

European Businesses and the New European Legal Requirements for ODR

Graham Ross*

Abstract

In terms of practical use outside of e-commerce platforms such as eBay, ODR has not advanced as speedily as many thought might be the case. Two pieces of legislation by the European Parliament applying to consumer disputes, being the European Directive on Alternative Dispute Resolution For Consumer Dispute and the associated Regulation on Online Dispute Resolution have opened up the opportunity for that to change. For the first time, there now is a law that effectively requires businesses to promote ODR. However, with widespread breach, evidence of which is referred to in this paper, this law has not as yet been implemented or honoured as it should be and is in danger that its impact could thereby become counter-productive to its essential objective, albeit not its whole scope, in increasing public confidence in cross-border buying of products and services online. One problem is that the EU decided in their wisdom to stop short of making participation in online ADR mandatory. So we have the odd situation in which it is an offence for businesses to not inform a dissatisfied customer of the web address of an online ADR provider who has been approved under the legislation by the Chartered Trading Standards Institute, yet when that customer seeks to use that service the business can refuse to participate. If refusal to participate is extensive, the situation could lead to a loss of trust generally in a law designed to improve consumer rights and access to justice. This is especially so if traders carry on their website the mandatory link to an EU portal that will refer dissatisfied consumers to an approved provider of online ADR, and which may have been a deciding factor for that consumer in selecting the particular trader to buy from, yet, when a complaint arises, refuse to participate in the provider selected by the consumer.

Whilst awareness of ODR will grow as a result of this legislation, albeit as an awareness of ADR that will, in the sense of the medium for discussions and exchange of documents, operate online, I have concerns that broad awareness of the fullest extent of what ODR can offer by way of more advanced forms of ODR will not be fully achieved for some time. Whilst this law does indeed present a significant opportunity to expand the use of ODR, it will not happen without effort by those with interests, commercial or otherwise or both, in promoting the expansion of access to justice that ODR offers. Only in this way will this legislation help ensure that there is a commercial need to explore increasingly innovative technology.

* Head of the European Advisory Board to Modria.com Inc, Member of the Civil Justice Councils' ODR Advisory Group and of its ADR Working Party, and Fellow of the National Center for Technology and Dispute Resolution.

Graham Ross

There is an even greater opportunity currently being lost by this legislation beyond consumer disputes. Given that ODR can enable mediation to take place at much more proportionate cost for disputes below the higher levels of value, ODR offers the opportunity to increase mediation's share of ADR over arbitration. Further, if the public can begin to experience mediation in the busier field of consumer disputes, it would help more quickly embed mediation into our society's vision of justice and make engagement in mediation for more complex disputes much more frequent. Instead, by lumping mediation in with ombudsman style adjudication, as does this legislation, a much less satisfactory process with at least one party, and often both, dissatisfied with the outcome, it lowers the satisfaction level of all forms of ADR.

Keywords: online dispute resolution (ODR), alternative dispute resolution (ADR), consumer disputes, EU legislation, e-commerce.

1 Introduction

Online dispute resolution (ODR) has been occasionally, but regularly, talked about and written about these past 10 years, hailed as the proverbial successor to sliced bread by some and characterized as a threat to access to justice, if not justice itself, by others. For most people, however, for whom it has any degree of professional or commercial relevance, it has been routinely ignored. As a result and with the exception of internal contracted-in systems such as run by eBay, PayPal and Amazon, not much actual use of technology beyond online filing of claims has so far taken place. Such is the widespread ignorance of ODR's true potential, online filing IS ODR to many.

Enthusiasts like your author have run mediations online (privately and also a pilot for the UK Small Claims Court¹) but it has yet to become common let alone part of mainstream activity amongst professional mediators. It is often thought that the opinions that have to be swayed are of the neutrals and neutral organisations who, after all, set out the processes they offer. Marketing experts might disagree. Neutrals will take some shifting from current norms of practice until such time as they see either demand or the availability of intelligent forms of technology that will significantly lower their costs and improve the efficiency and quality of their service or, ideally, both. The primary drive must come from the clients buying ADR services. It is they, after all, who stand to gain most from the usual benefits of ODR (reduced cost, reduced time and increased user experience).

