have been the victims of illegitimate businesses or fraudsters.

#### *Principles and practical guidance for businesses*

There have been efforts at the international level to come up with principles and practical guidance for businesses to ensure that consumer complaints are resolved in a fair, prompt and effective manner. In July 2004, the International Standards Organisation (ISO) adopted an International Standard to provide guidance for the design and implementation of complaints handling processes for all commercial and non-commercial transactions including those relating to e-commerce (ISO, 2004). The standard sets out nine guiding principles for the effective handling of complaints. It also provides practical guidance on the planning, design, operation, maintenance and continual improvement of the complaints handling process. The standard is one of a trio of standards on customer satisfaction in the ISO 9000 Quality Management area. The other two standards, due to be completed in 2006, will set out guidelines for the development and implementation of codes of conduct and external dispute resolution.

Industry groups have also been active in developing principles and practical guidance in the complaints handling area. In 2003, the International Chamber of Commerce (ICC) issued best practices for customer redress in online businesses (ICC, 2003). The best practices are designed to give advice and

practical assistance to businesses operating in the online environment to ensure the majority of consumer complaints can be resolved internally. They are also intended to provide consumers with information on what to expect from a business's internal customer redress system. The best practices include seven guiding principles for internal complaints handling, setting out that systems should be objective and clear; credible and supportive to customers; easily accessible; free; speedy and equitable; sufficiently resourced; and should not deprive the customer of any right he or she would otherwise have. The best practices also provide operational guidance to companies on how to implement these principles into day to day processes for consumer complaints handling and redress.

### ***Facilitating complaints handling in cross-border cases***

At the European level, there have been initiatives to facilitate and streamline the consumer complaints process, in particular in cross-border cases. In 1999, the European Commission introduced a standard consumer complaint form to assist businesses and consumers reach friendly settlements to disputes. The form is designed to help consumers communicate better with businesses, allowing them to describe their problems and propose solutions in a clear and simple manner. The form can be used for any kind of commercial consumer dispute regardless of the sum of money involved. In order to simplify communication in cross-border disputes where the consumer and business may speak different languages, the form is in a simple multiple-choice format and is available in eleven European languages. Where friendly settlement of the dispute cannot be reached, the form includes an option for the company to propose referral to an out of court settlement body. The European Consumer Centres Network (ECC-Net),<sup>8</sup> a network of national consumer centres established by the Member States and the European Commission, provides assistance to consumers in using the form and pursuing cross-border complaints.

Another recent innovation to facilitate complaints handling in cross-border transactions is the Consumer Complaints Form for Online Resolution Mechanisms (CCForm) developed by the Federation of European Direct and Interactive Marketing (FEDMA).<sup>9</sup> Although not yet in operation, the aim of CCForm is to provide an online platform where consumers can file complaints in their own language that will then be automatically translated (where necessary) and referred to the business. Where the business is registered, the complaint is automatically transmitted to it and the complainant is assured of receiving a response. If the business is unregistered, CCForm will attempt to contact it and request its participation in the complaints process but the complaint is not automatically referred. The platform is designed to be used for any consumer complaints arising from commercial transactions whether occurring online or offline. Consumers will be able to track the progress of their complaint online, and, where a settlement cannot be reached will have the option to refer the complaint to an ADR services provider. Although funded by the European Commission, the project is intended to be available for use by consumers and businesses anywhere in the world.

## **B. Payment Cardholder Protections<sup>10</sup>**

### *Overview*

Payment cardholder protections, sometimes referred to as “chargebacks,” are remedies provided by payment card issuers to consumers for unauthorised or disputed charges on their payment cards. The protections currently available to cardholders vary considerably among OECD member countries. They can include anything from a consumer’s ability to have billing errors corrected; to liability limits for unauthorised charges; to redress for non-conforming or non-delivered goods and services. In some instances these protections are required as a matter of national law or regulation, but in others they are provided voluntarily through industry codes or other programmes by card issuers. In either case, they are typically implemented through the payment card networks’ chargeback mechanisms. These payment card networks have global reach, thereby considerably reducing redress challenges for consumers shopping across national borders. When provided in a transparent and effective manner, cardholder protections can increase consumer confidence in the use of payment cards for online purchases, and in the global marketplace more generally.

### *Protections set out in international and regional instruments*

The OECD E-commerce Guidelines highlight the important role of payment cardholder protections and enhanced consumer education in the development of the online global marketplace. The Guidelines provide that “[l]imitations of liability for unauthorised or fraudulent use of payment systems, and chargeback mechanisms offer powerful tools to enhance consumer confidence and their development and use should be encouraged in the context of electronic commerce.” The importance of protections for payment cardholders, especially for unauthorised and fraudulent payments in cross-border transactions is echoed in the OECD Cross-Border Fraud Guidelines, which call on member countries to jointly study “approaches to developing additional safeguards against the abuse of payment systems and redress for consumer victims of such abuse.”

At the European Union level, although there is no specific instrument that deals directly with the issue of consumer protections for payment cardholders, some directives or other initiatives contain relevant provisions. For example, article 8 of the 1997 Distance Selling Directive<sup>11</sup> provides that a consumer should be reimbursed where fraudulent use has been made of his or her payment card in connection with distance contracts covered by the Directive. Similar protections are included in the 2002 Directive on the distance marketing of consumer financial services.<sup>12</sup> Article 11 of the 1987 Consumer Credit Directive<sup>13</sup> provides consumers with the legal right to pursue remedies from credit issuers in cases of disputes with the suppliers of goods and services (for non-delivery or non-conformance) that cannot be resolved amicably. In addition the 1997 Commission Recommendation on Electronic Payment Instruments<sup>14</sup> addresses a number of issues that are relevant in the context of the contractual relationship between the providers of electronic payment instruments, including payment cards, and consumers. It recommends limiting consumers liability for losses sustained due to the loss or theft, and providing consumers with full refunds in cases of processing errors. Although not legally binding, the Recommendation is supposed to be fully implemented in all EU member states.

In December 2003, the European Commission issued a communication paper concerning a new legal framework for payments in the Internal Market.<sup>15</sup> The communication addresses various issues to be included in a future legal framework establishing a “Single Payment Area,” including adequate protections for users of payment services. It recommends that any future instrument set out a high level of consumer protection, including limited liability for unauthorised payments and the possibility to seek reimbursement from the payment provider in cases of non-delivered or non-conforming goods and services. The

Communication stresses that any future instrument should be technically neutral, applying to all payment services including traditional forms, such as payment cards or credit transfers, and forthcoming methods, such as internet and mobile payment schemes.

### *National legal or regulatory regimes for payment cardholders*

Not all OECD member countries have legal or regulatory regimes covering consumer protections for payment cardholders. Furthermore, there are great differences among those that do have these regimes. While many member countries, for example, have specific provisions with regard to unauthorised charges and processing errors, not as many have specific provisions addressing non-delivery or non-conforming goods and services. Even fewer member countries have specific provisions that discuss consumer satisfaction issues. There also are differences among nations with regard to the types of problems that are addressed by specific legal provisions, and those which are either left to guidelines, industry practice, or to consumers to work out with merchants and issuers on their own. Among the differences of particular relevance to e-commerce are whether or not the regimes cover all payment cards and how the regimes treat domestic versus international transactions.

**Unauthorised use.** Several OECD member countries have specific legal or regulatory provisions dealing with unauthorised charges to payment cards. Those member countries with these provisions include Belgium, Czech Republic, Denmark, Finland, Greece, Hungary, Ireland, Korea, Mexico, Norway, Poland, Portugal, Sweden, the United Kingdom and the United States.

In some of these countries the levels of protection for consumers may vary according to the circumstances of the case. For example, a key determinant in countries such as Belgium, Denmark, Korea, Norway and Sweden appears to be whether there was negligence on the part of the consumer. In Belgium, there are different ceilings of liability that take into account such factors as whether negligence, or extreme negligence, played a role, and whether fraud was committed before and/or after notification. In Sweden, consumers are only liable if the card was given to a third party, if it was lost negligently, or if the cardholder fails to notify the issuer immediately. In Korea, an issuer can contract out of liability in the event of a “serious mistake” by a cardholder. However, a 2004 amendment to the Credit Finance Act exempts consumers from liability where they disclosed their password due to violence or threat of violence.

**Non-delivery.** Few OECD member countries report having specific legal or regulatory provisions protecting cardholders in cases of non-delivery of goods or non-performance of services. Among those that do are Finland, Greece, Japan, Korea, Norway, the United Kingdom, and the United States. The details of the provisions differ among the countries with specific provisions already in place, although the focus in all is providing consumers with some ability to avoid liability for charges incurred if goods are not delivered in a timely manner. In Japan, credit cardholders can raise claims against the issuer in some cases of non-delivery, and in the United States credit cardholders can delay payment of disputed amounts or have such funds provisionally restored while the dispute is being resolved. Meanwhile, in Korea, both credit and debit cardholders can refuse payment if goods are not delivered. Legal and regulatory provisions also often address issues of connected liability. In Finland, for example, the Consumer Credit Act includes provisions for connecting the liability of the merchant to the card issuer. In the United Kingdom, for items between GBP 100 and GBP 30 000, both the creditor and the supplier are liable in the event of breach of contract or misrepresentation. In Denmark, protections for non-delivery problems are provided in the Consumer Ombudsman Guidelines. However, there are no specific legal provisions because that issue is considered a part of the purchase commitment between a seller and buyer/cardholder. The same rationale holds true for the lack of specific legal protection in the case of defective goods or services considered below.

***Non-conforming goods and services.*** Member countries with specific provisions on non-conforming goods and services include Finland, Greece, Japan, Korea, Norway, the United Kingdom, and the United States. For example, Finnish law in this area provides protections equal to those for non-delivery; that is, there is connected liability for the merchant and the credit issuer. Korean laws provide for rights of withdrawal in some circumstances, although, in practice, cardholders usually seek resolution of disputes through mediation by the card issuer. In Japan, the Instalment Sales Act enables credit cardholders engaging in purchases by instalment to raise the same claims relating to non-conforming goods or services against the card issuer as against the merchant itself, and have payment invoicing stopped temporarily. This Act has recently been expanded to cover a wider range of goods and services.

***Consumer satisfaction*** Only Canada, Denmark, Italy and the United Kingdom report having specific provisions dealing with consumer satisfaction issues. For example, in May 2001 Canadian federal, provincial and territorial ministers responsible for consumer affairs agreed to an Internet Sales Contract Harmonisation Template (the “Template”) which serves as a guide to amending provincial consumer protection legislation of general application as they pertain to Internet sales. The statute sets out a mandatory credit card chargeback right where a merchant fails to refund the consumer following a lawful cancellation and the Internet purchase was made by way of credit card. In the United Kingdom, for items between GBP 100 and GBP 30 000, both the merchant and the issuer are liable in the event of breach of contract or misrepresentation. This, however, only applies to credit cards. In Italy, the legal protection is afforded solely for non-face-to-face contracts.

***Different protections for different payment schemes.*** One key question as new payment methods, such as prepaid cards, mobile and online payment schemes, evolve is whether current legal and regulatory regimes cover all payment mechanisms and not only the more traditional credit and debit cards. These new payment mechanisms may eventually be a major component of the online business-to-consumer marketplace. Consumers may wish to use other systems to avoid the disclosure of their credit card information. However, in doing so, they may relinquish consumer protections unless these laws and regulatory regimes apply to the new payment systems.

Currently a number of countries limit consumer protections to users of credit cards as opposed to other types of payment cards or emerging payment systems. For example, in the United States, long-standing legislation provides significant protections to cardholders of credit cards. However, the laws provide less protection for holders of debit cards and users of other emerging cards or payment schemes. This issue recently arose in relation to the online payment provider, PayPal. Following an investigation, the New York State Attorney General’s office alleged that PayPal’s User Agreement contained false statements advising its users that they enjoyed all “the rights and privileges expected of a credit card transaction.” In reality, users were often denied reimbursement when goods and services ordered through PayPal were not delivered (New York Attorney General, 2004). Among other member countries that differentiate protection levels based on the type of payment mechanism used are Austria, Canada, Finland, Greece and the United Kingdom.<sup>16</sup> Legal and regulatory regimes in these countries grant less protection to users of debit cards than credit cards and it is unclear how they will apply to other payment systems once they come into more widespread use by consumers, especially in their online purchases.

In other countries, legal protections apply to a broader range of payment cards, if not all kinds of electronic payments. For example, in Denmark, legislation passed in July 2000 provides protections in such areas as processing errors, transparency, options of payment methods, fraudulent use, and confidentiality/data protection for all electronic payments that are offered or available for use. In Ireland, new regulations introduced in February 2005 to implement the 2002 European Directive on the distance marketing of consumer financial services include protections which apply equally to all payment cards. In Poland, a new law implementing the 1997 European Commission Recommendation on Electronic Payment Instruments came into force in October 2003. The law limits the liability of cardholders in cases of loss or

theft and applies equally to credit, debit or charge cards. In Finland, there have been recent legislative proposals to extend the protections for credit cardholders set out in the Consumer Protection Act to debit-card holders.

### ***Protections mandated by industry practice***

In addition to laws and regulations, important protections are also provided by industry practice through such means as industry codes, card network requirements and individual issuer initiatives.

***Industry codes.*** In a number of countries the card industry has implemented self-regulatory codes that contain provisions relevant to card-related protections and the rights and responsibilities of the parties to the card system. They are developed by industry, often in partnership with governments and consumer representatives. Compliance with such codes can be voluntary or obligatory, either by an industry association or government body.

For example, the New Zealand Bankers' Association has issued a Code of Banking Practice for its member banks. The Code is a self-regulatory regime, and the Banking Ombudsman monitors compliance with it. The Code clarifies the obligations of bankers and consumers in respect of the loss or theft of cards. Similarly, the Australian Banking Industry Ombudsman is an industry-based scheme that provides individuals and small businesses with an external means of investigating and resolving their complaints about banking services. Australia also has an Electronic Funds Transfer Code of Conduct (EFT Code), developed by a working group of government, industry and consumer representatives that has been subscribed to by most financial institutions offering retail electronic funds transfer services in Australia. The EFT Code, which was revised in 2001 and again in April 2004, covers all forms of electronic funds transfers, including ATM and EFTPOS (electronic funds transfer at point of sale) transactions, telephone and internet banking, all credit card transactions (other than those intended to be authenticated by a manual signature), and stored value products such as smart cards, pre-paid telephone cards and digital cash. The British Bankers Association has also issued a voluntary banking code providing that card issuers bear full responsibility for loss occurred due to certain misuses of cards. In some countries, card-issuing banks have voluntarily established dispute resolution services. For example, in Italy, an ombudsman panel is available to settle low-value disputes. Consumers can apply to the ombudsman after dealing with a particular bank's own complaints department, but only if the consumers have not already filed a claim in court. Similarly, in Germany certain bank associations have set up conciliation services for consumers.

***Card networks.*** The major card networks impose obligations on their issuers to provide protections that may exceed those required by national laws. Such measures can provide important benefits to cardholders. The three largest card networks, Visa, MasterCard, and American Express, recommend that issuers of its cards abide by a number of policies aimed at protecting cardholders. For example, Visa USA advertises a "zero liability" policy for US cardholders, which promises protection against liability for certain unauthorised credit or debit charges. Visa International has a global policy that requires issuers to implement the chargeback process for certain kinds of complaints. Visa Canada has issued a voluntary "e-promise" initiative to provide consumers recourse in most situations covered by the official "Template" (see above) for all forms of distance sales (*e.g.* Internet, mail and telephone order). MasterCard also advertises a "zero liability" policy for certain unauthorised uses of US-issued credit and debit cards. American Express has implemented a programme through which US cardholder disputes regarding charges for electronically delivered goods or services will result in an immediate chargeback.

***Individual card issuers.*** In some cases, individual issuers supplement the requirements imposed by the card networks to provide additional protections for consumers. For example, some US-based issuers opted to go to the zero-liability policy for Internet purchases prior to being required to do so by the payment card networks. Some of these protections are marketed specifically to allay fears of online shopping, providing protections like "purchase insurance" and "extended warranty" or "purchase replacement protection". Issuers

in various other member countries provide similar reassurances. For example, in Australia some issuers provide protections like “online security guarantee” or “100% shopping guarantee”.

### ***Cross-border considerations***

Some legal and regulatory regimes differentiate between domestic and cross-border transactions. In an era where cross-border transactions are breaking down barriers between national jurisdictions, this issue can be especially important. A lack of resolution could leave consumers either confused as to when protections apply in one case or over-confident in their protections in another.

The United Kingdom provides an example of a member country where there may be more comprehensive protections for domestic transactions than for cross-border transactions. A recent decision by the United Kingdom High Court held that Section 75 of the United Kingdom Consumer Credit Act 1975, which provides consumer protections for product related difficulties do not apply to overseas credit card transactions (OFT, 2004). By contrast, in the United States cardholders doing business with merchants outside the United States are covered by the same federal legal protections as those afforded them when trading with merchants within the United States.

Due to the limitations of legal protections in some countries, policies instituted by the card networks can be particularly useful because they can standardise protective measures across national borders. However, where they are optional, their use is left to the discretion of the individual issuer.

## C. Alternative Dispute Resolution (ADR)

### *Overview*

Where efforts to resolve disputes directly with businesses fail, alternative dispute resolution (ADR) can offer consumers a quick, effective and cheap way to obtain a remedy without the burden and expense of taking formal legal action. There are a wide variety of ADR mechanisms. Some of the most common forms are mediation, conciliation, assisted negotiation, and arbitration. Although there is not full consensus - in the academic or business fields - on the precise definitions of these terms, they can be broadly categorised into consensual versus adjudicative processes. Mediation, conciliation, and assisted negotiation are all consensual processes whereby a neutral third party facilitates communication between the parties to help them reach agreement. Arbitration is an adjudicative process whereby a neutral third party gathers information from both parties and makes a decision that is often intended to be legally binding and final. Arbitration is more formal or “court-like” than consensual ADR mechanisms, with parties agreeing (either before or after the dispute arises) to be bound by the final decision of the third-party arbitrator. In consensual ADR schemes, on the other hand, decisions are agreed upon by the parties themselves rather than imposed by the third party.

In recent years there has been an increasing use of information communications technology in alternative dispute resolution processes. In particular, the growth of the Internet during the 1990s provoked great interest in online ADR, or ODR as it is sometimes known.<sup>17</sup> There are different forms of online ADR mechanisms which may be suitable for business-to-consumer disputes, including fully automated mechanisms (where outcomes are generated without human intervention),<sup>18</sup> or assisted negotiation and mediation which involve active participation of a third party. While some online ADR services may only be used to resolve disputes arising from online or ecommerce transactions, more commonly they may be used for all forms of disputes, whether online or offline (Conley Tyler, 2004, p4). Online ADR services for business to consumer disputes exist in a variety of contexts, including within a particular online marketplace (*e.g.* online auction sites), as part of a trustmark or seal programme, or on an independent basis.<sup>19</sup> These differences may have an effect on consumer access to ADR and on business compliance with the outcome.

### *Principles for ADR procedural rules*

To date there are no legally binding international principles setting out procedural safeguards governing the accessibility, independence, transparency, and cost, among other issues for ADR services in business to consumer cases.<sup>20</sup> On the other hand, there have been a number of initiatives to develop voluntary or “soft-law” principles.

At the international level, the OECD E-Commerce Guidelines set out that alternative dispute resolution mechanisms should provide “effective resolution of the dispute in a fair and timely manner and without undue cost or burden to the consumer.” The International Standards Organisation (ISO) is also currently developing an international standard on external dispute resolution which is expected to be completed in 2006. Together with the already published standard on internal complaints handling (see section A above) and a forthcoming standard on codes of conduct, the standard will form one of a trio of standards on customer satisfaction in the ISO 9000 Quality Management area.

At the regional level, the European Commission has issued two recommendations to guide the implementation of ADR services for consumer disputes. The first, issued in 1998, governs standards for out of court dispute resolution procedures which lead to a settlement of the dispute through the active intervention of a third party (*i.e.* a proposed or imposed solution).<sup>21</sup> It includes seven principles including principles of independence; transparency; adversarial proceedings; effectiveness; legality; liberty and

representation. The second, issued in 2001, governs out of court procedures which lead to a settlement between the parties by common consent, and includes four principles relating to the impartiality; transparency; effectiveness; and fairness of the procedure.<sup>22</sup> ADR schemes that are deemed to respect the principles set in the recommendations are notified to the Commission by Member States for inclusion in a centralised database.<sup>23</sup>

At the national level, some OECD member countries have also developed co-regulatory principles to govern industry-based ADR schemes. For example, in 1997 the Australian government released Benchmarks for Industry-Based Customer Dispute Resolution Schemes, which were developed with the assistance of dispute schemes, consumer groups, government and regulatory authorities. The Benchmarks set out six comprehensive principles - relating to accessibility; independence; fairness; accountability; efficiency; and effectiveness - that are intended to guide industry in developing and improving ADR schemes (Minister for Customs and Consumer Affairs, 1997). The Australian National Alternative Dispute Resolution Advisory Council (NADRAC) has also issued a framework for the ongoing development of ADR standards with recommendations for government and private sector ADR providers (NADRAC 2001). It is currently developing principles for the use of information technology in dispute resolution (NADRAC, 2002). In many other member countries, there are legal provisions governing certain aspects of ADR procedures.<sup>24</sup> For example, it is common for countries to have laws setting out confidentiality rules for ADR proceedings or regulating the qualifications and neutrality of ADR practitioners. However, there are no overarching legal frameworks regulating all procedural aspects of ADR services in consumer cases.

