Assessing the Scope of European Dispute Resolution Platform
Abstract

The present note addresses the issue of the scope of the European online dispute resolution Platform. In particular it examines whether such a scope can be extended.
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<th>Abbreviation</th>
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<tr>
<td>AGRI</td>
<td>Agriculture and Rural Development Committee</td>
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<tr>
<td>ALDE</td>
<td>Group of the Alliance of Liberals and Democrats for Europe</td>
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<td>BAS</td>
<td>Brake-assist systems</td>
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<td>CAP</td>
<td>Common Agricultural Policy</td>
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<td>CFP</td>
<td>Common Fisheries Policy</td>
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<td>CMO</td>
<td>Common market organisation</td>
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<td>CoR</td>
<td>Committee of the Regions</td>
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<td>CULT</td>
<td>Culture and Education Committee</td>
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<td>ECOSOC</td>
<td>Economic and Social Committee</td>
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<tr>
<td>ECTS</td>
<td>European Credit Transfer System</td>
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<tr>
<td>EPP-ED</td>
<td>Group of the European People’s Party and European Democrats</td>
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<tr>
<td>FAO</td>
<td>Food and Agriculture Organisation of the United Nations</td>
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<td>FPS</td>
<td>Frontal Protection Systems</td>
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<td>GDP</td>
<td>Gross Domestic Product</td>
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<tr>
<td>GM</td>
<td>Genetically-modified</td>
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<tr>
<td>Greens/EFA</td>
<td>Greens/European Free Alliance</td>
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<td>GUE/NGL</td>
<td>Confederal Group of the European United Left - Nordic Green Left</td>
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<tr>
<td>IFI</td>
<td>International Fund for Ireland</td>
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<tr>
<td>IND/DEM</td>
<td>Independence/Democracy Group</td>
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Background

The background of the note is represented by two instruments proposed by the Commission, which are meant to provide a EU-wide access to ADR for consumer disputes:

- The ADR Directive ('Directive on alternative dispute resolution for consumer disputes')
- The ODR Regulation ('Regulation on online dispute resolution for consumer disputes')

Aim

- Examine whether the ODR Platform complies with the requirement of competence, subsidiarity and proportionality;
- Examine whether the ODR Platform can be extended to cover domestic consumer disputes
- Examine further issues concerning added value of ODR Platform to European consumers
GENERAL INFORMATION

KEY FINDINGS

- The limited scope the Online Dispute Resolution Platform has in the Commission proposal (online cross-border disputes) meets the requirements of competence, subsidiarity and proportionality.

- However, also the extension of the ODR Platform to domestic contracts would be consistent with the requirement of competence, subsidiarity and proportionality. Moreover, this extension would provide substantial advantages with regard to consumers’ protection, consumers’ trust, and promotion of the Internal Market and would entail very limited additional costs, namely, only those involved in using, for a larger set of case, the same ODR Platform, in the framework already provided for by the ADR Directive. Thus the benefits of the extension of the Platform to domestic contracts do clearly outweigh the costs. Also the extension to the ODR Platform to the offline contract would provide considerable consumer benefits and entail very limited costs.

- Thus, we recommend that the ODR Platform is made accessible also for consumer disputes concerning domestic contracts. The extension to offline disputes should also be considered.
1. INTRODUCTION

To address the topic of the present note, namely, “Assessing the Scope of European Online Dispute Resolution Platform”, we need to consider two legal instruments recently proposed by the Commission in the domain of ADR/ODR.

The first such instrument is the proposed ADR Directive (‘Directive on alternative dispute resolution for consumer disputes’). The Directive obliges Member States to make access to ADR available in both domestic and cross-border consumer disputes, introduces principles ADR entities must comply with (expertise and impartiality, transparency, effectiveness, fairness), and provides for national authorities charged with monitoring the ADR entities.

The second such instrument is the ODR Regulation (‘Regulation on online dispute resolution for consumer disputes’). The Regulation provides for the Commission to establish and maintain a European ODR Platform, defines the ways in which the Platform will connect consumers, traders and ADRs, and obliges the Member States to designate facilitators to support the use of the Platform.

There is an important difference between the scope of the ADR Directive and the scope of the ODR Regulation, a difference that we shall question in the following. The ADR Directive has a broad scope. In particular it obliges the Member States to ensure that all ADR entities (or at least dealing with consumer contracts) are accessible electronically, and that they offer ODR services (that they enable the parties to exchange information with them via electronic means) with regard to all consumer disputes, pertaining to both domestic and cross-border consumer contracts, both online and offline. On the contrary the ODR Regulation has a much more limited scope: the EU ODR Platform provides access to ADR only with regard to online cross-border disputes, to the exclusion of two classes of disputes, those pertaining to domestic contract and those pertaining to offline contracts.

In the following section (section 2) we shall consider what may be the optimal scope for the ODR Platform, having regard to consumer protection and the added value to the European consumers. We shall consider the scope of the Platform in the Commission proposal, namely its limitation to disputes concerning online cross-border contracts, and we shall focus on the possible extension to disputes concerning domestic contracts. Since the issue of the extension of the Platform to domestic disputes is strongly connected with its extension to offline disputes, we shall also comment on the latter extension.

In section 3 we shall address some further issues that we believe are important in increasing added value of ODR Platform to European consumers.
2. THE SCOPE OF THE EUROPEAN ONLINE DISPUTE RESOLUTION PLATFORM

In this section we shall address the issue of the scope of the Platform by taking into account competence, subsidiarity and proportionality, as required by EU law. Our evaluation will include considering the added value of such extensions to the European consumer and their financial implications for the EU budget.

