White Paper open source ADR Framework

Towards sustainable and effective ADR with high adoption rates

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ABOUT THE PLATFORM

The ADR Platform is an initiative aiming to promote a common ADR standard and legislative framework. We are committed to higher adoption of ADR techniques and the effective regulation of ADR with a focus on maintaining flexibility whilst ensuring an achieved minimum level of quality.

Using the combined experience and knowledge in the fields of dispute resolution, quality management and certification as well as by listening to the voices from the ADR market ADR Platform concluded that a new vision was required to kickstart the stagnant development of ADR. With the Covid-19 crisis overburdening already thinly stretched courts we decided to start this initiative.

During 2020 the ADR platform wants engage in discussions with all parties involved in ADR in order to develop a model for a single regulatory framework and a set of standards that will allow ADR to solve the problems faced by the current judicial system as well as in the lives of citizens and businesses both are separate but interlinked goals.

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Part 0

INTRODUCTION

The current market of ADR practitioners and providers is hopelessly divided. Internationally there is a myriad of standards, bodies, and (legal) systems that apply to ADR and several disciplines. Furthermore, within the ADR field, there is a low-level of agreement on the use of ADR and which disciplines are appropriate. Resulting in infighting in many of the markets in which it is used. ADR, and its disciplines (arbitration, mediation, negotiation, ombud procedure, conciliation e.t.c), are chronically under used when compared to the judicial system and there is a vast reserve of untapped potential with regards to time and cost saving, efficiency, consumer satisfaction and especially performance of the judicial system that could be unlocked with the effective used of ADR.

Mediation, as an example, has seen mixed fortunes in the past 20 years. Even in areas of relatively 'widespread' adoption (i.e. the Netherlands) the landscape of institutions, mediators and governments is not functional or sustainable[1]. Mediators as professionals are primarily part-timers that perform a host of other-services to get by[2] economically. Talk in the Netherlands of a maturing profession is not realistic and on the current course, unlikely. Legislative acts such as the Mediation Directive and ADR Directive have made little impact and their cautious nature has left much to be desired. The current proposal by the minister of rights-protection, whilst an advance, is unambitious and a drop in the bucket against what is required.

[1] The authors have seen first hand how infighting has let to a toxic environment that has stagnated once promising innovation.

[2] Coaching as just one example

This does not mean however, that the outlook is bleak. It just means that a next step is required. Various European countries (including the Netherlands) have made considerable inroads in the implementation of standards, quality mechanisms and, at times, even adoption rates[3] of mediation. Furthermore, other ADR disciplines have seen higher harmonisation rates[4] and adoption rates[5] however even then, the oversight and quality management of these bodies has been done by governments against relatively vague requirements[6]. None of this inspires confidence.

The purpose of this paper is to outline a first draft of a vision to harmonise, regulate and mature the ADR market in general. This must include various techniques including arbitration, mediation, negotiation, hybrid variants and application techniques such as ODR and their inter-operability.

This paper will propose a set of standards, institutions and legal acts that will aim to bring the entire field of ADR into the next phase of its development. These standards should be international in nature with a focus on their adoption through the International Organization for Standardization (ISO). The proposal for institutions and legal acts will, due to the constraints of International Law, be designed at EU level. We are thus proposing a model that, from a regulatory perspective, the EU will be able to adopt and other countries will be able to mirror.

This paper is meant to start a discussion, not present a final draft. As is the nature of ADR we want to engage the entire market in an open and cooperative manner, hearing all voices and coming, as best as possible, to a consensus. With the goal of presentation of a final draft of the framework within Q4 of 2020. This paper will take a macro perspective and not all issues will be discussed in specific detail. We also aim to get started with the development of the standards immediately. With both initiatives we invite cooperation and look forward to working with everyone.

[3] Giuseppe de palo, a ten year long "eu mediation paradox", iii b

[4] Arbitration has been subject to various international agreements and is generally considered a well regulated discipline within adr.

[5] Selectively, directive 2013/11/eu has led to some ADR bodies having a high amount of complaint handling is some countries (i.e. the telecom dispute body in belgium)

[6] Directive 2013/11/eu chapter ii

Any analysis performed in this report will be primarily use European examples and parties from the European market. However, for many non-EU countries, the dynamics of their problems relating to ADR share many similarities found in EU countries and this system can thus be used in a broad manner.

In order to assist with the reading of this document ADR platform has prepared a set of flow-charts that will assist with the reading and visualization of this report. The flowcharts can be found under annex 1.

Part 1

LANDSCAPE

Before a problem an be solved, it needs to be diagnosed. So what exactly has caused ADR to come to where it is and why is innovation needed?

ADR and its most recognised disciplines, arbitration and mediation have been around for hundreds if not thousands of years. ADR as a field has the aim of resolving disputes between two or more parties without the need to go through a judicial system.

Arbitration is by far the most regulated and controlled form of ADR. Arbitration is subject to a strict set of procedures and has several international agreements that apply to it[7]. Furthermore, arbitration is often enshrined in national legislation and the arbitration process often subject to strict requirements[8] which are often policed by certification bodies.

Mediation has not fared quite as well. The supervising bodies that operate for mediators are far more diverse, informal and unregulated. In most countries, mediators are left to fend and promote themselves and dispute resolution, from a government perspective is still dominated by judicial proceedings. Some countries have adopted an opt-in model that informs parties before a court procedure however these have been ineffective.

Even in countries that are seen as 'leading' in Mediation such as the Netherlands the figure, when placed in perspective, are bleak. There were around 50 000[9] completed mediations in the Netherlands. Around 1.500000 court cases[10] were filed in a similar period. In 2009 there were already around 47000 mediations so this number has not increased much and this could even point to slight stagnation.

[7] For example the convention on the recognition and enforcement of foreign arbitral awards however there are several more.

[8] For example the NAI rules for arbitration (https://www.nai-nl.org/downloads/nai%20arbitration%20rules%20and%20explanation.pdf?v=150101)

[9] "De nederlandse mediation markt 2019" by Panteia

[10] https://www.rechtspraak.nl/organisatie-en-contact/rechtspraak-in-nederland/rechtspraak-in-cijfers

There are however, also causes for optimism. In some EU countries we have seen that specific disciplines or initiatives have led to positive development's in ADR[11] [12] however they success has been sporadic. The most optimistic case can be made in Italy's case where the amount of mediation cases has surpassed 200 000[13].

Courts are infamous for being slow and expensive and over the years have accumulated a large backlog. With the Covid-19 crisis forcing them to alter and, in many cases, pause their operation this problem will only get larger.

At the same time courts and ministries of justice have been reluctant to adopt, broadly, ADR measures except for the ineffective opt-out method. Their problem is understandable.

Looking at the ADR market it is difficult to feel a sense of confidence that handing over something as important as citizens access to justice to a professional group in this state will not cause more issues than that it will solve. At the same time the crisis facing the judicial system at the moment requires a radical solution and ADR, when regulated and implemented correctly, can provide an alternative. Failure to do so will cause courts to continue to struggle, violating citizens essential right of access to justice

[11] Mediation in Italy, based on the adoption of an opt-out model, has seen a surge in use with over 200 000 cases. It is by far the leader in the EU.

[12] Directive 2013/11/eu (ADR directive) has had a positive effect in some countries such as Belgium. However some of this success can be attributed to the fact that these countries already had matured ADR systems.

[13] "A ten year long eu mediation paradox" By G de palo et al.

PART 2

THE FRAMEWORK

In order to set out the framework, first we need to set out certain core requirements that are required of a system that will regulate the ADR market.

