Optimal Integration of the European Dispute Resolution Platform
Abstract

The objective of this briefing paper is to discuss the possible issues and solutions regarding the optimal integration of the ODR Platform within the current consumer-oriented websites at the EU and national levels, taking into account the possible extent of scope of the Regulation on consumer ODR.
1. BACKGROUND, MAIN ISSUES AND OBJECTIVES

1. In November 2011, the following proposals were introduced by the Commission: the proposal for a Directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes\(^1\) ("Directive on consumer ADR") and the proposal for a Regulation of the European Parliament and of the Council on online dispute resolution for consumer disputes\(^2\) ("Regulation on consumer ODR").

The main objective of the Directive on consumer ADR is to ensure that disputes between consumers and traders can be submitted, in the Member States, to entities offering impartial, transparent, effective and fair alternative dispute resolution procedures (Art. 2 of the Directive).

The Regulation on consumer ODR is the complement of the Directive: pursuant to the Regulation, the Commission shall establish a platform (interactive website), acting as a single point of entry to consumers and traders seeking out-of-court resolution of disputes arising from cross-border online sale of goods or provision of services.

2. The introduction of both proposals must be understood in the context of other measures adopted at the European level and in the Member States in order to improve the retail internal market and ensure a high level of protection for consumers.

Material protection rules are indeed prescribed by the legal instruments\(^3\): information duties, formal requirements, right of withdrawal, prohibition of unfair contract terms or unfair commercial practices, etc. The achievement of the functions and the objectives of these rules is subordinated to the existence of effective redress in case of dispute between consumers and professionals.

Regarding the features of such disputes (among others, low value cases), and considering that no amicable settlement could be found by the parties, the preference should be given, at least at a first stage, to a simple, fast and affordable out-of-court settlement procedure\(^4\).

This is particularly critical for disputes arising from cross-border transactions and in the digital environment of electronic commerce. It does not mean, however, that for domestic or offline transaction, such a Platform should not be needed.

\(^{1}\) COM (2011) 793 Final.
\(^{2}\) COM (2011) 794 Final.

3. Numerous ADR schemes are available in the Member States, but some issues must be addressed in order to ensure a better effectiveness of the mechanism. In particular, the following shortcomings could be identified\(^5\): awareness of the schemes among consumers and professionals, lack of financial resources, fragmentation of the ADR schemes (sectoral or cross-sectoral schemes, with a distinct geographical coverage, distinct outcomes depending on the scheme, etc.), gaps in the sectoral and geographical coverage or reluctance of the professionals to engage in such schemes. In the context of cross-border disputes, additional issues can be pointed out: language barriers, lack of jurisdiction, lack of knowledge on applicable law and enforceability of the decisions.

The objective of the proposals is to address most of these issues.

4. The determination of the scope of the Regulation on consumer ODR is currently discussed: it could be extended to all disputes arising from online transaction (or offline), cross-border and domestic. In any case, the ODR Platform shall be integrated among the existing (and future) ADR schemes covering disputes arising from online transactions.

The terms of reference of the present paper are as follows:

"Examine the optimal integration of the ODR platform with other EU and/or national consumer-orientated websites,

in the light of the two scenarios: (i) the scope of the ODR platform is maintained as foreseen in the current Commission proposal (cross-border online sales); (ii) the scope of the ODR platform is extended to all disputes arising from online transactions, cross-border and domestic,

in order to: (i) maximise consumer awareness, in particular of their rights; and (ii) contribute towards a single EU consumer portal".

Therefore, the objective of the present briefing paper is to point out and discuss the possible issues of this integration from a legal point of view, with regard to other EU (point 2) or national consumer-oriented websites (point 3), in particular the websites offering similar tools and process, in the light of the possible scope extension of the Regulation and taking into account the principles of subsidiarity and proportionality.

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2. INTEGRATION WITH REGARD TO EU CONSUMER-ORIENTED WEBSITES

5. After a short overview of the EU Consumer-oriented websites, including their objectives and the role they could play with regard to the Platform (2.1.), the requirements of the optimal integration of the platform are analyzed, regardless of whether the scope is extended or not (2.2.) and with regard to an extension of the scope to domestic or offline transactions (2.3.).

2.1. Overview and objectives EU Consumer-oriented websites

6. The weakness of the consumer mainly lies in a lack of knowledge on factual or legal data related to the contractual relationship with the professional trader. Accordingly, pursuant to the applicable legal framework, information duties are imposed to the professional trader.