2.1. Legal basis (competence)

The main legal standard for assessing the legality of the two instruments is Art. 114 TFEU and Art. 5 TEU, as interpreted by the Court of Justice of the European Union (ECJ) in the context of ADR and consumer protection.

Art. 114 TFEU provides a legal basis (the necessary EU competence) for both the ADR Directive and the ODR Regulation. This is the “approximation of the laws” concerning “the establishment and functioning of the internal market” (114, 1), considering that “a high level of protection” is aimed at with regard to consumers (114, 2).

The legal basis established by Art. 114 TFEU covers the scope of the ODR Regulation as proposed by the Commission. The ODR Platform established by the Commission will improve the functioning of the Internal Market and increase the level of consumer protection, by facilitating access to effective ODR/ADR remedies for consumers, all over Europe. As it is argued in the recitals to the Regulation, the ODR Platform will strengthen confidence in the retail Internal Market and will open up new opportunities for business.

We need to establish whether this rationale also covers the extension of the Platform so that it also includes disputes concerning domestic online contracts. Since the extension of the Platform to domestic disputes is strongly connected with its potential extension to offline disputes, we will present our comments on the latter issue where appropriate.

It seems to us that there is a clear case for both extensions since such extensions would further improve the functioning of the market and consumer protection, facilitating access to effective ODR/ADR remedies also with regard to disputes concerning domestic online contracts and offline contracts. They would likewise establish a greater consistency between the two mechanisms of dispute resolution, which can often not so easily be separated in practice.

However, the existence of a EU competence alone is insufficient for legitimising a EU action, such as introduction of a EU-wide Platform, possibly having a broader scope. This being an area of shared competence, it is also required that the principles of subsidiarity and proportionality are respected (art. 5 TEU).

2.2. Subsidiarity

The principle of subsidiarity requires that the Union only engage in actions whose objectives can be better achieved at Union level. Therefore the principle is violated when the Union pursues objectives that can be better or equally achieved at state or regional level.

We agree with the assessment of the Commission that the proposed European ODR Platform satisfies the principle of subsidiarity. With regard to online cross-border contracts, being able to access ADR services in all Member States through a single EU-wide ODR Platform is undoubtedly the best option for the consumer. The alternatives, namely, having the consumer access directly the ODR functionality made available by particular ADR
providers in other countries or having the consumer access national ODR Platforms would not equally achieve consumer protection.

In fact, through a single ODR Platform consumers will save the information costs involved in determining which ODR Platform to access for their particular disputes, as well as the costs involved in learning how to use different Platforms. Moreover the EU Platform will foster consumers’ trust, by providing reliable information on the ADR services and contributing to ensure that their activity complies with the ADR principles.

We need to consider whether the principle of subsidiarity is also satisfied through the extension of the ODR Platform to disputes concerning domestic online contracts or offline contracts, or whether purely national solution could better meet consumers’ needs with regard to these classes of disputes.

We believe that the possibility to access ADR services through the Platform also with regard to such classes of disputes would indeed increase consumer protection more that national solution would do.

For this purpose we need to compare two possible states of affairs.

The first is the state of affairs which would result from the ODR proposal as it is now: consumer could use the EU ODR Platform only for accessing ADR with regard to disputes pertaining to online cross-border contracts.

Thus, all such entities will be accessible through the EU Platform (since they are bound to provide cross-border ADR, according to Art. 5 of the Directive). However consumers would be barred from submitting through the Platform any disputes pertaining to domestic or offline contracts. With regard to such contracts, consumers would need to access the relevant ADR entities through the websites of such entities, or possibly through sectoral or national ODR Platforms (not yet available).

The second state of affair would result from extending the scope of the ODR Platform also to disputes pertaining to domestic or offline contracts. This would mean that the ADR entities registered in the Platform could also be accessed through the Platform also for these classes of contracts. It seems to us that this solution would be beneficial with regard to both consumer protection and costs of implementation.

With regard to consumer protection we need to consider that the distinction between domestic and cross-border contracts may be difficult in various situations. The ADR Directive defines cross-border disputes as those “arising from the sale of goods or provision of services where, at the time the consumer orders the goods or services, the consumer is resident in a Member State other than the Member State in which the trader is established”.

This means that, in case the Platform were limited to cross-border contracts, in order to know whether they can use the Platform for a dispute, consumers would have to know whether their stay in a country qualifies as residence (which may not be obvious, for instance, when one is temporarily working in a foreign country), and whether the trader is established in their country of residence for the purpose of the contract. Moreover, consumers who have changed their residence would not be able to use the Platform for contracts they concluded when they were resident in the same country as the trader: these contracts would remain domestic ones, even if concluded online, since the cross-border or domestic nature of the contract is determined by residence of the parties at the time when “the consumer orders the goods or services” (Art. 4 of the ODR Directive). Thus disputes pertaining to purchases made by this consumer with the same trader would be subject to two different regimes: the consumer would be prevented from using the Platform with
regard to contracts stipulated before changing residence, while being allowed to use the Platform with regard to contracts stipulated after the change.

As the distinction between domestic and cross-border disputes is problematic from the consumer’s perspective, so is the distinction between offline and online contracts. As it has often been observed the Internet has merged with the physical world and most activities are done partly online and partly offline. Hence, consumers may see goods and their description online and then purchase them in physical shops; they may conclude the contract online and collect the goods in a shop; they may see the goods in the shop and then decide to make an online purchase contract, etc. In many cases it may be difficult, from the consumer’s perspective, to distinguish between online and offline purchases. If the Platform were limited to online contracts, the uncertainty on whether the contract is online of offline might prevent the consumer from using the Platform. Moreover, the exclusion of offline contracts from the Platform will prevent tourists and other travelling customers from benefitting from the Platform with regard to the offline contracts they concluded outside of their residence.