In order to ensure effective regulation of the ADR landscape a balance needs to be struck between effective, proportionate regulation and free-market initiative that ensures ADR, and it's various disciplines, can continue to operate with flexibility whilst also having credibility. In order to ensure the effectiveness of ADR the following will need to be developed and integrated:

- A European Directive that enshrines certain rights and obligations and regulates the operation of ADR in the EU market.
- The development of a set of standards for various processes and operators (i.e. mediators, arbitrators, educators, ODR, large project mediation, conciliation e.t.c.) within the ADR market.
- A broad consultation with the market on the above.

A directive needs to ensure that systems are in place that provide credibility and quality through certification and standards development. It is critical that a directive enshrines certain rights and obligations within the EU which clearly define the rights of citizens and the obligations and responsibilities of all (economic) operators within the EU market that are active in the dispute resolution chain.

Standards should be primarily developed by the operators in the free market (practitioners, representative bodies, certification institutes, educators e.t.c.) on request of the market or regulators. The way these standards are developed and adopted should learn from the way standards for CE certification are developed through a process called harmonisation (part 6 & 8).

It is not the task of a directive to dictate the form of all ADR processes and force a specific process to be followed with specific model documents that need to be used. Taking this approach removes the ability for innovation from market operators. Standards should therefore be open and take a macro perspective to quality. Furthermore, standards should be general so they can be reproducible and reusable.

A directive should ensure that standards are developed and used by certifying and accrediting authorities as well as setting certain essential requirements (part 7) of various processes and providers

How we envision these systems in the current context of EU law will be described below.

PART 3

CURRENT MARKET MECHANISMS

"Those who do not remember the past are doomed to repeat it" - George Santayana

Various attempts at regulation and system development (through governmental or free market initiative) have been attempted across the EU. In various countries differing techniques have been attempted with various success rates.

In Europe many of these attempts were kickstarted by Directive 2008/52/EC and Directive 2013/11/EU. We see various rates of success of these methods. These directives made little impact from a macro perspective however they did initiate some interesting initiative's and start a (at times) productive general debate. Furthermore, even before government got involved, various forms of ADR were already being policed by free market initiatives and non-binding certification bodies that have made significant in-roads in setting up an infant quality control system, that can now be used matured.

In order to come to an effective overview of the various legislative and regulatory tools one must first analyse the myriad of ways ADR is implemented.

Free market control

In a lot of countries, for different disciplines of ADR, free market control has been they way the market has regulated, policed and promoted itself. In for example the Netherlands organizations such as MFN, ADR Register and NMV have cared for the promotion and quality assurance of the mediators without much government assistance. Next to these bodies there is a very large sub-layer of small bodies that cluster various practitioners on content-based grounds. The majority of mediators get their work from the free market through contracting and marketing, with only a small minority coming from judicial procedure [14] and a government information Helpdesk[15]

This exercise has led to mixed results. On the one hand, relative to the starting point, the market has matured and a system of quality assurance has been setup. Furthermore, representation of mediators is accounted for through NMV.

However, the amount of infighting and disagreements significantly hurts the credibility of mediators and the awareness among general public of the availability of mediation, ADR and their benefits, is minimal. It must also be said that this pattern repeats itself in other countries as well[16].

Where free market control has achieved the most success is through the development of standards for mediators. Whether you are ADR full certified or MFN Registered the requirements both for theoretical and practical knowledge is (mostly) equal. Advances in the management of complaints against ADR practitioners has provided a useful base to build upon. Furthermore, a moderate amount of qualified ADR practitioners have been introduced in the Netherlands, practitioners that can now be used for the new framework as well as the fact that most of the essential institutions required for a regulated ADR market have already been created.

The conclusion from the free market model is that it works well, up to a point. It is a great way in which ADR can develop and grow through its infancy phase however it is plagued by a glass ceiling.

[14] Between 2500 and 5000 cases as seen in "De nederlandse mediation markt 2019" by Panteia

[15] Around 12 % of cases as seen in "De nederlandse mediation markt 2019" by Panteia

[16] The situation around mediation in South africa is similar to the Netherlands in some ways

Judicial Opt out model

The judicial op out model is an effective method for bringing a particular ADR technique, often mediation, to the attention of those seeking a judicial verdict. The opt out model ensures that disputant's must attempt an initial session of ADR (or an information session exploring whether this is possible) before they can file their dispute with a court for verdict. Failure to attend or participate in the session can lead to punitive action - raising the stakes for parties involved.

This model can at times be considered controversial as opponents worry whether access to justice is impeded by creating a mandatory barrier to justice on which penalty may be imposed on parties if they refuse participation. However, the European court has ruled the opt out model legal and Italy has successfully adopted it.

The implementation of the opt-out model in Italy has lead to great success. In Italy's case the opt-out model is applicable to a select few type of cases (i.e. contract disputes) and an initial mediation session must be attempted. Through this system Italy currently has over 200 000 disputes resolved through mediation, by far the most of any EU country. Furthermore, during a period of 1 year in 2012 in which the mandatory mediation system in Italy was ruled unconstitutional and had to be implemented through a different legal act[17], the amount of cases plummeted. This appears to prove the effectiveness of an opt-out model.

In order for the judicial opt-out model to be viable a high degree of quality needs to be maintained for ADR practitioners and Italy has taken steps within this direction. However, further improvements can be made including the de-leveraging of governments of their role in the qualification procedure as well as more content-based requirements

[17] The law was passed via decree which the Italian court ruled unconstitutional. The law was reimplemented via a legal act that passed through an ordinary parliamentary procedure. The court did not make a ruling that the opt-out model itself was unconstitutional. This ruling has further been confirmed at EU level by the Court of Justice of the European Union (CJEU).

Judicial Opt in model

Countries that are hesitant to implement a judicial opt-out model have often chosen its lighter cousin the opt-in model. Rather than forcing parties into a room in which they explore the possibilities or start work on their dispute with a trained professional the courts will *inform* parties of various forms of ADR.

The parties must then perform research and come to mutual agreement, on their own initiative, on whether they want to proceed with ADR or go to court. This leaves more initiative with the disputants however it also people have to do their own research and work to setup and coordinate an ADR session. This is something that people neglect to do. People often find it harder to evaluate and choose mediation when they have to perform individual research without the guidance of the professional. With this as a backdrop parties often choose the regular judicial procedure as it seems simpler.

Countries like the Netherlands adopted a Judicial opt-in model for mediation with the passing of Directive 2008/52/EC. This action has proven ineffective in promoting widespread usage of mediation techniques.

Supply side

Directive 2013/11/EU (ADR Directive) and Regulation 524/2013 (ODR Regulation) created an EU wide supply-side obligation forcing companies to inform their clients of their right to access to ADR providers in most cases as well as creating a rudimentary system of approval for ADR providers and an ODR platform on which complaints could be handled.

This supply-side obligation has met mixed success. It has led to the wider access to ADR in the EU however, without regulating ADR bodies too much. Furthermore, it must also be said that it is difficult to asses the results of the ADR directive quantitatively. To take Belgium as an example, ADR bodies already existed in Belgium so whilst they may handle a large volume of disputes, it is not fair to give the ADR directive all credit for this.

Another problem was that there was not an effective method for dispute root-cause analysis or a legislative instrument that determined an appropriate ADR discipline. This meant that consumers may be faced with procedures that they may not understand and that often have a semi-judicial nature (i.e. arbitration). Furthermore adoption has been sporadic with mixed results varying from country to country. Aggregated Quantitative data on the effects of the ADR Directive are harder to find however it appears to have made several important impacts:

- A wide variety of access to ADR providers. However, the variation in disciplines by ADR providers is minimal in some countries.
- Slight improvement in the awareness by consumers and traders.
- Provided a set of early requirements required of ADR providers that can now be integrated into essential requirements in the new directive[18]

[18] An example is the publishing of yearly reports, this is a logical requirement for ADR providers to ensure transparency and to allow data-driven decisions.