The factors that impact on the road ahead for ODR have come to the fore across Europe with the passing of two pieces of legislation by the European Parliament applying to consumer disputes, being the European Directive on Alterna-

1 A. Sherr, 'Evaluation of the Small Claims Online Dispute Resolution Pilot', available at: <https://www.academia.edu/764234/Evaluation_of_the_Small_Claims_Online_Dispute_Resolution_Pilot>.

tive Dispute Resolution For Consumer Disputes² and the associated Regulation on Online Dispute Resolution.³ Depending on how the business community responds, which, in turn, will depend on the extent by which the authorities and business community agencies explain the benefits and encourage usage, this legislation could present either an opportunity for ODR or a threat to the speed of development of the technology and thus of the benefits that technology can offer to justice systems. If the legislation is properly addressed and utilised by EU Member States then the marketing of ODR will be boosted and future ODR developments such as through the application of artificial intelligence as forecast by Professor Richard Susskind and Daniel Susskind,⁴ will come nearer than its current position on the technology horizon. On the other hand, if governments fail to encourage more than minimal compliance, or the initially high level of ignorance within businesses of the new duties is not reduced and wholesale breach becomes largely ignored by the authorities, it could lead not just to the loss of the biggest opportunity for effective growth in the use of ODR but the loss of trust in ADR generally as consumers become increasingly more attracted to sorting out their complaints and claims with the assistance of social media and consumer review sites. A 2013 study found that 85% of consumers read online reviews to determine the quality of the business and 79% of those consumers trust the information they read in online reviews just as much as they trust a personal recommendation.

Positive reviews have a real, actual impact on purchasing decisions. Reviews influence both attitude and the resultant actions of consumers...The way a business responds to public complaints and praise is equally important. Businesses need to act swiftly and positively to show they listen to and care about what their customers think.⁵

Whilst legislation that, on paper, encourages more use of ODR is welcome it is not going to alone have optimal impact. In fact, I see a danger of damaging trust in the public's perception of ADR as a whole and, at the same time, a discouragement to technology developments in ODR.

- 2 Directive 2013/11/EU of The European Parliament and of the Council on Alternative Dispute Resolution For Consumer Disputes and amending Regulation (EC) 2006/2004 and Directive 2009/22/EC, available at: <<http://tinyurl.com/kcgfruo>>.
- 3 Regulation (EU) No 524/2013 Of The European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes, available at: <<http://tinyurl.com/lqyfqh6>>.
- 4 R. Susskind & D. Susskind, *The Future of the Professions: How Technology Will Transform the Work of Human Experts*, Oxford, Oxford University Press, 2015, available at: <<http://tinyurl.com/on58tzu>>.
- 5 M. Anderson, '2013 Study: 79% of Consumers Trust Online Reviews As Much As Personal Recommendations', available at: <<http://tinyurl.com/np6vxxb>>.

2 Legislative Rationale and Impact

This paper does not attempt to explain the European legislation in detail, but rather to consider the impact it may have on developments in ODR and, to the extent such may be discouraging of such developments, what steps could be taken to improve the situation.

Let me, first, clarify the legislative impact of a Directive and Regulation of the European Parliament. Whereas a Regulation comes into effect in each Member State as soon as it is passed by the Parliament, the Directive does not have such impact until such time as each Member State passes a law that implements the requirements of the Directive. The Directive was required to be in place in the local law of each Member State by the 9th July 2015. The UK complied with the passing of the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015.⁶ This article will largely focus on the implementation in the UK and where improvements could and, in the writer's opinion, should be made.

European Directives helpfully contain a very detailed preliminary section that sets out the objectives of the legislation, described overall as

Ensuring access to simple, efficient, fast and low-cost ways of resolving domestic and cross-border disputes which arise from sales or service contracts should benefit consumers and therefore boost their confidence in the market. That access should apply to online as well as to offline transactions, and is particularly important when consumers shop across borders.

