Encouraging Online Dispute Resolution in the EU and Beyond- Keeping Costs Low or Standards High?

By Julia Hörnle


Abstract

The main focus of this article is to analyse the new proposed EU regime supporting and regulating ODR against the background of the existing mechanisms for the resolution of cross-border disputes through ADR (and in particular through the network of European Consumer Centres (ECCs)). However this has to be placed in the context of the discussions of and proposals for ODR at UNCITRAL, which this article will discuss first. By comparing and contrasting the UNCITRAL proposals with those of the EU, the differences in approach will become evident. This is crucial for understanding how ODR may function in the EU. Finally, this article will pinpoint where and how the EU Proposals should be improved, in particular as regards the potential for co-operation between public consumer protection authorities and private ADR bodies interacting through the ODR platform. However such co-operation would raise serious data protection issues, which this Article also analyses, suggesting appropriate safeguards. It concludes by evaluating the Proposals and assessing their real contribution to the EU consumer acquis.

1. Introduction

European consumer protection law is currently being widened to add Online Dispute Resolution (ODR) into the toolbox of European consumer redress. The European institutions are currently adopting a Directive on ADR\(^1\) and a Regulation on ODR\(^2\) based on Article 169 (1) and 169 (2) (a) of the TFEU.

Cross-border Online Dispute Resolution (ODR) has extensively been discussed at least since 2000 in *academic*, theoretical literature as a kind of magic bullet solution for redress in international e-commerce, particularly for consumer disputes at the lower value end.\(^3\) Now, some twelve years later, ODR has been firmly established on the agenda of policy makers:

---

\(^1\) COM (2011) 793 final

\(^2\) COM (2011) 794 final

\(^3\) See E Katsh, J Rifkin *Online Dispute Resolution* (Jossey-Bass San Francisco 2001); C Rule *Online Dispute Resolution for Business* (Jossey-Bass San Francisco 2002); O Märker, M Trenel *Online Mediation* (Sigma Berlin 2003); G Kaufmann-Kohler, T Schultz, *Online Dispute Resolution* (Kluwer Law International 2004); J Katsh, *Alternative Online Dispute Resolution* (PhD Thesis Faculty of Law, University of Oslo 2008); J Hörnle, *Cross-border Internet Dispute Resolution* (Cambridge University Press 2009); P Cortes *Online Dispute Resolution for Consumers in the European Union* (Routledge 2011)
both the EU and UNCITRAL have recently issued proposals on creating ODR systems for solving e-commerce disputes.

The main focus of this article is to analyse the new proposed EU regime supporting and regulating ODR against the background of the existing mechanisms for the resolution of cross-border disputes through ADR (and in particular through the network of European Consumer Centres (ECCs)). However this has to be placed in the context of the discussions of and proposals for ODR at UNCITRAL, which this article will discuss first. By comparing and contrasting the UNCITRAL proposals with those of the EU, the differences in approach will become evident. This is crucial for understanding how ODR may function in the EU. Finally, this article will pinpoint where and how the EU Proposals should be improved, in particular as regards the potential for co-operation between public consumer protection authorities and private ADR bodies interacting through the ODR platform. However such co-operation would raise serious data protection issues, which this Article also analyses, suggesting appropriate safeguards. It concludes by evaluating the Proposals and assessing their real contribution to the EU consumer acquis.

2. Definition of ODR

Before doing so, and by way of background, it may be helpful to explain what ODR means. In a nutshell, ODR is dispute resolution outside the courts, based on information and communications technology and in particular, based on the power of computers to efficiently process enormous amounts of data, store and organise such data and communicate it across the internet on a global basis and with speed.4 As a concept ODR arose from, and is based on Alternative Dispute Resolution (ADR) which refers to extra-judicial dispute resolution processes such as arbitration and mediation. However, in addition to processes such as online mediation and online arbitration, ODR has developed innovative online processes, such as mock trials5 (where a ‘jury’ of online volunteers give a verdict based on a set of facts as a form of crowd sourcing6) or blind-bidding negotiation7 techniques (where each party makes successive monetary settlement offers, which are not disclosed to the other party and lead to a settlement if and when the bids come within close reach of each other).8

---

4 J. Hörnle, Cross-border Internet Dispute Resolution (Cambridge University Press 2009) 75; G Kaufmann-Kohler, T Schultz, Online Dispute Resolution (Kluwer Law International 2004) 7
5 www.ejury.com and www.virtualjury.com
7 Called automated negotiation in the UNCITRAL terminology
8 See further J. Hörnle, Cross-border Internet Dispute Resolution (Cambridge University Press 2009), Chapter 5; G Kaufmann-Kohler, T Schultz, Online Dispute Resolution (Kluwer Law International 2004) 10-21; P Cortes Online Dispute Resolution for Consumers in the European Union (Routledge 2011) 52-54
UNCITRAL’s draft Procedural Rules define ODR as follows: online dispute resolution is a mechanism for resolving disputes through an IT based platform and facilitated through the use of electronic communications and other information and communications technology.9

3. UNCITRAL’s Proposals

This section will briefly analyse the UNCITRAL initiative for comparison purposes.