An odd result of the ADR Directive is that it both harmonized and de-harmonized the ADR market. Some countries adopted a more open result leading to more effective ADR organizations that were clearer for consumers to understand. The UK for example has an ADR body specifically to veterinarian complaints. Whereas the Netherlands only has 3 bodies and primarily uses arbitration as a dispute procedure[19].

Furthermore, the effectiveness of dispute handling procedures were mixed. In Belgium the body appointed for handling telecom related complaints received over 10000 disputes[20]. In the comparably sized Netherlands just 653 disputes were reported[21].

The ODR platform has had limited success. EU wide, last year, only 36 000 cases were *registered* in the ODR system[22]. Only 2% of these disputes were handled through an ADR body. It's interesting to note that another 37% of these disputes were handled by direct negotiation between trader and consumer. The ability to offer fast (assisted) negotiation[23] on the ODR platform will most likely lead to a dramatic uptick in the amount of resolved cases as consumers often want results and not complicated procedures.

Lastly, the ADR directive failed to ensure monitoring on the part of the member states. Many traders do not display the correct and accurate information on their website and on those that do the information is more often than not buried in the T's & C's. This was not in the spirit of the legislation nor did it help consumer awareness.

The conclusion to these attempts is that they all only dipped a toe in the water and most are post-court based which means the dispute has already matured beyond certain crucial phases. A much larger focus should be placed on preventative action and bold action.

[19] Whilst one of those bodies (De Geschillencommissie) has 80 sub-chambers the monolithic nature of using primarily one ADR discipline has resulted in low effectiveness.

[20] http://www.mediateurtelecom.be/servlet/repository/annual-report-2019.pdf?id=879&savefile=true

[21] https://www.samenwerkenaankwaliteit.nl/jaarverslag-2018/inhoud/jaarverslag-consumenten/internet-televisie-telefonie-en-post/telecommunicatiediensten/

[22] https://ec.europa.eu/info/sites/info/files/2nd_report_on_the_functioning_of_the_odr_platform_3.pdf

[23] The ODR platform has made inroads into this already with their direct conversation feature. It must be said however that this is a rather simple implementation and not very intuitive. Furthermore, if not coupled to the appropriate legal instruments it is unlikely to succeed.

PART 4

IMPLEMENTING A DIRECTIVE

A directive provides a simple way to ensure the anchoring of ADR in the dispute resolution system. In the EU, the best way to achieve this is a directive.

European directives, as described in article 288 of the Treaty for the functioning of the EU (TFEU), provide a way for the EU to set a set of legal requirements that member states are then free to transpose, in a format that suits them, into their national legal systems. Allowing flexibility in the implementation and adaptation to national legal systems.

ADR in Europe is covered by a variety of national regulations. Specific disciplines of ADR are themselves subject to regulation as well (i.e. mediation in Italy). This makes it impossible to simply pass a directive that radically changes the ADR landscape without offering member states the flexibility to integrate the directive into their national legal systems in a way of their choosing. For this reason, using a directive, with a large transposition window (i.e. 2 years), allows for an orderly transition to a new way for regulating ADR. Furthermore this transition period allows plenty of additional time to ensure that the required institutions and standards are developed, appropriate, subject to consultation and harmonized.

A directive for ADR will need at least the following:

- Equalise and recognise various disciplines of ADR. A system of complaint triage will also need to be envisioned.

- Create a framework for quality control, standards development and market cooperation (part's 5, 6, 7 and 8) and a common code of conduct.

- Ensure effective and proportionate monitoring by member states.

- Assure certain rights to ADR Practitioners and the ADR processes (part 9)

- Impose certain requirements from market operators such as ADR practitioners and economic operators in the EEA internal market.

Furthermore, in order to ensure clarity and consistency, Directive 2008/52/EC and Directive 2013/11/EU should be repealed and integrated into the new Directive. ADR Bodies recognised under the old directive must be allowed to operate in the new. They must however fall under the certification scheme of the new directive (part 5).

The ODR Regulation will also need to be rewritten to ensure that the ODR Platform is a tool that can be used for the myriad of different ADR disciplines. It should, as discussed in part 3, also be expanded to allow faster dispute resolution mechanisms based on the input and wishes of consumers, highlighting a core general principle that must be embedded into ADR legislation, namely:

legislation needs to be bottom-up with a focus on demand side (consumers and businesses) requirements rather than the old beaten path of top-down "we know what's good for you".

PART 5

ACCREDITATION & CERTIFICATION

Certification ensures quality of process. Accreditation ensures quality of certification.

Europe has a vast history, and is leader, in the usage of accreditation as a foundational pillar of product quality control. Regulation 765/2008 and Decision 768/2008 setup a market surveillance system in which private market notified bodies provide certification of products to producers of goods and in which national accreditation bodies supervise notified bodies. This approach integrates the best of multiple worlds:

- Governments role is purely supervisory, reducing bureaucracy and improving efficiency.
- Standardization is guaranteed and correctly monitored through accreditation against international standards and cooperation of accreditation bodies through a central body[24].
- Innovation in quality control and certification is allowed through free market competition.
- Pan-European acceptance of goods is possible as standards and processes are harmonized
- Clarity is provided to consumers as there is a single mark of certification on all products[25].

[24] https://european-accreditation.org

[25] https://ec.europa.eu/growth/single-market/ce-marking_en

By using accreditation as the method of policing ADR Conformity assessment bodies (certification bodies) we can ensure that quality is set centre stage and the needs of users of ADR providers are met. It ensures that certification is professional, appropriate and credible. Furthermore, the common accreditation system allows for immediate certification in the trainers market as well ensuring a one stop-shop for the certification of all operators in the ADR market.

Because of the diverse nature of the incorporation of ADR providers (they can be companies, individuals, cooperations e.t.c.) a new accreditation standard may be required that incorporates elements from ISO 17011, ISO 17024 and ISO 17065 where appropriate.

In order to provide clarity for the users of ADR providers it is imperative that all notified and accredited certification bodies as well as all their certified ADR Practitioners, ADR Providers and dispute boards be listed on the European Commission's ADR Website, leading effectively to a single register for all ADR providers across the EU. Because all certification providers will be accredited under one common system against harmonized requirements the ADR Providers can choose a certification body of their choosing. This market dynamic will stimulate innovation and efficiency in the certification process. Furthermore, it also ensures that cross-border recognition of ADR providers is guaranteed where required.

Certification bodies will be tasked with providing the certification of ADR providers through qualification and bi-yearly audits against harmonized standards. These standards are discussed in part's 6&7. Remote auditing will be a central component in the certification of ADR providers due to the nature of the profession and in order to keep certification costs low.

Certification bodies will also be required to limit their actions to certification. This ensures they solely have the interests of the quality of the certification subject in mind. They will be forced to take actions to ensure oversight and impartiality and be forced to cooperate in harmonisation groups as described in part 8. They will be prohibited from engaging freely in activities such as advocacy.

All practitioners, ADR providers and dispute boards will receive a scope of activity for which they are certified. Through this way we can ensure that, for example, family mediators need specific additional qualifications to business mediators. All ADR practitioners may only work in areas for which they are certified as listed on their scope. All scopes will be public. Specific scope authorisations can be linked to specific harmonized standard(s).

PART 6

STANDARDS

Harmonisation of content-based standards form the bedrock to ensuring credibility and recognition in ADR.

"A harmonized standard is a European standard developed by a recognized European Standards Organization.... It is created following a request from the European Commission.... Manufacturers, other economic operators, or conformity assessment bodies can use harmonized standards to demonstrate that products, services, or processes comply with relevant EU legislation."[26]

EU Harmonized standards are the way in which the essential requirements (part 7) of a directive can be met by those whom it apply too. In the case of products, it is up to the producers to use harmonized standards to prove compliance with the essential requirements of an applicable directive. In the case of ADR, the ADR providers and trainers will need to work against to a set of harmonized standards in order to ensure compliance with the essential requirements of a directive, at the verification of certification bodies.