In the matter of consumer protection, the legal framework is very complex: numerous legal instruments have been enacted and, depending on their purpose, their scope is defined more or less broadly, *ratione materiae* (any sale of good or any provision of services, credit agreement, travel contract, time-sharing contract, insurance contract, etc.), *ratione personae* (only B2C or B2C and B2B) or with regard to the means used to conclude the contract (contracts concluded at a distance; contracts concluded at a distance and by electronic means).

With regard to the lack of knowledge of the consumers and the complexity of the legal framework, it is critical to provide consumers with clear, easily understandable and accessible information on their rights.

7. Various consumer-oriented internet pages can be found on the website of the European Institutions. In this respect, a distinction can be made between the portal pages, directing consumers to the information (see for instance the homepage or “Your Europe” or the homepage of “europa.eu”), and the pages hosting more specific contents interesting consumers.

Accordingly, depending on their scope and objective, the latter ones aim at providing consumers with general information on their rights under EU or national law or, contrariwise, when the scope is much more specific, they only focus on determined topics (online shopping, travel, financial services, etc.).
Moreover, the website are numerous and the consumer could feel a lost when searching clear, concise and easily understandable information allowing him to get useful knowledge on his rights and to determine whether the trader did violate these rights or not. Indeed, before deciding to implement an out-of-court settlement, the consumer shall be aware of a possible violation of his rights.

It is also very common that the consumers are directed to the webpages providing information on their rights through a search engine (such like Google, for instance). In this case, they will not visit the homepage or the portal page of the website, on which they could have access to additional and potentially more exhaustive information on their rights.

In order to ensure that consumers will get access to an exhaustive source of information on their rights, the solution could be to draw the attention of the consumers on the existence of a home page portal especially dedicated to the protection of their interests and that would play, more or less, the role of single entry point giving access to all available information (through Your Europe, for instance).

8. Various websites, further to the abovementioned provision of information on consumer rights, also provide specific tools allowing consumers to get legal advice on their rights or to lodge a complaint against a (foreign) trader.

With regard to the ADR framework implemented at the European level, ECC-NET, FIN-NET or SOLVIT networks play a very important role.

ECC-NET, for instance, is the Europe-wide network of all the European Consumer Centres (29 National ECCs - 27 Member States plus Iceland and Norway). In case of complaint against a professional trader established in another Member State, the consumer is invited to contact the ECC of his or her own country and, where necessary, to fill in a standardized complaint form available online. The ECC of the consumer’s country will then process information and take contact with the ECC located in the trader’s country. The latter ECC will try to find an amicable settlement with the trader or, where possible, will direct the consumer to an appropriate ADR Scheme.

2.2. Optimal integration of the Platform regardless of whether the scope of the Regulation is extended or not

9. The integration of the Platform will be optimal provided that various requirements/guidelines are respected.

10. The implementation of the ODR Platform should rely on the existing tools, i.e. the consumer-oriented websites providing consumers with information on their rights and, for some of them, handling complaints against foreign traders.

For each of them, strengths and weaknesses can be identified and it is very important to benefit from the experience gained in the past (not reinventing everything and avoiding gaps of the past). For instance, the main strengths of ECC are the good cooperation and communication between the national centres (with the use of an “IT-Tool”), the bridging of language barriers (with the use of one language within the network) and the use of a standardized multilingual complaint form, available on any ECC website.
11. This Platform should be seen as a tool directing consumers to the competent ADR entity that will offer them an effective redress in case of dispute; in other words, the Platform is one single piece among various other instruments implemented in order to improve consumer protection.

Although the purpose of the ODR Platform is not to provide consumers with general information on their rights, the Platform needs to be in direct connection with such information. Indeed, consumers need to receive the useful knowledge on their rights (and their possible violation by the trader) in order to decide whether or not they are interested in introducing an out-of-court settlement procedure.

Consumers shall also be provided with all necessary information on the distinct categories of out-of-court or traditional judicial settlement procedures, including their features and their respective strengths and weaknesses (cost, length, language, binding or non-binding). For instance, a bargaining process between the parties will be faster and cheaper than a judicial procedure, but the existence of a binding solution at the end of the process is only guaranteed in the latter case.

