

ADR and transparency

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Transparency in ADR means different things to different people involved. Moreover, ADR as such is a very large container concept in which just about any mechanism to settle, adjudicate or sweep under the carpet civil claims without the help of ordinary courts will fit. One would not expect full online publication with names of the parties involved in an amicable settlement reached by a conciliator as a proper level of transparency. So, to be realistic, one needs to have a closer look at the particular ADR scheme, its aims as well as its factual socio-economic and political stature in a given jurisdiction.

If the output of an institutional ADR scheme is a *decision*, whether binding or not, it should be a reasoned decision stating the relevant facts, norms and argumentation. I would call this *ex post* transparency for the persons and businesses involved. If consumers are involved, it should ideally be legible for lay people to the extent possible. And if these decisions are intended as precedents for future cases, then some form of publication is appropriate.

From the traders' point of view, every decision leads to a question: should we adapt our business to avoid similar cases going to ADR in future or is this a one-off which we can discard completely? At an aggregate level, the same issues arise for both traders' associations and consumers' associations. If company A is more frequently involved in particular conflicts which come before an ADR board or Ombudsman than one might expect from its market share, then possibly there is a structural flaw in its business model involved. Transparency could help to find the patterns of such structural flaws and provide a feedback loop to both business and consumer constituencies.

Such transparency demands do not apply for all ADR schemes. One could see ADR as a continuum with on the one end completely voluntary and non-binding arrangements and at the far opposite a compulsory scheme which emulates state court practice.

However, at both ends of the spectrum, transparency is relevant. A completely voluntary scheme needs to compete with courts and therefore needs to advertise and substantiate its competitive advantages it has over court adjudication. In a full-fledged compulsory system, the justification for transparency is the need for accountability towards stakeholders and society as a whole.

Hence, especially when ADR operators become influential and establish a certain level of power in the market for dispute resolution – either because of some statutory monopoly or because of the fact that ordinary courts have slowly and deliberately been made inaccessible for ordinary consumer claims precisely because of the existing alternative – there is every reason to raise transparency demands to a much higher level. I mention a few of the demands that would then seem reasonable from a societal point of view:

- Full transparency of and accountability for costs for all stakeholders concerned (government, individual consumers and traders' associations)
- Full transparency of levels of satisfaction of all stakeholders concerned (which might serve as a measurement of whether society thinks the scheme renders fair and just results)
- *Ex ante* transparency for the benefit of consumers and their legal services providers: if the ADR is an alternative route for adjudication, the consequence of choosing ADR might be that access to court is then forfeited (save nullification procedures of some sort); choosing between options is only efficient if there is perfect information on the expected outcomes of the alternatives.
- The use of fixed and predictable formats, and preferably and indexed database for consultation.

Independent evaluation of all this is warranted. In particular, operators of ADR schemes should not be entrusted with the exclusive power of disseminating their products.

I submit that by guaranteeing a high level of transparency, all else follows. It may trigger higher expectations concerning throughput, costs, legibility, impartiality, the feedback loop, et cetera. Surely, checks and balances that exist in ordinary civil procedure would need to be considered as potentially valuable for ADR as well. Transparency enables scholars to criticize, practitioners to lay bare conflicting outcomes and ill-founded past decisions. An ADR scheme that actually has 'market power' should be robust and open to constant public scrutiny.

Obviously, all these requirements come at a price. In a society, however, where ADR is the only viable route to adjudication of certain claims, government is not to be allowed to shirk state responsibility for a fair, balanced and transparent adjudication scheme by cynically pointing to the ADR 'alternative'. If practically speaking the ADR scheme is the only alternative, then certain fundamental principles come into play for which the state continues to bear responsibility.

To end my introduction and to stimulate debate, I would like to submit the following propositions:

- What transparency means, depends much on legal culture. Rendering a reasoned decision might mean something different in France than in Germany. Respecting privacy when publishing decisions may mean something different as well.
- Transparency rationales are different for voluntary schemes than for mandatory schemes. In the latter case, constitutional warranties may come into play.
- Transparency is key: it triggers quality assurance, lays bare any inconsistencies or biases in the decisions produced, as well as puts pressure on stakeholders to find patterns and act upon these.