The background to this objective is that, despite fast growth in online consumer transactions throughout the European Union, the Single Market across all Member States has still not achieved its fullest potential in that far too few cross-border transactions take place. The discussion paper for the European Consumer Summit 2013 stated that, of the estimated 53% of consumers that shopped online in 2012, only 15% did so cross-border.⁷ Increasing consumer confidence through facilitating ready access to speedy, low-cost processes for resolving disputes can be expected to help increase consumer confidence in cross-border sales. Businesses also stand to gain in that it was reported in a study that 59% of businesses in Europe claimed that an important obstacle to them selling cross-border

6 The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015, available at: <<http://tinyurl.com/qytyljd>> – as amended by The Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015 – usefully consolidated by the Civil Aviation Authority, available at: <www.caa.co.uk/docs/33/ConsolidatedADRregulations.pdf>.

7 See 'European Consumer Summit 2013: Towards a more efficient enforcement of EU Consumer Rights', page 1, available at: <http://ec.europa.eu/consumers/enforcement/docs/07032013_consumer_summit_discussion_paper_en.pdf>.

is the potentially higher cost in resolving complaints and conflicts cross-border compared to domestically.⁸

A secondary consideration was that such improvement in cross-border transactions would bring obvious trade and economic benefits, especially for the newer, primarily Baltic and Balkan, Member States of the European Union, whilst generally improving access of consumers to competitively priced goods in a vibrant and competitive cross-border marketplace.

3 Impact and Scope

The Directive effectively means that, as from its commencement into local law in each Member State of the European Union, a very large proportion of all businesses in each EU country will become unpaid marketing agents for ODR. I say this because businesses who are affected will have a legal duty to provide two pieces of information to customers with whom they have not been able to resolve a dispute as follows:

- the web address of an Alternative Dispute Resolution service that has been approved by a body appointed for such purpose in each Member State (the ‘Competent Authority’) and which must satisfy various standards as set out in the Directive;
- a statement as to whether or not they will participate in such ADR.

Further, Member States shall ensure that ADR entities:

(a) maintain an up-to-date website which provides the parties with easy access to information concerning the ADR procedure, and which enables consumers to submit a complaint and the requisite supporting documents online;

[...]

(d) enable the exchange of information between the parties via electronic means or, if applicable, by post.⁹

If the business is obliged, outside of the Directive, to make use of ADR, either because it operates within an industry for which there is a statutory obligation to submit to ADR (in the UK this will cover, for example, energy suppliers, telephone services, financial services as well as professional services such as accountancy and law) or has voluntarily contracted to submit to ADR by being members of a trade association that requires such as a condition of membership, then the details of the ADR service should be notified to consumers on the website of the business and within its terms and conditions and sales contracts.

8 See ‘European Commission Executive Summary of the Impact Assessment on the EU Directive on Alternative Dispute Resolution in Consumer Disputes’ – see page 5, available at: <<http://tinyurl.com/pkoeldk>>.

9 *Ibid.*, Art. 5(2).

Graham Ross

The businesses affected are all businesses in the EU that sell products or services, whether online or offline, to customers whose purpose in making the purchase comes within the definition of ‘consumer’. There is a slight variation between the wording of the Directive and of the UK Regulation that transposes the Directive into UK law. The definition of ‘consumer’ in the Directive is:

any natural person who is acting for purposes which are outside his trade, business, craft or profession.¹⁰

The UK law¹¹ has slightly adjusted the definition to add “wholly or mainly” so it now reads:

an individual acting for purposes which are wholly or mainly outside that individual’s trade, business, craft or profession.

The UK regulation, therefore, allows for a mixed purpose (e.g. buying a digital camera for mainly leisure use but with occasional usage of taking photographs for a business). This will avoid any attempt at a technical defence to a claim of breach by the business that may show secondary business use by a customer. In general, though, the law does not apply to B2B (business to business) sales. However, as the purpose in making the purchase will be solely in the mind of the customer, many businesses that consider they are ‘trade’ suppliers will inevitably engage in occasional sales to those who come within the definition of ‘consumers’. For all practical purposes, all businesses selling products or services that could never be purchased solely for business purposes, i.e. not wholesalers selling only large quantities of similar stock, would be covered by this law. The total number of UK businesses selling either goods or services to consumers, and thus affected by this legislation, has been estimated, on 2012 figures, to be approximately 742,000.¹²

Whilst awareness of ODR will grow, albeit as an awareness of ADR that will, in the sense of the medium for discussions and exchange of documents, operate online, I have concerns that awareness of the fullest extent of what ODR can offer by way of more advanced forms of ODR may grow less fast than otherwise might have been the case without this legislation.