In the last few years there have also been a number of private sector initiatives setting out principles for business to consumer ADR schemes operating in the global marketplace. For example, in November 2003 the Global Business Dialogue on Electronic Commerce (GBDe) adopted guidelines for ADR in business to consumer disputes arising from 'electronic' transactions (GBDe, 2003). The guidelines were negotiated with the Consumers International and offer recommendations for ADR providers on impartiality and qualifications of personnel; accessibility and convenience; speed; cost; transparency; representation; applicable rules and consumer awareness. They also include recommendations for governments concerning the need to address international rules on jurisdiction and applicable law and to adopt different measures to promote increased use and development of ADR. The International Chamber of Commerce has also issued best practices for online dispute resolution (ODR) in business to consumer and consumer to consumer transactions (ICC, 2003). The best practices include guidance for businesses engaging in online transactions with consumers and for online dispute resolution providers. They encourage businesses to use ODR wherever practicable when disputes with consumers cannot be resolved internally and set out recommendations for ODR providers relating to the accessibility, convenience, privacy and confidentiality, user information, representation, and choice and qualification of dispute resolution professionals. Finally, in 2002, the American Bar Association (ABA) Taskforce on Ecommerce and ADR issued recommended best practices for ODR providers (ABA Taskforce, 2002). Rather than set minimum substantive standards, the goal of the ABA best practices is to focus on the use, adequacy, content and means of disclosures by ODR providers of information about their services, policies and procedures.<sup>25</sup>

Consumer groups have also developed recommendations in this area. For example, a 2000 resolution of the Trans Atlantic Consumer Dialogue (TACD) called for ADR systems to be easily accessible and convenient; free or low-cost; independent; expeditious; fair and equitable; and staffed by personnel trained in both basic legal concepts and mediation skills. They also recommended that necessary frameworks and standards for ADR systems be set out in legislation (TACD, 2000). With respect to online ADR, Consumers International has recommended that to be "useful to consumers" mechanisms need to cover all types of B2C disputes; be free or low cost; be available for initiation by consumers; be visible, accessible and easy to use; and operate in a timely fashion. Furthermore, they state, in order to be "optimally

effective,” online ADR mechanism need to accommodate linguistic diversity; be scaleable and coordinated with each other; and offer appropriate levels of security (Consumers International, 2001, p.15).

Finally, procedural safeguards may also be introduced into ADR processes through professional codes of conduct to which mediators, conciliators and other third party neutrals are often required to adhere. For instance, where ADR is undertaken by lawyers, they will often be subject to the ethical requirements and disciplinary procedures of their national bar associations or law societies which may serve to introduce some procedural safeguards, particularly around independence, impartiality and transparency.

### ***Principles governing recourse to ADR***

Related to principles governing procedural rules are principles governing the issue of recourse to ADR, including whether consumers can be contractually required to resort to ADR procedures prior to traditional court mechanisms; and/or whether they can be required to submit to binding ADR, either before or after the dispute has arisen. Again there are no international rules in this area. At the regional level, the 1993 EU Directive on Unfair Terms in Consumer Contracts,<sup>26</sup> sets out that “a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.” In the annex to the directive, a list of examples of unfair clauses includes “clauses ... to exclude or hinder the consumer's right to take legal action or exercise any other legal remedy.” In addition, the 1998 and 2001 Recommendations of the European Commission on out-of-court settlements in consumer cases, provide that “[ADR] procedures may not deprive consumers of their right to bring the matter before the courts unless they expressly agree to do so, in full awareness of the facts and only after the dispute has materialised.”

At the national level, member country laws vary greatly. With respect to contractual agreements to exhaust recourse through ADR prior to seeking redress through the courts, few member countries report having specific provisions that would affect the validity of such clauses. A number of European countries, however, interpret the EU Unfair Terms Directive as invalidating contracts that require prior resort to ADR.

With respect to binding ADR, in general member countries do not have specific provisions that prohibit contractual agreements between parties to be bound by ADR after a dispute has arisen, and, *a fortiori*, at the end of the ADR process. However, the general practice appears to be that contractual provisions binding parties to ADR prior to a dispute having arisen may be regarded as an “unfair” contract term or contrary to public policy, notably if it deprives the consumer to the right to go to court. For example, legislation in Sweden and France mandates that consumer contracts entered into prior to a dispute that contain an arbitration clause are automatically invalid as unfair. Similarly, in the United Kingdom, an arbitration agreement is automatically void as unfair for consumers specifically if it relates to a claim for a small amount. In 2002, a court in Canada (Ontario) found that companies could in certain circumstances curtail consumer recourse to the courts and compel consumers to use arbitration.<sup>27</sup> In apparent response, the new Ontario Consumer Protection Act, 2002 (not yet in force), includes a statutory over-ride of any contractual restrictions on the ability of consumers to go to court to protect their rights under the Act.<sup>28</sup> Other countries which have adopted this approach include Australia, Austria, Denmark, Finland, Italy, Netherlands, and Spain. In Japan, a new arbitration law which entered into force in 2004, includes an interim provision allowing a consumer, in principle, to cancel pre-dispute arbitration agreements.<sup>29</sup> In New Zealand and the United States, consumers are generally free to consent to be bound by ADR, but a court may consider general contract law defenses such as fraud, undue influence or unconscionability to strike down such a contractual provision.

The issue of recourse has been addressed in self-regulatory and other non-government developed principles for ADR. Principles developed by consumer groups have long recommended that consumers should not be deprived of rights to access the courts.<sup>30</sup> In addition, some business codes state that consumers should not be forced into ADR proceedings. For example, the GBDe guidelines state that “ADR should be presented as a voluntary option for consumers if a dispute arises, not as a contractual obligation.” They also generally discourage the use of binding arbitration on the grounds that it “may impair consumer confidence in electronic commerce,” and prohibit pre-dispute binding arbitration agreements, stating that “[c]onsumer decisions to engage in binding arbitration must be fully informed, voluntary, and made only after the dispute has arisen” (GBDe, 2003). Likewise, the ICC best practices state that “[g]enerally, companies should not obligate consumers to agree to use binding dispute resolution processes prior to the materialization of a dispute” (ICC, 2003).

### ***Government established, funded or run ADR programmes***

Many OECD countries offer some sort of government-established, funded or run programme to resolve business to consumer disputes. In a number of countries, there are consumer complaints bodies to deal generally with business to consumer disputes. For example, in Denmark, Finland, Norway and Sweden state-run consumer complaint boards have competence for most commercial consumer disputes. In Greece, there are public ADR committees operating in every prefecture. In Mexico, the federal consumer protection agency (Procuraduría Federal del Consumidor) administers a two-stage mediation and arbitration scheme. Consumers are required to first submit their disputes to mediation proceedings. If no agreement can be reached, the dispute is then referred to arbitration proceedings. In Poland, there exist Standing Conciliatory Consumer Courts which serve as an alternative to ordinary courts. In 2003, Turkey established arbitration committees for resolution of consumer disputes. Recourse to the arbitration committees is compulsory for disputes under a certain threshold and rulings are legally binding. Some countries also provide for court-annexed or court-referred ADR. For example, in France there is a judicial conciliation scheme by which a judge, with the agreement of the parties, may designate a conciliator to assist in amicable dispute resolution. In the Swiss canton of Geneva a new mediation law was adopted in October 2004 allowing judges to refer a dispute to mediation with the agreement of the parties. A variety of other government ADR mechanisms have been established in Australia, Germany, Hungary, Japan, Korea, New Zealand, and Spain.

A number of member countries also have established government-run business to consumer ADR schemes or bodies that deal only with consumer complaints from a particular industry or sector or particular kinds of disputes. For example, in Austria, an arbitration panel was established in October 2002 pursuant to the Energy Liberalisation Act to resolve disputes relating to energy services. In Canada, the Financial Services Commission of Ontario has been established with a mandate to resolve motor vehicle insurance disputes through mediation and arbitration. In Italy, there are arbitration and conciliation committees to resolve business to consumer (as well as business to business) disputes relating to tourism services. In Finland, a new Securities Complaint Board began operating in March 2002. In Korea, a March 2002 revision of the ‘Door-to-Door Sales Act’ and the ‘Consumer Protection Act on E-Commerce’ authorises the Korea Consumer Protection Board (KCPB) to refer disputes relating to door-to-door sales, telemarketing, pyramid sales and e-commerce, to the Consumer Dispute Settlement Commission (CDSC), before it issues corrective action. In Poland, an Ombudsman for Insured Persons, and an attached conciliatory court, to resolve disputes between insurance providers and consumers. There are currently also proposals to create conciliatory courts in the telecommunications sector. Australia, Austria, Italy, Mexico, Netherlands, Spain, and Sweden also have sector-specific government-run schemes in place.

Finally, in addition to government established or run schemes, in some countries certain businesses or industry sectors are required by law to establish or to belong to an ADR service to resolve disputes with consumers. For example, in Australia the *Corporations Act of 2001* requires that businesses providing

financial services must be a member of one or more approved external dispute resolution schemes to deal with consumer complaints. In Germany several bank associations run conciliation services. The establishment of these services was recommended by several acts of the EU. In the United Kingdom, the Communications Act 2003 requires every public communications provider in the UK to provide consumers with access to a dispute procedure scheme which has been approved by the telecommunications regulator Ofcom.

### ***Encouraging the use and development of ADR***

Given the practical and legal limitations of traditional court-based dispute settlement mechanisms in cross-border cases, over the past ten years there have been significant efforts at the international, regional, and national level to encourage the use and development of ADR as a viable alternative to court action in consumer cases, in particular cases arising from Internet or cross-border transactions.

Fostering the development of effective ADR mechanisms for business to consumer transactions has been a central focus of the OECD's programme to build trust in the global marketplace. The OECD E-Commerce Guidelines stress the need for businesses, consumer representatives and governments to work together to continue to provide consumers with access to alternative dispute resolution mechanisms. They also call for the innovative use of information technologies to enhance consumer awareness and freedom of choice relating to alternative dispute resolution (OECD, 1999). In December 2000, the OECD together with the Hague Conference on Private International Law and the International Chamber of Commerce organised a conference on business to consumer dispute resolution in the online environment.<sup>31</sup> The primary objective of the workshop was to explore how existing and future online ADR mechanisms can help resolve B2C disputes arising from privacy and consumer protection issues and thus improve trust for global electronic commerce. More recently, the OECD has focused on the role ADR can play in promoting SMEs (small and medium sized enterprises) to engage in cross-border transactions with consumers and take full advantage of the expanded global economy. In June 2004, OECD Ministers adopted a *Declaration on Fostering the Growth of Innovative and Internationally Competitive SMEs*, which encouraged the development and use of ADR mechanisms, as a means to reduce barriers to SME access to global markets.<sup>32</sup>

The European Union also has a strong policy of promoting ADR in e-commerce and cross-border consumer disputes.<sup>33</sup> The European Commission has undertaken a number of practical initiatives to provide consumers with access to ADR services that meet adequate procedural standards. Most significantly in October 2001, the Commission launched the European Extra-Judicial Network (EEJ-Net) to facilitate consumers' access to ADR providers in cross-border cases. Each country participating in the network is required to set up a central contact point, or "clearing house", to provide consumers with information and support in making a claim to an approved ADR scheme in the country where the business is located.<sup>34</sup> In January 2005, this network was merged with the European Consumer Centres "Euroguichet" to form one stop "European Consumer Centres Network" (ECC-Net), with the aim of providing European consumers a full range of services from information through to dispute resolution. To be included in the network, ADR schemes must be deemed to meet the standards set out in the 1998 and 2001 European Commission recommendations mentioned above. A complementary network, known as FIN-NET, is available for disputes relating to financial services. The Commission has also recently adopted a proposal for a directive on certain aspects of mediation in civil and commercial matters.<sup>35</sup> The proposed directive includes provisions that aim at ensuring a sound relationship between the mediation process and judicial proceedings, by establishing common rules in the Community on a number of key aspects of civil procedure. It also provides the necessary tool for the courts of the Member States to actively promote the use of mediation, without making mediation compulsory or subject to specific sanctions.

The European Commission was also a primary sponsor, together with the Irish Department of Enterprise, Trade and Employment, of the ECODIR (Electronic Consumer Dispute Resolution) project.<sup>36</sup> ECODIR is a three stage consumer conflict resolution service, managed by University College Dublin in Ireland. The first phase is the negotiation phase. Upon receiving a consumer complaint ECODIR sends an invitation to the respondent to enter negotiations and the parties are given a fixed time to negotiate a solution via the ECODIR platform. If no agreement is reached, the parties may initiate the mediation phase whereupon an independent mediator is appointed by ECODIR to facilitate the parties in reaching a solution. If, within 15 days, a solution is not found the mediator may issue a non-binding recommendation. The recommendation is not binding upon the parties, unless they agree to this in a separate agreement, and parties remain free at all times to refer the matter to the courts.

Other significant international initiatives to help consumers resolve cross-border disputes through ADR are the *econsumer.gov* and Global Trustmark Alliance projects. *Econsumer.gov* is a joint project of consumer protection agencies from twenty countries and the OECD, with the primary aim of gathering and sharing consumer cross-border complaints to facilitate enforcement action against cross-border fraud.<sup>37</sup> The project has also recently included an ADR element to link consumers to ADR providers. Upon filing complaints, consumers are provided with the option to choose from an international directory of ADR providers willing to undertake resolution of disputes in the country of the trader. Links between this initiation and the European Consumer Centres network (ECC-Net) are envisaged. The Global Trustmark Alliance is made up of self-regulatory organizations from eight nations in Asia, Europe and the Americas, an Asian coalition of e-commerce organizations, and three pan-European bodies. The alliance intends to promote safe electronic commerce within each of the participating jurisdictions, and a trustworthy system for cross border e-commerce. The GTA is an outgrowth of recommendations made by the GBDe in past years for close cooperation amongst trustmark programs and for the linking together of dispute settlement mechanisms. The GTA anticipates use of an online dispute resolution program developed by the Council of Better Business Bureaus, which will be launched at in April 2005.

At the national level, most OECD countries have adopted policies recognising the potential benefits of ADR for business to consumer cases. These policies aim at increasing consumer awareness of effective, timely and cheap mechanisms as an alternative to formal court-based dispute resolution. In addition to establishing state-run ADR schemes, as described in the section above, a number of countries have taken practical steps to facilitate privately-run schemes and/or to encourage awareness and use of these schemes by consumers.

For example, in Australia government bodies at the federal and state level have established clearing house facilities to assist consumers in identifying ADR schemes. The Commonwealth government has established a new online consumer information and advice center ([www.consumersonline.gov.au](http://www.consumersonline.gov.au)) which also serves as a sort of ADR clearinghouse by providing a directory of who to contact depending on the nature of the complaint. In France, a new online mediation service for consumers was established in September 2004 with support from the Ministry of Justice.<sup>38</sup> The service is run by the organisation, *Forum de Droits sur l'internet*, and provides an interactive online platform through which the parties, and independent third party mediator, communicate. It aims to resolve 500 internet-related disputes a year. In Japan, a new law aimed at promoting the development and use of ADR was enacted in December 2004 and will come into force no later than May 2007. In the United Kingdom, a July 2004 public consultation document issued by the UK Department of Trade and Industry (DTI) proposed the establishment of a scheme to refer consumers directly to accredited third party ADR providers. The referral scheme would be integrated into Consumer Direct, a new government telephone and online consumer advice service (UK DTI, 2004, pp. 42-43). Finally, all European countries belonging to ECC-Net (described below) have established national clearinghouses to provide consumers with assistance in locating and using ADR schemes.<sup>39</sup>

While there has been no comprehensive assessment of the availability, usage and suitability of ADR schemes (public and private) for business to consumer disputes in OECD member countries, a number of surveys of more limited scope have been conducted which indicate that ADR has not yet fulfilled its potential as a low cost and efficient mechanism for the resolution of business to consumer disputes. For example, in 2004 the UK National Consumer Council conducted a survey on the provision and use of ADR in business to consumer cases. The survey found that the provision of ADR services for consumer problems is “*ad hoc* and presents a lottery for the consumer...[depending] either on the type of problem faced or where the problem arises, and sometimes depending on the ability of the consumer to afford the fees.” With regard to usage, the survey found that a “microscopically small fraction” of consumer complaints are referred to an ADR service (Doyle, Ritter and Brooker, 2004). In a 2004 report, the Irish European Consumer Centre found that a shortage of ADR bodies and a lack of business participation were creating barriers to ADR use in Ireland and preventing the Centre from operating to its full potential within the EEJ-Net system (Reilly, 2004). A 2003 review by the European Commission of the operation of the EEJ-Net identified “important gaps” in ADR services in member countries. The report found that in some countries certain key sectors were still not covered and that in all countries there was a need for development of ADR services with cross-border competence (EC, 2003a, p17). A recent Eurobarometer survey on access to justice found that 38% of respondents had never heard of bodies, such as arbitrators, ombudsmen, arbitration or conciliation bodies, that could offer an alternative to court action (EC, 2004, p. 13). In late 2001, Consumers International released a survey of twenty nine online ADR schemes for business to consumer disputes, of which only thirteen were deemed “useful to consumers” (Consumers International, 2001). Reviews of this kind indicate that there is still room for improvement in the development, promotion and use of fair and effective ADR services for business to consumer disputes.

## D. Small Claims Procedures

### *Overview*

Recognising that the regular court system is often beyond the reach of average consumers with low value claims, a significant number of OECD member countries have introduced simplified court procedures for small claims. These procedures are designed as informal alternatives to traditional civil court proceedings, allowing individuals to resolve disputes and obtain redress at a cost and burden not disproportionate to the amount of their claim. Being independent, binding and enforceable, small claims procedures offer consumers the main benefits of the judicial system without the high costs, delay and procedural complexities associated with the regular courts.

The following twenty responding countries have simplified court procedures available claims under a certain monetary threshold: Australia, Austria, Canada, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Korea, Mexico, Netherlands, Norway, Poland, Portugal, Sweden, Switzerland, the United Kingdom and the United States. These procedures vary significantly between countries and even between regions in the same country. Variations can be seen in the type of procedure; the type of dispute and claim that may be heard; monetary thresholds; the financial costs to parties; and overall accessibility to consumers (“consumer friendliness”).

### *Type of procedure*

Member country responses indicated very different forms of court procedures to resolve small consumer claims. The procedures are broadly organised here into three different categories: separate courts or tribunals of limited jurisdiction; modified procedures in ordinary courts; and other types of simplified procedures. In countries with federal systems, the type of small claims court procedure often varies among the regions. For example, in the United States every state has established a small claims procedure which may be either a stand-alone court or a special division of state, county, municipal or other local courts. Similar variations exist in Canada where all provinces and most territories provide some form of small claims court procedure. In Switzerland, the cantons (federal entities) have a choice whether to provide consumers with conciliation or simplified court procedures to resolve their low value disputes. In the majority of cases, the cantons provide that the *juge de paix* should first attempt to resolve disputes amicably and if this is not successful, the matter is then referred to the court of first instance.

***Separate courts or tribunals of limited jurisdiction.*** In some countries small consumer claims are resolved by separate courts or tribunals of very limited jurisdiction, designed to provide individuals with an accessible form of justice for day-to-day legal matters. In some countries, these tribunals or courts are specialised for consumer disputes, while in others they handle all minor legal matters both civil and criminal. The distinguishing characteristic of these courts and tribunals is that they only resolve minor legal matters, are usually not courts of record, and usually operate under less formal procedures than the higher courts irrespective of the type of case being heard. Examples of this category are the specialist consumer tribunals in the Australian states of New South Wales and Victoria;<sup>40</sup> the ‘jurisdiction de proximité’ in France, new form of local magistrates court established in 2002; the Justices of the Peace courts in Italy; the municipal courts in Korea; the minor tribunals and justices courts in Mexico; the sub-district courts in the Netherlands; and the Portuguese magistrates courts (Julgados de Paz) established in 2001.

***Modified procedures for small claims in ordinary courts.*** In a number of responding member countries, small consumer claims are resolved by courts of first instance operating under simplified and/or accelerated procedures. Very often, these courts have a separate division or section to handle small claims.

For example, in Australia, all states and territories have a small claims court or tribunal administered by the Magistrates court. In Japan, small claims fall under the jurisdiction of the summary courts, which have several informal procedures to resolve cases expeditiously. In Germany, the courts may resolve low value civil and commercial disputes by simplified procedure. In Greece, the county courts operate under simplified procedures when resolving small claims. In Ireland, there is a small claims procedure available in the district courts. In Norway, there is a special procedure available in the county court for the resolution of small claims, and discussion is under way about improving the system. In Poland, a new simplified procedure for small claims was introduced into the civil code in 2000. This procedure is mandatory for all disputes falling under the specified monetary threshold. In Sweden, there is a specific small claims procedure available in the civil courts. In the United Kingdom there is a special procedure, known as the small claims track, used within the county courts to resolve small claims.

***Other types of simplified procedures.*** In a few countries there are special procedures provided by the regular courts, which may only be used for a particular type of claim. These procedures are not usually tailored towards consumer disputes. For example, in Austria, there are summary proceedings available for debt repayment orders for amounts not exceeding a certain threshold. Similarly in Hungary, there is a simplified payment order procedure, allowing a claimant to obtain a court order (for payment of monies and delivery of movable property) upon the filing of a unilateral petition. In France, a simplified procedure may be used at the *tribunal d'instance* and *jurisdiction de proximite* for claims for specific performance (“*injonction de faire*”) (*i.e.* a court order requiring the defendant to fulfil his or her contractual obligations). In addition, there is a simplified procedure for filing claims at the *tribunal d'instance* (“*déclaration au greffe*”).