The UNCITRAL draft Procedural Rules envisage a three stage procedure: (i) automated/assisted negotiation between the parties without a human neutral, which may include blind-bidding techniques (ii) mediation/conciliation and (iii) arbitration leading to a decision which can be enforced.10 If the dispute is not solved by negotiation within 10 calendar days the procedure will automatically move on to the next stage, conciliation.11

The main thrust of the UNCITRAL initiative is to establish an internationally accepted and trusted, normative framework for ODR.12 This is an ambitious and far-reaching project which will establish a new paradigm for dispute resolution for e-commerce, in a similar way that the Uniform Dispute Resolution Procedure adopted by ICANN has changed the paradigm for disputes arising out of the conflict between domain names and trademarks.

In establishing this normative framework, UNCITRAL is planning to draft the following six ‘model’ rules and guidelines: (1) Procedural Rules for ODR, (2) Guidelines for Neutrals13, (3) Minimum Standards for ODR Providers, (4) Supplementary Rules for ODR Providers, (5) Substantive Legal Principles for Resolving Disputes and (6) Cross-border Enforcement Mechanisms.14 To date UNCITRAL has commenced its work on the Procedural Rules for ODR but has not yet produced drafts of any of the other rules and guidelines.15

Of particular significance are the intention to draft Substantive Legal Principles and Cross-border Enforcement Mechanisms. Their significance is that these instruments address the three main challenges16 for the success of ODR as a ‘magic’ bullet solution for providing

---

9 Draft Article 2 (6), UNCITRAL Working Group III (Online Dispute Resolution) Note by the Secretariat 28. February 2012
10 A/CN9/WG III/WP112 UNCITRAL Working Group III (Online Dispute Resolution) Note by the Secretariat 28. February 2012, Paras 5 and 46
11 Article 5 (2) draft Procedural Rules A/CN9/WG III/WP112 UNCITRAL Working Group III (Online Dispute Resolution) Note by the Secretariat 28. February 2012
12 As to the trust argument, see further the discussion in M Philippe “Now where do we stand with online dispute resolution (ODR)?” (2010) International Business Law Journal 563-576, 566
13 Ie the person in charge of dispute resolution, mediators or arbitrators
14 Preamble 2 draft Procedural Rules and A/CN9/WG III/WP112 UNCITRAL Working Group III (Online Dispute Resolution) Note by the Secretariat 28. February 2012, Para 3
15 But see the Canadian delegation’s proposal of principles for neutrals A/CN9/WGIII/WP114 of 12. March 2012
redress in e-commerce disputes: (1) incentivising the parties to agree to participate in ODR, (2) according to which (national consumer protection?) law the dispute is evaluated and (3) guaranteeing that the parties comply with a settlement or decision, or in other words, ensuring enforcement.

UNCITRAL’s initiative attempts to move away from domestic consumer protection law and embraces a form of transnational consumer protection law (in the shape of the Substantive Legal Principles) yet to be developed. UNCITRAL’s initiative also attempts to steer clear from private international law and using the courts for enforcing ODR, instead relying on private enforcement mechanisms as far as possible. What shape these enforcement mechanisms will take is as yet unclear. However, payment providers such as credit card issuers, payment intermediaries such as Paypal and other internet intermediaries, such as online platforms and web 2.0 services hosting and organising content, domain name registrars and search engines may also have to play a role as the gate-keepers of the internet.

UNCITRAL’s proposals are informed by the assumption that ODR will provide more effective, efficient, speedy and low-cost dispute resolution in cross-border e-commerce than the courts can provide, but that ODR has remained stilted in its growth for the reason that disputants are not aware of the concept nor of its benefits and do not use or trust ODR and that therefore it has been difficult for ODR providers to build successful schemes.

UNCITRAL’s initiative is informed by the belief that a clear and authoritative legal framework in the form of rules promulgated by UNCITRAL will overcome this problem and hence kick start activity in the ODR field.

Another important observation about the UNCITRAL proposals is that they are not primarily driven by consumer protection concerns. Naturally, UNICTRAL approaches the ODR framework from the perspective of its previous work on arbitration and conciliation. An example for this is draft Article 7 (4) which provides that each party shall have the burden of proofing the facts he or she relies on as part of the claim or defence. Such a provision may not be suitable in a B2C transaction, where the business frequently has more information and greater resources. Consumer protection law therefore, frequently reverses the burden of proof. This has been pointed out by members of the Working Group in May 2012.

---

17 See A/CN9/744 UNCITRAL Report of Working Group III (Online Dispute Resolution) Meeting May 2012 para 120
18 See further J Goldsmith and T Wu Who Controls the Internet? (Oxford University Press 2008) 68-84; J. Hörnle, Cross-border Online Gambling: Law and Policy (Edward Elgar, Cheltenham 2010) 111-139
19 With the exception of ODR provided by some of the large online marketplaces such as Amazon and eBay
20 See A/CN9/WGIII/WP112/Add1 Addendum to the Note of the Secretariat of 28. February 2012
21 See for example Directive 1999/44/EC on the Sale of Consumer Goods and Associated Guarantees of 25 May 1999 L171/12 of 7. July 1999 as amended by the Consumer Rights Directive 2011/83/EU, Article 5 (3) provides that any defect which becomes apparent within six months of the sale of the goods is presumed to have existed at the time of the sale
22 A/CN9/744 UNCITRAL Report of Working Group III (Online Dispute Resolution) Meeting May 2012, Para 111
Given that UNCITRAL does not concentrate on consumers, the Procedural Rules do not make a distinction between B2B, B2C and C2C disputes and apply to all three types of disputes. The Procedural Rules will be model rules which the ODR providers and the parties may decide to use on a voluntary, contractual basis. This of courses again raises the question whether a pre-dispute arbitration agreement in a consumer contract is valid, a question to which different national laws provide different answers.