Let us now consider the issue of the costs, namely, whether allowing the EU Platform to be used also for domestic and offline contracts would involve costs lower than setting up similar services at the national level to address these classes of disputes. We do believe that this is the case. In fact, once the Platform is in place for cross-border online contracts, all ADR entities providing services to consumers will be accessible from it, and the fix costs for setting up the infrastructure will already have been covered. What is needed is just to allow the users of the Platform to access the ADR entities also for domestic and national disputes. This only involves the marginal costs for dealing with additional disputes. It would be much more expensive to duplicate or rather multiply the effort required for developing and maintaining the EU-wide Platform, by constructing similar Platforms in each Member State with the purpose of covering domestic and offline disputes. Thus, the EU-wide solution has the advantage that the fix costs are paid only once. In general, creating computer based services involve high fix costs (the cost of developing the infrastructure and ensure its functioning) and very low marginal costs (the cost of accommodating additional users). A fragmented infrastructure for accessing ADRs in Europe does not make much sense in the Internet era, where millions of users all over the world access the same online Platforms for e-commerce, auctions, social networks, etc.

2.3. Proportionality

Finally, we need to consider the issue of proportionality, namely, whether extending the scope of the ODR Regulation does not “exceed what is necessary to achieve the objectives of the Treaties” (art. 5 (4) TEU).

The proportionality of the ODR Regulation, limited to online cross-border contracts, passes the test. The case law of the ECJ concerning control of Union measures provides a relatively strict test to challenge and evaluate the legality of, for example, Community Directives. It was used extensively in the Tobacco advertising judgment as an argument for annulment. However in later judgments, the Court took a more cautious approach, insisting on the broad discretion of the EU to define the appropriate measure in areas which involve political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. This is the case here at stake.

In addition, we need to consider whether the extension of the Platform to domestic and potentially offline contracts does not go beyond what is necessary. This involves establishing that there is no easier or cheaper way of achieving the objectives aimed at
Assessing the scope of European Online Dispute Resolution Platform

through these extensions, and that the additional benefits for the protection of EU consumers outweigh the additional costs.

The advantage aimed at through the extension is to facilitate consumers' access to ADR, enabling consumers to bring also domestic and potentially offline disputes to ADR through the ODR Platform, freeing consumer from the burden of distinguishing different classes of disputes, and providing consumers and traders with equal opportunities to deal with ODR. The costs to be covered in order to achieve these purposes seem to be minimal indeed. As we observed above, the ADR Directive already obliges all ADR entities dealing with consumer contracts to be present in the ODR Platform (since all such entities must provide their services also for online cross-border contracts). What needs to be done is only to allow these entities to be contacted through the Platform also for domestic or potentially offline contracts: only the marginal cost of processing this request is at issue, a cost that may approach zero when no human intervention is needed on the Platform’s side.

So, it seems to us that no cheaper equally effective way exists to achieve those objectives. Finally we need to consider whether the advantages for consumers, to be obtained by extending the scope of the Platform, outweigh the costs of this extension. We think that this is indeed the case, and we would question that reducing the scope may yield beneficial effects on the cost-benefits balance. In fact, we need to consider that the economy of the Internet is driven by the so-called network effect: this means that the more an infrastructure is used the more it is useful for its participants. Coupled with the fact mentioned above (namely, that there are high fix costs and very low marginal costs), this means that only those infrastructures reaching a sufficient scale are able to persist and grow. This is the case for social-networks, online shops, auctions and repositories, but also, we believe, for a Platform like the one we are considering: if a larger number of users submits a larger number of disputes to the Platform, there will be the incentive for the ADR entities to have a richer presence and compete by offering better services through the Platform, a larger feedback will be generated, which will provide better information, etc. Thus by expanding the scope of the Platform it is likely that, in exchange for a very limited increase in costs, there would be both an increase in the number of users as well as an increase in the benefit each user would obtain from the Platform.

By artificially limiting the scope of the Platform to online cross-border dispute on the contrary, there is the risk that the Platform will fail to achieve the point where the network effect sustains its growth, so that the Platform only has a marginal role, attracting a limited circle of users. Consequently, given the fixed costs for the Platform’s development and maintenance, there would be a much higher cost per user. On the contrary, making the Platform available also for domestic and offline disputes may bolster the interest of the consumer, provide the needed incentive to use it, and thereby bootstrap its growth and reduce the cost per user and per dispute.

2.4. Conclusions on the scope of the Platform

With regard to the main issue submitted to us namely concerning the scope of the ODR Platform, our conclusions and recommendation are the following:

- The limited scope the Platform has in the Commission proposal (online cross-border disputes) meets the requirements of competence, subsidiarity and proportionality.
- However, also the extension of the ODR Platform to domestic contracts would be consistent with the requirement of competence, subsidiarity and proportionality. Moreover, this extension would provide substantial advantages with regard to
consumers’ protection, consumers’ trust, and promotion of the Internal Market and would entail very limited additional costs, namely, only those involved in using, for a larger set of case, the same ODR Platform, in the framework already provided for by the ADR Directive. Thus the benefits of the extension of the Platform to domestic contracts do clearly outweigh the costs. Also the extension to the ODR Platform to the offline contract would provide considerable consumer benefits and entail very limited costs.

- Thus, we recommend that the ODR Platform is made accessible also for consumer disputes concerning domestic contracts. The extension to offline disputes should also be considered.
Annex I. Further considerations

In the following we shall address some additional points that, while not being directly included in the question directed to us, are important with regard to adding value of the ODR Platform for European consumers.

**Traders’ complaint services through the ODR Platform**

The ADR Directive does not cover traders’ complaint services, which are explicitly excluded from the scope of the Directive by to Art. 2 (2).