At the time of writing there were 23 ADR providers who had been approved by the Institute of Trading Standards Institute in the UK.¹³ Some offer full mediation either online or by telephone but the majority offer adjudication. Given that the details of each provider has to be provided online in each Member State and such information required has to give details of their fee rates but little if any-

10 *Ibid.*, Art. 4 1(a).

11 *Ibid.*

12 Department of Business, Innovation and Skills, ‘Implementing the Alternative Dispute Resolution Directive and Online Dispute Resolution Regulation – Impact Assessment’, page 13, para. 19, available at: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288200/bis-14-594-implementing-alternative-dispute-resolution-directive-and-online-dispute-resolution-regulation-impact.pdf>.

13 <<http://tinyurl.com/qb6746t>>.

thing as to the nature of the process and, given almost all of the cost has to be borne by the business that sold the product or service (the Directive requires that the cost to the consumer must be either free or nominal¹⁴) is there not a danger of a “race to the bottom” for both price and services offered. Where is the incentive for an ODR provider offering advanced technology? The Directive whilst requiring much information, is very short on the detail of the process. Given that traders are not required to participate in ADR and given also that most traders will not have the experience or knowledge of ADR to make a reasoned judgment by which to compare providers other than by price then providers may try to offer services at as low a price as will attract traders. Low price means a short service which in turn means more adjudication over mediation. If mediation is operated it is likely to be off low skill. The race (to the bottom) is enhanced by the fact that the pricing structure is shown on a TSI page that effectively acts as a comparison site for providers.

There is no doubt that the legislation will significantly broaden the knowledge within business communities of the vendors of ADR.

Whilst the Directive is not itself restrictive in this way, and arguably equivocal, the UK Regulation, as amended, specifically allows for UK businesses to refer not just to ADR providers accredited by the UK authority, the Chartered Trading Standards Institute, but accredited by any other equivalent authority in other Member States. Given the existence of an approved list of providers, there will, to a degree at least, be an inevitable ‘race to the bottom’ over fees, which dynamic can only increase in impact if, say, UK businesses become aware that they are free to satisfy their legal duties by nominating providers operating in countries in which the cost of living and salary levels are significantly lower. There may be justification beyond the fee levels given that some providers outside of the UK may specialise in the products or services in question.

As to the scale of coverage of this law in the UK, a survey for Consumer Focus in 2012 (Consumer Detriment 2012 – Prepared for Consumer Focus by TNS BMRB) estimated there were 15.7 million consumer problems in the 12 months to February/March 2012. Removing sectors with statutory ADR schemes (financial services, legal services, energy, telecommunications and property sales) leaves an estimate of 11.1 million problems.

The 1st October came with very few businesses in the UK understanding that, as they walked into their offices or opened virtually for their online business, they were now the unpaid marketeers for online dispute resolution.

It is tempting to look at this law and consider that it simply extends what is happening in large volumes of low value e-commerce. However, there is no financial limit to the value of the transaction in the definition of ‘consumer’. The trade seller of an ocean going yacht is subject to the same duty to inform a dissatisfied customer of the web address of one of the approved ADR providers (who in turn are required to offer an online facility) as the seller of a toy yacht. This is important since many ADR professionals, particularly mediators at the higher end of the mediation food chain, would probably feel that this legislation is not relevant

14 Art. 8(c).

Graham Ross

to their practices since they might make the mistake of assuming the term 'consumer' refers only to low to modest value transactions that could not justify their fees.