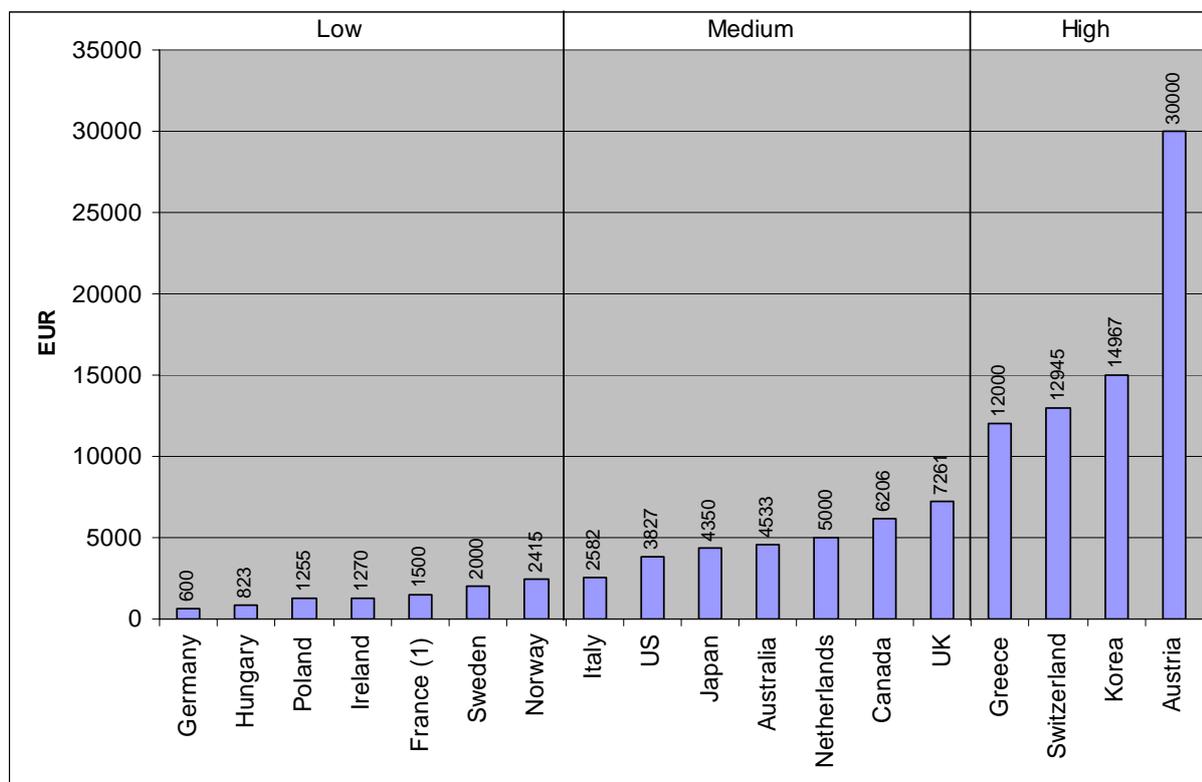
In some countries, as an alternative, or addition, to small claims procedures, there are state run alternative dispute resolution bodies (such as consumer complaints boards or ombudsman schemes) which operate outside the ordinary civil court system to serve the same function as judicial small claims procedures. For example, in Turkey there is no small claims procedure within the court system but there is compulsory recourse to an arbitration committee for disputes under a certain monetary limit. In Poland, Norway and Sweden there are quasi-judicial complaints bodies or consumers tribunals that can issue binding settlement recommendations. These types of bodies have been examined in the discussion on alternative dispute resolution in Section C above.

### ***Type of dispute, remedies, and monetary thresholds***

In all responding countries, small claims courts have jurisdiction to adjudicate most types of commercial consumer disputes relating to goods and services.<sup>41</sup> However, in certain countries there are restrictions on the type of relief that may be sought. In Austria, Japan, Korea, Netherlands, Norway and select states in the United States only claims seeking monetary relief (as opposed to injunctive relief) may be filed through small claims procedures. In Austria and Hungary, the simplified procedures may only be used for the recovery of outstanding payments and movable property. In France, the simplified “*injonction de faire*” procedure only applies to claims for specific performance of a contractual provision.

All countries set threshold limits on the monetary value of the claim that may be filed under simplified proceedings. As can be seen from the figure below, these limits vary greatly by country. At the lower end of the scale are thresholds in Germany, Hungary; Ireland Poland; France; Sweden; Norway and Italy. At the mid range are thresholds in Japan; Australia (Queensland); the Netherlands; Canada (Ontario); and many states in the United States. Finally at the higher end, are thresholds in Greece, Switzerland; Korea and Austria.

Figure 1. Figure 1. Threshold limits in EUR



Note: Conversion of national currencies, where applicable, into EUR, according to the rate on 22 February 2005.

(1) This (EUR 1 500) figure is the threshold limit for proceedings before the "jurisdiction de proximité." The threshold for the simplified filing procedure ("déclaration au greffe") is EUR 3 800 and the threshold for claims for specific performance ("injonction de faire") is EUR 7 600.

Source: OECD.

In some countries threshold limits vary according to the nature of the dispute. For example, in the United Kingdom the threshold limit for commercial disputes is approximately EUR 7 150, whereas claims for personal injuries or claims for housing repairs by residential tenants is approximately EUR 1 400. Similarly, in Greece the threshold limit is EUR 12 000 for most civil disputes except for product liability cases which are limited to EUR 500.

### ***Financial costs to claimants: filing fees, liability for costs, and legal representation\****

In all responding countries except France, Italy and Mexico, there is a fee for filing a claim. Flat fees are in place in Ireland (EUR 9), Korea, Norway (NOK 845/EUR 103); Portugal (EUR 70); and Sweden (SEK 450/EUR 49). In Portugal, however, the consumer is obliged to pay only 50% of the fee upon filing and the outstanding 50% if his or her claim is unsuccessful. In other countries, the fee is linked to the amount of the claim. For example, in Queensland, Australia filing fees range from AUD 12.50 (EUR 7.50) to AUD 70 (EUR 42); in Germany they range from EUR 75 to EUR 105; in the Netherlands they range from EUR 57 and EUR 190; and in the United Kingdom they range from GBP 30 (EUR 43) to GBP 120 (EUR 175). In Greece and Hungary filing fees are calculated as a set percentage of the claim. Finally, in

\* Conversion of national currencies, where applicable, into EUR, according to the rate on 22 February 2005.

some countries, fees vary according to the number of claims that are filed by a plaintiff, increasing according to the frequency of filings. For example, in Ontario (Canada) the fee for “infrequent claimants” is CAD 50 (EUR 31), whereas for “frequent claimants” it is CAD 145 (EUR 91). In California (United States) the filing fee is USD 12 (EUR 9.5) for the first 12 claims a year and USD 66 (EUR 53) thereafter.

In both the United Kingdom and many states in the United States, a waiver or reduction of the filing fee may be granted to persons unable to afford it. In all responding countries where a filing fee is in place, except some Australian states and territories, consumers are entitled to recover the fee from the other party if they are successful in their claim.

A major factor in assessing the financial burden to consumers of filing a claim through small claims procedures relates to legal representation. If consumers are required to be represented by a lawyer, or themselves feel that the system is too complex to appear in court without a lawyer, the costs of filing a claim increase significantly. The presence of lawyers also increases the formality of the procedure, which may be off-putting to consumers and deter recourse to the courts. Consequently, in most responding countries, small claims procedures are designed to be simple enough for individuals to represent themselves without incurring the cost of a lawyer. Often there will be some form of assistance provided by the court to the unrepresented parties, either in the form of printed information booklets and guides or assistance with filing out forms, submitting evidence etc. In addition, it is common for small claims judges to take more of an “interventionist” role where parties are not legally represented, explaining rules of procedure, evidence and other legal requirements to the parties.

Only one responding country, Portugal, requires an individual party to be legally represented or assisted and this only in cases where the party suffers from a specified physical handicap; does not speak Portuguese; or is otherwise at a manifest disadvantage. In certain states in the United States, although individual claimants are free to represent themselves or be represented by a lawyer, corporations and collection agents may not appear as claimants without a lawyer.

On the other hand, while legal representation is not required and may be actively discouraged in most other countries, only certain jurisdictions in Australia and the United States actually prohibit the use of lawyers. In Australia, legal representation is not permitted in the specialist consumer tribunals in New South Wales or Victoria. In the Queensland Small Claims Tribunal, legal representation requires agreement by both parties and approval by the tribunal. In the United States, many states, such as California, prohibit legal representation. In New York, legal representation is permitted but if both sides are represented, the case may be transferred from the small claims section to a regular part of the court. In all other countries legal representation is permitted. In some countries, such as France, Germany, Italy, Japan and the Netherlands, claimants may also choose to be represented by another (non-lawyer) appointee.

In most responding countries, except the United States and Mexico, consumers that are unsuccessful in their claim are liable to pay some or all of the costs the other party has incurred in responding to the claim. This potentially includes court fees; expert witness fees; loss of earnings (of the party or witness); travel and accommodation expenses; and lawyers’ fees. In order to reduce the financial detriment to the average consumer of having to reimburse the winning party for costs, many countries place some sort of restriction on cost amounts, and lawyers’ fees in particular.<sup>42</sup> In Ontario (Canada) and Sweden, fixed limits are placed on the amount in costs that may be ordered. In Korea, the Netherlands, and the United Kingdom, lawyers fees are either not included in cost awards or there are limits on the fee-amounts that may be recovered. In other countries, there is an element of judicial discretion in the award of costs. For example, in Poland, where parties are usually liable for the other side’s costs the judge may exempt a party from liability if he or she can demonstrate an inability to pay.

### ***Relationship with Alternative Dispute Resolution (ADR)***

Small claims courts have been described as a “middle ground” between formal civil litigation and alternative dispute resolution (ADR) (World Bank, 2001). Indeed, in many responding countries different forms of ADR are incorporated before or during small claims court proceedings. For example, in Portugal and eight German Länder claimants are required to have prior resort to ADR before judicial proceedings may begin. Once a claim is filed it is automatically forwarded to a court-annexed mediation service. In Australia, the Consumer Trader and Tenancy Tribunal in New South Wales is required to use its “best endeavours” to mediate a settlement among the parties before proceeding to adjudication. Likewise, in the United Kingdom, the court has a duty to encourage the parties to use ADR to resolve the dispute, but it is not mandatory for the parties to do so. Upon filing a claim with the court, claimants are given the opportunity to request a stay for one month to attempt to settle the dispute by ADR. In other countries, such as Ireland, Germany and Sweden, the court will attempt to achieve a settlement among the parties even if not legally required to do so. In the United States, small claims courts increasingly offer ADR services. In some parts of the state of New York, small claims cases may be tried by an arbitrator instead of a judge if both sides agree. In Ontario (Canada) Rule 24.1 of the Ontario Rules of Civil Procedure, which came into effect in January 1999, established a regulatory regime for the Ontario Mandatory Mediation Program (OMMP). The program calls for the referral of all case-managed Toronto and Ottawa civil cases to mediation as soon as they are defended. Cases may also be referred to ADR by judges. In France and Korea judges have the discretion to refer the parties to some form of ADR. In Italy, either party is free to request the Justice of the Peace to resolve the cases using conciliation procedures. Similarly, in Germany and the Netherlands the court may transfer appropriate cases to ADR upon agreement of the parties. In Norway, there are no legal requirements to submit the case to ADR, however, due to the costs of filing a complaint in court, it is common for claimants to first attempt to resolve their dispute through ADR.

### ***Cross-border considerations***

Seeking to obtain information on how small claims courts may operate in cross-border cases, the OECD questionnaire asked whether there were any specific legal restrictions on foreign claimants using the system. No responding country reported any such legal restrictions based on the residency of the claimant. Nonetheless, there are often significant practical and financial barriers to using the court procedures of another country to resolve low value disputes. Apart from the time and expense of travelling to another country to pursue a case against a defendant, unfamiliarity with foreign legal systems, and language differences also present practical obstacles to consumers.

The questionnaire asked whether there were options for fully written procedure or other alternatives to in-person hearings, that could help overcome these practical obstacles and facilitate the use of small claims proceedings across-borders. In a number of respondent countries, including Canada, France, Ireland, Japan, Portugal, and the United States, oral hearings are usually required and the claimant is expected to attend in person. In some countries, such as Germany, Norway and Sweden, it is possible to conducting the entire case by written procedure, however, oral hearings may still be required at the discretion of the judge or upon the request of one or both parties. A purely written procedure is also available in the United Kingdom for claims that are admitted or that are not defended.

Some countries have begun to make use of communications technologies to allow for remote attendance of parties or witnesses, or the submission of documents. For example, in Australia, the Victorian and Civil Administrative Tribunal parties may request a telephone hearing if they are unable to attend in person. In Germany, it is possible to receive witness testimony by telephone. In Sweden, witness testimony may be received via telephone-conferencing, and in some cases video-conferencing. In the United Kingdom, there is an online mechanism for money claims for fixed amounts with the County Court. The procedure may be used for foreign claimants, however, an address in England or Wales is required for receipt of documents.

Within the European Union, there have been proposals for new measures to facilitate cross border handling of low value consumer claims in member states. The Tampere European Council Conclusions of October 1999, which set out guidelines for implementing the provisions of Treaty of Amsterdam on improving access to justice and judicial cooperation in Europe, called for the introduction of “special common procedural rules for simplified and accelerated of cross-border litigation on small consumer and commercial claims.”<sup>43</sup> In 2002, the European Commission adopted a green paper consulting on a possible future Community instrument that would establish common rules for small claims procedures in order to facilitate cross-border litigation among EU member states.<sup>44</sup>

It may also be possible for consumers to file a complaint through domestic small claims procedures against a business that is based overseas. However, whether the domestic court will be able to establish jurisdiction to subject the foreign defendant to legal process, will depend on the standard jurisdictional rules of country and the particular facts of the case. In addition, even assuming the consumer is able to overcome jurisdictional challenges and receives a favourable judgment, the ultimate enforceability of the judgment in the country where the defendant is based will depend on the laws of that country governing the recognition and enforcement of foreign judgment.

## **E. Private Collective Action Lawsuits**

### *Overview*

In some countries, there is a procedure available for legal action to be filed by groups of private individuals who have each suffered similar harm as a result of the actions of the same defendant. Typically associated with the class action lawsuit in the United States, in recent years this type of action has been gaining in popularity in other OECD member countries as a consumer protection mechanism (albeit often in a more limited form). Collective action can be particularly useful in cases where large numbers of consumers have each suffered small losses. It offers an avenue for redress to consumers who, due to the low value of the claim, would not be willing to undertake the burden and cost of legal action individually. The threat of collective action lawsuits can also play an important role in regulating the marketplace, depriving defendants of ill-gotten gains and deterring future wrongful or irresponsible commercial behaviour. In this respect they serve a useful supplement to action by government consumer protection bodies.

It should be noted that collective action lawsuits differ from country to country both in form and in name. In this report, the term ‘private collective action’ is used in its broadest sense, and is intended to incorporate any lawsuit – whether it be known as a class action, a group action, or a representative action – in which private individuals consolidate their claims into a single case against a defendant.

Procedures for some form of private collection action are available to consumers in the following responding member countries: Australia (at the federal level and in some states); Canada (in some provinces only); Germany; Japan; Portugal; Sweden; Turkey; the United Kingdom; and the United States (at federal level and in all but two states). The possibility of introducing procedures for private collection actions by consumers is under review in a number of other countries. For example, in Finland, the Ministry of Justice has appointed a working group to study the possibility of introducing a collective action procedure for commercial consumer claims (Finland Consumer Ombudsman, 2004). In Korea, a collective action procedure for shareholder actions came into effect in January 2005 and a proposal to introduce a similar procedure for consumer cases is under review. Finally, in Norway, a government proposal to introduce a private collective action procedure is under consideration.

In Austria, the Czech Republic, France, Greece, Italy, and the Netherlands there is a variant of the private collective action available, whereby a lawsuit may be filed by a third party consumer organisation on behalf of consumers. Such actions closely resemble the private collective action lawsuit. The crucial difference is that the representative party (*i.e.* the party filing the lawsuit) is an established organisation rather than a private individual or individual(s) having suffered harm. These procedures are examined in the section below on legal actions by consumer organisations.

### ***Type of procedure (opt-in versus opt-out)***

There are significant differences among responding countries in the procedural rules governing the filing of private collective actions. For simplicity, this report categories them into two broad models – the opt-out and the opt-in model. Both models begin with a lead plaintiff or plaintiffs who file a case on behalf of themselves and a group of other “similarly situated” individuals (*i.e.* those who have suffered the same loss in similar circumstances). The difference arises in determining who is included in the group. Under the opt-out model, all other similarly situated persons are automatically included, and will be bound by the final outcome (judicial decision or out-of-court settlement) of the case unless they take specific steps to exclude themselves. Under the opt-in model, only those similarly situated individuals who have expressly joined the group and agreed to be bound by the final outcome are included in the group.

*The opt-out model* is the traditional model for private collection action lawsuits. It is applied in Australia; some Canadian provinces (e.g. Ontario); Portugal; and in the United States. The threshold requirements (including numbers of affected persons) that have to be met in order to file a collective action vary among these countries. For example, in Australia, where collective action has been available at the federal level since 1992, seven or more persons having claims against the same person may file a lawsuit on behalf of all, or specifically named, other persons who have suffered similar loss. The claims of the group members must have arisen from similar circumstances and must have at least one substantial issue of law or fact in common. In Ontario (Canada), a collective action may be taken where two or more persons have claims raising common issues, and collective action is the preferable means to resolve these common issues. In the United States, one or more persons may file a collective action in federal court on behalf of all other similarly situated persons where the group is so numerous that joinder of all members is impracticable and where there are common questions of law or fact.

Adequate procedures for notification are of particular importance in the opt-out model, so that consumers who may potentially be included in the case and bound by its outcome are alerted to this fact and provided with an opportunity to request exclusion. In Australia, the court will issue an order specifying the methods by which potential plaintiffs should be notified of the pending case. This may include personal notice to identifiable group members or notice through the national media. The court will also set a date by which group members may opt-out of the case by providing written notification to the court. In Ontario (Canada), the court may order that notice be given personally or by mail to identifiable members of the group; that individual notice be given to a smaller sample of the group; or that notice be given by any other means such as publishing, advertising or leafleting. In Portugal, notification may be made by any media channel. It must identify the defendant; at least one of the main parties; the cause of action; and the remedy sought. In the United States, the type of notice depends on the circumstances of the case. Individual notice must be provided to members who can be identified without unreasonable effort. It must specify the nature of the action; the definition of the members of the group; and instructions on how to opt-out. It must advise members of the binding effect of the judgement and that they may enter an appearance in the case through legal counsel. In Australia and the United States, different rules may apply to notification and opt-out rights where the action does not request monetary damages. In Australia, the court may dispense with notification requirements where monetary damages are not sought. In the United States there is no right for members to request exclusion from final judicial decrees or settlement orders where the action seeks declaratory or injunctive relief only.

*The opt-in model* is applied in Germany; Japan and Sweden. In Germany, there is a procedure allowing a “community” of litigants to file a joint action if the central claim is based on similar factual and legal grounds. Only those who have expressly joined the action are bound by its outcome. In Japan, where several persons have a common claim they elect from among themselves one or more “appointed” parties to conduct the litigation on behalf of the entire group. The judgment is binding only as to the specified members of the group on whose express behalf the appointed party(ies) acted. In Sweden, the Group Proceedings Act of 2002, introduced a new procedure by which private persons may take collective legal action on behalf of other persons, who are identified by name and address in the summons and individually registered with the court. The final outcome of the case is binding only upon such persons.

#### ***Type of dispute; remedies; and settlement orders***

In all responding countries, the collective action proceeding may be used in respect of most types of commercial consumer disputes involving sales of goods and services. Similarly, in all countries a wide range of remedies is available from declaratory, to injunctive to monetary damages.

It is quite common, where a proposed settlement between the lead plaintiff and defendant is reached, for the court to have to approve that settlement before it will become binding on the group. This is the case in most responding countries with opt-out collective action models, including Australia, Canada (Ontario),

and the United States, where members of the class will typically have less involvement in the case than in the opt-in model. In Australia, all settlement proposals require approval of the court and group members must be notified of any application for approval. In Ontario (Canada) settlements are not binding without the approval of the court. In the United States a separate court hearing is required to assess whether a proposed settlement is fair, reasonable and adequate. The court may also at its discretion refuse any settlement that does not provide members with a new opportunity to opt-out. Settlement proposals also require approval of the court in Sweden, a country with the opt-in model.

### ***Cross-border considerations***

No country reported any specific legal limitations on foreign claimants making use of the collective action procedure. Nonetheless, there may be still challenges to non-resident claimants in establishing jurisdiction of the court to adjudicate the claims arising from conduct that occurred overseas, as this may require an extraterritorial application of law. On the other hand, where these legal difficulties can be overcome, the possibility of non-resident foreign plaintiffs consolidating their claims or joining an ongoing case by resident plaintiffs, may provide consumers with a valuable remedy that would not have been otherwise available to them to the high costs and burden of taking legal action in a foreign country.

With respect to collective claims filed in the consumers' domestic court against a foreign based defendant, standard jurisdictional rules will require that an adequate link is demonstrated between the defendant and the country before the court will subject the defendant to legal process and application of its laws. In addition, there may also be legal difficulties in enforcing the judgment in the country were the defendant, or his assets are located.

## **F. Legal Actions by Consumer Organisations**

### ***Overview***

In some countries, the rights of consumers to take private legal action are supplemented by rights provided to consumer organisations to file lawsuits on behalf of a consumer or, more frequently, a group of consumers. Like private collective action lawsuits, actions by consumer organisations are particularly useful in cases of widespread consumer harm, providing a mechanism to prevent or remedy wrongful conduct by a defendant that may otherwise go unchecked.

In the European Union, consumer organisations have long been seen as playing an important role in consumer protection in the courts. Many European directives on consumer protection, including the 1984 and 1997 directives on misleading and comparative advertising;<sup>45</sup> the 1993 directive on unfair contract terms;<sup>46</sup> and the 1997 directive on distance selling,<sup>47</sup> leave open the possibility for Member States to provide consumer organisations with the right to take legal action to ensure compliance with the terms of the directives. In addition, the 1998 Injunctions Directive provides that EU member states must recognise the legal standing of "qualified" consumer organisations from fellow member states before their own domestic courts in certain cases.<sup>48</sup> The details and implications of this directive for cross-border action by consumer organisations are covered below.