The standards will ensure that, for each ADR discipline and process, requirements are set for the ADR providers or trainer. They will not discriminate against certain disciplines or ADR techniques and instead aim to set certain requirements of those practicing them. An example can be found in the world of ODR. The standard will not dictate how ODR must be performed and prescribe exactly what contract's and agreements the client must make. Instead, just as a single example, they will require an ADR Practitioner to think and evaluate the tool(s) they are using, which ADR techniques they will use and against what standards they will work as well as ensuring the disputants understand and accept to use of ODR. This example is one of many requirements that one could write about an ODR process for a harmonized standard for ODR.

[26] https://ec.europa.eu/growth/single-market/european-standards/harmonized-standards_en

The writing of standards is done through commissions. Commissions will consist of experts and representatives of all market operators (consumers, certification bodies, companies, advocate organizations e.t.c.). The commissions will provide their input to a particular standard and ensure it is proportionate to its task. The task of this commission is to ensure that standards set requirements that ensure the quality of ADR. It will also be allowed to use internationally accepted non-harmonized standards for ADR processed and procedures. The burden of proof for ensuring that the non-harmonized standard sets similar quality and protection requirements as a comparable harmonized standard will fall on the individual or organization desiring usage of the standard. The certification body will be tasked with evaluating this.

The writing and maintaining of standards should be done through the International Organization for Standardization (ISO). The standards should align, as close as possible, with standards, models and tools already developed by government and free market organizations.

PART 7

ESSENTIAL REQUIREMENTS

Essential requirements are a tool used in EU product legislation to achieve a minimum quality level that is then met with harmonized standards.

— A large part of Union harmonisation legislation limits legislative harmonisation to a number of essential requirements that are of public interest. [27]
—Essential requirements define the results to be attained, or the hazards to be dealt with, but do not specify the technical solutions for doing so. [28]

Essential requirements are a way of regulating the outcome of a particular process, product person or entity to ensure that a legal minimum has been achieved on which accountability can be attached.

Essential requirements are slightly vague and are macro in nature. They look at the big picture of a process. In case of ADR an essential requirement might for example be privacy. The essential requirement would regulate specifically that privacy must be maintained in the ADR process.

The 'how' question can then be left to harmonized standards as discussed in part 6. Essential requirements are thus a great way to ensure a minimal level of quality without being dictatative or create the bureaucratic overhang of specifying all requirements in legal texts, which also removes flexibility.

[27] eu blue guide page 39; https://ec.europa.eu/growth/content/'blue-guide'-implementation-eu-product-rules-0_en

[28] idem 27

Many characteristics of ADR (especially the processes of it's various disciplines) allow themselves to be distilled to essential requirements. The directive will have to have multiple differing sets of essential requirements for core processes (i.e. one list of requirements for ADR based dispute resolution through a third party, one for complaint triage (part 10) one for trainers e.t.c.).

As an example, below are potential areas that can become subject to essential requirements:

- ADR Processes
- ADR Practitioners, providers and dispute boards
- Training providers
- Triage process

Essential requirements will be developed in consultation.

PART 8

COOPERATION

The ability to harmonise standards and practices in continually will be crucial to maintain flexibility and dynamism to changing circumstances.

A directive cannot wave a magic wand and get all market parties to agree. One of the problems of the free market model discussed in part 3 is that parties disagree on competing (but relatively similar) visions for the ADR landscape.

What a directive can do, is create a framework in which dialogue is mandated, roles are minimized, and cooperation is thus supported. One of the reasons there is often infighting within a free market model is because certification providers, representative organizations and governments all compete and ingress into each other's territories[29]

Certification providers are often also responsible for advocacy, governments start offering (partial) certifications and representative organizations try their hand at all roles. The result is an unholy mix of conflicting interests that hurt cooperation. By assigning all parties their own role and reducing ingress into each other's territories we reduce conflicts of interests

Of course, we have only looked at cooperation as far as relating to the requirements for the ADR framework from a formal perspective as far as what can be 'regulated' through a legal act. Cooperation between various ADR operators on the subjects of advocacy, rights, promotion and learning initiatives e.t.c. will be left up to the free market system and are out of the scope of a formalized framework.

[29] Again the Netherlands provides a good example. See situation ADR register, MFN and NMV. However countries such as South Africa have had similar problems with advocacy organizations now also providing certification and/or registration leading to infighting within the ADR sector.

The framework will create two cooperation groups, one for certification bodies, trainers, and advocacy groups to discuss and agree on standards and one group will be solely limited to intra-government cooperation. The cooperation groups targets will be to harmonise the *application* of standards. Similar groups working in CE marking have proven effective in ensuring similar interpretation of standards and it is imperative to learn from their model.

PART 9

RIGHTS & OBLIGATIONS

A directive will need to assign certain rights and obligations to adr providers and agreements resulting from ADR.

A directive will enshrine certain rights to the subjects that it covers as well as implement certain obligations. These rights and obligations will be the anchors through which ADR will be settled into European and national law. It is important to discuss the primary ones individually. More may be added later based on consultation with stakeholders.

Recognition and enforceability of ADR agreements and contracts

Contracts that result from an ADR process should be binding, valid and enforceable. It is however, important that the disputants are aware of their rights and the implication of signing this contract.

In order to ensure maximum clarity for disputants a neutral-third party (i.e. the European Commission) needs to set up an authoritative page containing this information. ADR providers and tools must refer to this page.

Judicial triage session

Mandated judicial triage (part 10) before a court case allows a certified ADR practitioner to assess the most suitable and proportionate way in which a dispute might be handled. The practitioner should evaluate various forms of ADR together with the disputants to evaluate if a form of ADR is appropriate. The session should leverage automation through the ODR platform to ensure that the service is fast and efficient.

The disputants must also be informed of their rights in all forms of ADR (where applicable) as well as what a court procedure entails. It is preferable for the appropriate attorneys to be present in this triage session.

Failure to participate in a triage session is subject to punitive action that is appropriate and proportionate.

What types of disputes should be applicable to triage sessions will be decided in consultation.

Supply side obligation

Similarly, but expanded, to how the obligation was anchored in Directive 2013/11/EU, the new directive should implement an obligation on traders to ensure that consumers are aware of their ability to solve a dispute through ADR and should ensure traders first use ADR to attempt to solve their disputes. A focus must be held that (assisted) negotiation is often preferable too many other forms of ADR due to its lower barrier of entry, of course subject to the nature of the complaint.

Traders must refer to the EU ADR page and inform consumers of their right to ADR when they have purchased a product. This information must be clear to find for consumers and all traders should maintain a single simple, readable information source on how complaints can be filed. Furthermore traders should appoint a dispute handler, department or Organization that is authorised to handle disputes.

Member states, in their dealings as far as they relate to disputes, must always prefer ADR to court proceedings where possible. Contracts between member states and private market operators must always contain an ADR clause that ensures parties attempt ADR.

Local chambers of commerce and other institutions should be leveraged by member states to ensure that traders are aware of their obligations under the new directive. Member states must implement a system of monitoring to ensure that obligations from the directive are correctly implemented.

Right of non-disclosure

ADR Practitioners should be granted the right of non-disclosure as described in Directive 2008/52/EC Article 7.

Right of transition to and from ADR

It should be possible, during judicial proceedings, to transition to and from ADR.

Disputants right to a fair hearing may never be impeded by ADR and if they feel they would be better served through judicial proceedings then they should be allowed to exercise that right.

Furthermore, on the initiative of of parties, courts should have the ability to stay proceedings to allow the parties to attempt ADR.

Right of partial ADR settlement

Courts should recognise partial settlements of disputes if only a particular set of issues were resolved through ADR. The other issues may then be decided through judicial proceedings.