As there are currently no regulations or standards for ODR, anyone can set up a service and call it online dispute resolution. As the experience of people who use ODR will reflect in their views on ODR, it is important, in terms of marketing ODR as a useful and appropriate form of justice, to try to ensure standards are designed and maintained. To that extent this European legislation plays a useful and positive role in that it does make some attempt to ensure that the ADR providers to whom businesses must direct consumers demonstrate good standards of neutrality and fairness. To that extent if it results in services less likely to generate complaints over their operation then it can help further promote quality ODR.

4 Unintended Consequences

However, whilst the scope of disputes is sufficiently extensive to be optimistic that the legislation will have a significantly positive impact on the rapid growth in use of ODR, there are a number of reasons to suggest that various elements of the legislation as well as the way in which it is being implemented, may significantly reduce such a dynamic. As a result, whilst this law does indeed present a significant opportunity to expand the use of ODR, it will not happen without effort by those with interests, commercial or otherwise or both, in promoting the expansion of access to justice that ODR offers. Only in this way will this legislation help ensure that there is a commercial need to explore increasingly innovative technology.

Another problem is that the EU decided in their wisdom to stop short of making participation in online ADR mandatory. So we have the odd situation in which it is an offence for businesses to not inform a dissatisfied customer of the web address of an online ADR provider who has been approved under the legislation by the Chartered Trading Standards Institute, yet when that customer seeks to use that service the business can refuse to participate. If refusal to participate is extensive, the situation could lead to a loss of trust generally in a law designed to improve consumer rights and access to justice. The situation has become worse now that the European Commission's platform has come into operation. Now every business in Europe must contain a link to the platform. A consumer, noticing this link to an EU approved ODR platform on a website of a business, may be persuaded by that link to buy from that business over a competing business, believing any disputes will be more easily resolved. If a dispute does then arise, he will click the link and complete the claim form. If the business then responds to say it refuses to participate in ODR, that will surely lead to much greater mistrust on the part of the consumer who will feel he was misled into buying from that business in the first place.

One element that may increase the degree of refusal by businesses is the fact that the Directive requires almost all of the cost of the dispute resolution process

to be borne by the business. The precise rule is that the cost should be either free or nominal to the consumer.

Unlike with the Directive, which applies to all consumer sales whether transacted online or offline, The Regulation on Online Dispute Resolution applies only to online sales and required that, as from 15 February 2016, all business selling to consumers online were required by law to have a hyperlink on their website linking to a European Commission website the objective of which is to refer enquiries from the public to an approved online ADR provider. The website was developed under the authority of the European Regulation on Online Dispute Resolution, possibly the first legislation in the world with ODR in its title.

The Directive requires that the ADR provider provides online functionality to allow for disputes to be filed online and for information to be exchanged 'electronically'.¹⁵ In view of these requirements (transposed into UK law by the Alternative Dispute Resolution in Consumer Disputes (Competent Authorities and Information) Regulations 2015¹⁶ that ADR providers operate to a degree online, it can be seen therefore as requiring businesses to promote ODR. It should be added that the ADR provider must, of course, also be able to operate offline for those people who cannot participate online.

In the UK the Competent Authorities are; The Financial Conduct Authority (In relation to the Financial Ombudsman Service in particular); Legal Services Board (In relation to the Office for legal Complaints in particular); Civil Aviation Authority; Gambling Commission; Gas and Electricity Markets Authority; Office of Communications and finally the lead enforcement authority for the purposes of the Estate Agents Act 1979. They are the relevant Competent Authority to make an application to gain ADR approval, in relation to transactions for which they have regulatory responsibility, an oversight or have been specifically assigned responsibility.

Where the dispute transaction falls outside the remit of these Competent Authorities and for the services of the Pensions Ombudsman in particular, then the Secretary of State is the relevant Competent Authority. However, the Secretary of State has delegated responsibilities for dealing with applications and approval in its role as Competent Authority, to the Chartered Trading Standards Institute (CTSI). CTSI will also act for the Secretary of State, as the single point of contact for all the UK Competent Authorities.