Under one proposal, the UNCITRAL Working Group has also stated that its normative framework has no intention so supersede national mandatory laws. In other words, domestic laws invalidating pre-dispute arbitration clauses in consumer contracts used against a consumer would be applicable. The idea is that the UNCITRAL rules are applied to a dispute by contractual agreement of the parties only to the extent that the domestic law allows such rules to be enforced. The latest discussions proposed that the following article be included in the draft Procedural Rules: “The Rules shall not apply where the law of the buyer’s state of residence provides that agreement to submit disputes within the scope of the ODR Rules are binding on the buyer only if it was made after the dispute has arisen and the buyer has not given such agreement after the dispute has arisen or confirmed such agreement (...)”.

Under an alternative proposal, the UNCITRAL discussions seem to suggest that as long as the consumer has given express and informed consent to a pre-dispute arbitration clause, it should be valid.

Which one of these two approaches is going to prevail remains to be seen as the Procedural Rules crystallize.

The Working Group has also stated that it is not the objective of the UNCITRAL initiative to lead to law harmonisation or law approximation or to change domestic laws on a global basis. Instead the purpose of the UNCITRAL instruments will be to provide practical avenues of redress for small-value disputes where currently none exists.

It is also important to point out that the UNCITRAL initiative is designed for cross-border low-value, high volume disputes, which are mass claims not involving complex factual or

---

23 Article 1 of the draft Procedural Rules and also A/CN9/WG III/WP112 UNCITRAL Working Group III (Online Dispute Resolution) Note by the Secretariat 28. February 2012, Para 5
24 A comparative analysis of the validity of consumer arbitration clauses is complex and merits an article on its own and is therefore outside the scope of this article, but see J Hörnle, Cross-border Internet Dispute Resolution (Cambridge University Press 2009) 171-185 and P Cortes “Building a Global Redress System for Low-Value Cross-Border Disputes: An (European) Appraisal of the UNCITRAL Rules on Online Dispute Resolution” (forthcoming article) Section III 2
27 A/CN9/744 UNCITRAL Report of Working Group III (Online Dispute Resolution) Meeting May 2012, Para 15
legal issues.\(^28\) The Working Group has decided not to define the terms “cross-border low value and high volume disputes” but intends to provide more guidance in a commentary.\(^29\)

Therefore, the key question, yet unanswered is: what disputes are low value and high volume? The problem with the concept is that it is an entirely subjective assessment relative to the wealth and priorities of the claimant. One claimant’s low value claim may be another claimant’s high value claim, especially in cross-border disputes involving countries with varying living standards.

This then raises the question of how does due process fares under the Rules. Arguably given the focus on low-value, high-volume cases, due process (perhaps correctly) has a low priority.

A first example for the lack of focus on due process are the provisions on the notification of the respondent about the claim brought against him or her. It is clearly fundamental in any dispute resolution system that a respondent is notified of any claims, so that the respondent has an opportunity to defend himself or herself. A lack of diligence in notification may mean that a decision by default is reached, depriving a defendant of the opportunity to defend himself/herself. Therefore, most dispute resolution systems require the claimant to exercise a degree of due diligence in serving the claim and notifying the respondent. Clearly in e-commerce, in a transaction concluded online over the internet, it is even more tricky to track a respondent compared to the offline world. Therefore, the UNCITRAL Procedural Rules simply state that: “the electronic addressee(s) for communication of the notice by the ODR provider to the respondent shall be the addressee(s) of the respondent which has [have] been provided by the claimant”.\(^30\) This does not impose any obligation on the claimant or the ODR provider to ensure that he or she gives the correct email address or carry out due diligence by, for example conducting a Whois search.\(^31\) This may not be an issue in the majority of the ‘run of the mill’ e-commerce type cases, which the ODR rules are designed to cater for, but illustrates the ‘rough justice’ nature of the proposal.\(^32\)

A second example for the lack of focus on due process are the provision ensuring that the time-limits under the draft Procedural Rules are squeezed tight: the respondent has seven

\(^{28}\) Preamble 1 to the draft Procedural Rules and A/CN9/716 UNCITRAL Report of Working Group III (Online Dispute Resolution) December 2010, Para 115

\(^{29}\) A/CN9/WG III/WP112 UNCITRAL Working Group III (Online Dispute Resolution) Note by the Secretariat 28 February 2012, Para 9

\(^{30}\) Article 3 (3) of the draft Procedural Rules A/CN9/WG III/WP112 UNCITRAL Working Group III (Online Dispute Resolution) Note by the Secretariat 28 February 2012