12. Even if it is obvious, it needs to be stressed that the consumer must be aware of the existence of the Platform. Therefore, the Platform (or, at least, a clear and accessible electronic link to the internet homepage of the Platform) shall be available on all European consumer-oriented websites. The choice of the European Commission webpage hosting the Platform (being understood that the cross-linking should also be realized with other consumer-oriented webpages) could be made with regard to objective and qualitative criteria, such as the number of visits, in order to provide the higher visibility to the Platform.

When there are various ODR platforms or ADR schemes, it is probable that the consumer will not be aware of all of them and will just remember the existence and, eventually, the features, of only a few of them. Contrariwise, when there is one main Platform, acting as a single entry point, it is easier for the consumer to be aware of its existence.

When an effective outcome can be expected from these measures, public communications and advertising campaigns could also be made at the European level and within the Member States in order to present the Platform and explain how it will ensure a high level of protection for consumers, in case of online cross-border transactions (or in other cases, if the scope is extended).

2.3. Optimal integration of the Platform with an extended scope of the Regulation

13. The scope of the Regulation is currently limited to cross-border and online transactions (not domestic or offline transactions) and several critics could be made in this respect.

14. The fragmentation of the ADR schemes/tools at the European level and within the Member States requires the existence of a single entry point, allowing a simple and easy access to the appropriate ADR entity.

11 See also Art. 13 of the Regulation on consumer ODR, prescribing information duties on the ODR Platform to the trader.
Various issues could result from the fragmentation of ADR Schemes/tools.

The consumer could lodge his or her complaint before an ADR entity which is incompetent to process the dispute (from a sectoral or a geographical point of view). Therefore, he or she could loose useful time and would probably be discouraged to introduce another claim before another ADR entity, potentially competent.

The consumer could also lodge his or her complaint before an ADR entity which is competent but not necessarily the most appropriate, just because the consumer did not know that another ADR entity could process the claim. This could be the case when the final decision of the ADR entity is not binding for the trader (while it would be binding before another ADR entity) or when fastest or cheapest processes could be offered by another entity.

The lack of consumer awareness of appropriate ADR Schemes is indeed a major weakness of the current situation. With the ODR Platform acting as a single entry point, this issue is addressed because the Platform itself will identify the appropriate ADR Scheme(s) (see also point 3 on this topic). Accordingly, the consumer can make an informed choice, consistent with his or her interests.

When the scope of the Regulation is limited to cross-border and online transactions, the consumer cannot benefit from the advantages of the single entry point in case of domestic or offline transaction. It should not be an issue when there is no fragmentation of the ADR Schemes at the national level or, if so, when there is a similar ODR platform at the national level. In many cases, however, there is a fragmentation of national ADR Schemes, without any national platform playing the same role than the Platform implemented by the Regulation.

Without any objective justification explaining such difference, we are of the opinion that it could be considered as discriminatory: indeed, some consumers suffering from a similar weakness would not benefit from an equivalent Platform directing them to the most appropriate ADR Scheme(s).

15. With regard to the ADR schemes/tools currently available at the European level, some overlapping issues could occur. For instance, ECC-Net is also competent to handle complaints regarding cross-border and online transactions. By the way, ECC-Net has much strength; the main weaknesses are related to the sectoral or geographical coverage gaps in the field of e-commerce (which will not be solved by the Regulation on consumer ODR but by the Directive on consumer ADR).

The new Platform should not increase the current fragmentation of the ADR Schemes. Therefore, where possible, the resources and the tools of the ADR Schemes currently available at the European level and pursuing the same function of a single entry point, should be dedicated to the new Platform.
The differences in the scope and in the features of the new Platform, on one hand, of other ADR schemes/tools on the other hand, could also be invoked in order to ask for an extension of the scope of the Regulation. Indeed, ECC-Net or any other European ADR Schemes should remain for the disputes falling outside the scope of the new Platform (taking into account the current scope of the proposal, cross-border transactions offline shall be submitted to ECC-Net, for instance). In this case, there is not one single entry point and the consumer has to analyse the features of each scheme in order to identify the most appropriate. With a broader scope, the consumer could lodge the complaint before the Platform for any dispute and the weakness would be dismissed.

16. Moreover, it could be pointed out that the scope of the Regulation is not consistent with the scope of the Directive.

The scope of the Regulation on consumer ODR (disputes arising from cross-border online sale of goods or provision of services) is narrower than the scope of the Directive on consumer ADR (any contractual dispute arising from cross-border or domestic, online or offline sale of goods or provision of services). It could be argued that, as soon as the European legislator decided that a specific legal framework should be enacted, prescribing the requirements of all ADR Schemes, additional rules should also be enacted in order to ensure that the consumer is correctly directed to the most appropriate scheme(s) (i.e. with a platform).