The following seventeen responding countries reported that consumer organisations have standing to take some form of legal action before the courts on behalf of consumers: Austria; Belgium; the Czech Republic; Denmark; France; Germany; Greece; Hungary; Ireland; Italy; Netherlands; Norway<sup>49</sup>; Poland; Portugal; Sweden; Switzerland; Turkey; the United Kingdom; and in the United States (in more limited measure). In Korea there are proposals underway to amend the Consumer Protection Act to allow consumer groups, meeting certain requirements, to take legal action against businesses on behalf of consumers.

### ***Different types of action (authority of consumer organisations)***

The authority of consumer organisations to take legal action varies from country to country. Broadly speaking, member country responses indicated different types of legal action which may be taken by consumer associations, which are described here under the following headings: actions in the collective interest of consumers; representative or joint representative actions; “*partie civile*”; and other types of actions. In some responding countries, consumer organisations have authority to take only one of these types of action whereas in others two or more types are available.

***Actions in the collective interest of consumers:*** In these types of actions, the consumer organisation takes the action in its own name on behalf of the “collective interests of consumers.” This type of action is taken to vindicate the general consumer interest, without any showing of actual harm to individual consumers. It is regarded as an important mechanism to correct market failures, where the collective harm that is caused by defendant’s action is more than the sum of the individual losses involved. This mechanism is available to consumer organisations in the following countries, and unless otherwise noted may be used in a broad range of cases relating to general breaches of consumer protection laws: Austria (for cases relating to unlawful or unconscionable terms in standard form contracts and business terms and conditions); Belgium; France (for cases relating to illegal clauses in standard form non-negotiable consumer contracts); Germany (for cases relating to unfair competition or to prevent a breach of certain consumer protection laws); Hungary; Ireland (for cases relating to unfair contract terms); Italy; the Netherlands; Norway; Poland; Switzerland (for cases relating to unfair and deceptive commercial practices); Turkey.

***Representative or joint representative actions:*** In these kind of actions, the consumer organisation acts on behalf of a consumer or, more frequently, a group of consumers who have each suffered individual harm as a result of the same illegal action. Where the action may be taken on behalf of a single consumer it is referred to here as a representative action, and as a joint representative action where it may be taken on behalf of two or more consumers. The authority to file a representative or joint representative action is available to consumer organisations in Austria (joint representative action); Denmark (representative action);<sup>50</sup> France (joint representative action); Germany (joint representative action); Greece (joint representative action); Portugal (joint representative action); Sweden (joint representative action); the United Kingdom (joint representative action); and some states in the United States, such as California (joint representative action). The authority of consumer organisations to file such actions varies among these member countries. In some, the consumer associations may initiate the representative action on their own initiative and the procedure operates very similarly to the private collective action procedure described above. In others, the right to initiate the action is more restricted and may only be filed on behalf of identified consumers who have expressly assigned their claims to the organisation. Likewise, in some countries the consumer organisation may file an action in respect of a broad range of cases whereas in other countries they may only be filed for breaches of specific legislation.

There have been proposals in both France and the United Kingdom to extend the rights of consumer organisations to file collective claims on behalf of consumers. In France, President Chirac announced on January 4, 2005 that he has asked his government to draft a proposal introducing a new collective action procedure in consumer cases (Maussion, 2005; Hollinger, 2005). It is likely that the draft law, rather than introducing a private collective action procedure, will extend the existing rights of consumer organisations to act on behalf of consumers, allowing them to independently initiate the action without having to individually identify each member of the plaintiff group. In the United Kingdom, in a July 2004 consultation document, the UK Department of Trade and Industry proposed the introduction of a broader right for consumer organisations to bring representative actions on behalf of consumers (DTI, 2004, pp. 44-45).

**Partie civile:** Under this procedure, which is common to a number of continental European countries, an individual or group of individuals may join (as a “*partie civile*” or civil party) a criminal prosecution of a defendant requesting civil remedies for the criminal act. If the judge returns a guilty verdict, the defendant may be ordered to pay compensation to the *partie civile*. In France and Portugal, consumer organisations may use the *partie civile* procedure to file a complaint on behalf of the collective interest of consumers.

**Other** Finally two other types of action which do not fall into any of the above categories should be mentioned. Firstly, in France and Poland, consumer organisations may intervene in support of a case that has already been filed by a private party or parties. Secondly, in the United States, consumer organisations may have legal standing before the federal courts if they can show actual harm or threat of harm to themselves or their members. Such cases are usually filed to challenge government action or inaction.

### **Remedies available**

In a number of responding countries, the only remedies that can be sought by a consumer organisation are conduct remedies, most commonly injunctions to restrain or compel certain action by the defendant. This is the case in the following countries: Austria; Belgium; the Czech Republic; Denmark; Ireland; the Netherlands; Switzerland; and Turkey. In actions by consumer organisations in United States federal courts, the relief that is sought is usually injunctive or declaratory (judicial determination of the parties’ legal rights).

In other countries, monetary relief may also be sought in addition to conduct remedies. In France, damages are available in joint representative actions. Damages may also be awarded under the *partie civile* procedure, but frequently will be a symbolic amount only, and are awarded directly to the organisation. In Greece, in addition to injunctive relief, monetary relief may be sought in cases where “moral damage” can be shown. In Poland, the usual remedy is an injunction to restrain prohibited practices. However, in cases relating to unfair competition the organisation may seek an order requiring the defendant to pay a certain sum to a charitable purpose where the defendant is shown to have acted with intent. In Germany (for collective interest claims); Norway, Portugal, Sweden, the United Kingdom and the United States (at the state level) both conduct and monetary remedies are available. In the Netherlands, the government has introduced a proposal to allow case settlements providing for damages to be approved and declared binding by a court.

### **Cross-border considerations:**

The OECD questionnaire asked whether consumer organisations could take action on behalf of foreign consumers or against foreign businesses. The following countries responded that it is legally possible to take action both in protection of foreign consumers and against foreign businesses: Germany; Ireland; Italy; the Netherlands; Portugal; Sweden; Switzerland; Turkey; and the United States. In Switzerland, such cases may only be filed by the consumer organisations acting in its own name. In the Czech Republic and Hungary action may be taken on behalf of foreign consumers but only against businesses located within their country. In Belgium and France action can be taken against foreign businesses that target domestic consumers. However, even where a consumer organisation has the legal authority to take action against a foreign defendant in domestic court, standard jurisdictional rules will require that an adequate link is demonstrated between the defendant and the country before the court will subject the defendant to legal process and application of its laws. There may also be legal difficulties in enforcing the judgment in the country where the defendant is located. This is especially true with respect to judgments ordering conduct remedies.

One significant development, in the European context, to address the challenges of taking action in cross-border cases is the EU Injunctions Directive mentioned above.<sup>51</sup> It specifically aims at addressing

how to control traders that undertake activities in one Member State, which harm the collective interests' of consumers in another Member State. It sets out a common injunction procedure whereby an action for an injunction can be brought by "qualified" entities,<sup>52</sup> which includes consumer organisations designated by Member States, for infringements of national provisions transposing certain EU consumer protection directives.<sup>53</sup> EU Member States must authorise their courts or administrative authorities to rule on actions for injunctions commenced by qualified entities of other Member States. The objective of the Directive is to ensure that collective actions to protect consumers can be brought where the business is located and therefore where the remedy is most likely to be effective.

## **G. Government-obtained Redress**

### ***Overview***

A variety of entities and mechanisms have been developed in OECD countries for governmental enforcement of consumer protection laws. The 1960s and 70s brought an expanded role for government in consumer affairs, one aspect of which involved the grant of statutory authority to government officials to bring legal actions to protect consumers.<sup>54</sup> The organisational forms for these government consumer protection bodies vary among member countries, from consumer ombudsman offices, to independent commissions, to directorates or divisions within a ministerial branch of the government.

Government consumer protection agencies have at their disposal – either directly or via the courts – a number of types of remedies with which to address marketplace infractions. They can be broadly characterised as conduct remedies and monetary remedies. Conduct remedies can involve injunctions, cease-and-desist orders and related measures. Typically this type of remedy is aimed at directly preventing certain types of conduct that breach the law. In unusual circumstances, conduct remedies may impose affirmative conduct obligations, usually requiring a party to disclose information to clarify the products or services for the consumer.

Monetary remedies can take a variety of forms, including fines or civil penalties, which are intended to deter infractions of the law, and disgorgement orders, which deprive a wrongdoer of the profits of the unlawful activity. The proceeds of both of these remedies end up back in government treasuries. Another type of monetary remedy, and the sole focus of this section, is an order for monetary redress.

Orders for monetary redress aim to recover monies wrongfully obtained by a trader for return directly to injured consumers. In addition to alleviating consumer injury, redress orders serve a deterrent function by depriving the wrongdoer of the ill-gotten gains. The OECD Cross-Border Fraud Guidelines recognise the importance of consumer redress in limiting the incidence of fraudulent and deceptive commercial practices against consumers. The Guidelines call on member countries to include within their domestic frameworks "[e]ffective mechanisms that provide redress for consumer victims of fraudulent and deceptive commercial practice," while noting the other different roles played by government agencies (OECD, 2003).

### ***Authority to obtain monetary redress orders***

While most government consumer protection agencies in OECD countries have authority to obtain conduct remedies, and some forms of monetary remedies, many do not have the ability to secure monetary redress. The contrast among different OECD countries here is particularly striking, considering that agencies in some jurisdictions have the authority to award redress to foreign as well as domestic consumers.

In the following nine responding countries, government consumer protection agencies have some form of authority to obtain monetary compensation for consumers: Australia; Canada; Denmark; Finland;

Ireland; Mexico; Portugal; Sweden; and the United States. In just two of these countries, Australia and the United States, can the consumer protection agency directly obtain orders for consumer redress. The Australian Competition and Consumer Commission (ACCC) may make an application to the courts, under the Trade Practices Act, seeking compensation of one or more persons who have suffered loss or damage as a result of infringement of certain provisions of the Act. Prior to making such an application, the ACCC must receive the express consent of each person on whose behalf it seeks to act. In the United States, the Federal Trade Commission (FTC) can obtain a court order for consumer redress for violations of the unfair and deceptive practices provisions of the FTC Act and other trade regulation rules promulgated by the Commission. In 2003, the most recent year for which statistics are available, the FTC obtained 95 federal district court judgments ordering USD 873 million in consumer redress. In Canada, a draft law to amend the Competition Act was introduced in parliament in November 2004 which would provide the federal Commissioner of Competition with the authority to directly obtain orders for monetary redress in certain cases of deceptive marketing.<sup>55</sup> Similar proposals have been made in the United Kingdom. In its July 2004 consultation paper, the UK Department of Trade and Industry (DTI) proposed providing certain government agencies with new powers to take action through the courts to recover and return directly to consumers the proceeds of trader's wrongful activities (DTI, 2004, p 45).

A more common mechanism for government consumer protection agencies to obtain consumer redress is to act as the representative party in lawsuits seeking damages (among other remedies) on behalf of one or more named or identifiable consumers. For example, in Australia, in addition to directly obtaining redress orders under the Trade Practices Act, the ACCC may file a collective action under the representative proceedings provisions of the 1976 Federal Court Act. As is the case for private collective actions in Australia, this procedure operates on an opt-out basis and the ACCC does not need to obtain the express consent of consumers on whose behalf it files the case. In Denmark, the Consumer Ombudsman may institute legal proceedings under the Danish Marketing Practices Act, on behalf of large numbers of consumers having "uniform claims for damages" against a defendant for breach of the Act. In Finland, the Consumer Ombudsman, may take action on behalf of an individual where a business has not followed the ruling of the Consumer Complaint Board, or where the case raises issues of importance to the collective consumer interest and the Ombudsman wishes to obtain a judicial precedent. In Mexico, Profeco, the federal consumer protection agency may file collective action lawsuits seeking damages for consumers who have suffered harm. In Portugal, the government consumer protection agency has the same authority as consumer organisations to file collective action lawsuits on behalf of injured consumers. In Sweden, the Consumer Ombudsman may file a "public group action" under the 2002 Group Proceedings Act. The Ombudsman may also represent individual consumers before the courts in cases concerning financial services. The authority to initiate collective action lawsuits has also been proposed for the future government consumer protection agency in the Netherlands and is under consideration.

In some countries, consumer protection agencies can also seek compensation for consumers through consent agreements to settle allegations of illegal conduct. For example, in Canada, the federal Commissioner of Competition has sought redress for consumers as part of consent agreements with businesses to settle allegations of civil deceptive marketing practices. Upon registration with the court, consent agreements have the same effect as a court order. This kind of power has also been proposed for the future government consumer protection agency in the Netherlands and is currently being discussed in the national parliament.

In Mexico, under a new administrative remedy which came into effect in 2004, consumers who have suffered harm as a result of certain illegal conduct may submit petitions for monetary redress to Profeco, who investigates the complaint. Where a breach of the law is identified, Profeco notifies the affected consumers who may then rely on this finding to claim redress from the wrongdoer.

Another possible mechanism for consumer redress is through restitution orders in the context of criminal proceedings. Restitution orders require the defendant to compensate the victim for harm caused by his or her criminal conduct. Often they are issued as a condition of granting a defendant probation or a reduced sentence. In Canada, restitution orders are often ordered as a condition of probation at the provincial level. The federal Commissioner of Competition is also exploring the possible use of provisions of the Criminal Code to obtain restitution orders for all indictable offences under the Competition Act, including deceptive mail and telemarketing, and pyramid schemes. In Ireland, under the Consumer Information Act 1978, a court may order a defendant to pay compensation to any person who appeared on behalf of the prosecution in the proceedings and who suffered injury, loss or damage as a result of the offence.

### ***Authority to act on behalf of foreign consumers***

In most responding countries where government consumer protection agencies have the authority to seek consumer redress, this authority can be applied in respect of foreign consumers. The following seven responding countries reported that they had the legal authority (if not the practical ability or experience) to seek redress act on behalf of foreign consumers: Australia; Canada; Finland; Mexico; Portugal; Sweden; and the United States.

In Australia, the ACCC can seek redress on behalf of foreign consumers provided that (i) the conduct complained of occurred in Australia, or (ii) the conduct occurred outside of Australia, but was engaged in by a corporation incorporated in Australia; or a corporation carrying on business within Australia; or a person who is an Australia citizen or person ordinarily resident within Australia. In Canada, at the provincial level, restitution may be (and has in the past been) obtained in criminal proceedings on behalf of foreign consumers. At the Federal level, the Commissioner of Competition can pursue consent orders that include restitution as a remedy on behalf of foreign consumers. In the United States, the FTC may seek redress on behalf of foreign consumers provided there is a substantial connection to harm occurring at the national level. In practice, the US FTC has obtained and distributed redress funds to consumers in more than 75 countries, in cases involving telemarketing fraud, pyramid schemes, and lottery schemes among others.

### ***Other cross-border considerations***

Generally speaking, consumer protection entities were created to protect domestic consumers from the unlawful practices of local or national actors. The prospect of cross-border commercial activity between businesses and consumers was not likely a consideration for national legislatures in establishing the scope of authority and tools for these enforcement bodies. In the current, increasingly globalised marketplace, however, if consumer protection law enforcement agencies are not able to stop harmful practices originating abroad, they will be unable to fully protect their consumers at home.

In this respect, the adoption of OECD Cross-Border Fraud Guidelines was a significant development. The Guidelines set forth broad principles for international cooperation among consumer protection enforcement agencies in protecting consumers against cross-border fraudulent and deceptive practices. They also recommend that consumer protection enforcement agencies have sufficient authority for effective action in the cross-border context, including the authority to take action “against domestic businesses engaged in fraudulent and deceptive commercial practices against foreign consumers” and against “foreign businesses engaged in fraudulent and deceptive commercial practices against their own consumers” (OECD, 2003, section V). Although the guidelines do not explicitly call for consumer protection enforcement agencies to have authority to seek redress for consumer victims, they do set the stage for further developments in this area by calling on member countries to jointly study the “possible roles that consumer protection enforcement agencies can play in facilitating consumer redress, including the pursuit of redress on behalf of defrauded consumers” (OECD, 2003, section VI). The Guidelines have

already had a demonstrated impact in this area, prompting some member countries to seek additional authority to take action on behalf of consumers. For example, in a speech before a standing committee of the House of Commons, commenting on the proposed amendments to the Canadian Competition Act, the Competition Commissioner specifically noted that the authority to seek redress on behalf of consumers is consistent with the OECD Guidelines and would bring Canada into line with other OECD countries where this remedy is already available (Scott, 2004).

Also of relevance in this area is the new EU Regulation on Consumer Protection Cooperation,<sup>56</sup> adopted in October 2004. The aim of the Regulation is to establish a network of national consumer protection enforcement agencies capable of taking co-ordinated action against rogue traders who target consumers living in other EU countries. The regulation provides for national enforcement agencies to be vested with common investigative and enforcement powers. The authority to seek consumer redress is authorised under the Regulation, although not required.<sup>57</sup> Thus enforcement agencies that have this authority under national law will benefit from the related information sharing and investigative assistance measures set out in the Regulation in seeking to exercise it and obtain remedies for consumers in cross-border cases.

Despite these developments a number of challenges remain to obtaining consumer redress in cross-border cases. As a practical matter, even where consumer protection agencies have the domestic legal authority to seek consumer redress in cross-border cases they may not be able to prioritise the expenditure of limited resources to protect consumers located abroad. In addition, where the case involves a large number of consumers it can be a cumbersome process to contact and obtain the necessary details from consumers for distribution purposes. These difficulties tend to increase where the consumer protection agency is seeking redress for consumers who are located in a foreign country. There may also be legal obstacles to obtaining provisional measures, such as asset freezes, in foreign courts or against overseas assets. Finally, where a domestic judgment is obtained awarding monetary compensation to consumer victims, it may not be possible obtain enforcement of that judgment in the country where the defendant or his or her assets are located. These issues are addressed in Part II below.

## PART II: MAKING JUDICIAL REMEDIES EFFECTIVE ACROSS BORDERS

### A. Overview

This section examines the legal impediments to ensuring that monetary judgments obtained in cross-border consumer cases ultimately result in compensation to consumers. It examines two issues. Firstly, it examines provisional pre-judgment measures that can be obtained to improve the effectiveness of final monetary judgments and ensure that there will be money left to provide compensation to consumers. Secondly, it examines the recognition and enforcement of foreign monetary judgments. While both issues are common to all types of court-ordered redress for disputes with a cross-border dimension, they raise particular issues for government actions to obtain monetary redress. Given the complexity and significant costs involved, it will often be impractical for an individual to seek judicial remedies in cross-border cases. Therefore, the ability of government consumer protection agencies to take legal action will often be crucial to ensuring that consumer victims of cross-border illegal activity are compensated for losses suffered.

### B. Pre-judgment freezes of assets

In some cases, courts will issue provisional remedies before a case is decided in order to maintain the *status quo* pending the outcome of the case. One important type of provisional remedy is a temporary order that “freezes” a defendant’s assets to ensure that there will be funds available at the conclusion of the case to satisfy the judgment. An asset freeze places a temporary hold on the assets of the defendant, pending the outcome of the case. This protective tool, where permitted, greatly increases the likelihood of collecting on any money judgement that is ultimately issued for return to consumers.

Many Commonwealth – and certain other common law – countries make available a form of asset-freeze, known as a *Mareva* injunction.<sup>58</sup> The *Mareva* injunction is an interim measure, granted at the discretion of the court, on *ex parte* basis.<sup>59</sup> Usually a *Mareva* injunction is filed in the country in which the defendant’s assets are located and seeks to prevent the assets being removed from, or dissipated within, that country. Like other provisional measures, in most countries a *Mareva* injunction will only be granted where the requested court also has jurisdiction over the merits of the case. The exception to this rule is in European countries, where the 2001 Brussels Regulation and 1989 Lugano Convention<sup>60</sup> permit provisional measures to be sought as stand alone actions by residents of state parties in the courts of other state parties.

Outside of Europe or for non-European applicants, however, in order to obtain provisional remedies, such as asset freezes, the primary action will also have to be filed in the overseas court. One important development in this respect, is the increased willingness of courts to grant “extra-territorial” *Mareva* injunctions and other provisional asset freeze orders, that extend to the defendant’s assets on a world-wide basis. As a result, it may be possible in some countries to seek a provisional order in domestic court to freeze the assets of the defendant wherever located, without having to institute substantive proceedings in a foreign court.

#### *Asset freezes in government actions for consumer redress*

Often perpetrators of fraud will hide or dissipate assets once they learn that enforcement authorities have taken an interest in their activities. Where a national legal regime permits the pre-judgment freezing of assets, an enforcement body has a much better chance of collecting any final money judgment and returning the money to consumers. As examined in Section G above, not all government consumer protection agencies have powers to seek orders for consumer redress. Among those that do, even fewer have authority to seek preliminary measures designed to ensure the effectiveness of a final monetary judgment.

Only Australia, Canada, and the United States reported the ability for government consumer protection bodies to seek asset freezes in support of cases for consumer redress.<sup>61</sup> In Australia, it is possible to obtain a *Mareva* injunction to freeze the assets of residents and foreign nationals that are held within Australia, or the assets of Australian residents that are held overseas. It may also be possible for the ACCC to obtain an order under the Trade Practices Act freezing some or all of the defendant's assets. It is unlikely, however, that such an order would extend to overseas assets. In Canada, there is statutory authority under provincial consumer protection law, to obtain asset freezes in consumer protection cases. At the federal level, proposed amendments to the Competition Act would also authorise the Commissioner to request asset freeze orders in certain civil cases of deceptive marketing practices.<sup>62</sup> In criminal cases under the Competition Act it may currently be possible to seek provisional freezes of the defendant's assets, from which restitution to victims may eventually be paid, upon a guilty verdict. In the United States, the FTC has authority under its constituent act to seek preliminary measures, including asset freezes covering the assets of the defendant wherever located. In practice, a US court's asset freeze would only be enforceable in US courts. However, the FTC has been able to obtain repatriation of assets following a final judgment.