We think that, however, the ODR Platform could (and should preferably) provide links to the online complaints service. This should be the case for traders who have indicated (possibly through the competent national authority, designated according to Art. 15 of the ADR Directive) that they wish to offer this service to their clients.

It should be clear, however, that customers are not obliged to go through the complaints service before starting the ADR process. Recourse to the trader’s service is just an option for the customer.

Thus, we believe that the ODR Platform should provide links to the traders’ online complaint services, while informing the customers that using such services is fully optional for them.

**Judicial remedies and the ODR Platform**

Providing any kind of judicial remedy is clearly beyond the scope of the ADR Directive and the ODR Regulation.

However, the Platform should inform the customer on the possibility of bringing the case to court.

Moreover as the national system allows for customers to submit online small claims (according to national laws implementing the Directive 861/2007), the Platform could also offer some support for that, such as computer support to the online preparation of the form for submitting the claim and to the identification of the competent judicial authority. In case such a support is offered by the Member State, a link to the service offered by the Member State should be rather provided.

In conclusion, we believe that the ODR Platform may support submitting small online claims to judicial authorities, if such a support is not provided at the national level.

**The inclusion of existing ADR bodies in the new system**

The two proposals constitute a major shift in policy, for a sectoral or subject-related approach to an all-comprising approach. The two sets of rules are meant to lay down common standards for all existing ADR bodies as well as for those to be established to cover areas where no such bodies exist.

There is a lot of resistance in Member States with well-established ADR bodies to accept that these are now submitted to the criteria set out in the ADR Directive. Some Member
States go as far as arguing that all vertical ADR bodies which have been established in particular in the aftermath of sectoral Directives, such as energy, telecommunication, transport, should be exempted from the scope of allocation.

First and foremost the ADR Directive and the ODR Regulation do not aim at abolishing these vertical sector-related bodies. Quite to the contrary is true. They can be fully integrated into the system. The two proposals do not claim that each ADR body must have an all-encompassing competence. This is made clear in Art. 5 (3) of the ADR Directive, which only requires that an ADR body having a residual competence is established, in addition to the existing sectoral bodies. Such a residual entity could work as a safety net dealing with all those types of disputes that do not match with the vertical sector-related bodies.

However, the two Directives submit literally all ADR bodies within the scope of application to the same standards as spelt out in Art. 1 ADR Directive. The Directive mentions only four ADR principles – impartiality, transparency, effectiveness and fairness, as Recommendation 2001/310/EC, whereas the Recommendation 98/257 has seven ADR principles – on top of the four: independence; legality; representation. However, one might read the draft proposals so as to be guided by the same principles, i.e., if the principles clearly spelt out in the Directive are to be read together and those enshrined in the two recommendations, which are referred to in the recitals. We would appreciate a clarification in that Art. 1 reiterates the ADR principles clearly, and the recital should clarify the connection between the 4 principles in the Directive and the 7 principles in the 1998 Recommendation.

It seems to us that the requirement of independence from the 1998 Recommendation is at least partially included in the principle of expertise and impartiality in the Directive (which requires that the persons in charge of ADR are not liable to be relieved from their duties without just cause and have no conflict of interest with either party to the dispute).

The principle of liberty is included in the principle of fairness, which requires that the consumer, before agreeing to a suggested solution, be informed that he has the choice as to whether or not to agree to a suggested solution. What is not included is the principle of legality, which requires that « The decision taken by the body may not result in the consumer being deprived of the protection afforded by the mandatory provisions of the law of the State in whose territory the body is established ». It should be clarified whether and to what extent this principle applies to non-binding suggestions of the ADR bodies.

We also think that it would be necessary to better clarify the implications of the principle of independence, as an aspect of impartiality. In this regard, the 1998 recommendation stated that "if the person concerned is appointed or remunerated by a professional association or an enterprise, he must not, during the three years prior to assuming his present function, have worked for this professional association or for one of its Members or for the enterprise concerned”, a constraint that would apply unless “the decision is taken by a collegiate body, giving equal representation to consumers and professionals”.

The crucial point is that all ADR bodies should be submitted to the same standards. By now the sectoral rules differ in whether Member States are obliged or not to introduce the ADR principles, in what the standards of the procedures are and in whether the Recommendation 98/257/EC applies. What is needed is that these differences are
overcome. The principle of independence is of particular importance here. By now the sectoral Directives leave it to the Member States whether the competent regulatory agencies or business organisations or joint bodies are in charge of ADR. Whilst this freedom of choice should be maintained, it should equally made clear that the principle of independence requires institutional safeguards, if the ADR management lies in the hands of a business or consumer organisation.

It should be recalled that the basic message of Alassini judgment of the ECJ exactly is that all sectoral ADR bodies have to comply with the seven principles of the Recommendation 98/257 (at least when the use of the ADR is obligatory). The two proposals should not remain behind the case law of the ECJ. Among the seven principles of the 1998 recommendation, the only one that can possibly be derogated by the informed and free choice of the consumer is the principle of legality. As a matter of fact, the importance of legality in the current proposal is subject to discussion between the Parliament and Commission, which will possibly lead to a revision of the current text of the proposals. We will be happy to comment on a revised version of the Directive once it is made publicly available.

In conclusion we believe that existing ADR bodies can participate in the system, but only if they comply with the ADR principles. We also believe that a clarification is needed concerning the content of such principles.

**Cybersettling through the Platform**

The Platform could offer cybersettling facilities. However, according to the subsidiarity principle, such services may also be offered by the Member States, or by ADR providers, or even by the trader's customer services.

Which cybersettling facilities to offer to the parties should be a choice of the customer's services or ADRs involved. In any case, the outcome of such facilities should not be binding upon the consumer, unless national laws allow for that (by admitting arbitration for consumer complaints). This means that the consumer who is unhappy with the outcome of the cybersettling system should still have the option of going to court.