In other words, the objectives of the Directive on consumer ADR could not be achieved efficiently when, due to the absence of a platform (for domestic or offline transactions), the consumer is not directed to the most appropriate scheme(s), complying with the requirements of the Directive. The ODR Platform should be seen as a means, among others, aiming at ensuring that the objectives of the Directive on consumer ADR are fully achieved.

17. Regarding especially the extension to domestic transactions, it could also be pointed out that the consumer could not be aware of the trader’s country of establishment (e.g. when the website, with a domain name [.eu] is available in other languages). In other words, the consumer is not necessarily aware whether he or she is entering into a cross-border or a domestic transaction.

With a scope limitation to cross-border transactions, those consumers who did not know that it was a domestic transaction could lose the protection granted by the Platform (and allowing them to choose the most appropriate ADR Scheme(s), fully informed).

18. Regarding in particular the extension to off-line transactions, an additional advantage could be mentioned.
Indeed, under the reserve of the Directive on electronic commerce\textsuperscript{12}, the legal framework protecting consumers is similar whether the contract is concluded at a distance or at a distance and by electronic means (see the Directive on Consumer Rights or the Unfair Commercial Practice Directive, applicable in both cases). Therefore, the weakness of the consumer can be partly explained by the same circumstances (mainly the distance between the parties) and the existence of similar effective redress is necessary in order to ensure consumer protection. In other words, it should not be acceptable that, for similar weakness, the protection of the consumer (with the existence of a platform) is not equivalent.

Furthermore, the extension to any sale of goods or any provision of service “at a distance” (and not “online”), would avoid the creation of this new category of sale of goods and provision of services (“online”\textsuperscript{13}). Some legal uncertainty could occur when applying the criteria defined in Article 4, c) and d), of the Regulation on consumer ODR, with the references to “website”, “electronic means” or “off-line services”. The “contract concluded at a distance” is a very well known notion, defined by the Directive on consumer rights\textsuperscript{14} and we are of the opinion that it would be much more appropriate.

19. The implication for the EU Budget would probably be higher in case of extension of the Regulation’s scope, because the Platform should have to deal with a greater number of claims.

However, the existence of an effective redress scheme and the possibility, for the consumers, to receive solutions for their disputes would globally strengthen their confidence and encourage them to multiply their transactions (in the benefit of the traders and more globally, of the retail internal market).

It could also be argued that the global cost would probably be higher if a similar platform should be implemented in each Member State (or, at least, in most of them).

20. With regard to the aforementioned consideration, we are of the opinion that the principles of subsidiarity and proportionality are not violated in case of a scope extension of the Regulation.

Indeed, the issues raised by the domestic and off-line transactions are not sufficiently addressed at the national level and need to receive an effective solution at the European level. Moreover, at the lowest comparative cost, the outcomes of the use of the platform for any kind of transaction could probably not be achieved with a similar level of efficiency with another solution.


\textsuperscript{13} One could also wonder why no reference was made to the Directive on electronic commerce (and the notion of “information society services”).

\textsuperscript{14} Art. 2 (7) of the Directive.
3. INTEGRATION WITH REGARD TO NATIONAL CONSUMER-ORIENTED WEBSITES

21. The integration of the Platform must also be optimal with regard to national consumer-oriented websites and, in particular, the websites providing ADR Schemes. The references to these websites can be found on the website of the European Commission\(^\text{15}\). Various other sources of consumer-oriented websites could also be mentioned\(^\text{16}\).

22. Among the Member States, various ADR Schemes can be identified. With regard to the numerous variations in their main features (sectoral/cross-sectoral coverage; geographical coverage, outcomes of procedures, nature of funding, etc.), the average consumer will not be aware of their existence and, if so, he or she will not be able to identify, among them, the most appropriate ADR Scheme that could solve the dispute.

In this sense, the Platform constitutes an efficient tool ensuring the integration of all the ADR Schemes complying with the requirements of the Directive on Consumer ADR.

Indeed, pursuant to Article 5 (2) of the Regulation, "The ODR platform shall be an interactive website which can be accessed electronically and free of charge in all official languages of the Union. The ODR platform shall be a single point of entry to consumers and traders seeking the out-of-court resolution of disputes covered by this Regulation".