As noted above, in many countries it is not possible to obtain provisional remedies from a court unless that court also has jurisdiction over the substantive action. Therefore, where a consumer protection agency seeks to obtain a freeze of a defendant's assets in the country where those assets are located, it will also have to file a parallel substantive action in that country. Only the United States reported to having had experience in filing such cases.

### ***Information sharing about foreign assets***

An important element of obtaining an order to freeze overseas assets is the ability to identify where those assets are located. In the context of actions by consumer protection enforcement agencies, the ability to request assistance from a foreign counterpart agency can be crucial to obtaining this information. At present, however, consumer protection agencies are typically subject to laws or procedures that may restrict their ability to request assistance from, or provide assistance to, foreign agencies in obtaining information in cross-border cases.

The following respondent countries reported that they currently have some ability to share information relating to assets with foreign agencies: Australia; Belgium; Canada; Italy; Korea; Mexico; Norway; Sweden; Switzerland; the United Kingdom; and the United States. However, in many countries, including Australia, Finland, Italy, Norway, Switzerland, Sweden, and the United States, this ability is limited to sharing information that is publicly available, and/or information that is obtained informally, or with consent of the subject, and/or non-confidential or non-personal information. Finland noted that it would encounter serious obstacles to sharing information but that it may be possible in respect of publicly available information.

In other countries, including Canada, Korea, and Mexico enforcement agencies may provide information sharing assistance provided there is some sort of bi-lateral agreement in place with the requesting country such as a memorandum of understanding or mutual legal assistance treaty. In addition, in Australia, a foreign consumer protection agency could make an application to a state or territory Supreme Court or a request to the Commonwealth Attorney General agency to seek to obtain non-public information, under the *Mutual Assistance in Business Regulation Act 1992* or the *Mutual Assistance in Criminal Matters Act 1987*. In the United Kingdom, the Office of Fair Trading (OFT) can share with (but not officially gather on behalf of) foreign consumer protection agencies – in aid of civil or criminal proceedings – information that it has obtained for the exercise of its functions. As the OFT does not have the power to freeze or attach assets, it is unclear whether the gathering and sharing of information relating to assets would be deemed to be in the exercise of its functions.

There are proposals to increase information sharing powers in Korea and the United States. In Korea, there are proposals to revise the Consumer Protection Act to grant information sharing powers to the Korean Consumer Protection Board. Currently, only the Fair Trade Commission has such powers provided a memorandum of understanding is in place. In the United States, there are legislative proposals to grant the Federal Trade Commission power to share information obtained pursuant to compulsory process with foreign

law enforcement agencies and allow it to issue compulsory process on behalf of a foreign law enforcement agency.

Consumer enforcement bodies from a number of member countries have put in place bi- and multi-lateral arrangements and memoranda of understanding to strengthen ties between signatory agencies and create a better environment for future enforcement co-ordination. These types of agreements are generally 'best efforts' type arrangements. They are not legally binding and do not require countries to amend existing laws. Thus, even where such agreements contain provisions on information gathering and sharing, signatory agencies remain subject to the kinds of domestic restrictions outlined above.

For example, in 1999 the Nordic Consumer Ombudsmen of Denmark, Finland, Norway, and Sweden established closer co-operation by agreeing to conduct lawsuits on behalf of each other and exchange information about marketing across national borders. The United States Federal Trade Commission has entered into cooperation arrangements with consumer protection agencies in the following countries: Canada (1995);<sup>63</sup> Australia; the United Kingdom (2000);<sup>64</sup> Ireland (2003);<sup>65</sup> and Mexico (2005).<sup>66</sup> Belgium has entered into cooperation and information sharing agreements with France, UK, Germany, Netherlands, Luxembourg, and Hungary. Trilateral arrangements covering both consumer protection and competition law have been concluded between government agencies in Australia, Canada and the New Zealand (2000)<sup>67</sup> and between agencies in Australia, New Zealand, and the United Kingdom (2003). In March 2004, Competition Bureau Canada entered into information sharing protocols with consumer protection agencies in the United Kingdom<sup>68</sup> and Australia. Consumer protection agencies in Australia and the United Kingdom are close to finalising an information sharing protocol. Enforcement agencies in OECD member countries also work on information sharing through participation in the International Consumer Protection and Enforcement Network (ICPEN).<sup>69</sup>

Two important developments on the international and regional level in this area are the OECD Cross-Border Fraud Guidelines and the 2004 EU Regulation on Consumer Protection Cooperation.<sup>70</sup> The OECD Cross-Border Fraud Guidelines include specific provisions on the authority of consumer protection enforcement agencies to share information. The Guidelines recommend that member countries strive to enhance the ability of enforcement agencies to "share information within timeframes that facilitate investigations in cross-border fraudulent and deceptive practices against consumers," including, publicly available and other non-confidential information; and documents and third party information, which could potentially include asset-related information. In an effort to address the practical difficulties that enforcement agencies sometimes face in knowing who to contact in other countries, the Guidelines also recommend each member country to designate either a consumer protection enforcement agency or a consumer protection policy agency to act as a national contact point for other agencies.<sup>71</sup>

The EU Regulation on Consumer Protection Cooperation, likewise includes specific provisions on information sharing. As a legally binding and directly applicable instrument, it will require EU member states to lift barriers to information exchange with consumer protection enforcement authorities from fellow European countries. It provides that upon request, a consumer protection agency shall "supply without delay any relevant information required to establish whether an intra-community infringement has occurred." Furthermore the requested agency is to undertake "the appropriate investigations or any other necessary or appropriate measures ... to gather the required information."<sup>72</sup> Given the broad scope of the language, and given that consumer enforcement agencies are entitled under the Regulation to require the losing defendant "to make payments into the public purse or to any beneficiary," it is possible that these investigative and information sharing provisions extend to asset-related information.

### **C. Recognition and enforcement of monetary judgements**

Even assuming that other legal difficulties relating to jurisdiction and applicable law have been overcome, in cases filed against overseas defendants the ability to enforce the judgment in the country where the defendant or his or her assets are located remains a significant challenge. This point was raised explicitly in a recent decision by the Federal Court of Australia in a consumer protection case. In ruling on a request by the ACCC to restrain

conduct by a US-based defendant accused of misleading consumers, the Judge noted that there was little likelihood of extra-territorial enforcement of an injunction issued by an Australian court.<sup>73</sup> In spite of this obstacle the Court granted the injunction, citing evidence of international co-operation to curb cross-border fraud including the OECD Cross-border Guidelines as an important factor. The question remains, however, whether further work is needed to improve international arrangements for the mutual recognition and enforcement of judgments of consumer protection orders in cross-border cases.

Considerations of sovereignty, among other issues, mean that without a treaty or other reciprocal arrangement, it is often very difficult or even impossible, to enforce a judgment in the courts of another country. This is particularly the case for judgments ordering conduct remedies. Monetary judgments are usually considered more suitable for enforcement, and are thus more likely to be effective in cross-border cases.

At present there are no global arrangements in place to ensure the mutual recognition and enforcement of judgments.<sup>74</sup> A long running negotiation at the Hague Conference on Private International Law during the 1990s to adopt a Convention that could have ensured a broad base for cross-border enforcement of civil judgments, including judgments obtained in consumer cases, has been abandoned and the draft convention scaled back to cover enforcement of judgments resulting from choice of court agreements in business to business contracts.<sup>75</sup>

At the European level, enforcement of judgments in civil and commercial cases is governed by the Brussels Regulation of 2001<sup>76</sup> and the Lugano Convention of 1988.<sup>77</sup> These instruments provide that any judgment, subject to certain exceptions, made in one of the contracting states will be recognised and enforced in other contracting states. Although under the Brussels Regulation procedures for obtaining a declaration of enforceability (exequatur) are more streamlined than under the Lugano Convention (or previous Brussels Convention), recognition and enforcement is still not automatic. In order to reduce the delays and additional costs associated with these procedures, there have been proposals for the abolition of all intermediate measures for the recognition of judicial decisions among member states.<sup>78</sup> In April 2004, a new regulation was adopted creating a European enforcement order for uncontested claims. The regulation abolishes the exequatur procedure for decisions on money claims that were not contested by the debtor.<sup>79</sup> On the longer term, there are plans to abolish exequatur in all areas covered by the Brussels Regulation.<sup>80</sup>

In addition to the Brussels and Lugano instruments, there is a bi-lateral agreement in place between Canada and the United Kingdom, and a multi-lateral convention among the Nordic countries providing for the recognition and enforcement of judgments in civil and commercial matters.

Where there is no treaty in place to govern the reciprocal enforcement of judgments, the decision of whether a foreign judgment will be enforced is made on the basis of the requested country's private international law rules (whether codified or common law rules). Common requirements for obtaining enforcement of a foreign judgment include: that the foreign judgment needs to be final and binding; that the rendering court must have had proper jurisdiction over the subject matter and the parties; that the party against whom enforcement is sought must have had proper notice of the proceedings. Of these requirements, particular difficulties can often arise in relation to the grounds of jurisdiction, which may be deemed "exorbitant" or 'improper' by the requested country (Danford, 2004, p.408). In some countries, including Japan, Korea, and the United States, enforcement will be refused if the judgment is deemed to offend the public policy of the requested state. Other countries, including Australia, Germany, Japan, Korea, and Sweden usually require reciprocity with the rendering jurisdiction before a judgment will be enforced. In Australia, the Foreign Judgments Act of 1991 allows for the registration and enforcement in Australia of judgments from certain countries. Those countries to which the Act applies are set out in the Foreign Judgments Regulations 1992. In order to be listed, there must be substantially reciprocal arrangements in place for the enforcement of judgments in that country. Foreign judgments not covered by the Act may still be enforced in Australia under common law principles provided that certain conditions are met.

Generally speaking, no country will enforce a foreign judgment that is deemed to be penal or revenue in nature. This raises a potential concern that government-obtained judgments providing monetary redress to consumers would be deemed unenforceable. However, some countries, such as Japan specifically noted that they

would draw a distinction between government obtained judgments for fines and penalties (which would be deemed penal), and judgments providing monetary remedies to consumers. Likewise, the United States Federal Trade Commission would draw such a distinction and it has recommended as a matter of policy that United States as well as foreign judicial authorities should enforce the restitutionary judgments of foreign governmental agencies to provide monetary restitution to consumers, investors, or customers who have suffered economic harm as a result of being deceived, defrauded, or misled. In addition, the Free Trade Agreement between the United States and Australia, which entered into force in January 2005, contains a provision stipulating that a monetary judgment obtained by certain government authorities, including the US FTC and the ACCC, for the purpose of providing monetary compensation to consumers should not generally be disqualified from recognition and enforcement on the grounds that it is penal or revenue in nature.<sup>81</sup>

#### **D. Other legal issues**

Although not within the scope of this report, there are other significant legal issues which may affect a consumer's ability to resolve disputes and obtain redress through the courts in cross-border cases. Of particular significance are challenges of identifying which court has jurisdiction to hear the case and which law will be applied to determine the outcome.

In disputes arising from cross-border transactions, unless the consumer is willing to institute legal proceedings in the country where the business is located, he or she will have to demonstrate that the courts of his or her country have jurisdiction to hear the case. Each country has different rules on when it will extend the jurisdiction of its courts to persons outside its territory. But it will usually require some sort of "link" between the defendant and/or the action or event in question and that country. However, there are significant differences among countries in the standard that is applied to establish whether such a link exists. For example, in some countries jurisdiction may be established solely on the basis that the defendant has assets in the forum state; or that the defendant was "doing business" in the forum state even if that business does not relate to the case; or that the defendant was temporarily present within the forum state at the time the case was filed against him or her. In other countries, these would be regarded as an "exorbitant" or "improper" bases of jurisdiction, and consequently any judgment arising from the exercise of such jurisdiction would not be recognised and enforced.

There are also divergent national rules with respect to applicable law in cross-border cases. Even assuming the consumer's domestic court is competent to hear the case, it will not necessarily apply domestic law in order to determine the outcome. In contract cases, where the parties have agreed as to what law will be applied in the case of an eventual dispute, the basic principle of "freedom to contract" is often applied and the parties' choice respected. In business to consumer cases, however, not all countries will apply these agreements if they are not favourable to the consumer, who is deemed to be the "weaker" bargaining party. In non-contractual cases, the most popular approach to resolving conflicts of laws issues is to apply the law of the place where the cause of action arose (*lex loci delicti*). Other approaches are to apply the law of the country where the damage was sustained or the law of the country with which the situation is most closely connected.

At the European level, harmonised rules on jurisdiction, containing special protections for consumers, are set out in the Brussels Regulation of 2001 and the Lugano Convention of 1988. These instruments provide that in certain cross-border contract cases the consumer may take legal action against defendants in their own courts (or in the courts of the defendant).<sup>82</sup> Harmonised rules for applicable law in contract cases, to ensure that any given legal dispute is resolved under the same law irrespective of what country it is adjudicated in, are set out in the Rome Convention of 1980.<sup>83</sup> The Convention, which is in force in all European Union member states, also provides special protections for consumers setting out that they may not be deprived of certain "mandatory" protections set out in national laws. In July 2003, the European Commission made a proposal to supplement the Rome Convention with a regulation on applicable law in non-contractual obligations.<sup>84</sup> With respect to non-European consumers, or European consumers engaged in transactions with non-European businesses, there are so far no harmonised rules in these areas,<sup>85</sup> which continue to be governed by divergent national rules.

## CONCLUSIONS

Examination of member country responses indicates that domestic frameworks for consumer dispute resolution and redress provide for a combination of different mechanisms. Although not available in all countries, three clear categories of mechanism were identified in this report: mechanisms for consumers to resolve their individual complaints; mechanisms for consumers to resolve collective complaints; and mechanisms for government bodies to take legal action and obtain monetary redress on behalf of an individual consumer or group of consumers. These different categories serve distinct yet complementary functions, responding to the varying nature and characteristics of consumer complaints. For example, individual mechanisms, and in particular informal non-judicial mechanisms, are most suited to one-time disputes with legitimate businesses. Collective action procedures can be useful to address cases where large numbers of consumers each suffer small losses as a result of the wrongful actions of the same defendant. Mechanisms for government consumer protection agencies to seek monetary redress for consumers can be effective in cases of fraudulent or deceptive practices, where investigative and other enforcement powers not available to private litigants prove particularly valuable.

Increased mobility and the growth of the online marketplace have significantly increased the possibility for consumers and businesses to engage in transactions over great distances and without regard to geographic borders, local cultures and legal frameworks. Such benefits, however, raise challenges as to how potential disputes can be resolved in an accessible, effective, and fair way. In general, in most OECD countries mechanisms for consumer dispute resolution and redress were developed to address domestic cases and are not always adequate to provide consumers with remedies across borders. In particular, there are serious obstacles to pursuing court-based remedies in cross-border cases. Aside from legal challenges relating to jurisdiction and applicable law, the costs and practical difficulties associated with filing cross-border claims means that court procedures are beyond the reach of most consumers with low value disputes. Member country responses suggest that, for the most part, not much has been done to make court procedures more accessible to overseas claimants, for example, through the increased use of new information communications technologies. Going forward, therefore, domestic frameworks for dispute resolution and redress will need to further adapt to the challenges of cross-border disputes.

There are also major challenges to ensuring that court ordered monetary remedies ultimately result in compensation to consumers in cross-border cases. It is only possible to obtain provisional pre-judgment measures, such as asset freezes, in a few countries in cross-border cases. These measures can help ensure that there is money left to fulfil any final monetary judgment awarded. In addition, in most member countries, it is very difficult or even impossible to enforce monetary judgments in the courts of another state without a treaty or other substantial arrangement in place. At present, there are no global arrangements in place to ensure the recognition and enforcement of judgments, although there are bi-lateral and regional arrangements in place. If consumers are to be guaranteed adequate protections in the global marketplace, these legal and practical obstacles to accessing effective dispute resolution and redress procedures across borders will need to be addressed.

## NOTES

- <sup>1</sup> A survey conducted for the European Commission in 1996, estimated the average cost of pursuing a cross-border consumer claim worth EUR 2 000 to be EUR 2 489 for proceedings in the country of the defendant's residence and only an average 3% lower for proceedings in the country of the plaintiff's residence. The average duration of a cross-border consumer claim was found to be almost two years at the defendant's residence and six months more at the plaintiff's residence, due to procedural requirements relating to overseas service of process and recognition and enforcement of the judgment (Von Freyhold et al, 1996). A follow-up survey conducted in 1998 affirmed these results, concluding that while the opportunities for participation in the single market had risen, the means for consumers to effectively defend and protect their legal rights remained limited, and that "no rational actor would pursue a cross-border consumer claim in court" (Von Freyhold et al, 1998). One could reasonably predict the costs and delay for consumers wishing to take cross-border cases in countries outside the internal market of the European Union to be even higher.
- <sup>2</sup> A 2004 report on complaints received by European Consumer Centers in 12 EU member states found increasing numbers of consumer complaints arising from cross-border ecommerce transactions (Leonard, Lenox-Conynham, and Nordquist, 2004). The findings of the survey confirmed the negative findings of a 2003 report into the problems consumers face when shopping online (Appmann and Nordquist, 2003). The most recent available statistics from the econsumer.gov database, reported 3 502 complaints relating to ecommerce from 1 January to 30 June 2004 (FTC, 2004).
- <sup>3</sup> Again, some recent European statistics provide some insight into current levels of consumer trust and confidence and the impact this may have on decisions to engage in cross-border transactions. A November 2003 Special Eurobarometer on Consumer Protection reported that 51% of European citizens feel they have access to means of dispute resolution settlement when they buy products in their own countries. This figure drops to 17.8% with respect to access to dispute resolution mechanisms for products purchased in other European countries (EC, 2003b, p36-37). A 2004 survey on access to justice in the EU reports that a high percentage of respondents (25%) said that they had never purchased anything from another country (EC, 2004, p55).
- <sup>4</sup> The UN Guidelines were first developed in 1985 and expanded in 1999 to include sustainable consumption.
- <sup>5</sup> ICPEN was formerly known as the International Marketing Supervision Network (IMSN).
- <sup>6</sup> Permanent Council of the Organization of American States Committee on Juridical and Political Affairs, Draft Resolution, Seventh Inter-American Specialized Conference on Private International Law, CP/CAJP-2239/05 Rev.1, 18 February 2005.
- <sup>7</sup> The OECD educational instrument on ADR, *Resolving E-Commerce Disputes Online: Asking the Right Questions about ADR*, recommends that consumers should first try and resolve disputes directly with the organisation or merchant before having recourse to third party dispute resolution services (OECD, 2002c).
- <sup>8</sup> The European Consumer centres network (ECC-Net) is the results of the merger of two existing EU networks (the European Consumer Centres "Euroguichet" and the European Extrajudicial network (EEJ-Net). The ECC-Net mission is to increase consumer confidence in the Internal Market by providing consumers with information about their rights in the EU and assisting them with their cross-border disputes.
- <sup>9</sup> Further details and a demonstration of the CCForm project are available at <http://ccform.interbyte.be/>, accessed 20 January 2004.

- 10 For a fuller examination of payment cardholders protections, including a description of the payment card system and “chargeback” procedure, see the *OECD Report on Consumer Protection for Payment Cardholders* (OECD, 2002a).
- 11 Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, *Official Journal L 144*, pp.19-27, [http://europa.eu.int/comm/consumers/cons\\_int/safe\\_shop/dist\\_sell/dist01\\_en.pdf](http://europa.eu.int/comm/consumers/cons_int/safe_shop/dist_sell/dist01_en.pdf).
- 12 Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2003 concerning the distance marketing of consumer financial services and amending Council Directives 90/619/EEC, 97/7/EC and 98/27/EC, *Official Journal L 271*, pp. 16-24, [http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l\\_271/l\\_27120021009en00160024.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_271/l_27120021009en00160024.pdf).
- 13 Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the member states concerning consumer credit, *Official Journal L 042*, pp. 4–53 (with corrigendum in *Official Journal L 278*, 11 October 1988, p. 0033), [http://europa.eu.int/comm/consumers/cons\\_int/fin\\_serv/cons\\_directive/index\\_en.htm](http://europa.eu.int/comm/consumers/cons_int/fin_serv/cons_directive/index_en.htm).
- 14 Commission Recommendation 97/489/EC of 30 July 1997 concerning transactions by electronic payment instruments and in particular the relationship between issuer and holder, *Official Journal L 208*, pp. 52–58, [http://europa.eu.int/comm/internal\\_market/payments/paymentcards/index\\_en.htm#legislation](http://europa.eu.int/comm/internal_market/payments/paymentcards/index_en.htm#legislation).
- 15 Communication from the Commission to the Council and the European Parliament concerning a new legal framework for payments in the internal market, COM(2003)718, 2 December 2003, [http://europa.eu.int/comm/internal\\_market/payments/framework/communication\\_en.htm](http://europa.eu.int/comm/internal_market/payments/framework/communication_en.htm).
- 16 In the United Kingdom, new regulations implementing the EU Distance Selling Directive, came into force in October 2004. The new regulations limit the liability of cardholders (including credit, debit and charge cards) in cases of fraudulent use. However, the broader consumer protections set out in the Consumer Credit Act only apply to payment by credit card.
- 17 While the most common forms of ODR involve alternative dispute resolution mechanisms (including negotiation, mediation, and arbitration), in its broadest sense the term ODR incorporates all forms of dispute resolution mechanisms, including judicial dispute resolution, that are facilitated by the Internet.
- 18 Automated negotiation is a computerised process, mostly designed to settle disputes over monetary amounts. It is often based on a system of blind bidding, through which the parties enter successive bids in an attempt to reach agreement, but without knowing what the other party has offered. The process concludes when the bids become sufficiently close to one another and the computer programme can propose a solution.
- 19 There have been a number of inventories and surveys of online ADR schemes for business to consumer disputes. In late 2000, Consumers International released a survey of twenty nine ODR schemes (Consumers International, 2001). In September 2000, the International Chamber of Commerce released an inventory of forty ODR initiatives, which was later updated in 2002 in co-operation with the OECD (ICC, 2002). In 2003, the Department of Justice in Victoria, Australia, commissioned a study of worldwide ODR schemes, including online ADR schemes for business to consumer disputes (Conley Tyler and Bretherton, 2003). This survey was updated and expanded in 2004 (Conley Tyler, 2004).
- 20 Recent surveys of online ADR services have found widely diverging practices among providers in terms of policies and procedures for handling disputes (Consumers International, 2001; Conley Tyler, 2004).
- 21 Commission Recommendation of 30 March 1998 on the principles applicable to the bodies for out-of-court settlement of consumer disputes, 98/257/EC, *Official Journal L 115*, pp.31-34, [http://europa.eu.int/comm/consumers/redress/out\\_of\\_court/adr/index\\_en.htm](http://europa.eu.int/comm/consumers/redress/out_of_court/adr/index_en.htm).