In conclusion, we believe that the Platform should offer cybersettling facilities, but that the use of such facilities should be optional for the party, and the outcome should not be binding for the consumer.

**Information on consumers’ rights**

The Platform should include links to legal sources (Regulation, official document, cases, etc.) on consumers’ rights, consumer contracts, and consumer protection. However, such information will have probably a very limited importance to the consumer, who cannot reasonably use this material. In fact the consumer usually will not have the skills for studying the legal aspects of the case, and this would require an investment of energies usually unjustified by the importance of the case to the consumer.

Some simple introductory material on basic consumer rights can be more useful. It is even more important to provide customers with FAQs concerning the most frequent issues a consumer may address. The consultation of the FAQs may be guided by computer tools, directing the consumer to the most relevant item. It could also be investigated how AI tools could be used for directing consumers to possible solutions to their queries.
In conclusion, we believe that the Platform should provide information on consumers’ rights, especially FAQ supported by intelligent search.

**Distinguishing cases where consent by the trader is not necessary**

In the preamble to the ADR Directive, it is affirmed that while the Directive does not require that traders be bound to participate in an ADR process, or to accept its outcome, the Directive is without prejudice to any national rules making the participation of traders in such procedures mandatory or their outcome binding on traders. We believe that indeed any determinations on making ADR binding should be left to national laws, according to the principle of subsidiarity. It should be recalled that Member States’ laws differ considerably with regard to the admissibility of consumer arbitration, respectively to the requirements the parties have to meet if they want to engage in arbitration. The deviating opinions centre around the admissibility of arbitration clauses in standard consumer contract forms. In some countries these are legal, in others they are illegal and in the third group they are subject to the fulfilment of particular requirements. Not least the prevailing differences might have deterred the ECJ from taking a clear position on arbitration clauses under the Directive 93/13 on unfair terms (See ECJ Asturcom).

In various countries there are indeed Regulations that require certain traders to participate in ADR processes started by a consumer, and which make the outcome of such processes binding for the trader. A EU Regulation of this aspect would possibly violate complementarity and proportionality.

However, neither the ADR Directive nor the ODR Regulation address the bindingness of the suggestions of the ADR body. We believe that this is indeed correct.

The only issue we need to address here is whether the Platform should take into account that

- traders and (and sometimes also consumers) may be obliged to submit their cases to a certain ADR entity, according to national law, before going to court and
- traders may be bound to accept the outcome of the ADR process, without having recourse to judicial remedies after the decision

In this regard, we think that the Platform should inform the users, both traders of consumers on whether according to national law they are bound to submit to ADR processes of to accept their outcome, according to national laws.

**Languages in of the ODR Platform**

It is the common policy of the European Union not to engage in regulating the use and usability of language. However, the success of ADR/ODR in particular in cross-border disputes depends on whether consumers might speak and complain in their own language. Whilst the impact assessments as well as the explanatory memoranda underline the importance of language as a barrier to success, the two proposals pursue the rather reluctant and unsatisfying policy of the European Union. All the trader is obliged to do is to inform the consumer on the languages they may use in the ADR/ODR mechanism. One might argue that a consumer right to speak in his or her language is in the offing. So far the case-law and the respective EU rules had to handle less sensitive issues such as advertising or labelling in particular of foodstuff. But access to justice and access to ADR/ODR is much more crucial and more fundamental.
We would suggest to rethink the soft working of the language requirements and to pay more attention in particular to the link between the language in which the contract is concluded and in which the disputes could be solved. We would propose in more concrete terms that the language of the contract must be the language of ADR/ODR subject to an explicit deviating agreement between the parties.

In conclusion, we believe that the language of the contract should be the language of ADR/ODR, unless the parties agree to a different language.

**Offering case management tools through the ODR Platform**

We think that it is acceptable, and even opportune, that the ODR Platform offers to the ADRs entities the opportunity to use certain case management tools. However, this should only be an option for the ADRs entities, which may choose to use instead their own case management. The case management tools provided through the Platform can be particularly useful for such ADR entities that do not have developed their capacities yet (and for those countries where such capacities are most difficult to be found).

In conclusion, we believe that the Platform should offer ADR entities the option to use the case management tools in the Platform.

**Providing controls on performance of ADR bodies through the ODR Platform**

The Platform should collect information about the performance of the ADR entities. In addition to the information provided by the ADRs according to Art. 16 (2), the Platform itself should collect data on ADR processes and their outcome. It should allow users and traders to assess the performance, and aggregate this assessment into ratings of traders and ADRs. This could contribute to the release of trustmarks to traders and ADRs deserving them. A black list could also be provided to cover the worst abuses.

In conclusion, we believe that the Platform should support monitoring ADR bodies and assessing their performance, in particular by aggregating users’ evaluations.

**Publishing ADR decisions in binding and non-binding processes**

We think that all decisions should be published. This would provide a progressively increasing knowledge base of precedents, which could be useful for the parties, as well as for jurists and policy makers.

The names of the customers should be made anonymous, for the sake of data protection and participation in ADR. The names of the traders may be made public unless the concerned traders prefer to remain anonymous.

In conclusion we believe that all decisions should be published, possibly in an anonymous form.

**Providing incentives to participate and settle**

We think that the participation of consumers in ADR processes could be incentivised by having customers pay only a nominal fee, which is to be reimbursed by the trader in case the customer is successful, according to the ADR.
Also the participation of companies in ADR processes should be incentivised through low fees (which having all companies in the concern domains cover for a larger portion of the costs of the system).