\(^{31}\) This concern has also been raised in see A/CN9/744 UNCITRAL Report of Working Group III (Online Dispute Resolution) Meeting May 2012 para 74 and is reflected in draft Article 7 (6) obliging the neutral to ensure that the notification has been received by the respondent, para 116

\(^{32}\) This was further discussed in the latest UNCITRAL meeting in May 2012 adding a Proposal that the address for notification should be the address agreed at the time when the ODR agreement is made- this may be a more sensible approach, see A/CN9/744 UNCITRAL Report of Working Group III (Online Dispute Resolution) Meeting May 2012 para 68
calendar days to respond to the claim.\textsuperscript{33} Compare this, by way of example, to an existing, national, highly successful (consumer) ODR system, namely the Dutch Consumer Complaints Boards, where the respondent has four weeks to prepare a defence.\textsuperscript{34}

While internet communications technology may only take minutes or seconds to travel around the globe, the human effort involved in preparing a response and gathering relevant evidence may take significantly longer, particularly where the respondent is temporarily unavailable or needs to obtain information from a third party. Such short deadlines are therefore likely to lead to unfairness. The Working Group itself pointed this out and recommended that the deadlines be handled liberally to prevent unfairness to the respondent.\textsuperscript{35}

The other side of the coin is, if payment intermediaries are used to enforce claims and therefore payment (for goods or services) have to be held in escrow during dispute resolution, then timeframes have to be quick in order to enable payment flows with which sellers can cope. This can be illustrated by a case where a buyer unjustly claims that goods are defective, and therefore if the seller does not receive payment until the dispute has been solved, and if the dispute resolution takes three months to complete, this may cause problems to the seller’s cash-flow.

A third example for the lack of focus on due process in the draft Procedural Rules are the provisions on the language in which the dispute resolution is conducted. The Rules currently provide that both the claimant and the respondent may select their preferred language, but crucially they do not provide what would happen if these choices do not match.\textsuperscript{36} However in practice this may not be an issue for the types of disputes envisaged, as the claim form and the response should be multilingual and automated.

The UNCITRAL initiatives took as the starting point for their deliberations, eBay’s dispute resolution procedure and the procedures developed by the major credit cards for Chargeback.\textsuperscript{37} The Chargeback procedures of the major credit card providers rely on sets of automated, standardised and coded electronic messages between the credit card issuer and

\begin{footnotesize}
\textsuperscript{33} Draft Procedural Rules Article 4 (3) A/CN9/WG III/WP112 UNCITRAL Working Group III (Online Dispute Resolution) Note by the Secretariat 28. February 2012
\textsuperscript{34} C Hodges, I Benöhr, N Creutzfeldt-Banda Consumer ADR in Europe (Hart Oxford 2012) 142; likewise in the recent English case on the disclosure of the addresses of internet subscribers who are accused of copyright infringement by peer-to-peer file sharing to copyright owners the Court held that to give the consumer respondent 14 days to respond to an allegation of copyright infringement is not sufficient and a breach of the principles of fair justice- Mr Justice Arnold suggested that a deadline for response of 28 days is more suitable, see Para 29 of Golden Eye International Ltd v Telefonica [2012] EWHC 723 (Ch) 26. March 2012
\textsuperscript{35} A/CN9/WG III/WP112 UNCITRAL Working Group III (Online Dispute Resolution) Note by the Secretariat 28. February 2012, Para 31
\textsuperscript{36} A/CN9/WG III/WP112 UNCITRAL Working Group III (Online Dispute Resolution) Note by the Secretariat 28. February 2012, Para 38
\end{footnotesize}
the merchant’s bank, involving Chargeback reason codes such as “merchandise defective”, “merchandise not as described”, “cardholder cancelled recurring transaction”, “goods or services not provided or not delivered”.  

For this reason the Working Group is considering whether to limit the grounds on which claims can be brought to certain typical heads such as those described in the previous paragraph and to limit the remedies available. It considered whether “Annex A should enumerate the grounds on which claims can be made and the available remedies. In a global cross-border environment for resolving low-value high-volume cases it may be necessary to limit the type of cases to simple fact-based claims and basic remedies, to avoid the risk of overloading the system with complex cases (...).”

The idea behind the proposals is that the resolution of such ‘simple’, run of the mill disputes can be achieved with a high degree of automation, quickly, in an efficient manner and cost-effectively, using automated forms and responses for communicating the claim, the defence and related evidence. Over time, as the system learns from the experience of a large volume of cases, more complex situations can be build into the communication and dispute resolution patterns. However this rough-justice approach is only justified in low-value, high-volume cases, hence it is all the more important that (i) the application of the Rules is clearly defined and (ii) redress to the courts for consumers is still possible (including collective action, where available), unless the consumer has agreed to arbitration after the dispute has arisen. In low-value, high-volume claims it is unlikely that consumers will regularly resort to litigation in any event.

UNCITRAL therefore takes a pragmatic approach to dispute resolution, moving away from law harmonisation or approximation, and focusing on a cost-effective procedure for high-volume, low value disputes. It considers consumer protection and private international law of secondary importance, justifying this approach with the nature of disputes covered by the Proposal. Its weakness however is that its scope (high-volume low value disputes) is ill-defined and this raises the question whether the initiative will receive the trust of the parties. This can be contrasted with the approach in the EU, which will be discussed next.