22 Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the  
consensual resolution of consumer disputes, 2001/310/EC, *Official Journal* L 109/56, pp.56-61,  
[http://europa.eu.int/comm/consumers/redress/out\\_of\\_court/adr/index\\_en.htm](http://europa.eu.int/comm/consumers/redress/out_of_court/adr/index_en.htm).

23 The database currently includes nearly 400 ADR schemes and is available on [www.eejnet.org](http://www.eejnet.org).

24 OECD member country rules on procedural safeguards for ADR services are examined in detail in a 2002  
report on Legal Provisions Related to Business to Consumer Alternative Dispute Resolution in Relation to  
Privacy and Consumer Protection (OECD, 2002b).

25 Interestingly, a recent survey of 115 ODR providers found that, although almost all providers disclosed  
policies and procedures, the form of these disclosures varied greatly from the most formal procedures  
manuals to simple flow charts (Conley Tyler, 2004).

26 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *Official Journal* L 95,  
pp. 29-34, [http://europa.eu.int/comm/consumers/cons\\_int/safe\\_shop/unf\\_cont\\_terms/index\\_en.htm](http://europa.eu.int/comm/consumers/cons_int/safe_shop/unf_cont_terms/index_en.htm).

27 *Kanitz v. Rogers Cable Inc* [2002] O.J. No. 665

28 Specifically, the legislation states that any provision in a consumer agreement that purports to require that  
disputes must be resolved by arbitration is invalid insofar as it prevents a consumer from commencing a  
Superior Court of Justice action provided for under the new Act (s. 7).

29 Japanese Arbitration Law (Law No. 138 of 2003), entry into force 1 March 2004, supplemental provisions,  
article 3. English translation available at [www.kantei.go.jp/foreign/policy/sihou/law032004\\_e.html](http://www.kantei.go.jp/foreign/policy/sihou/law032004_e.html).

30 The TACD resolution on ADR, for example, states that “ADR systems should be designed and presented  
as a voluntary option for consumers, not as a legal or contractual requirement” and continues that  
“[c]onsumers who submit disputes to ADR systems should not be asked to waive their legal rights, nor  
should they be restricted or blocked from resorting to other avenues of recourse that would normally be  
available if they are not satisfied with the outcome” (TACD, 2000).

31 The report of the conference, *Building Trust in the Online Environment: Business to Consumer Dispute  
Resolution*, and other conference materials are available on the OECD website at  
[www.oilis.oecd.org/oilis/2001doc.nsf/LinkTo/dsti-iccp-reg-cp\(2001\)2](http://www.oilis.oecd.org/oilis/2001doc.nsf/LinkTo/dsti-iccp-reg-cp(2001)2).

32 The Declaration was adopted at the close of an OECD Ministerial Conference on Promoting  
Entrepreneurship and Innovative SMEs in a Global Economy, held in Turkey in June 2004. Conference  
materials, including a report on *Alternative Dispute Resolution (ADR) On-line Mechanisms for SME Cross-  
border Disputes*, are available on the OECD website at  
[www.oecd.org/document/23/0,2340,en\\_2649\\_33956792\\_31919319\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/23/0,2340,en_2649_33956792_31919319_1_1_1_1,00.html).

33 The EU Ecommerce Directive of 2000 provides that Member States should ensure their legislation does not  
hamper the use of out-of-court schemes available under national law, for dispute settlement. Directive  
2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of  
information society services, in particular electronic commerce in the internet market, *Official Journal* C  
155, p. 1, Article 17, <http://europa.eu.int/scadplus/leg/en/lvb/l24204.htm>

34 For access to EEJ-Net visit <http://www.eejnet.org>.

35 Proposal for a directive of the European Parliament and of the Council on certain aspects of mediation in  
civil and commercial matters, COM (2004) 718 final, 22 October 2004.

36 See <http://www.ecodir.org>.

37 See <http://www.econsumer.gov>.

38 See <http://mediateurdunet.fr/fo/index.php>

39 Currently 21 European countries (Austria, Belgium, Czech Republic, Denmark, Estonia, France, Finland, Germany, Greece, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Norway, Poland, Portugal, Sweden and the United Kingdom) are members of ECC-Net. Cyprus, Malta and Spain will likely join in 2005.

40 The Consumer Trader and Tenancy Tribunal in New South Wales and the Victorian and Civil Administrative Tribunal in Victoria.

41 In some countries there are restrictions on certain non-commercial disputes. For example, Mexico excludes family, inheritance, and real estate disputes; Portugal excludes family, inheritance, and labour law disputes; and Sweden excludes family law disputes.

42 Prohibiting or limiting the reimbursement of lawyers' fees to the winning party is also regarded as a potential means to discourage the use of lawyers (Whelan, 1990, p221).

43 Tampere European Council 15 and 16 October 1999, Presidency Conclusions, point 30, [http://www.euoparl.eu.int/summits/tam\\_en.htm](http://www.euoparl.eu.int/summits/tam_en.htm).

44 Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation, Com (2002) 746 final, <http://europa.eu.int/scadplus/leg/en/lvb/l33212.htm>.

45 Article 4 of the 1984 Misleading Advertising Directive (as amended by Article 1 of the 1997 directive) provides that "Member States shall ensure that adequate and effective means exist to combat misleading advertising and for the compliance with the provisions on comparative advertising" including "legal provisions under which persons or organizations regarded under national law as having a legitimate interest in prohibiting misleading advertising or regulating comparative advertising may (a) take legal action against such advertising." Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, *Official Journal* L 250, pp. 17–20; Directive 97/55/EC of European Parliament and of the Council of 6 October 1997 amending directive 84/450/eec concerning misleading advertising so as to include comparative advertising, *Official Journal* L 290, pp.18- 23, [http://europa.eu.int/comm/consumers/cons\\_int/safe\\_shop/mis\\_adv/index\\_en.htm](http://europa.eu.int/comm/consumers/cons_int/safe_shop/mis_adv/index_en.htm).

46 Article 7 of the 1993 Directive on Unfair Terms in Consumer Contracts provides that "Member States shall ensure that adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers," including "provisions whereby persons or organizations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms." Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *Official Journal* L 95, pp. 29-34, [http://europa.eu.int/comm/consumers/cons\\_int/safe\\_shop/unf\\_cont\\_terms/index\\_en.htm](http://europa.eu.int/comm/consumers/cons_int/safe_shop/unf_cont_terms/index_en.htm).

47 Article 11 of the 1997 Directive on Consumer Protection in Respect of Distance Contracts provides that "Member States shall ensure that adequate and effective means exist to ensure compliance with this Directive" including "provisions whereby [consumer organizations having a legitimate interest in protecting consumers] ... may take action under national law before the courts." Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, *Official Journal* L 144, pp.19-27, [http://europa.eu.int/comm/consumers/cons\\_int/safe\\_shop/dist\\_sell/dist01\\_en.pdf](http://europa.eu.int/comm/consumers/cons_int/safe_shop/dist_sell/dist01_en.pdf).

48 Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, *Official Journal* L 166, pp.51-55, [http://europa.eu.int/eur-lex/en/lif/dat/1998/en\\_398L0027.html](http://europa.eu.int/eur-lex/en/lif/dat/1998/en_398L0027.html).

49 In Norway, the legal standing of consumer organisations is based on judicial pronouncements rather than positive law. In a 2002 government report, it was proposed to establish this right in law.

50 In Denmark the representative action is currently operating on the basis of a publicly funded pilot scheme. Under the pilot project, the private Consumer Council may take legal action to force a trader to abide by a prior decision of the Consumer Complaint Board (a public ADR body) or one of the approved private consumer complaint boards.

51 EU Injunctions Directive 1998, above note 48. For an analysis of the Injunctions Directive and its impact on consumer protection, see Rott, 2001.

52 The list of qualified entities under the Injunctions Directive is published in the EU Official Journal. Commission Communication concerning Article 4(3) of Directive 98/27/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interests, concerning the entities qualified to bring an action under article 2 of this directive, *Official Journal* C 321, pp. 26-38, [http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/c\\_321/c\\_32120031231en00260038.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/c_321/c_32120031231en00260038.pdf).

53 The directives include those on misleading and comparative advertisements, consumer credit, package travel, unfair contract terms, distance selling contracts, sale of consumer goods and guarantees.

54 For example, the Consumer Ombudsman posts common in Nordic countries were mostly created in the 1970s. In the UK, the post of Director General of Fair Trading was created in 1973. In Ireland, the Office of the Director of Consumer Affairs was established in 1978. Although the establishment of the US FTC dates to 1914, in 1975 the consumer movement helped push Congress to authorise new enforcement remedies for FTC use, including consumer redress and civil penalties. See Magnuson-Moss Warranty-Federal Trade Commission Improvement Act of 1975.

55 *Bill C-19, An Act to Amend the Competition Act and to Make Consequential Amendments to Other Acts*, clause 5(3), submitted to the House of Commons on 2 November 2004, legislative summary available at [www.parl.gc.ca/common/Bills\\_ls.asp?Parl=38&Ses=1&ls=C19](http://www.parl.gc.ca/common/Bills_ls.asp?Parl=38&Ses=1&ls=C19).

56 Regulation (EC) No. 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, *Official Journal* L364/1, pp.1-11 [http://europa.eu.int/comm/consumers/prot\\_rules/admin\\_coop/index\\_en.htm](http://europa.eu.int/comm/consumers/prot_rules/admin_coop/index_en.htm).

57 Article 4 (6)(g) of the Regulation provides that enforcement agencies are to have the ability to “require the losing defendant to make payments into the public purse or to any beneficiary designated in or under national legislation.”

58 There are related types of procedure available in a number of other countries. A survey conducted by the Hague Conference on Private International Law in 1998 examines the details of provisional and protective measures in Commonwealth countries, the United States, Germany, France, Netherlands, and Switzerland (Kessedjian, 1998). At the European Union level, there have been proposals for harmonized procedural rules on ancillary measures to provide for the improved enforcement of decisions, including protective measures such as the attachment of bank accounts.” European Council, Draft Programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters, section II B 2, *Official Journal*, C12/1, 15 January 2001, pp.1-9, [http://europa.eu.int/eurlex/pri/en/oj/dat/2001/c\\_012/c\\_01220010115en00010009.pdf](http://europa.eu.int/eurlex/pri/en/oj/dat/2001/c_012/c_01220010115en00010009.pdf).

59 The Mareva injunction takes its name from the English case of *Mareva Compania Naviera SA v. International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509, in which its availability as a preliminary protective measure was confirmed.

60 Article 31 of the Brussels Regulation provides that "Application may be made to the courts of a member state for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter." Article 24 of the Brussels and Lugano Conventions includes the same wording.

61 Finland reported that this power may be available in theory but has never been tested.

62 Bill C19, above note 55, clause 6.

63 Agreement Between the Government of The United States of America and the Government of Canada Regarding the Application of their Competition and Deceptive Marketing Practices Laws, 3 August 1995, text available at <http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/en/ct02007e.html>.

64 *United States and United Kingdom Sign Agreement to Enhance Cooperation on Consumer Protection Matters at First U.S. Meeting of International Marketing Supervision Network*, Press Release, 31 October 2000, [www.ftc.gov/opa/2000/10/ukimsn.htm](http://www.ftc.gov/opa/2000/10/ukimsn.htm).

65 *FTC and the Irish Director of Consumer Affairs Agree To Enhance Cooperation on Consumer Protection Matters*, Press Release, 9 October 2003, <http://www.ftc.gov/opa/2003/10/irelandcb.htm>

66 *FTC Signs Memorandum of Understanding with Mexican Consumer Protection Body*, Press Release, 27 January 2005, <http://www.ftc.gov/opa/2005/01/memunderstanding.htm>.

67 Cooperation Arrangement between the Commissioner of Competition (Canada), the Australian Competition and Consumer Commission and the New Zealand Commerce Commission regarding the Application of their Competition and Consumer Laws, October 2000, <http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/en/ct02030e.html>

68 *International Pact to Crack Down on Cross-Border Scams*, Press Release, 29 April, [www.oft.gov.uk/News/Press+releases/2004/77-04.htm](http://www.oft.gov.uk/News/Press+releases/2004/77-04.htm).

69 The mandate of the Network is to share information about cross-border commercial activities that may affect consumer interests, and to encourage international cooperation among law enforcement agencies. See, [www.icpen.org](http://www.icpen.org).

70 Regulation (EC) No. 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, *Official Journal* L364/1, 9/12/2004, pp.1-11 [http://europa.eu.int/comm/consumers/prot\\_rules/admin\\_coop/index\\_en.htm](http://europa.eu.int/comm/consumers/prot_rules/admin_coop/index_en.htm).

71 The public list of national contact points is available at [www.oecd.org/sti/crossborderfraud](http://www.oecd.org/sti/crossborderfraud).

72 Article 6, EU Consumer Protection Regulation, *above* note 70.

73 See, *Australian Competition and Consumer Commission v. Chen* [2003] FCA 897 (Sackville J.).

74 In 1971, the Hague Conference on Private international Law adopted a Convention on the Recognition and Enforcement of Foreign Judgements in Civil and Commercial Matters, adopted, 1 February, 1971; entry into force, 20 August 1979, [http://hcch.e-vision.nl/index\\_en.php?act=conventions.text&cid=78](http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=78). However,

to date there are only four parties to this Convention (Cyprus; Netherlands; Portugal and Kuwait) and it is largely regarded to have been unsuccessful (Kessedjian, 1997) (accession date: XII-2002, 2002).

75 For background and current status of the draft Convention visit [www.hcch.net/index\\_en.php?act=progress.listing&cat=4](http://www.hcch.net/index_en.php?act=progress.listing&cat=4).

76 The Brussels Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which entered into force in March 2002, revised and replaced the 1968 Brussels Convention of the same name in respect of all EU Member States except Denmark. The Brussels Convention therefore remains in force in relations between Denmark and other EU Member States. Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *Official Journal* L 12/1, 16/01/2001, pp. 1-23; Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, concluded 27 September 1968, *Official Journal* C 027, 26 January 1998, pp.1-27 (consolidated version), [http://europa.eu.int/comm/justice\\_home/ejn/enforce\\_judgement/enforce\\_judgement\\_int\\_en.htm](http://europa.eu.int/comm/justice_home/ejn/enforce_judgement/enforce_judgement_int_en.htm).

77 The Lugano Convention is a parallel convention to the Brussels Convention, applying between member states of the European Union and the European Free Trade Association (EFTA) *i.e.* Iceland, Liechtenstein, Norway and Switzerland. Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, concluded 16 September 1988, *Official Journal* L 319, 25 November 1988, pp. 9-33, [http://europa.eu.int/comm/justice\\_home/ejn/enforce\\_judgement/enforce\\_judgement\\_int\\_en.htm](http://europa.eu.int/comm/justice_home/ejn/enforce_judgement/enforce_judgement_int_en.htm).

78 These proposals build on the Tampere European Council Conclusions of 1999 called for the “further reduction of the intermediate measures which are still required to enable the recognition and enforcement of a decision.” See Tampere European Council Conclusions, above note 43, at point 34.

79 Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European enforcement order for uncontested claims, *Official Journal* L143, 30 April 2004, pp.15-39, [http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l\\_143/l\\_14320040430en00150039.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_143/l_14320040430en00150039.pdf).

80 European Council, Draft Programme of measures for the implementation of the principle of mutual recognition of decisions in civil and commercial matters, above note 58, at section II A 2.

81 Article 14.7, The Australia-United States Free Trade Agreement (AUSFTA), <http://www.dfat.gov.au/trade/negotiations/us.html>.

82 Article 15- 16 Brussels Regulation, above note 76; Articles 13-14 Lugano Convention, above note 77.

83 1980 Rome Convention on the law applicable to contractual obligations (consolidated version), entry into force 1 April 1991, *Official Journal* C 027, 26 January 1998, pp. 34-46, [http://europa.eu.int/comm/justice\\_home/fsj/civil/applicable\\_law/fsj\\_civil\\_applicable\\_law\\_en.htm](http://europa.eu.int/comm/justice_home/fsj/civil/applicable_law/fsj_civil_applicable_law_en.htm).

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85 The previous negotiations at the Hague Conference on Private International Law to draft an international treaty on recognition and enforcement of judgments in civil and commercial cases would have set out agreed rules of jurisdiction, including specific rules for consumer cases. However, the scope has been restricted to enforcement of judgments in business to business cases arising from exclusive choice of court agreements. See above note 75 and accompanying text.

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## CHAPTER II: OECD WORKSHOP ON DISPUTE RESOLUTION AND REDRESS

**Abstract:** this chapter contains a summary of the OECD Workshop on Dispute Resolution and Redress, held in Washington, DC on 19-20 April 2005. The aim of the workshop was to enable a better understanding of existing mechanisms for consumer dispute resolution to consider ways to improve the effectiveness of consumer remedies in cross-border cases. This chapter includes a list of main points that emerged from the discussions and a summary of each of the workshop sessions.

## A. Background

On 19-20 April 2005, the OECD held a Workshop on Consumer Dispute Resolution and Redress in the Global Marketplace. The event was organised by the OECD's Committee on Consumer Policy (CCP) and hosted by the US Government at the Federal Trade Commission Conference Center in Washington, D.C. Nobuo Tanaka, OECD Director for Science, Technology and Industry and Tony Sims, Chair of the CCP opened the workshop. Keynote speeches were given by Deborah Platt Majoras, Chairman of the US Federal Trade Commission and Markos Kyprianou, European Union Commissioner for Health and Consumer Protection.

The workshop attracted 129 participants from 24 OECD countries and non-member economies (Argentina, Australia, Belgium, Brazil, Canada, Chile, Chinese Taipei, the Czech Republic, Denmark, France, Germany, Ireland, Italy, Japan, Korea, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Sweden, the United Kingdom, and the United States). Moderators, speakers and panellists included senior government officials, and experts from business, consumer groups and academia.

The aim of the workshop was to enable a better understanding of existing mechanisms for consumer dispute resolution and to consider ways to improve the effectiveness of consumer remedies in cross-border cases.

This chapter includes a list of main points that emerged from the workshop, followed by summaries of each of the eight sessions. The workshop agenda is attached as Annex 1, and the hypothetical case study that served as the basis of the break-out discussions in Session 7 is attached as Annex 2. Presentations delivered at the workshop, the background report, and other workshop materials are available on the OECD Web site at [www.oecd.org/sti/consumer-policy](http://www.oecd.org/sti/consumer-policy).

## B. Main points

The following key points emerged from the presentations and discussions during the workshop, reflecting in particular the ideas highlighted during the last session's moderated discussion on next steps.

- The **importance** of effective dispute resolution and redress mechanisms remains clear. This is particularly true in addressing cross-border complaints, which are on the rise. Such mechanisms can increase consumer satisfaction, encourage good business practices, and promote cross-border commerce, including e-commerce.
- There is considerable **diversity** in the approaches taken by different countries, reflecting varied cultural and legal traditions. In most countries a range of different mechanisms can be found, helping to address different types of disputes (individual versus collective; disputes with legitimate businesses versus fraud).
- There are questions concerning how best to **fund** dispute resolution and redress mechanisms. Some participants noted a decrease in funding for government assistance to consumers in resolving disputes. Although in some areas marketplace competition has resulted in businesses increasing the level of protections on offer to consumers (*e.g.* payment cards), challenges have been identified in creating incentives for businesses to offer private dispute resolution services to consumers (*e.g.* ADR). One suggested approach to the funding of private schemes is to include dispute resolution mechanisms as part of a trustmark or other type of self-regulatory programme.
- **Government obtained redress** is an essential tool, especially in cases of cross-border fraud where the legal and practical obstacles to individual action are great. A consensus appears to be emerging about the importance of providing government agencies effective tools in this area.

- The **barriers to legal action** in cross-border cases remain, in initiating actions (establishing jurisdiction), obtaining evidence, and enforcing judgments and collecting assets. Apart from private, non-legal mechanisms, such as the payment card system and trustmark programmes, the **enforcement of judicial outcomes** remains problematic in the international arena.
- A lack of **consumer understanding and information** about dispute resolution mechanisms has hampered their uptake. Furthermore, evidence suggests that under-privileged consumers are less likely to be aware of their rights or to take (informal or formal legal) action to assert those rights. Consumer advice and referral schemes (*e.g.* ECC-Net and econsumer.gov) can be especially valuable to help consumers identify dispute resolution and redress options in other countries.
- There is still room for a greater use of **technology**, especially to facilitate the filing and management of cross-border disputes. There has been significant growth in the online dispute resolution marketplace but there is considerable scope for improvement. Participants identified only limited use to date of technology in formal legal proceedings.
- Efforts to expand **judicial education** about dispute resolution mechanisms could be useful, in particular, to sensitise judges to the needs of foreign consumers that are harmed by domestic “bad actors” and mitigate against inherent advantages possessed by local defendants.
- A number of suggestions for **further work** by the OECD Consumer Policy Committee were discussed, including: further collection and joint study of the evidence base for action; development of a framework on the elements of an effective dispute resolution system; work towards an OECD Recommendation directed at member governments in relation to a framework; and increased outreach to non-OECD economies.