In case the ADR terminates with a suggestion (which we think should preferably be the case), a further incentive for activating ADR or submitting to it would consist in the fact that the ADR has binding effects. Some degree of bindingness could be consistent with letting the unsatisfied parties access the judicial system. For instance a Regulation of expenses could establish that the party who did not activate the ADR cannot obtain reimbursement for its judicial expenses. Similarly, it may be established that the party who started judicial proceeding refusing to accept the suggestion of the ADR cannot recover his or her expenses, or even has to pay the other party’s expenses, in case the judge confirms the ADR suggestion (as according to Art. 91 of the Italian civil procedure code).

However, establishing such incentives would go beyond the remit of EU law. In particular, EU law cannot impose obligations on legal costs, which amount to an interference in the procedural autonomy of the Member States.

In conclusion we believe that there should be incentives to participate and settle, but that the Member States should establish such incentives.

**Supporting collaboration between the ODR Platform and consumer enforcement agencies**

The ODR Platform, run by the European Commission, will have a key role to play. Whilst the facilitators are meant to provide merely technical services, they may easily generate all sorts of information, on the institutional design of the ADR/ODR, on their availability, on the functionality, on the types of conflicts which come to ADR/ODR, on the key actors on both sides of the disputes, on the role and function of third parties in the dispute resolution and on how they are resolved. Like spiders in the web, the Platform facilitators are the only ones who may gain a full overview on what is going on in ADR/ODR in Europe. It is certainly not correct to argue that the facilitators are law enforcers; however, they are involved in law enforcement.

It seems, therefore, necessary to build institutional links between national enforcement authorities, be they public or private and the facilitators. The Regulation 2006/2004 has contributed to bring some uniformity in Europe, as each Member State is obliged to designate one competent body for consumer law enforcement. We would propose to consider giving the facilitators a role and a word in the enforcement procedure and we would equally propose to seriously study the ways and means in which the information on consumer complaints generated in the Platform may be used for European wide law enforcement. It might be useful to recall that the UK Financial Ombudsman is empowered to black list companies that do not manage their consumer complaints properly. It would be worthwhile for the EU to study more carefully these new forms of enforcement in the emerging economies, like e.g. Brazil, China.

In conclusion, we believe that a link should be established through the ODR Platform and national enforcement authorities, in particular those dealing with consumer law.

**Conclusions and recommendations regarding additional considerations**

With regard to the further issues we have taken the liberty to address, we have proposed the following suggestions for the development of the Platform:

- Enabling access to traders’ complaint services through the ODR Platform
Assessing the scope of European Online Dispute Resolution Platform

- Supporting submitting online small claims through the ODR Platform
- Including existing ADR bodies, but ensuring compliance with the ADR principles
- Providing cybersettling facilities
- Providing information on consumers’ rights
- Taking into account the bindingness of ADR for traders, as regulated by national law
- Providing ADR in the language of the contract unless the parties agree to a different language
- Offering case management tools through the ADR Platform
- Providing controls on performance of ADR bodies through the ODR Platform
- Publishing ADR decisions in binding and non-binding processes
- Providing incentives to participate and settle
- Supporting collaboration between the ODR Platform and consumer enforcement agencies
Annex II: Legal issues concerning the ADR Directive and the ODR Regulation

In the following we shall consider further the key legal issues we have identified with regard to the proposed Directive and Regulation on ADR/ODR and provide short answers.

The two set of rules, the Directive on ADR and the Regulation on ODR are based on a twofold premise, first that it is possible to clearly distinguish between ADR and ODR on the one hand and domestic/cross-border disputes on the other. This distinction impacts the design of the rules proposed by the European Commission.

The proposal on ADR sets out the ground rules. Art. 5 obliges Member States to make access to ADR available domestically and in cross-border issues. The preceding Recommendation 98/257/EC paved the way for such a step, although with the focus on domestic availability. It should be recalled, however, that in the last decade numerous sectoral Directives have imposed on obligation on the Member States to introduce sectoral and/or subject related ADR mechanisms, usually under reference to the Recommendation 98/257/EC. In Alassini the ECJ held that mandatory ADR in telecommunication disputes – as foreseen in the Italian rules to implement the universal services Directive - is compatible with EU law provided a) access to court is not barred and b) the mandatory ADR procedure complies with inter alia the seven principles set out in the Recommendation 98/257/EC. By this token the ECJ granted the Recommendation 98/257/EC a quasi-binding status, which according to the Court is being required by the European Convention on Human Rights and since 2000 by Art. 47 of the Charter of Fundamental Rights. Therefore, the seven principles already today define the benchmark against which Member States ADR mechanisms being introduced by the EU must be measured. The proposal on the ADR Directive could and should be seen as a means to give shape to the right to effective legal protection. Its major idea is to overcome the compartmentalisation of ADR mechanism in the Member States and to define a common benchmark on the legal outlook of ADR for all kind of consumer disputes.

The Regulation on ODR equally has its predecessor, this is Recommendation 2000/310/EC, as complemented by the EEC-net and the FIN-net. The ODR proposal introduces an electronic Platform for ODR disputes. Its workability depends on the existence of either particular national ODRs/ADRs which are ready to handle online dispute. Less visibly the draft Regulation on ODR is deeply connected to the project on the introduction of a common European Consumer Sales Law (CESL). Commissioner Reding intended to publish both the draft CESL and the ODR mechanism together. As this failed, the ODR proposal is intertwined with the ADR proposal, but not with CESL, perhaps with the exception of the choice of the instrument – Regulation in contrast to a Directive. To our mind this deficiency should be remedied. It should be considered how the ODR proposal could be brought closer to CESL. The introduction of a common sales law in b2c transactions does not make much sense without the availability and the access to ODR. What is needed in concreto is a link between the famous blue-button in CESL and the opt-in procedure in ADR/ODR. However, it was not our mandate to come up with concrete solutions.