4. The European Union Proposals

As part of the Digital Agenda announced in 2010 and the Single Market Act communicated in 2011 the Commission has taken action in this field, promulgating the twinned Proposals for a Directive on ADR and for a Regulation on ODR published on 29. November 2011.

---

39 A/CN9/WG III/WP112 UNCITRAL Working Group III (Online Dispute Resolution) Note by the Secretariat 28. February 2012, Para 36
The main thrust of the EU Proposals is twofold (1) they aim to ensure that there is an ADR scheme, complying with certain minimum standards, for each type of B2C dispute in the EU regardless of the sector in which the business operates and (2) they create an ODR platform for cross-border B2C e-commerce disputes to ensure that such disputes can be solved efficiently.

While the EU institutions (like UNCITRAL) regard ODR as an important mechanism for solving cross-border e-commerce disputes, the EU proposals have as their central focus and aim the improvement of consumer protection (unlike UNCITRAL). In fact, as will be seen from the following discussion, it can be argued that the EU Proposals have three main goals: (i) integrating the ADR mechanisms already existing in various Member States and making them function more effectively across a border; (ii) strengthening the existing consumer acquis (ie the harmonised EU consumer protection rules) and bolstering due process standards in consumer ADR. The idea is that increased consumer protection, effectiveness of ADR and high standards will increase trust in ADR (and ultimately e-commerce in the Internal Market).

Some Member States have had a long tradition of consumer ADR (for example the Consumer Complaints Boards system in the Netherlands, or the Consumer Complaints Boards in Sweden), but the structure and provision of consumer ADR varies enormously between the Member States. They range from private trade association/consumer association schemes, Ombudsman schemes (such as the UK Financial Ombudsman Service), public arbitration schemes (such as the Spanish consumer arbitration scheme) to industry mediation schemes (common in France).

However, these ADR schemes are frequently limited in that they only cover particular sectors and/or only particular regions, as a consequence there are many gaps in coverage. Furthermore, these are essentially national, not EU-wide schemes, which do not function well in cross-border disputes. As a consequence, there are huge gaping holes in the coverage of ADR.

42 COM (2011) 793 final
43 COM (2011) 794 final
44 http://ec.europa.eu/consumers/redress_cons/adr_en.htm
45 C Hodges, I Benöhr, N Creutzfeldt-Banda, Consumer ADR in Europe (Hart Oxford 2012) 129-165
46 C Hodges, I Benöhr, N Creutzfeldt-Banda, Consumer ADR in Europe (Hart Oxford 2012) 229-252
49 C Hodges, I Benöhr, N Creutzfeldt-Banda, Consumer ADR in Europe (Hart Oxford 2012) 209-228
50 C Hodges, I Benöhr, N Creutzfeldt-Banda, Consumer ADR in Europe (Hart Oxford 2012) 37-72
51 Although some of these schemes are linked together in pan-European networks, see the networks of European Consumer Centres and the FIN-net.
52 See fn 47; see also D Thompson “Online Dispute Resolution Expansion in the EU” [2012] 22 (6) Computers & Law 31-34, 32
The integration of these ADR schemes to make them function more efficiently across the EU Internal Market and to close any gaps in the coverage of ADR is one of the main goals of the current EU Proposals. This also explains why the EU did not propose a draft set of procedural rules, since these procedural rules are better left to the individual (national) ADR scheme. The approach of the EU is therefore to create ADR schemes and networks of ADR schemes, which co-operate and function across borders, in preference to creating one international ADR scheme with the ambition of global operation. This can be seen as a more realistic approach to ADR, as it makes use of existing resources and schemes.

The second aim is to strengthen consumer protection and due process and thereby creating trust. This has been on the Commission’s agenda for a long time- it has already issued two Recommendations on standards for consumer ADR in 1998 and 1999 setting standards for the extra-judicial resolution of consumer disputes, albeit in the form of Recommendations, which are, of course, not binding on the Member States. Therefore the second main goal of the Proposals is to reincarnate these due process standards and adapt them to ODR, making them binding on ADR schemes. This latter point is not without controversy, as it will mean that some of the already existing ADR schemes have to be amended to comply with such standards as independence (which may not be the case for in-house mediation schemes, for example).

a. Standards in the Proposed ADR Directive—are they sufficient for trust?

Draft Article 5 (1) is the key provision of the proposed ADR Directive and provides: “Member States shall ensure that disputes covered by this Directive can be submitted to an ADR entity which complies with the [due process requirements set out in this Directive]. In order to comply with this obligation to provide ADR in all sectors Member States will have to change the scope of application of existing ADR schemes, or create new sectoral ADR/ODR schemes or create a residual ADR/ODR scheme, which would cover all disputes where currently no sector ADR scheme exists.