Actually, the Platform per se will not act as an ADR/ODR entity: it will only direct the complainant party to the appropriate ADR Scheme. Moreover, acting as a single point of entry, the platform should be much more efficient than the instruments currently available and pursuing similar goals (ECC-NET, for instance).

23. In order to achieve the optimal integration with the ADR Schemes available on national consumer oriented websites, additional issues shall be addressed\(^\text{17}\).

First, standardized procedure shall be implemented with regard to the communication and cooperation between the ADR Schemes and the Platform (with the determination of a common language).

Internal process shall also be implemented in order to identify the appropriate ADR Scheme(s) within the Member States. For this purpose, the Platform should rely on accurate and updated information on the features of the ADR Schemes. This is not the case with the ECC-Net, for instance: the French Mediator of the Net is still listed on the European website\(^\text{18}\), although the service is over.

Reference should also be made, on these websites, to the ODR Platform implemented at the European level (with an electronic link).

\(^{15}\) http://ec.europa.eu/consumers/redress_cons/schemes_en.htm

\(^{16}\) See for instance the public websites dedicated to consumer protection in the UK (http://www.bis.gov.uk/policies/by/themes/consumer%20issues), in Belgium (http://economie.fgov.be/fr/consommateurs/, in Belgium) or the private ones (http://www.quechoisir.org/l-association/ufc-que-choisir-ufc-que-choisir-qui-sommes-nous, in France, for instance). In this respect, the solutions shall be found, at a first stage, in the current instruments (such like ECC-NET).

\(^{17}\) In this respect, the solutions shall be found, at a first stage, in the current instruments (such like ECC-NET).

The applicable law should also be taken into account\(^{19}\). By virtue of private international law, a traditional jurisdiction could have to apply a foreign law. However, it could be argued that, in the present context, where the ADR entities are not professional jurisdictions, it should probably be better that they only apply their own national law. Cooperation process should be further implemented with the ADR Scheme of the country of establishment of the professional trader in order to ensure the enforcement of the decision.

24. Some discussion could occur with regard to the possible extension of the scope of the Regulation to domestic disputes.

Once again, this extension must be assessed regarding the principles of subsidiarity and proportionality and we are of the opinion that it could be justified.

The establishment of an ODR Platform handling the complaints itself, without directing the disputes to an appropriate ADR Scheme within the Member State, would not comply with the principles of subsidiarity and proportionality: such Schemes already exist at a national level and the objectives of the legislator can be achieved with the same efficiency without the creation of an ADR Scheme at the European level.

In the present case, however, the Platform will act as a single entry point in order to direct the complainant to the appropriate Scheme. The identification of the appropriate Scheme is obviously required in cross-border transactions. This could also be the case with domestic or offline transactions (on this point, see, supra, point 2.3.).

CONCLUSION

25. In order to ensure an optimal integration of the ODR Platform with regard to consumer oriented websites on EU level, some requirements should be followed in any case (regardless of whether the scope is extended or not to domestic and/or offline services):

- the implementation of the ODR Platform should rely and benefit from the experience of the existing tools (ECC-Net, for instance);
- the ODR Platform should be closely linked to the webpages providing consumers with information on their rights;
- necessary information shall be provided on the ODR Platform itself as well as on other kinds of redresses (judicial procedure or out-of-court settlement procedures);
- Measures should be taken so that consumers are obviously aware of the existence of the Platform;

26. The optimal integration was also analyzed with regard to the possible extension of the Regulation’s scope. In this meaning, we are of the opinion that such extension would not be incompatible with the principles of subsidiarity and proportionality.

Indeed, as far as the scope of the Regulation is limited to cross-border and online transactions, the consumer will not benefit from the advantages of the single entry point in case of domestic or offline transaction, which could be discriminatory. The fragmentation at the European level would remain. Moreover, the scope of the Regulation is not consistent with the scope of the Directive.

Additional arguments, especially related to domestic or offline transactions, could also be mentioned.

27. With regard to the integration of the Platform at the national level, some guidelines were provided, in order to ensure that the process is optimal:

- Implementation of a standardized procedure;
- Implementation of measures insuring communication and cooperation between the Platform and the ADR Schemes at the national level (and between the ADR Schemes at the national level);
- Implementation of an efficient process in order to ensure that the Platform can rely on accurate and updated information;
- Reference made, on national websites, to the Platform;
- Reference made to applicable law.
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