5 Honoured in the Breach

Personal experience testing out the level of knowledge of businesses of this law and compliance shows that knowledge is low and breach high. The risk of failure with the legislation achieving its objective, therefore, exists. There does not, however, seem to be any interest in the UK Government to fund enforcement. I pre-

15 Art. 5, paras. 2(a) and 2(d) of Directive 2013/11/EU of The European Parliament And Of The Council on Alternative Dispute Resolution For Consumer Disputes and amending Regulation (EC) 2006/2004 and Directive 2009/22/EC, available at: <<http://tinyurl.com/kcgfruo>>.

16 *Supra* note 6.

Graham Ross

sented a complaint to a well known online ticketing agency. When the matter was not resolved, I asked them for the name and details of an ADR provider accredited under the legislation. They gave me the details of their trade association, which had not been listed as accredited. I pointed this out to them and they responded by naming the Chartered Trading Standards Institute. I explained that they were the body that accredited the ADR providers but were not a provider themselves. I referred them to the TSI list and eventually they referred me to an accredited provider.

I gave a short talk on the subject at a local business network and was not able, in talking to people, to identify anyone with prior knowledge of the law. The legislation came into effect on businesses on the 1st October but I could not find any coverage in the general media. This is notwithstanding there was wide coverage of consumer issues but primarily about the coming into effect on the same day of the Consumer Rights Act 2015.

I presented evidence on 23 May 2016 to the Westminster Legal Policy Forum and on 24 May 2016 to a conference on ODR at the Peace Palace in The Hague of breaches of this consumer law by many well known 'High St' retailers in the UK. Of 25 e-commerce websites, only five carried the required hyperlink to the EU's ODR platform. Further, none of these links satisfied the accessibility requirement in that they were all buried deep within lengthy terms and conditions and other 'legal' pages unlikely to be read, thus defeating the objective of the legislation. Since the objective of the legislation is to encourage public confidence in buying from any EU retailer, this link should be noticeable for the public before they make a purchase not something they search for when they have a problem if read at all. It should, therefore, be on the home page or similar and not buried within text.

The failure to take up the opportunity permitted by the EU to make participation in ADR mandatory on business, and thus reduce the above negative impact, is another lost opportunity. Instead the very trust that the Regulations were intended to generate in consumer purchasing throughout Europe is threatened. Take the case of a business that in fact complied with the legislation and placed the link to the EU's ODR platform. As a result, a prospective purchaser would be encouraged to buy from that company rather than from another website that did not contain the link. Imagine what the consumer will think when, after finding a problem with the product or service, and remembering the link and clicking on it and completing the complaint form, he is then informed that the business does not wish to participate in ADR. He will, understandably, feel that the trust he had placed in that company, because of the link to the EU's platform, had been betrayed. At the very least, we should be requiring companies to state on their website, alongside the link, whether or not they will comply.

6 Conclusions

ODR, providing fast and fair mediation and arbitration services as conveniently as your nearest smartphone, is surely the way forward to enable greater access to

justice for modest value cases. It is disheartening, therefore, when legislation designed to bring in these benefits for consumers is being so blatantly ignored by business.

The opportunity presented by the legislation to give civil justice a much needed encouragement with a far superior form of ADR, that is mediation, is being lost. The potential unintended consequences I wrote about before the legislation was transposed into the local law of Member States are coming into effect.¹⁷ If the public can begin to experience mediation in the busier field of consumer disputes, it would help more quickly embed mediation into our society's vision of justice and make engagement in mediation for more complex disputes much more frequent. Instead, by lumping mediation in with ombudsman style adjudication, a much less satisfactory process with at least one party, and often both, dissatisfied with the outcome, it lowers the satisfaction level of all forms of ADR. By encouraging a 'race to the bottom' on fees payable to providers, and, as a result, discouraging quality of service, with no explanation to business of the additional benefits of mutual, rather than imposed, solutions, the authorities are effectively discouraging improved forms of ADR and creating a barren market for the mediation providers. Of course the positive side is that this legislation is still in its infancy and it is hoped that in time the opportunities will be more fully embraced.

17 G. Ross, 'The Possible Unintended Consequences of the European Directive on Alternative Dispute Resolution and The Regulation on Online Dispute Resolution', *Digital Democracy and Electronic Government*, Vol. 1, No. 10, 2014, available at: <<http://tinyurl.com/m26e39q>>.