As to the scope of the ADR Directive, the Commission draft proposes that this would apply to all contractual B2C disputes arising from sales of goods and provision of services, including claims filed by traders against consumers. As drafted this would encompass cross-border as well as purely domestic disputes and the draft amended Proposal by the

53 Draft Article 1
55 See for example the various ADR schemes adopted under the sector specific Directives listed in the Annex to the draft ADR Directive
56 Author’s addition
57 Draft Article 5 (3)
58 Proposal for the ADR Directive and Explanatory Memorandum, p. 4 fn 42 and Recital 13
59 Article 2 (1) of the Proposal for the ADR Directive and Explanatory Memorandum, p. 4 fn 42
European Parliament makes this even more explicit. However some States have objected to the application of the Directive to purely domestic disputes, claiming this to be an infringement of the principle of subsidiarity.

Furthermore, the proposed ADR Directive excludes from its scope of application, direct negotiation and ADR operated by a trader (such as in-house mediation or complaints resolution), as these are not ADR schemes which can be said to be independent and impartial. Likewise an entity must be established on a durable basis, so that Member States cannot rely on ad-hoc mediation or ad-hoc arbitration as a way for fulfilling their obligation under Article 5 (1).

The Commission’s draft applied to disputes brought by consumers against businesses and to disputes brought by businesses against consumers- the European Parliament’s Report amends the Directive to apply only to disputes brought by consumers against traders, not vice versa.

The due process requirements set out in the draft Directive are: expertise and impartiality, transparency, effectiveness and fairness.

According to draft Article 6, the neutral (called a ‘third party’ in the Directive) must not have a conflict of interest with either party to the dispute, however independence is not stated as an express requirement.

As regards transparency, the proposed ADR Directive does not state that decisions or summary of decisions (with confidential details redacted) should be published. The transparency requirements mainly relate to the neutrals, the financing of the ADR provider, the scope and rules of procedure of the ADR scheme, language and applicable ‘law’, costs and duration, the legal effect of the outcome of the procedure, and annual reports. The annual reports, however have to contain: the number and types of disputes received, any

---

61 Draft Article 2 (2)
62 Draft Article 4 (e)
63 See Recital 11
65 For further discussion of due process in ADR and ODR see J Hörnle, Cross-border Internet Dispute Resolution (Cambridge University Press 2009) 91-218 and A Jaksic Arbitration and Human Rights (Peter Lang 2002)
66 Draft Article 6, the European Parliament has also expressly included ‘independence’ as one of the principles, see European Parliament, Committee on the Internal Market and Consumer Protection, Draft Report of 18. April 2012, 2011/0373(COD) Rapporteur Louis Grech
67 Draft Article 7
68 Draft Article 8
69 Draft Article 9
70 Draft Article 7 (1)
recurrent complaints, the number of discontinued procedures, the average time taken to resolve complaints, the rate of compliance and the participation in cross-border networks.\textsuperscript{71}

Arguably, a greater degree of transparency and in particular transparency in respect of the decisions reached (summary of decisions with confidential details redacted or examples of decisions in relation to common consumer problems) is needed. An ADR/ODR system is only financially viable if the great majority of cases settle early through negotiation with little third party intervention. However such early settlement only takes place if (1) there is binding adjudication as the ultimate dispute resolution and (2) if the parties know what the likely outcome would be, if their case went to adjudication. Therefore, it is key that the parties have access to previous decisions or at least summaries thereof. This would be essential for the parties (both the consumer and the business) in order to know what to expect and therefore would lead to a higher settlement rate at an early stage in the procedure.

In an ideal ADR scheme the ratio between cases solved through negotiation, mediation and adjudication should look like this:

\textbf{Fig 1: Pyramid of Dispute Resolution: Stages of Dispute Resolution}

\textsuperscript{71} Draft Article 7 (2)
The possibility of a binding decision at the top and the transparency of preceding decisions focuses the parties’ minds to settle early.

Interestingly the European Parliament has picked up on the need for greater transparency and has amended the Commission’s draft to include a new Recital 16 a: “Confidentiality and privacy should be respected at all times during the ADR procedure. However, it should be permitted for final decisions of an exemplary nature to be published subject to any legal obligation of confidentiality”\(^{72}\) and it also included in the information that ADR bodies must provide in their annual reports (Article 7 (2)): “exemplary decisions based on the outcomes of important disputes, which shall raise traders’ standards and shall facilitate the exchange of information and best practices”.\(^{73}\)

The requirement of effectiveness in draft Article 8 collects a number of criteria: (i) that the ADR procedure is easily accessible regardless of the location of the parties, (ii) that the parties need not be but may be (legally) represented, (iii) that the ADR procedure is free or at moderate costs for consumers and (iv) that the procedure is completed within 90 days.

The core fair hearing standards are set out in draft Article 9 which provides that parties (i) must be given the opportunity to state their case and hear the case put forward by the other side and any expert evidence (if applicable) and (ii) if the ADR procedure leads to a written decision this must be given with reasons and communicated in a durable medium.

However, the most important due process right is lacking in the Commission’s draft, namely the right to respond to the allegations made by the other party\(^{74}\), which the European Parliament has reintroduced.\(^{75}\)

Other due process principles contained in the Recommendations\(^{76}\) are missing from the Commission’s draft of the ADR Directive, notably the principle of legality\(^{77}\) and the principle of liberty\(^{78}\), but have been re-introduced by the European Parliament, at least for ADR mechanisms imposing a binding decision\(^{79}\).