## C. Report of the workshop

### *Welcome and introduction*

**Nobuo Tanaka**, OECD Director for Science, Technology and Industry opened the workshop. He extended a warm welcome to all participants and thanked the US government for offering to host the event. Mr. Tanaka noted that the OECD has considerable experience in developing policy frameworks for the digital economy. He highlighted the essential role of dispute resolution and redress in building consumer confidence and realising the promise of the global marketplace. He stressed that unless consumers are confident that disputes can be resolved in an accessible, effective, and fair way they will be reluctant to engage in cross-border transactions.

Mr. Tanaka recognised the valuable contribution that civil society can make to the OECD policy-making process, noting that OECD workshops bring a larger cross-section of OECD stakeholders into policy debate. He further welcomed the participation of senior officials from Argentina, Brazil, and Chile on the agenda and the attendance of a number of participants from other non-member economies.

**Tony Sims**, Chair of the CCP, welcomed the speakers and audience. He provided context to the discussions by providing background on the work of the Committee on Consumer Policy. That work includes the development of two sets of OECD Guidelines: one on consumer protection in e-commerce and the other focussed on protecting consumers from cross-border fraud. Both sets of Guidelines recognise that the role of dispute resolution and redress are fundamental.

Mr. Sims also introduced participants to “Carlos Consumer,” the star of the hypothetical examples that served as the subject of break-out discussions in Session 7. He concluded by emphasising the

importance of workshops to the policy development process and encouraged all participants to contribute to the final panel discussion on next steps.

### *Keynote speeches*

**Deborah Platt Majoras**, Chairman of the US Federal Trade Commission (FTC), welcomed participants, thanking them for travelling to Washington. She observed that the workshop was about problem-solving, noting that solving consumer problems within a market-oriented framework is at the centre of the FTC's consumer protection mission. She described the FTC's role in providing information to consumers about how best to resolve their complaints about products or services directly with merchants. She further explained how the FTC solves problems by using law enforcement authority to obtain monetary redress for consumers, particularly in cases involving pervasive consumer fraud.

Chairman Majoras described how the ability of governments to obtain redress for victims of cross-border fraud is becoming increasingly important to maintain and increase consumer trust in the global marketplace. Recognising that different jurisdictions have different consumer protection systems and legal tools, she stressed her belief that national consumer protection agencies have a unique role to play in obtaining compensation for consumers who have been the victims of fraud. For example, she noted, between April 2004 and March 2005, the FTC obtained judgments ordering the return of more than USD 480 million in compensation to consumers. In addition, the FTC has over the years provided redress funds to consumers in more than 100 countries. She concluded by noting that improving the recognition and enforcement of appropriate restitutionary judgments obtained by consumer protection agencies against cross-border fraud would also make government redress actions more effective.

**Markos Kyprianou**, European Union Commissioner for Health and Consumer Protection thanked the OECD Committee on Consumer Policy and the US Federal Trade Commission for organising the event, which focused on a crucial aspect of consumer protection. He explained that the European Commission views effective enforcement of consumer legislation as a high priority. He stressed that consumer legislation can only deliver tangible positive effects for consumers if properly enforced.

Commissioner Kyprianou stated that increasingly integrated global markets require all market players to take a corresponding global approach towards enforcement and redress mechanisms. Enforcement, he said, must include a full spectrum of actions by all parties concerned: businesses, self-regulatory bodies, consumer organisations and public authorities, as well as the individual consumer. He noted that the European Commission has taken action in this regard in two principal ways. First, it has sought to tackle the "sharp end" of the spectrum of infringements involving cross-border fraud. The recently enacted Regulation on Consumer Protection Cooperation, for example, authorises national consumer protection enforcement authorities to take co-ordinated action to stop rogue traders targeting consumers across borders. Second, the European Commission has acted to improve the capacity of consumers themselves to seek redress. The European Consumer Centers Network (ECC—Net), provides a "one-stop" information and advice service to consumers. In addition, a series of Commission legislative actions and proposals aim to facilitate enforcement of ADR agreements and court decisions. He expressed his belief that the workshop would result in some interesting and new ideas to feed the debate on how to make the dispute resolution and redress systems work best for consumers.

### *Session 1: Overview of dispute resolution and redress*

The introductory session provided an overview of the workshop topic, including discussion of the role of dispute resolution and redress in consumer protection policy; the role of business in resolving consumer disputes; and recent cross-border consumer complaint trends. Participants agreed that although consumer cases are usually small and do not affect norms nor modify market players' behaviour, when aggregated they can involve significant sums of money and have a widespread impact on consumer welfare.

The session began with a comprehensive examination of the different types of consumer dispute resolution mechanisms in place today. The speaker described these mechanisms in terms of a pyramid structure. At the bottom, where the largest number of disputes are resolved, are the two-party mechanisms in which consumers and businesses communicate directly with each other without the intervention of any third party. Further up the pyramid are third party informal mechanisms such as negotiation and mediation, where consumers and businesses request the assistance of a neutral party to help them achieve a satisfactory outcome. Further up again are mechanisms such as ombudsmen schemes in which a neutral third party assesses the facts and arguments of both sides and recommends or imposes a solution. At the top of the pyramid, where only a fraction of consumer disputes end up, are the formal legal mechanisms such as courts and government enforcement authorities.

The speaker suggested that the above mechanisms could be broadly classified as aiming either to affect behaviour (a regulatory purpose) or to provide redress to consumers for harm suffered (a compensatory purpose). He pointed to differences in the role of public and private entities among the OECD countries, perhaps reflecting different cultural and legal traditions. For example, in the United States the class action procedure largely fulfils a compensatory role whereas in Europe the collective cases pursued by consumer organisations serve more of a regulatory purpose. Likewise, in the United States the government has powers to obtain monetary redress for consumers whereas in most European countries government bodies may only obtain conduct remedies. The speaker noted that on the whole, however, most national systems offer a broad range of different mechanisms which is necessary to respond to different types of disputes (*e.g.* individual versus collective; “legitimate” disputes versus fraud).

With respect to the role of business in resolving consumer disputes, there was consensus that good business practices and effective complaints handling procedures can resolve a large majority of disputes, to the benefit of both the consumer and business. One presentation examined the kinds of resolution mechanisms offered to consumers by payment card issuers and highlighted how these protections can be a good way to increase confidence in engaging in online and cross-border transactions. The speaker explained how marketplace competition has driven payment card companies, such as Visa, to voluntarily increase protections to consumers beyond the legal requirements.

Looking to recent trends in consumer complaints, there were two presentations based on statistics from [econsumer.gov](http://econsumer.gov) and the European Consumer Centre Network (ECC-Net). The [econsumer.gov](http://econsumer.gov) statistics revealed an overall rise in cross-border consumer complaints, with the highest numbers of complaints involving undelivered products. The presenter noted that a vast majority of these types of complaints were suitable for resolution either directly by the companies involved or through ADR. On the other hand, she also noted that a smaller but growing percentage of complaints involved unauthorised charges to consumers and other types of fraud which are not suitable for private dispute resolution mechanisms. One important way to address such complaints, she said, was to strengthen government agencies’ ability to take enforcement action, including action to recover money for consumers.

The European statistics revealed quite similar trends with a steady increase each year in complaints involving cross-border ecommerce. Again, the largest category of complaints registered related to defective delivery of products but there has also been a marked increase in incidences of fraud affecting European consumers. The presenter noted that in addition to the increase in the number of cross-border complaints, they were also becoming more complex with it often being difficult to identify the company the consumer had contracted with and where that company is located. Both presenters emphasised the value of collecting consumer complaints and maintaining adequate reporting systems in order to help identify trends and problem areas in the marketplace and also identify recipients for redress in certain cases.

Focusing on the individual consumer perspective, one of the panellists noted that while there are differences in the mechanisms on offer, commonalities can be identified in terms of the needs and expectations of consumers. She explained that consumers firstly do not want problems, but if they do have problems they want them resolved quickly, and finally that they do not want others to have the same problems. Another panellist stressed the need to ensure that consumers are aware of their rights and the different types of dispute resolution mechanisms that are available to them. Furthermore, he added, there is a need to increase confidence among consumers that these mechanisms are operating in a fair and appropriate manner.

### ***Session 2: Recent developments in the ADR marketplace***

This session examined recent developments in the ADR marketplace, including online ADR. Speakers and panellists discussed ways to foster the continued uptake of ADR by businesses and consumers, including through increased government support.

Participants pointed out that the availability of ADR is still patchy from country to country and among sectors. Furthermore, they noted, that in the cross-border context, the challenges of locating a provider are significant. Apart from language difficulties, ADR services vary greatly from country to country (*e.g.* in terms of size, jurisdiction, and funding) which can leave consumers confused as to which type of body is appropriate to handle their dispute. Given these challenges, schemes such as ECC-Net and the International Directory of ADR Providers available on [econsumer.gov](http://econsumer.gov) that refer consumers to ADR bodies in other countries can play an important role. One speaker suggested establishing this kind of referral scheme on an OECD-wide basis.

Questions were raised about the funding of ADR. Although noting that in some areas (*e.g.* payment cards) marketplace competition has resulted in businesses offering stronger protection to consumers, many speakers believed that there was not a sufficient market for private sector business-to-consumer ADR without incentives or subsidies. One participant suggested that mandatory pre-resort to (non-binding) ADR might help create incentives, while noting that this could be controversial in some legal systems. Others suggested the attachment of ADR to a trustmark or other self-regulatory scheme as offering the best prospects of financial viability and noted the role that governments could play in encouraging and providing financial support to the development of such schemes.

In terms of online dispute resolution (ODR), it was noted that there has been a significant increase in the availability of services, but that there is still room for improvement in this sector. One speaker suggested that reasons for the slow adoption of ODR include a reluctance among providers to adopt new technologies and new procedures in dispute resolution practices. In addition, she said, a low level of consumer awareness of the availability of ODR schemes and concerns about enforceability of outcomes has hindered development. She recommended that further work to develop ODR mechanisms should include support for standards development, improving the ability to handle cross-jurisdictional disputes, ensuring greater enforceability, and increasing awareness among businesses and consumers.

### ***Session 3: Small claims civil court proceedings and other government-run dispute resolution schemes***

This session examined state-run procedures (judicial and non-judicial) offering consumers simple ways to resolve their individual low-value disputes. The session included presentations on small claims court procedures national consumer complaints boards, and on the adaptability of such mechanisms to cross-border cases.

With respect to small claims court procedures, much discussion focused on the monetary limits for using these procedures, which were considered too low in a number of countries. It was stated that consumers whose disputes involve sums over these financial limits are often left without recourse because

of the cost and burden associated with taking a case to the regular court system. Speakers and panellists also discussed the role of lawyers in small claims courts. There was a general consensus that lawyers should not be permitted because consumers often cannot afford a lawyer giving the other represented party an unfair advantage. In addition, it was stated that in the ideal system the small claims procedure should be as simple as possible so that lawyers are not necessary. Other issues discussed included the difficulties associated with collecting judgments and the need for consumers to be advised of these difficulties. Too often, participants noted, consumers come to court without a clear idea of how the procedure actually works.

Using the presentation on the national consumer complaints board as a starting point, participants turned to discussion of the comparative advantages and disadvantages of government run alternative dispute resolution procedures *vis à vis* courts. Participants noted that these types of ADR schemes often share many of the positive elements of courts in that they are independent and staffed by competent arbitrators (often legally trained and with specialised knowledge of consumer issues). In addition, such schemes are usually efficient at processing complaints, are either free or low-cost, and have simpler, less intimidating procedures than the courts. On the other hand, it was noted that government ADR bodies do not always have jurisdiction over all types of consumer disputes and, depending on the country, their decisions may not be legally binding.

With respect to cross-border cases, it was generally agreed that there are currently significant legal and practical obstacles to using small claims court procedures in such cases. Some suggested that judges should be sensitised to the needs of foreign consumers that are harmed by domestic “bad market actors”. Others highlighted a reluctance to adopt new technologies in the handling of cases which could greatly facilitate overseas claimants. One speaker discussed the key issues raised during recent attempts to develop a European procedure for small claims litigation across borders, which is the subject of a proposed European directive. He suggested that it could become a model for a global procedure.

Speakers and panellists concluded that there was an overall lack of consumer understanding and information about consumer dispute resolution. Furthermore, an audience member pointed to evidence suggesting that under-privileged consumers are less likely to be aware of their rights or to take (informal or formal legal) action to assert those rights. He questioned whether there was a way to improve access to justice for all and make dispute resolution procedures serve poorer and more vulnerable consumers as well as the middle classes.

#### ***Session 4: Collective claims: consumer plaintiffs and consumer associations***

This session examined procedures for collective action lawsuits by, or on behalf of, consumers. The session included presentations on collective action mechanisms in two different OECD countries – the United States and Japan; on procedures for consumer associations to take action on behalf of the “collective interest” of consumers; and on the compatibility of collective actions with the civil law tradition.

Speakers agreed that collective actions are a useful vehicle for consumer redress and can serve an important role in deterring bad practices by companies. However, some suggested that there was a potential for abuse in collective actions as well as the possibility of overburdening the legal system with complex cases involving large groups of claimants.

The presentations underscored the wide variety of approaches to collective action procedures. For example, in a number of countries, such as the US and Japanese models, it is consumers themselves that initiate the legal action. Whereas in other countries, mostly in Europe, it is consumer associations who initiate the action on behalf of consumers who have been harmed. In addition, there are differences in the

remedies that can be obtained under different systems. In countries where consumer associations take the collective action, usually only injunctive relief may be obtained. In other countries a full range of remedies including monetary damages is available. There was a general consensus that the ability to obtain compensation for consumers is an important element of an effective system although one speaker noted that there can be problems relating to distribution and dilution of value when large numbers of consumers are involved. Other differences include the means of determining consumer participation in the action. Under the “traditional” US model, it is an opt-out system whereby all consumers who have been harmed are automatically included unless they take measures to exclude themselves. Under other newer models, only consumers that specifically “opt-in” are included in the group. A number of participants, including audience members, expressed a preference for an opt-out system on the grounds that opt-in is too burdensome and can limit uptake.

With respect to civil law countries the presenter observed that, to date, there has been a great reluctance to adopt collective action procedures as they are understood to be incompatible with the civil law tradition. He suggested that this was a misconception. Noting the success of the collective action procedure in Brazil and the Canadian province of Quebec, he said that there was no reason to believe that such procedures can not work in civil law systems. He referenced a recent project that he had initiated to create a model class action law. The model law aims to provide a framework for the introduction of a collective action procedure for civil law countries taking into account the particular needs and characteristics of their legal systems.

The complexity of using collective action procedures in cross-border cases was also highlighted. One speaker observed that it can take years just to decide in what country the case should be heard. Another participant noted that apart from jurisdictional challenges, the differences among different countries’ collective action procedures make cross-border cases more difficult. He suggested working at the OECD level towards increased harmonisation of civil procedure laws to facilitate transnational collective actions in consumer cases.

Finally, it was noted that a number of OECD countries, including Finland, France, Korea and Norway, are considering proposals for new collective action procedures suggesting a convergence of opinion on the value of these mechanisms for consumer dispute resolution and redress.

### ***Session 5: Government facilitated redress***

This session focused on the role of government consumer protection enforcement agencies in facilitating consumer redress. It included presentations on the authority and experience of government agencies in the United States, Canada, Chile and Sweden in obtaining monetary redress for consumers.

Although not all OECD countries’ governments were represented at the workshop, the discussion suggested that a consensus may be emerging in favour of government facilitated redress. A number of countries have recently granted consumer agencies with some form of authority to obtain redress (*e.g.* Chile, Finland, Sweden) and others are considering doing so (*e.g.* Canada, United Kingdom). Participants stated that government-obtained monetary redress is an important complementary mechanism to other enforcement powers and an essential element of a comprehensive consumer protection framework. While injunctive relief may remedy future harms it does not compensate consumers for past wrongs they have suffered. Restitution, therefore, can serve as a vehicle to provide “complete justice” by providing consumers with compensation, restoring consumer confidence and depriving wrongdoers of ill-gotten gains.

The discussion also highlighted that there is no prescribed system for implementing government redress powers and that there are different ways to achieve the same goal. For example, government

agencies may obtain compensation for consumer victims either by applying directly to the court for a restitution order, such as in the United States, or by initiating a class action, such as in Sweden.

In terms of cross-border cases, particularly those involving fraud, participants observed that government-obtained redress can play an important role. Governments have at their disposal investigative and enforcement powers which make them better situated than private individuals or groups to take action against fraudsters operating overseas. In this respect, the importance of effective co-operation among government agencies was stressed. One speaker suggested that proper implementation of the 2003 OECD Cross-Border Fraud Guidelines would greatly facilitate enforcement action in cross-border cases by providing national consumer protection agencies with the authority to share information and provide investigative assistance to their counterparts in other countries. The point was also made that national redress systems can be structured to provide compensation to foreign as well as domestic consumers. For example, it was noted that in the past five years the US Federal Trade Commission has distributed USD 7.3 million to more than 100 000 consumers in 116 countries outside the United States.

Some suggested that there may be tension between the government collecting consumer complaints to support enforcement actions and the need to avoid unrealistic consumer expectations of what the government can or will do to intervene on their behalf. Other challenges highlighted in the discussion included questions of how consumer redress could work within existing legal systems and how to set up the apparatus to make it work in practice.

#### ***Session 6: International judicial co-operation in cross-border cases***

This session focused on the impediments to legal action in cross-border cases. Speakers and panellists identified a number of significant challenges, including difficulties in obtaining evidence and enforcing judgments and collecting assets. They discussed how increased international judicial co-operation and harmonisation of procedural law could improve the effectiveness of consumer remedies in cross-border cases.

With respect to the enforcement of foreign monetary judgments, one speaker explained that outside the European Union, there were no multi-lateral arrangements to ensure the mutual recognition and enforcement of judgments. She recalled previous efforts at the Hague Conference on Private International Law to negotiate a comprehensive international convention in this area, but noted that the scope of the convention was now significantly narrowed and excluded consumer cases. On the other hand she noted that some countries do have bi-lateral agreements in this area and that others, such as the United States, are willing to enforce overseas judgments without requiring reciprocity.

There was discussion of the particular issues raised by the enforcement of judgments in consumer cases, as opposed to other civil cases. It was noted that, in general, courts will apply the same rules to consumer and non-consumer cases alike. However, there may be some difficulties with respect to judgments obtained by government agencies awarding monetary redress to consumers as they may be regarded as penal or revenue in nature or raise other public policy concerns. For this reason, participants said, it is important to stress the restitutionary nature of these judgments before foreign courts. As a positive development in this area, participants referred to the recent Free Trade Agreement between the United States and Australia which contains a provision stating that monetary judgments obtained by government authorities for the purposes of providing compensation to consumers should not be viewed as penal in nature.

In the public law field, one of the speakers explained how the US FTC works to recover overseas assets in cases where foreign defendants are targeting US-based consumers. He described the burdensome procedures and serious legal obstacles to taking these types of cases. The most difficult cases, he said, are

when the agency needs to obtain a pre-judgment asset freeze in order to ensure that there will be money left to fulfill the final judgment if successful. He stressed the need for increased cooperation in this area. In particular, he recommended the implementation of bi-lateral memoranda of understanding authorising government agencies to avail of civil procedures in other countries in order to seek redress for their residents. He also suggested that judicial education was needed to sensitise judges to the problems that foreign consumers face when targeted by cross-border fraud. Currently, he said, there is a tendency to weigh the interests of the local defendant more heavily than foreign consumers, to protect the former from “over-burdensome” regulation of their overseas activities.

There was a presentation on a joint project of the American Law Institute and the International Institute for the Unification of Private Law (UNIDROIT) to develop Principles of Transnational Civil Procedure. The speaker explained that the main purpose of the project is to overcome procedural differences among national legal systems in order to facilitate transnational civil litigation. The principles address a number of the issues and legal challenges raised by other participants, including the availability of provisional and protective measures and the recognition and enforcement of judgments. Although not intended to cover consumer disputes, the speaker suggested that with some changes the principles could also be useful to address some of the most difficult challenges to taking cross-border consumer cases.

Another speaker discussed some of the work on international judicial co-operation that has been carried out by the Organisation of American States (OAS). He pointed to a number of conventions in the private international law field that could be of relevance in cross-border consumer cases. One obvious drawback, he said, was that when dealing with low-value disputes individuals are unlikely to take formal legal action and rely on such conventions. However, the framework for judicial co-operation and assistance they put in place could greatly facilitate government agencies taking consumer protection cases across borders. The speaker also noted that there are new proposals to begin work at the OAS which is specifically focused on consumer cases.

#### ***Session 7: Break out discussion - case studies***

Workshop participants assembled into three “break out” groups to discuss hypothetical examples of consumer disputes in small groups (see Annex II). They considered which forms of dispute resolution and redress would be available and appropriate given the circumstances of the dispute and identified the kinds of legal and practical obstacles the consumer may face.

#### ***Session 8: Wrap-up: next steps discussion***

Drawing on the discussion from the earlier sessions, session moderators drew conclusions on consumer dispute resolution and redress, identifying which mechanisms are working well and areas where further work is needed. Common themes included the importance of effective cross border dispute resolution to trust in global markets, the diversity of approaches around the world and the need to take account of differences in legal and cultural traditions, market practice and in the structure of local and regional economies.