Clear scope of application

The directive should maintain a clear scope of whom it applies to and in what situations.

Informal, non-profit ADR providers[30] should be excluded from the directive. These types of providers should be allowed to continue to operate informally without the overhead of certifications and other control procedures. Their ADR process will thus also not be subject to the directive and will not be granted certain rights. Nothing stops ADR providers from performing ADR not subject to the directive as a part-time and/or good will activity however they should clearly document this in the appropriate agreements.

Professional ADR that is performed in return for a financial incentive should always be subject to the directive. The scope of the directive should clearly describe when it applies ensuring that fly-by-night ADR providers operating under the radar without any quality control are eliminated. It will thus become mandatory to achieve certification to practice ADR professionally[31].

ADR Contracts should clearly state that the ADR is being done against the applicable directive to ensure it is applicable.

Separation of powers

ADR may never be considered a substitute to regular access to justice, only an alternative. Member states may not substitute their requirements to provide a fair hearing by only having a well organised ADR system.

An ADR system must however be considered as an alternative to relieve backlogs and improve consumer satisfaction.

[30] An example of this would be neighbourhood conciliators

[31] Non-profits that practice ADR in return for financial incentive should be included here.

Leave room for flexibility in member states

The directive, just like the previous directives, should allow member states some flexibility to integrate ADR into their national systems. It may, for example, be appropriate, at the evaluation of the European Commission and court to allow member states to limit the use of certain ADR disciplines in court annexed ADR for a period longer than the 2 year transposition window.

Member states should also be allowed to innovate with certain forms of ADR without it being subject to the directive as part of experimentation with new techniques. It will however be required to document these trials with the European Commission.

Specific examples of where flexibility in transposition or operation will need to evaluated based on consultation with the representatives of the governments of the EU member states.

PART 10

DISPUTE TRIAGE

ADR IS A WIDE RANGING CONCEPT UNDER WHICH MANY DIFFERENT DISCIPLINES CAN BE PLACED. SELECTING THE APPROPRIATE ONE IS CRUCIAL TO ENSURING SUCCESSFUL DISPUTE RESOLUTION.

ADR contains a myriad of different disciplines. It should be the objective of an ADR directive to allow all forms of coexist and recognise them. Next to requiring flexibility in the way we audit and certify ADR processes (part 6) we must also be flexible in the way we apply these processes and the way in which we decide to choose which ADR discipline to use for which complaint.

Dispute triage should be subject to a set of essential requirements (part 7) and one or multiple harmonized standards (part 6). Furthermore the process should be voluntary for parties unless a legal mandate requires it (part 9). The voluntary nature does not mean however, that it should only be used in a court annexed context. An effective system of dispute triage will also allow ADR Practitioners to effectively diagnose a dispute and allow the most suitable ADR discipline to be chosen, improving ADR effectiveness. Nothing prevents a dispute triage session to immediately transition into an ADR session and a dispute triage practitioner, next to being certified for dispute triage, must also be a certified for one or multiple ADR disciplines.

Dispute triage is a great way to improve disputant satisfaction and the success of ADR. Member states should, where appropriate, identify opportunities in which dispute triage can prevent or resolve disputes.

PART 11

COMPLAINTS

Allowing parties to file their complaints about adr providers ensures that accountability is always present.

It is important to note that there are two types of disputes that require handling within the context of a formal framework. The first is disputes against certification providers. These might arise from ADR practitioners and providers, clients or other operators and can cover a variety of subjects. In order to qualify as a dispute against a certification provider the dispute must be about the conduct or performance of a certification provider. If this is the case then the dispute must first be handled by the certification provider internally, using a complaint procedure that is accredited by their accrediting body. Appeals can then be lodged by the complainant with the accrediting body, or with the court system.

If the dispute is not about the certification body but rather about an ADR practitioner or ADR provider, then the dispute must first be handled by a complaint's process internally. This process is separate from the process discussed above and tailored made to protect client interests. Appeal's may be lodged initially with the cooperation group mentioned in part 8. This group can then make a representative decision based on expertise from the entire market and with a wide range of backgrounds. The specific ADR techniques used to resolve the dispute will be drafted into harmonized standards in consultation. Access to a judicial decision will always remain open to complainants.

It must always be the intention of a complain procedure to use appropriate ADR disciplines for different types of complaints. After all, not all complaints are created equal. It should thus be considered

PART 12

WHERE NOW?

So where to now? It's important to note that the above is an initial outline that now requires extensive consultation and further working out.

This paper presented an initial outline of a framework in which ADR can develop into a mature and professional service that is recognized and adopted by a large group.

A well-managed and regulated system of ADR benefits everyone. The backlog in courts and how that has only been exasperated by Covid-19 has affected everyone. The luxury of debating the potential feasibility of cautious initiatives has passed. ADR is the solution to several problems currently faced by EU member states and the world and it has the ability to make a meaningful impact on the lives of citizens. A chance is before us, in order to convert it, bold action must be taken.

The authors of this report make no mistake that some of the proposed solutions in this initial proposal are both bold and alien to some readers. It must therefore be said that this is not a final version, nor a complete one - that is the next step.

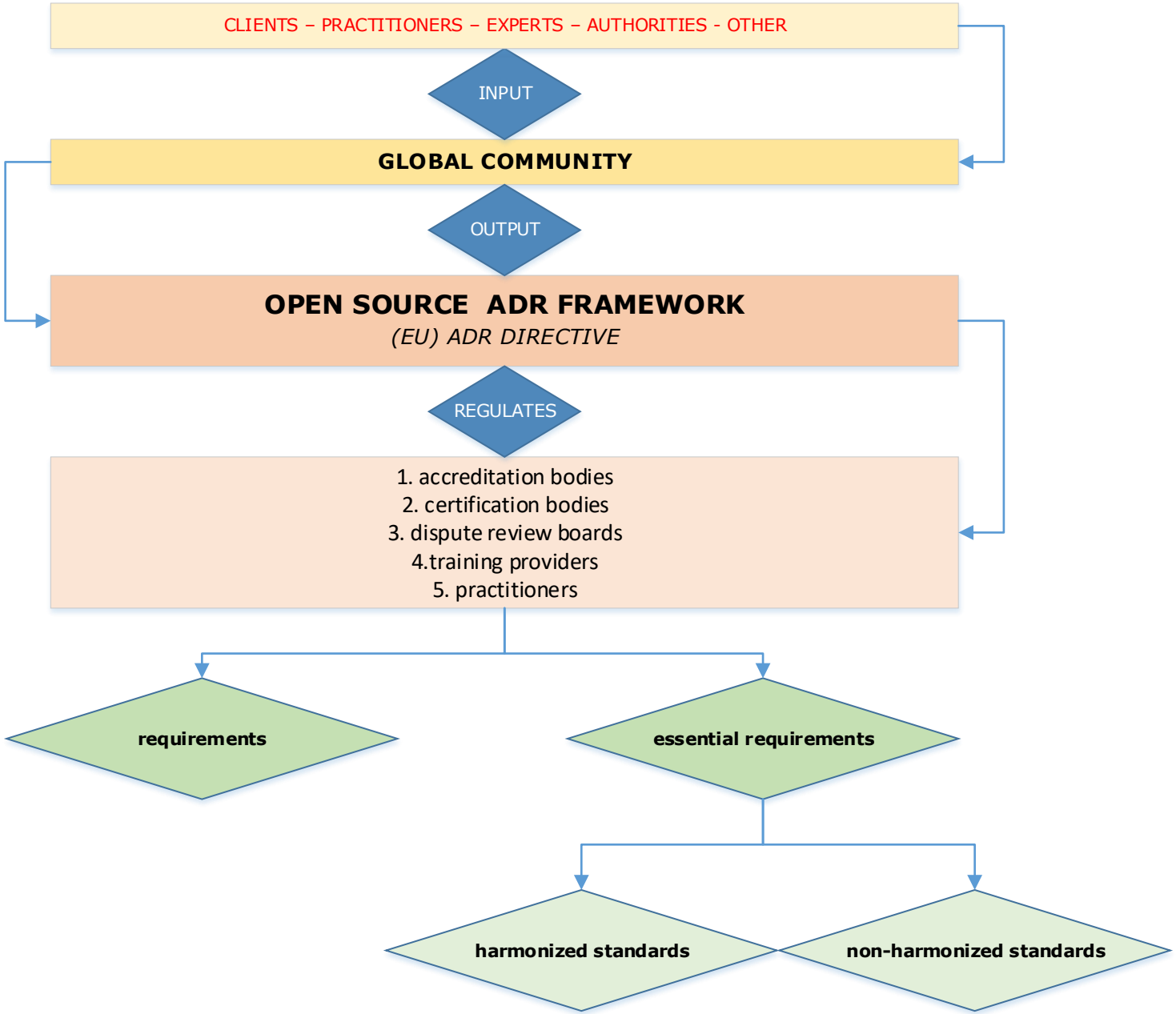
Over the current months we will take the following actions:

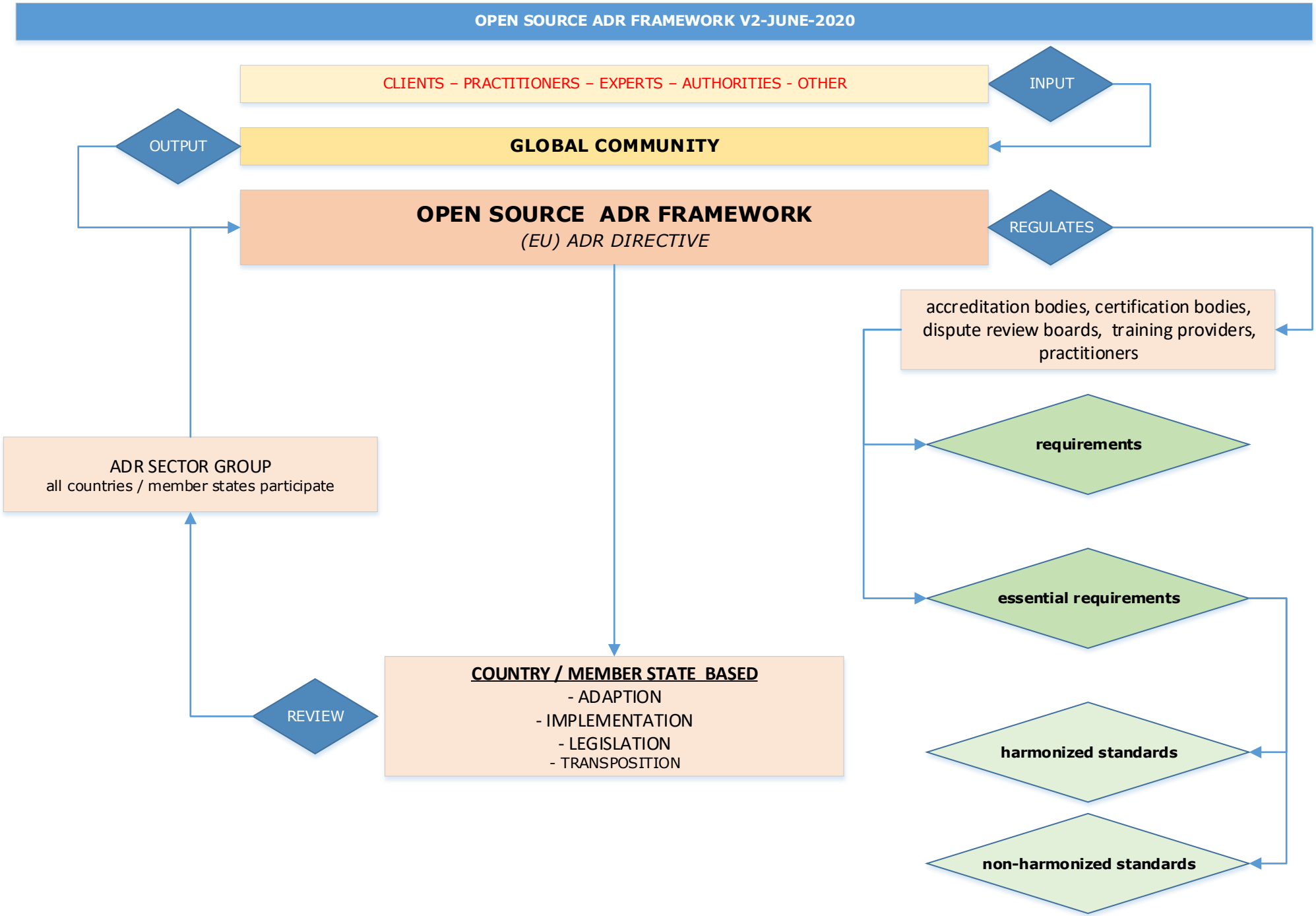
- Establish committees to begin work on the first harmonized standards. We will also reach out to ISO to explore possibilities of harboring the standards under their Organization. Until then any produced standards will be harbored by the ADR platform under the Creative Commons "Attribution-NoDerivatives 4.0 International" license

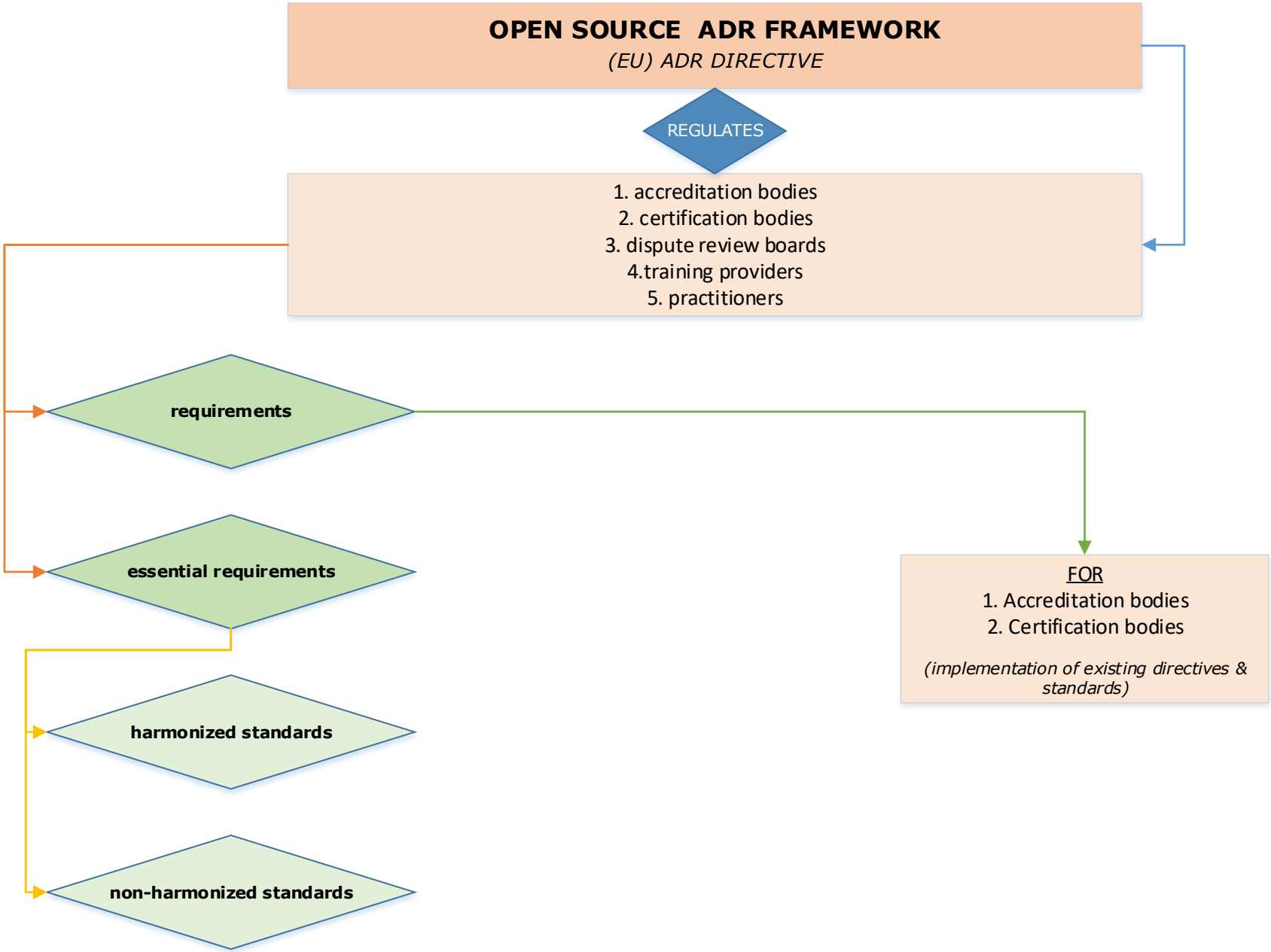
- Product a first draft of a fully qualified proposal for an EU directive that can be adopted at EU level for debate.