What matters in our context is the problematic divide between ADR/ODR and domestic/transnational. Seen through the lenses of the consumer in whose interest the two pieces of law are discussed, the dividing line might be far less evident. Therefore, our comments are guided by the overall philosophy that the links between ADR/ODR and domestic/cross-border should be strengthened provided that the EU has the competence to do so. We are convinced that this is the case.
Just like in CESL a number of Member States have raised concerns whether Art. 114 TFEU is the appropriate legal basis and whether the drafts meet the subsidiarity and the proportionality requirement. The three issues, competence, subsidiarity and proportionality have to be kept distinct. We will address these issues in the following, before moving into more specific aspects of the ADR/ODR instruments.

**Whether the ADR Directive and the ODR Regulation meet the criterion of competence according to Art. 114 TFEU and Art 5 TEU**

The legal basis of the two proposals is Art. 114 TFEU on the (broad) Union powers relating to the establishment and functioning of the Internal Market. In the explanatory memorandum to the ADR proposal (under 3.2. subsidiarity principle), this basis is justified because the:

“The development of a well-functioning ADR system within the Union, built on existing ADR entities in the Member States and respecting their legal traditions, will strengthen consumer confidence in the retail internal market, including in the area of e-commerce. It will also open up new opportunities for businesses. Action by Member States alone is likely to result in further fragmentation of ADR, which in turn would contribute to unequal treatment for consumers and traders in the internal market and create diverging levels of consumer redress in the Union. Action at Union level, such as proposed, should provide European consumers with the same level of protection and promote competitive practices amongst businesses, thus increasing the exchange of products or services across borders.”

In the ODR proposal (exp. Memo under 3.2.) the language is the following:

“The development of an EU wide ODR system for cross-border online disputes, built on existing ADR schemes in the Member States and respecting their respective rules of procedure, will strengthen confidence in the retail Internal Market and will open up new opportunities for business.”

At the same time, the Commission insists that it wants to guarantee a high level of consumer protection as required by par. 3 of Art. 114 TFEU (see recital 31 and Art. 1 ADR). The questions that arise differ with regard to the two proposals:

In ADR the concern is the extension of the scope to national and cross-border cases. Whilst the EU has a particular competence with regard to access to justice in cross-border litigation (according to Art. 81 (2) e), there is no such competence with regard to the Internal Market. The ADR proposal concerns enforcement which lies in the hands of the Member States. The ECJ has underlined in a whole series of discussions the procedural autonomy of the Member States who are in principle free to design the appropriate mechanism, provided they respect the principle of equivalence, effectiveness and effective legal protection (see Alassini). However, the EU benefits from an annex competence under Art. 114 as far as the Regulation of substantive legal issues require the introduction of particular remedies, e.g. ADR mechanisms. This is the reason why sectoral Directives in the field of consumer law provide for specific remedies (e.g. Dir. 93/13 on unfair terms or Dir. 2005/29 on unfair commercial practices). The two proposals are in a way indirectly connected to a number of EU Directives, such as the Directive on Consumer Sales (99/44), on E-commerce (2000/31), on Consumer Rights (2011/83), in so far there is a link to the substance of European consumer law. However, they go beyond in that they cover also non-harmonised areas of consumer law, which is particularly relevant for the broad area of services. The argument the Commission puts forward to justify the broad scope of
application is the enormous variety of ADR mechanisms in the Member States, as well as their overlapping or their often unclear scope. Therefore in the field of non-harmonised consumer law the stand-alone character of the two measures is much more obvious and so is the competence question. So far there is only one precedent in the area of consumer law, where the European Union adopted procedural rules on enforcement covering domestic and cross-border issues and that is Directive 98/27/EC on injunctions what came Directive 2009/22 without any major amendments. This Directive does claim not to introduce new remedies – what is subject to discussion, but to be limited to establish mutual recognition of standing of consumer institutions not only but in particular in cross-border litigation. Although the scope of Directive 2009/22 is much narrower than the ADR proposal, one might understand the Directive as a precedent in order to underpin that the EU has competence to oblige Member States to introduce ADR mechanism not only in cross-border but also in national disputes. This does not mean that consumers or traders are obliged to refer their complaints to the ADR body. In so far the parties to the conflict remain free to decide.

The ODR proposal is limited to cross-border issues. This would suggest reference to Art. 81 TFEU (judicial cooperation), as providing the limited legal basis needed to this effect. However, we believe that the reference to Art. 114 TFEU (approximation of laws) supports a broader scope for the Regulation, namely, that it should cover both national and cross-border disputes. In fact, it is not evident why the European Commission decided to limit the scope of the ODR Regulation to cross-border issues. There are good arguments in favour of extending the scope to domestic disputes, as we shall show in the following. There is a second layer in the choice of the instrument. The European Commission favours the adoption of a Regulation over a Directive. It has to be recalled, however, that the EU used Art. 114 TFEU (then Art. 95) as the legal base for adoption the Regulation 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws.

In conclusion, we believe that both the ADR and the ODR proposal find a sufficient legal basis in art. 114 TFEU, which provides EU with the competence to regulate the matter.

**Whether the ADR Directive and the ODR Regulation meet the criterion of subsidiarity according to Art. 114 TFEU and Art. 5 TEU**

*Subsidiarity:* Given that competence of the EU to adopt the two proposals can be established under Art. 114 TFEU, such instruments still have to respect the subsidiarity and proportionality criteria under Art. 5 TEU. This is the case because such competence relating to Internal Market and consumer protection matters is not an exclusive, but merely a shared one under Art. 4 (2) TFEU. Several national parliaments have objected to the Commission proposal expressly based on the argument that it does not meet the subsidiarity and proportionality requirements of the Treaty.