In his concluding remarks, CCP Chair Tony Sims brought together the various themes and suggestions that emerged over the two days, and particularly the final session. Looking at the different roles the CCP, the private sector, and individual governments can play, he summarised the various possibilities for future work.

#### ***OECD Committee on Consumer Policy***

The Chair noted that a number of concrete suggestions for next steps by the OECD Committee on Consumer Policy had emerged from the discussion, including:

- Further collection and joint study of the evidence base for action.
- Choosing one or more particular mechanisms on which to do further in-depth work.
- Developing a framework on the elements of an effective dispute resolution and redress system.
- Working towards an OECD Recommendation directed at member governments in relation to a framework.
- Using any of the above in the Committee's outreach efforts with non-OECD member economies.

Mr. Sims further recalled that other suggestions which were made at the workshop included: developing OECD norms for international class or group actions; studying best practice; more work on online or payment protections; developing an OECD-wide extra judicial network; and consumer surveys.

#### *Private sector*

The Chair reiterated that business has an important role of keeping customers satisfied and handling complaints effectively. Approximately 60-80% of consumer complaints, he said, could be resolved through direct consumer/business negotiation. He noted that the International Standards Organisation (ISO) has produced a world standard which could be relevant in this regard. For ADR and ODR providers and code owners, he stressed that the key was to provide quick, effective and user-friendly procedures which would enable consumers to pick from a range of systems according to their particular needs.

#### *OECD governments*

With respect to the work that could be done by individual governments, the Chair noted that possibilities discussed during the workshop included:

- Work on the demand side to ensure consumers were aware of their rights, had information about the marketplace and the methods of redress available.
- Provide signposts to ADR providers, industry schemes, Ombudsmen and judicial processes.
- Work to improve quality standards for ODR and ADR mechanisms and codes.
- Give seals of approval for such schemes which meet certain criteria (*e.g.* OFT's Codes Approval Scheme).
- Make their expectations clear to companies who trade across borders.
- Provide infrastructure arrangements, such as ECC-Net.
- Identify key principles of effective redress schemes (*e.g.* financial services ombudsmen) and consider whether they could be applied elsewhere.
- Form closer links between complaints recipients, policy officials and enforcers in order to rapidly respond to scams, etc.
- Improve access to justice, given its important backstop role, especially for the more vulnerable and excluded consumers.
- Examine whether they had effective redress systems, taking into account OECD member countries' diverse situations but also the need for international connectivity in order to combat cross-border scams and other redress shortfalls.

## ANNEX I: WORKSHOP AGENDA

### OECD WORKSHOP ON CONSUMER DISPUTE RESOLUTION AND REDRESS IN THE GLOBAL MARKETPLACE

US FEDERAL TRADE COMMISSION  
WASHINGTON, DC  
19-20 APRIL 2005

This workshop is organised by the OECD and hosted by the US Government. The objective is to examine approaches to dispute resolution and redress mechanisms in OECD member countries and exchange views about the advantages and disadvantages of different approaches, particularly in the cross-border context. The workshop will take stock of new developments in industry-sponsored or voluntary dispute resolution and redress mechanisms; examine various court and other state-run procedures for the resolution of individual and collective low-value consumer disputes; discuss the role that consumer protection enforcement agencies can play in facilitating consumer redress; and consider ways to improve the effectiveness of consumer redress in cross-border cases.

The workshop begins with an introductory overview (Session 1), which will take a broad view of the variety of dispute resolution mechanisms in OECD countries and consider current consumer complaint trends. Participants will then consider each of these mechanisms in greater detail. Looking first to mechanisms that may be available to an individual consumer who has a dispute with a legitimate business, Session 2 will focus on private sector alternative dispute resolution, and session 3 on small claims courts and other state-run alternative dispute resolution schemes. Session 4 will examine different procedures for collective action lawsuits that may be available to groups of consumers with the same complaint. Session 5 will focus on government-obtained redress, a tool available in some countries to compensate consumer victims. This session will also consider what other roles government consumer protection agencies can play in facilitating consumer redress. Session 6 will examine the legal and practical impediments to ensuring that monetary judgments obtained in cross-border consumer cases ultimately result in compensation to consumers. This issue is common to all types of court-ordered redress for disputes with a cross-border dimension, but raises particular issues for government-obtained redress. Finally, building on the discussion in the foregoing sessions, sessions 7 and 8 will examine hypothetical examples of consumer disputes and draw conclusions on the state of consumer dispute resolution and redress in the global marketplace.

The **format** of the workshop will mix presentations, moderated panel discussions, and breakout group discussions. **Participation** will be open to the public, but will require advance registration and will be limited by available space. Interested journalists will be able to attend.

<b>DAY 1</b>	<b>Tuesday, 19 April 2005</b>
<b>08.15</b>	<b>REGISTRATION</b>
<b>09.00-9.10</b>	<b>WELCOME</b>
	<p><b>Mr. Nobuo Tanaka</b>, Director for Science, Technology and Industry, OECD</p> <p><b>Mr. Tony Sims</b>, Chair, OECD Committee on Consumer Policy</p>
<b>9.10-9.30</b>	<b>KEYNOTE SPEECHES</b>
	<p><b>Ms. Deborah Platt Majoras</b>, Chair, US Federal Trade Commission</p> <p><b>Mr. Markos Kyprianou</b>, European Commissioner for Health and Consumer Protection</p>
<b>9.30-10.45</b>	<b>SESSION 1: Overview of Dispute Resolution and Redress</b>
	<p>Moderator: <b>Mr. Martin Bond</b>, Assistant Director, Consumer and Competition Policy Directorate, UK Department of Trade and Industry</p> <p>This introductory session will provide an overview of the workshop topic, including discussion of the role of redress in consumer protection policy; the role of business in resolving consumer disputes; and recent cross-border consumer complaint trends.</p> <p><b>Speaker 1:</b> The role of redress in consumer protection policy <b>Mr. Iain Ramsay</b>, Professor of Law, Osgoode Hall Law School, York University, Canada</p> <p><b>Speaker 2:</b> The role of business in resolving consumer disputes <b>Mr. Mark MacCarthy</b>, Senior Vice President, Public Policy, VISA USA</p> <p><b>Speaker 3:</b> Cross-border complaint trends from econsumer.gov <b>Ms. Lois Greisman</b>, Associate Director, Planning and Information Division, US Federal Trade Commission</p> <p><b>Speaker 4:</b> Cross-border consumer complaint trends in Europe <b>Mr. Fredrik Nordquist</b>, Legal Adviser, European Consumer Centre, Sweden</p> <p><b>Moderated panel discussion</b> among the speakers above and panellists below</p> <p><b>Panellist 1:</b> <b>Mr. Michael Jenkin</b>, Director General, Office of Consumer Affairs, Industry Canada</p> <p><b>Panellist 2:</b> <b>Ms. Susan Grant</b>, Vice President for Public Policy, US National Consumers League; US Co-Chair, Internet Working Group, Trans Atlantic Consumer Dialogue (TACD)</p> <p>Issues for discussion</p> <ul style="list-style-type: none"> <li>• What are the major trends in consumer complaints? How big is the cross-border redress problem?</li> <li>• How do the various redress systems work together (or not), and what are their comparative benefits?</li> <li>• What are the essential elements of an effective internal complaints handling process? What practical steps can businesses take in this area?</li> <li>• How can consumer awareness of dispute resolution and redress mechanisms be raised so as to increase trust and confidence in the global marketplace?</li> </ul>
<b>10.45-11.00</b>	<b>Break</b>

11.00-12.45	<p><b>SESSION 2: RECENT DEVELOPMENTS IN THE ADR MARKETPLACE</b></p> <p><b>Moderator:</b> Mr. Scott Cooper, Manager, Technology Policy, Hewlett Packard</p> <p>This session will take stock of recent developments in the ADR marketplace. Speakers and panellists will discuss ways to foster continued uptake by businesses and consumers and examine the role of government in encouraging, mandating, or financially supporting private-sector ADR schemes.</p> <p><b>Speaker 1:</b> ADR and new technology  <b>Ms. Melissa Conley Tyler</b>, Program Manager, International Conflict Resolution Centre, University of Melbourne, Australia; Member, UN Expert Group on ODR</p> <p><b>Speaker 2:</b> Linking ADR to trustmark programmes  <b>Mr. Steve Cole</b>, Senior Vice President and General Council, Council of Better Business Bureaus</p> <p><b>Speaker 3:</b> Facilitated complaints handling  <b>Mr. Alastair Tempest</b>, Director General, Federation of European Direct &amp; Interactive Marketing (FEDMA)</p> <p><b>Speaker 4:</b> ADR referral and the European extrajudicial network  <b>Mr. Christian Moritz</b>, Project Leader, European Consumer Centre, Germany</p> <p><b>Speaker 5:</b> Government support for private ADR schemes  <b>Ms. Isabel Mendes Cabecadas</b>, President of Board of Directors, Arbitration Centre for Consumer Conflicts, Portugal</p> <p><b>Moderated panel discussion</b> among the speakers above</p> <p><b>Panellist 1:</b> <b>Ms. Andrea Da Silva</b>, Senior Analyst, Office of Technology &amp; E-Commerce, US Department of Commerce</p> <p><b>Panellist 2:</b> <b>Mr. Steve Brooker</b>, Senior Policy Officer, National Consumer Council, United Kingdom</p> <p>Issues for discussion</p> <ul style="list-style-type: none"> <li>• Is there a viable business model for private sector business to consumer ADR?</li> <li>• What are the benefits of regional and international ADR referral programs such as EEJ-net, econsumer.gov and those provided by the private sector?</li> <li>• What is the role of government in ADR, in particular in online dispute resolution (ODR)? Is there a need for internationally agreed principles for business to consumer ADR?</li> </ul>
12.45-2.15	<b>Lunch</b>

2.15-3.30	<p><b>SESSION 3: SMALL CLAIMS CIVIL COURT PROCEDURES AND OTHER GOVERNMENT-RUN DISPUTE RESOLUTION SCHEMES</b></p> <p><b>Moderator:</b> Ms. <b>Benedicte Federspiel</b>, Danish Consumer Council; Steering Committee, TACD</p> <p>This session will examine simplified court procedures for small claims and other state-run dispute resolution mechanisms such as consumer complaints boards, ombudsman schemes, and arbitration tribunals.</p> <p><b>Speaker 1:</b> Small claims in civil court proceedings  <b>Ms. Susan Bowler</b>, Senior Analyst, Ministry of Consumer Affairs, New Zealand</p> <p><b>Speaker 2:</b> National consumer complaints board  <b>Mr. Lars Grøndal</b>, Advisor, Norwegian Consumer Council</p> <p><b>Speaker 3:</b> Cross-border small claims litigation  <b>Mr. John Stacey</b>, Head of Civil Business Branch, UK Department of Constitutional Affairs</p> <p><b>Moderated panel discussion</b> among the speakers above and panellists below</p> <p><b>Panellist 1:</b> Ms. <b>Patricia Vaca Narvaja</b>, Assistant Secretary for Competition and Consumer Protection, Argentina</p> <p><b>Panellist 2:</b> Mr. <b>Thomas Gordon</b>, Senior Counsel, HALT - An Organization of Americans for Legal Reform</p> <p>Issues for discussion</p> <ul style="list-style-type: none"> <li>• What are the comparative advantages of court-based versus other government-funded schemes for the resolution of small claims?</li> <li>• What are the legal and practical limitations of these mechanisms for cross-border cases?</li> <li>• Are small claims procedures adaptable to the online environment?</li> </ul>
3.30–3.45	<b>Break</b>

3.45-5.30	<p><b>SESSION 4: COLLECTIVE CLAIMS: CONSUMER PLAINTIFFS AND CONSUMER ASSOCIATIONS</b></p> <p><b>Moderator:</b> Ms. Isabelle Rouveure, European Commission, DG SANCO</p> <p>This session will cover two main categories of collective actions. The first category, commonly referred to as class, collective, or group actions, involves an action by a consumer or consumers on behalf of a group of similarly situated persons. The second category are actions taken by consumer associations to protect the collective interests of consumers.</p> <p><b>Speaker 1:</b> Collective claims in civil law countries  <b>Mr. Antonio Gidi</b>, Assistant Professor, University of Houston Law Center, United States</p> <p><b>Speaker 2:</b> The US class action lawsuit  <b>Mr. Robert Klonoff</b>, Professor of Law, University of Missouri-Kansas City School of Law, United States</p> <p><b>Speaker 3:</b> Collective claims in Japan  <b>Mr. Yutaka Yamamoto</b>, Professor of Law, Graduate School of Law, Kyoto University, Japan</p> <p><b>Speaker 4:</b> Collective claims by consumer associations  <b>Mr. Patrick von Braunmuehl</b>, Deputy Executive Director, Federation of German Consumer Organisations; EU Co-Chair, Internet Working Group, TACD</p> <p><b>Moderated panel discussion</b> among the speakers above and panellists below</p> <p><b>Panellist 1:</b> <b>Mr. André Longuet des Diguères</b>, Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes, France</p> <p><b>Panellist 2:</b> <b>Mr. Ricardo Morishita Wada</b>, Director, Consumer Protection Department, Ministry of Justice, Brazil</p> <p>Issues for discussion</p> <ul style="list-style-type: none"> <li>• What are the advantages and disadvantages of different models of collective action?</li> <li>• What types of remedies are commonly available?</li> <li>• What are the legal and practical difficulties in cross-border cases?</li> <li>• What is the role of government vis à vis both types of action?</li> </ul>
6.00-8.00	<p><b>Cocktail Reception at the Canadian Embassy</b> (Canada Room)  501 Pennsylvania Ave., NW, Washington, D.C.</p>

<b>DAY 2</b>	<b>Wednesday, 20 April 2005</b>
<b>9.00-9.10</b>	<p><b>WELCOME</b></p> <p><b>Mr. Orson Swindle</b>, Commissioner, US Federal Trade Commission</p>
<b>9.10-11.00</b>	<p><b>SESSION 5: GOVERNMENT FACILITATED REDRESS</b></p> <p><b>Moderator: Mr. Ian Edwards</b>, Presidency, International Consumer Protection and Enforcement Network (ICPEN)</p> <p>This session will focus on the role of government consumer protection enforcement agencies in facilitating consumer redress. It will examine the authority and experience of agencies in obtaining monetary redress for consumers, with a particular focus on cross-border cases. It will also look at the role of international co-operation among enforcement authorities in facilitating action in cross-border cases.</p> <p><b>Speaker 1:</b> Authority and experience in obtaining redress on behalf of consumers  <b>Ms. Stacy Feuer</b>, Legal Advisor, International Consumer Protection, US Federal Trade Commission</p> <p><b>Speaker 2:</b> Existing and proposed powers to obtain redress  <b>Ms. Andrea Rosen</b>, Assistant Deputy Commissioner, Competition Bureau, Canada</p> <p><b>Speaker 3:</b> Obtaining monetary equitable relief for groups of consumers  <b>Mr. José Roa Ramirez</b>, Director, National Consumer Service (SERNAC), Chile</p> <p><b>Speaker 4:</b> Obtaining redress through collective action proceedings  <b>Ms. Marianne Åbyhammar</b>, Deputy Consumer Ombudsman, Sweden</p> <p><b>Moderated panel discussion</b> among the speakers above and panellists below</p> <p><b>Panellist 1:</b> <b>Ms. Jean Ann Fox</b>, Director of Consumer Protection, Consumer Federation of America; Steering Committee, TACD</p> <p><b>Panellist 2:</b> <b>Ms. Min-Young Huh</b>, Manager, International Cooperation, Korea Consumer Protection Board</p> <p>Issues for discussion</p> <ul style="list-style-type: none"> <li>• What are the various ways a government consumer protection agency may obtain compensation for consumer victims (<i>e.g.</i> direct orders for redress, representative claims, restitution as part of settlements)?</li> <li>• What are the various ways (<i>e.g.</i> new legislation, interpretation of existing case law or legislation) that a consumer protection agency can acquire the legal authority to obtain monetary redress in consumer protection matters?</li> <li>• How can money be returned to consumers? What are the logistics of redress administration?</li> <li>• What are the legal and practical obstacles to consumer protection agencies obtaining redress in cross-border cases?</li> <li>• What other ways can consumer protection agencies facilitate consumer redress?</li> </ul>
<b>11.00-11.15</b>	<b>Break</b>

<b>11.15-1.00</b>	<b>SESSION 6: INTERNATIONAL JUDICIAL CO-OPERATION IN CROSS-BORDER CASES</b>
	<p><b>Moderator:</b> <b>Mr. Hugh Stevenson</b>, Associate Director, International Consumer Protection, US Federal Trade Commission</p> <p>This session will focus on the legal and practical impediments to recovering overseas assets and enforcing foreign monetary judgments and discuss how increased international judicial co-operation in this area could improve the effectiveness of consumer remedies in cross-border cases. Discussion will focus on: the ability to obtain orders from a foreign court to freeze or repatriate overseas business assets; and international arrangements for recognition and enforcement of foreign monetary judgments, including orders for consumer redress obtained by government agencies.</p> <p><b>Speaker 1:</b> Recognition and enforcement of foreign monetary judgments <b>Ms. Louise Ellen Teitz</b>, Professor of Law, Roger Williams University, School of Law, United States</p> <p><b>Speaker 2:</b> Recovering overseas assets: asset freezes and repatriation <b>Mr. Jonathan Welch</b>, Trial Attorney, Office of Foreign Litigation, US Department of Justice</p> <p><b>Speaker 3:</b> Draft Principles and Rules of Transnational Civil Procedure: a joint initiative of the American Law Institute and UNIDROIT <b>Mr. Michele Taruffo</b>, Professor of Law, University of Pavia, Italy</p> <p><b>Speaker 4:</b> Work at the Organisation of American States (OAS) on International Judicial Co-operation <b>Mr. John Wilson</b>, Legal Adviser, Private International Law, Department of Legal Services, OAS</p> <p><b>Moderated panel discussion</b> among the speakers above and panellists below</p> <p><b>Panellist 1:</b> <b>Ms. Cornelia Kutterer</b>, Senior Legal Advisor, BEUC - The European Consumers' Organisation, Belgium</p> <p><b>Panellist 2:</b> <b>Mr. Eric L. Lewis</b>, Partner, Baach Robinson &amp; Lewis PLLC, United States</p> <p>Issues for discussion</p> <ul style="list-style-type: none"> <li>• What are the main legal limitations to obtaining asset freezes or repatriation orders from a foreign court?</li> <li>• What particular legal obstacles do government consumer protection agencies face in enforcing orders for consumer redress in a foreign court?</li> <li>• What efforts are being taken at the bilateral, regional, and multilateral level to address the above challenges?</li> </ul>
<b>1.00-2.30</b>	<b>Lunch</b>

2.30-3.45	<p><b>SESSION 7: BREAK OUT DISCUSSION — CASE STUDIES</b></p> <p><b>Moderator:</b> Ms. Carmel Foley, Director of Consumer Affairs, Ireland</p> <p>In this break-out session, workshop participants will be invited to discuss two hypothetical examples (see Annex) of consumer disputes in small groups. They will consider what forms of dispute resolution and redress would be available and appropriate given the circumstances of the dispute and identify any potential legal and practical obstacles the consumer may face.</p>
3.45-4.15	<b>Break</b>
4.15-5.15	<p><b>SESSION 8: WRAP-UP: NEXT STEPS DISCUSSION</b></p>
	<p><b>Moderator:</b> Mr. Tony Sims, Chair, OECD Committee on Consumer Policy</p> <p>Drawing on the discussion from the earlier sessions, session moderators will be asked to draw conclusions on consumer dispute resolution and redress in the global marketplace, identifying which mechanisms are working well and areas where further work is needed.</p> <p><b>Session 1 Moderator:</b> Mr. Martin Bond  <b>Session 2 Moderator:</b> Mr. Scott Cooper  <b>Session 3 Moderator:</b> Ms. Benedicte Federspiel  <b>Session 4 Moderator:</b> Ms. Isabelle Rouveure  <b>Session 5 Moderator:</b> Mr. Ian Edwards  <b>Session 6 Moderator:</b> Mr. Hugh Stevenson  <b>Session 7 Moderator:</b> Ms. Carmel Foley</p>
5.15	<b>CLOSING</b>

**ANNEX II**  
**HYPOTHETICAL CASE STUDIES**

Carlos Consumer is a resident of Consumerland. He buys a “five-star holiday package” on line from valuevacations.com. The package is advertised as including “luxury accommodations” and “all meals and drinks.” The price of the package is EUR 1000.

**Assume the holiday turns out to include substandard accommodations. The meals provided are at a local fast-food restaurant, with only soft drinks included.**

1. Carlos would like at least a partial refund of the holiday purchase price. What are his best options in terms of efficiency and cost-effectiveness? Does it make a difference if valuevacations.com is located in another country?
2. Carlos would like at least a partial refund of the holiday purchase price. A number of other consumers were also unsatisfied with the holiday package and are demanding refunds. What options are available to Carlos and the other consumers? Does it make a difference if valuevacations.com or some of the consumers involved are located in another country?

**Assume that Carlos never receives a confirmation for his purchase or his holiday tickets. When he returns to valuevacations.com, the Web site has disappeared and he has no other information about the company. His payment card has been charged EUR 1000.**

3. Carlos would like a full refund. What are the best options for Carlos in terms of efficiency and cost-effectiveness? Does it make a difference if valuevacations.com turns out to be located in another country?
4. Assume there are a large number of consumers who have been harmed in this way. What are some of the available options? Does it make a difference if valuevacations.com or some of the consumers involved turn out to be located in another country?

**In General:**

5. Which dispute resolution and redress mechanisms would be best to deter valuevacations.com or other similar companies from acting like this again?
6. What are the most serious obstacles to obtaining redress for Carlos? As policy makers, what recommendations should we make in these areas?