- Cast a wide net of stakeholders, consumer organizations, businesses, and begin discussions on the standards and both this proposal and further proposals.

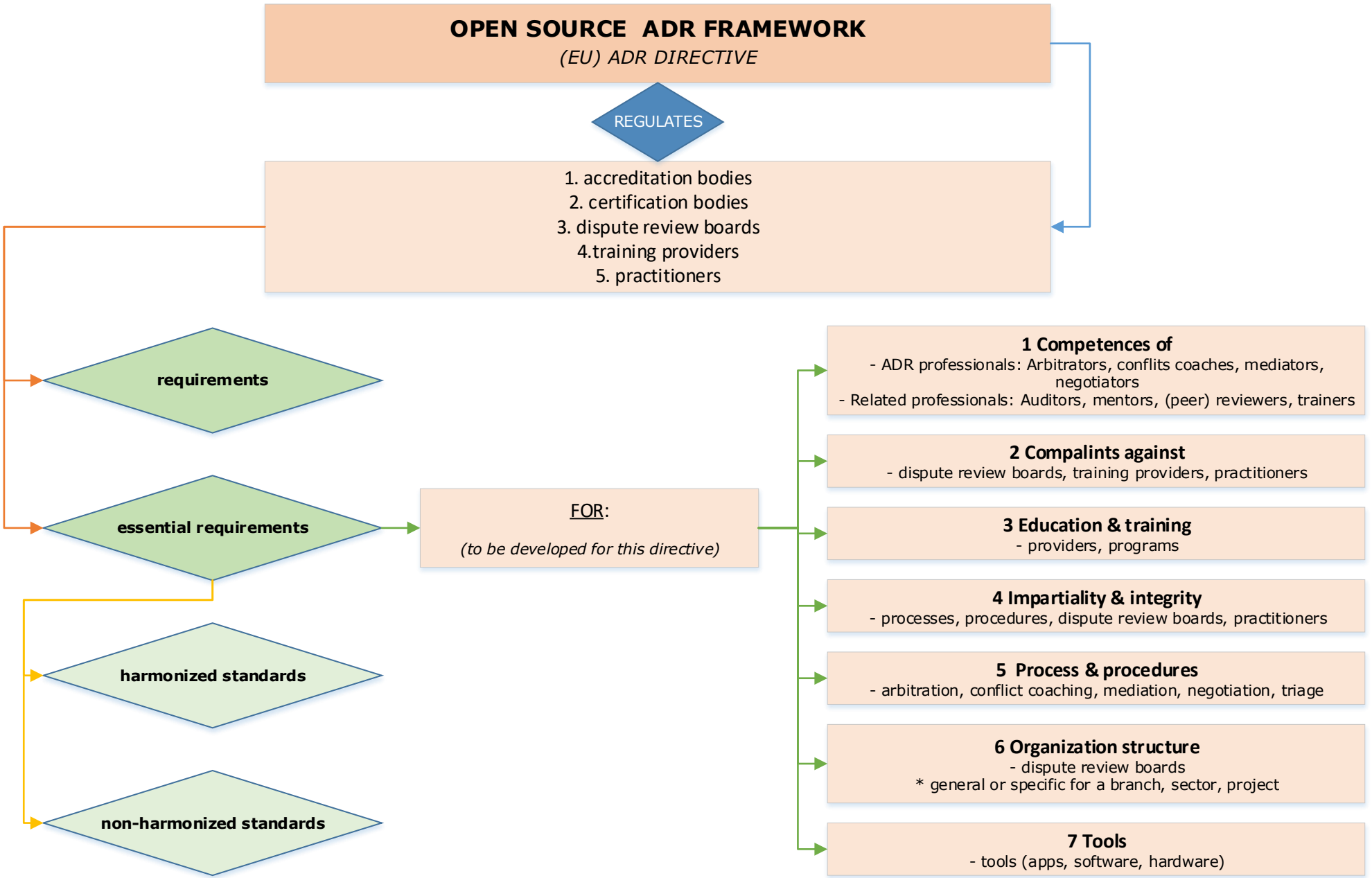
OPEN SOURCE ADR FRAMEWORK V2-JUNE-2020

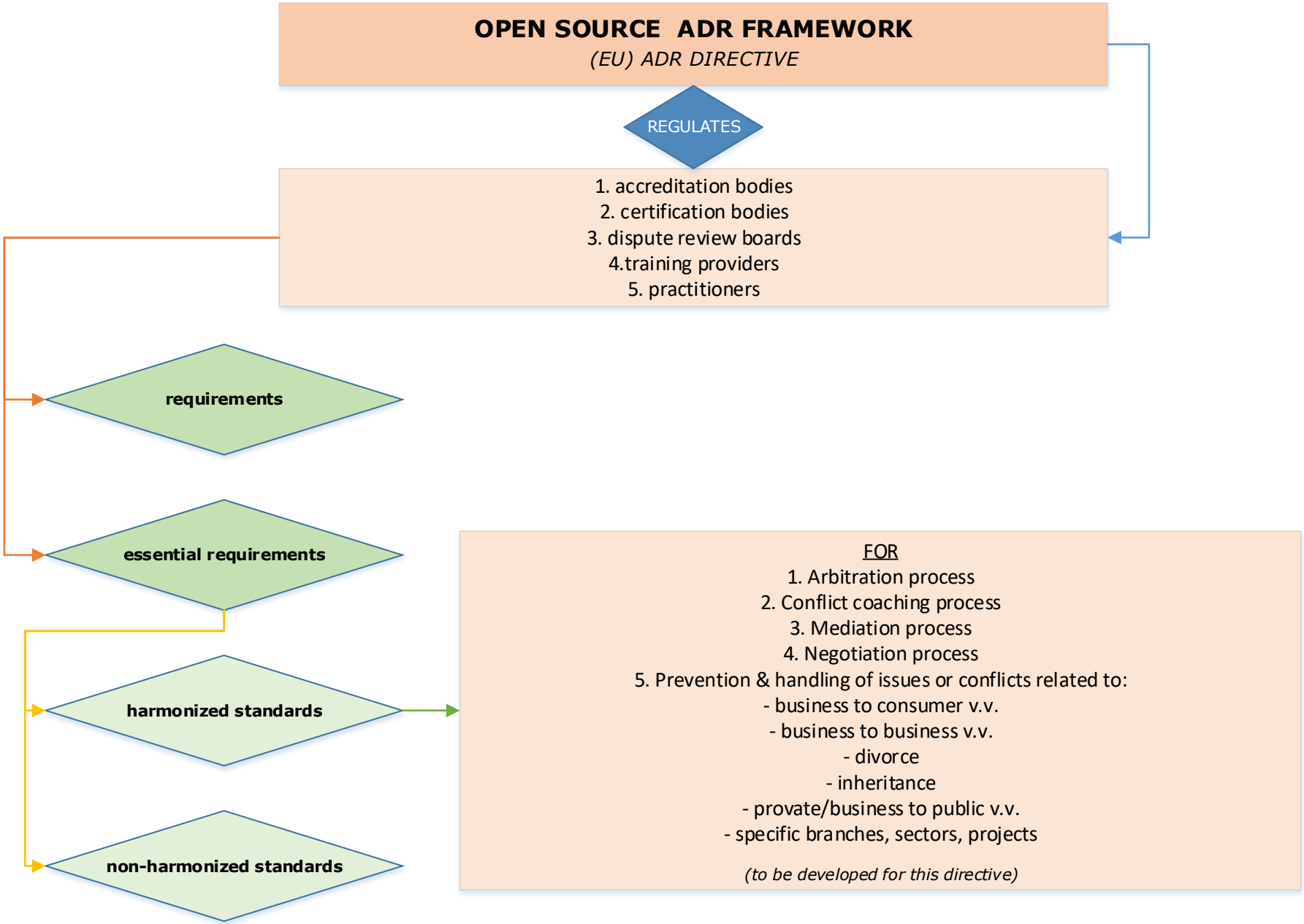


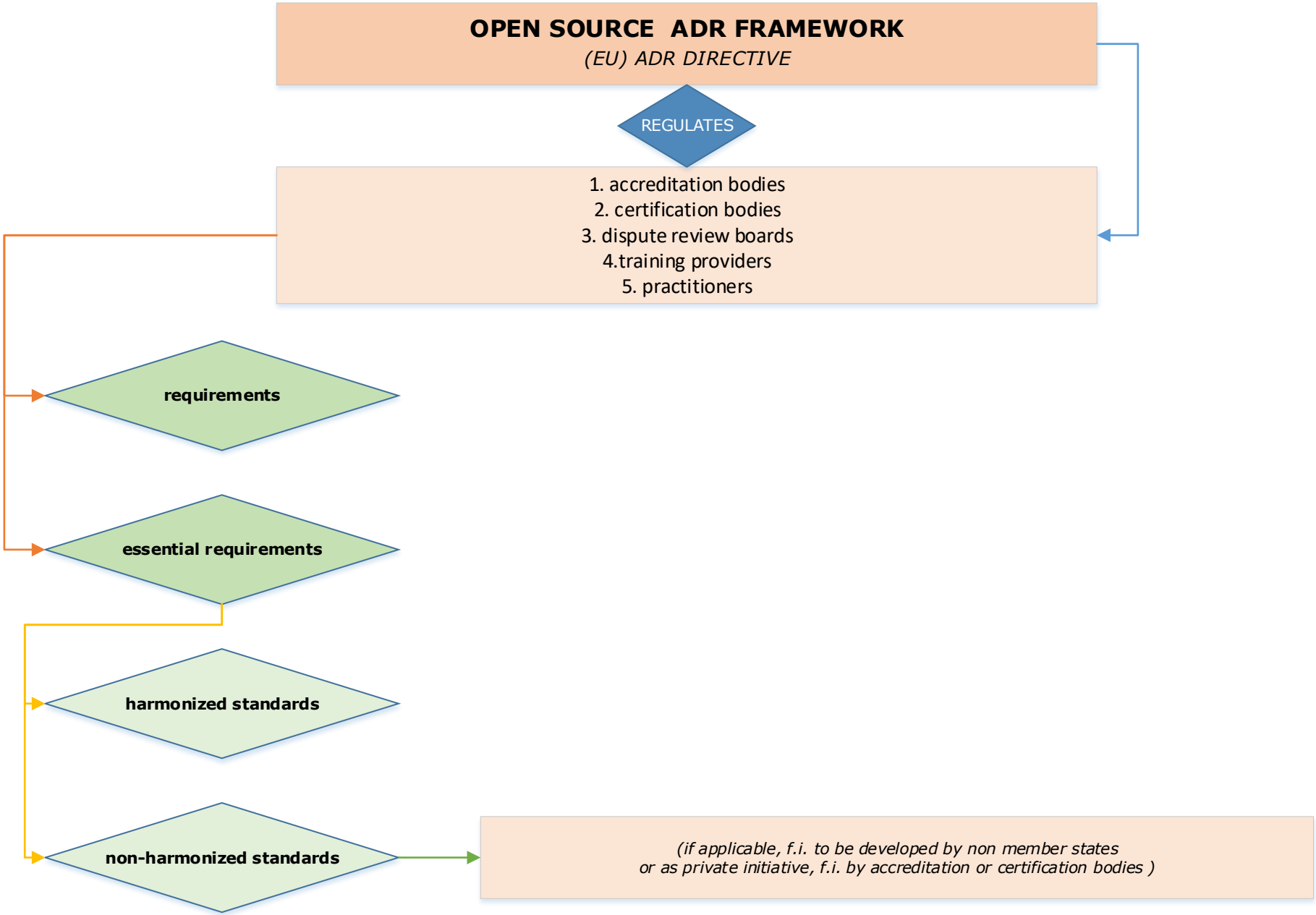

OPEN SOURCE ADR FRAMEWORK V2-JUNE-2020
CLIENTS – PRACTITIONERS – EXPERTS – AUTHORITIES - OTHER
INPUT
OUTPUT
GLOBAL COMMUNITY
OPEN SOURCE ADR FRAMEWORK
(EU) ADR DIRECTIVE
REGULATES
accreditation bodies, certification bodies, dispute review boards, training providers, practitioners
requirements
essential requirements
harmonized standards
non-harmonized standards
ADR SECTOR GROUP
all countries / member states participate
REVIEW
COUNTRY / MEMBER STATE BASED
- ADAPTION
- IMPLEMENTATION
- LEGISLATION
- TRANSPOSITION


OPEN SOURCE ADR FRAMEWORK
(EU) ADR DIRECTIVE
REGULATES
1. accreditation bodies
2. certification bodies
3. dispute review boards
4.training providers
5. practitioners
requirements
essential requirements
harmonized standards
non-harmonized standards
FOR
1. Accreditation bodies
2. Certification bodies
(implementation of existing directives & standards)

OPEN SOURCE ADR FRAMEWORK V2-JUNE-2020




OPEN SOURCE ADR FRAMEWORK
(EU) ADR DIRECTIVE
REGULATES
1. accreditation bodies
2. certification bodies
3. dispute review boards
4.training providers
5. practitioners
requirements
essential requirements
harmonized standards
non-harmonized standards
FOR
1. Arbitration process
2. Conflict coaching process
3. Mediation process
4. Negotiation process
5. Prevention & handling of issues or conflicts related to:
- business to consumer v.v.
- business to business v.v.
- divorce
- inheritance
- provate/business to public v.v.
- specific branches, sectors, projects
(to be developed for this directive)


OPEN SOURCE ADR FRAMEWORK
(EU) ADR DIRECTIVE
REGULATES
1. accreditation bodies
2. certification bodies
3. dispute review boards
4.training providers
5. practitioners
requirements
essential requirements
harmonized standards
non-harmonized standards
(if applicable, f.i. to be developed by non member states
or as private initiative, f.i. by accreditation or certification bodies)