---


\(^{74}\) G Kaufmann-Kohler, T Schultz, *Online Dispute Resolution* (Kluwer Law International 2004) 202-203


\(^{76}\) Fn 54

\(^{77}\) Principle V of EC Recommendation 98/257/EC

\(^{78}\) Principle VI of EC Recommendation 98/257/EC

The principle of legality means that the mandatory consumer protection law at the consumer’s habitual place of residence is applied to the dispute, to the extent that it would be applicable under the private international law rules in the Rome Regulation.\(^{80}\)\(^{81}\)

The principle of liberty means that an ADR decision is only binding on the parties if they were informed of the binding nature of the decision and specifically accepted this. It also means that pre-dispute arbitration clauses are not valid, if this clause prevents the consumer from seeking redress before the courts (which would be the case with the \textit{res judicata} effect of arbitration, but not with mediation).\(^{82}\)

Moreover the European Parliament has proposed that the limitation period for seeking action before the courts is suspended while ADR is pending.\(^{83}\)

Unlike other consumer protection directives\(^{84}\), the ADR Directive is a minimum harmonisation directive, meaning that individual Member States may maintain or introduce stricter standards for ADR on their territory ("gold-plating"). This may well be due to the fact that ADR is relatively new territory for EU law.

One of the criticisms which can be made against the proposed ADR Directive is that it does not make a distinction between non-binding, voluntary processes (such as conciliation and mediation) on the one hand and processes once agreed, lead to a binding outcome with \textit{res judicata} effect barring the parties from bringing a case on the same facts before a court \textit{de novo} (such as arbitration). This comingles two very different processes to which different rules should apply. For example, the question of applicable law and the question of mandatory consumer protection laws is crucial for binding processes, but less so for mediation. Likewise, an essential element of the fairness of a mediation procedure is that it is voluntary and the parties may withdraw from it an any stage before a settlement is reached\(^{85}\), but this principle would not apply to binding processes. The Proposal for a Directive on ADR would be much stronger and clearer and easier to implement if it made this distinction.

As has already been pointed out in relation to the UNCITRAL proposals, one key success factor for ODR is to provide incentives for the parties to use ODR. In this vain, the ADR Directive provides that businesses must mention on their website whether or not they participate in ADR and if they do, direct the consumer to the relevant ADR scheme.\(^{86}\)

\(^{80}\) See Article 6 EU Regulation 593/2008/EC
\(^{81}\) Fn 77
\(^{82}\) Fn 78
\(^{84}\) Such as the Consumer Rights Directive 2011/83/EC, Article 4
\(^{85}\) Principle D 1 (a) of EC Recommendation 2001/310/EC
\(^{86}\) As suggested by P Cortes \textit{P Online Dispute Resolution for Consumers in the European Union} (Routledge 2011) 193 et sequi and see also Draft Article 10 (1)
Likewise the draft ODR Regulation imposes an obligation on businesses to inform consumers about the ODR platform (discussed further below).\(^{87}\) Furthermore the amendments proposed by the European Parliament would introduce a European quality label to which only compliant ADR schemes have access, to raise consumer awareness.\(^{88}\)

Furthermore the Draft puts the European Consumer Centres on a legislative footing by imposing an obligation on Member States to provide support to consumers in cross-border disputes (intra EU) and to encourage networks of co-operation between ADR schemes.\(^{89}\)

More controversially, the Commission’s Draft also provides for co-operation between public consumer protection enforcement authorities and private ADR entities, including mutual obligations to exchange information about recurring consumer complaints about business practices.\(^{90}\) This provision is important, as many complaints may relate to large-scale consumer scams or dubious commercial business practices (and not merely an individual, single breach of contract) and valuable time is wasted by consumers attempting ADR with fraudsters who can only be dealt with by public (criminal) enforcement. For ADR entities it may be difficult to find out which complaints relate to fraud and consumer enforcement authorities may find out too late about large-scale fraud by which time the fraudster has disappeared or reincarnated itself with a different corporate vehicle. One reason for this latency is that victims may not complain to law enforcement directly.\(^{91}\) However data protection and privacy advocates may feel uncomfortable with this proposal and these aspects are discussed further below.

Finally the draft ADR Directive imposes an obligation on Member States to designate a monitoring authority, in order to aid the development of ADR in each Member State on a national basis with concomitant reporting obligations to the EU.\(^{92}\)

One stumbling block in the eventual implementation of the ADR Directive in the EU Member States will be the cost such ADR schemes will entail and who, particular in times of recession, should bear this cost. The fact that previous specific Directives\(^{93}\) in various sectors ranging from post and telecommunications to the financial services and energy sectors have already imposed an obligation on the Member States to create ADR bodies in these specific sectors, but imposed fewer standards as to due process and the quality of the mechanisms, does not help the implementation process, since Member States with established schemes in these

\(^{87}\) Draft Article 13 (1)
\(^{89}\) Draft Articles 11 and 13, such as FINnet \(\text{http://ec.europa.eu/internal_market/fin-net/index_en.htm}\) and the ECC-net \(\text{http://ec.europa.eu/consumers/redress_cons/webcenters_en.htm}\)
\(^{90}\) Draft Article 14
\(^{91}\) See the discussion further below
\(^{92}\) See draft Articles 15-17
\(^{93}\) See Annex to the draft Directive on ADR
sectors may be reluctant to change established schemes in order to comply with the higher standards in the ADR Directive94.