According to subsidiarity, the Union shall only engage in actions whose objectives can be better achieved at Union level. With regard to the subsidiarity argument, it should be recalled that it does not concern the existence but rather the exercise of EU competence (“...shall act only and insofar as...”). It limits the current competences of the Union and wants to leave room to Member States to achieve similar objectives on their own. It is difficult to argue that the objectives of the two proposals can better be achieved by Member State action. The major reservations from Member States' parliaments result from the extension of the ADR proposal to purely domestic conflicts. However, the domestic and the cross-border disputes cannot be so clearly distinguished from each other. This is particularly apparent when we take the consumer’s perspective. The consumer may not
know whether he or she is dealing with a national trader or with a trader from another Member State, and usually would not care, not knowing what difference it makes. Consider for instance the very common case of a national of a Member State who is making online purchases from traders of his own country as well as from traders of the country where he or she is currently located: quite a complex legal analysis would be required to establish which ones of these contracts qualify as national or cross-border ones.

While the ADR Directive concerns all e-commerce disputes, both national and cross-border ones, adopting the approach (we consider to be preferable), the ODR Regulation only addresses cross-border disputes. It seems to us that this difference is a serious defect in the design and the interplay of ADR/ODR. The parallel to Directive 98/27 (latter 2009/22) is obvious. The ADR institutions form the basis on which cross-border dispute settlement is built, via ADR or via ODR. An institutional separation by ADR and ODR (by providing the latter with a much more restricted scope) would not only endanger the objective of the ADR proposal; it would most prominently endanger the ODR proposal that relies on national ADRs as primary addressees.

The ECJ, when asked to rule on a Community, now Union measure, under the subsidiarity principle, usually takes a “light judicial approach.” That is to say, it will allow the EU legislator a wide margin of discretion. Its pronouncement in the Tobacco manufacture judgment of 10 Dec. 2002 on the one side made clear that the Community does not have exclusive competence to avoid distortions of competition under the Internal Market proviso. Nevertheless, the Directive was deemed to be justified because it avoided different rules for the marketing of tobacco products and at the same time achieved a high level of health protection: Such an objective cannot be sufficiently achieved by the Member States individually and calls for action at Community level ... (par. 182).

Thus we think that in the same way the requirement of subsidiary not only is satisfied by the proposed ADR Directive (which already covers both national and cross-border dispute), but would be equally satisfied by an extension of the scope of the ODR Directive, so that it also covers cross-border disputes.

In conclusion, we believe that the principle of subsidiarity is satisfied by the ADR Directive and the ODR Regulation. It would also be satisfied if the scope of the ORD Regulation were extended to cover also national disputes.

**Whether the ADR Directive and the ODR Regulation meet the criterion of proportionality according to Art. 114 TFEU and Art. 5 TEU**

Somewhat more complex may be the question of whether the proposals comply with the proportionality criterion, which requires that the action of the Union does not “exceed what is necessary to achieve the objectives of the Treaties”, and provides the “necessity” test concerning “content and form” of Union action. As a starting point, the case law of the ECJ concerning control of Union measures under this principle should be remembered: unlike subsidiarity, it provides a relatively strict test to challenge and evaluate the legality of, for example, Community Directives. It was used extensively in the Tobacco advertising judgment as an argument for annulment. In the above mentioned judgment, the Court took a more cautious approach, insisting on the broad discretion of the EU legislature: “Consequently, the legality of a measure adopted in that respect can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue (par. 123).”

The Court has recognised that “the Community legislature must be allowed a broad discretion in areas which involve political, economic and social choices on its part, and in
which it is called upon to undertake complex assessments”, even though it was bound by the proportionality principle according to Art. 5 (2) TEU.

To some extent, the proposals seem to pay respect to the necessity test despite providing for a comprehensive instrument covering most matters of dispute resolution. There remains a broad area where (different) Member State laws may still be applicable, despite the rather detailed requirements on expertise, impartiality, transparency, effectiveness and fairness, e.g. on the principle of legality – currently Art. 7 (1) (g), which seems to be subject to a political debate between the Commission and the Parliament - and on institutional independence.

However, one might wonder whether Art. 5 fully complies with the proportionality requirement. Par. 1 lays down the basic obligation of the Member States to make ADR mechanisms available. The way in which the consumers contact the ADR body remains for themselves to decide, via electronic means or via personal contacts. Par. 2 then obliges the Member States, i.e., in the end the ADR bodies, to have a website and to enable parties to exchange information with them via electronic means.

At least when literally interpreted this provision seems to concern all ADRs, regardless of whether they operate with regard to consumer disputes. The European Commission has not made clear why each and every ADR body should be obliged to make this ODR contact available. An ADR body might very well decide to offer its services just through personal contacts. Is it really necessary for the overall system the European Commission intends to establish via the two proposals that ADRs must be accessible via electronic means?

We think that given the need to provide EU-wide access to ADR in consumer disputes such a requirement is justified with regard to ADR entities which offer their services with regard to consumer disputes (who could profit of the support of the ODR Platform, in case they do not have their own tools for case management), but may be excessive with regard to ADR entities providing their services in other domains (e.g., in family disputes). The latter entities may well choose to work only through face-to-face interactions.

In conclusion, it seems to us that also the ODR Regulation satisfies the proportionality requirement, since there is no equally effective way to ensure a EU-wide access to the existing ADRs in e-commerce transactions.

This principle would also be satisfied if the scope of the ODR Regulation were extended to cover also national disputes or offline disputes.
POLICY DEPARTMENT A
ECONOMIC AND SCIENTIFIC POLICY

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