In conclusion the main challenge for the ADR Directive is to balance high standards and cost-effectiveness. With regards to the latter, the real novelty of the European approach is to integrate the ADRs through an online platform. This has the potential to confer on ODR a leap forward in the EU. The following section will analyse which functions the ODR platform has to undertake to fulfil this aspiration.

b. The ODR Platform and its Functions

The second proposal of the European Union is for a Regulation on ODR and this creates a pan-EU online platform for ODR.95 Its main purpose is to allow a consumer in Member State A to file a dispute against an e-commerce business in Member State B, thus facilitating and automating the work currently carried out by the European Consumer Centres (ECCs). The network of ECCs enables a consumer to contact the ECC in his or her own Member State of residence in a complaint against a business established in another Member State. The consumer’s local ECC then contacts the ECC in the business’ Member State. The ECC in the business’ Member State informs the consumer’s ECC about ADR available and assists in negotiating a solution or bringing a claim. This process is labour intensive and will be greatly assisted by the ODR platform which will provide a gateway to all compliant ADR mechanisms in all Member States.

Thus the ODR Platform links the compliant ADR schemes in the EU through one single ‘ADR hub’ or single point of entry.96 The online platform essentially will be a website and gateway to ADR in the Member States allowing consumers to file a claim through a multi-lingual complaint form and it will operate in all official languages. The platform will be operated by the European Commission at an implementation cost of Euro 4.586 million.97

In order to assist consumers with their claims, the ODR Regulation also establishes a network of “ODR facilitators” in each Member State whose function is to facilitate communication and assist with the filing of claims, similar to the existing ECC-net and in fact, the ODR Regulation envisages that this function may be carried out by the ECCs.98 Furthermore, traders will be obliged to inform consumers about the ODR platform, in order to encourage its use.99

---

94 See draft Article 3
95 COM (2011) 794 final
96 Draft Article 5 (2)
97 COM (2011) 794 final, p.5, see also Recital 14 and Draft Article 5(5)
98 Draft Article 6
99 Draft Article 13 (1)
This platform will be designed for ADR (extra-judicial dispute resolution) for contractual B2C disputes arising from cross-border online transactions for the sale of goods or the provision of services. Therefore the scope of the ODR Regulation is narrower than the ADR Directive in two respects: it only applies to e-commerce disputes and it is restricted to cross-border disputes, i.e. it does not apply to domestic disputes. The term “cross-border” is defined as meaning that the trader is established in one Member State and the consumer is resident in another at the time of the online order. In other words the platform cannot be used if either the trader or the consumer are outside the EU. The Regulation provides in Article 9 (b) that the procedure should completed within 30 days from the start of the proceedings. It should be pointed out that this in a completely unrealistic time limit.

The functioning of the ODR platform can be best understood by conceptualising its activities into five functions: (i) Clearing House Function, (ii) Referral Function, (iii) Transparency Function, (iv) Transfer Function and (v) Enforcement Function.

Before describing these functions it should be pointed out that one function which such a platform should fulfil is completely missing from the draft ODR Regulation. The ODR platform should provide a set of negotiation tools, enabling the parties to engage in negotiation without the intervention of a third party. While this may not be ADR (under the definition in the draft Directive), it would help the parties to settle early. Other authors have criticized the proposals for the omission of direct negotiation from the toolkit. ADR (and ODR) works most efficiently as a tiered procedure, starting with negotiation, moving to conciliation and using arbitration/adjudication only in a minority of cases.

The first function of the platform is the Clearing House Function, which ensures that only ADR mechanisms which comply with the quality and due process standards set out in the draft ADR Directive are admitted to the ODR platform. In other words this function effectively sets minimum standards for ODR providers by only admitting those which comply.

---

100 Draft Article 2
101 Draft Article 4 (e)
102 My terminology
103 See above and P. Cortes “Improving the EU’s Proposals for Extra-judicial Consumer Redress” 23 (2) Computers & Law 26-29, 27-28
106 Draft Articles 2, 4 (h), 5 (3) (g), 5 (4)
107 Discussed above
The Referral Function\(^{108}\) means that the ODR platform provides a search engine enabling complainants to find a competent ADR/ODR provider which can deal with the dispute. Hence the ODR platform sign-posts the complainant to a competent ADR/ODR provider.

The Transparency Function\(^{109}\) ensures that the complainant party is given all the information he or she needs in order to make an informed choice whether to use a particular ADR/ODR provider. This includes statistics on the outcome of complaints handled by the ADR/ODR provider in draft Article 5 (3) (i). As was discussed above transparency about outcomes is important to encourage settlement and while statistics in itself are not sufficient to achieve this, it is a step in the right direction.

The Transfer Function\(^{110}\) means that the complainant can directly and conveniently file his or her claim (argument and evidence) online via the ODR platform which transfers the case to the chosen ADR/ODR provider. Draft Article 5 (3) (a) provides that the electronic complaint form can be completed online by the consumer on the ODR platform and draft Article 5 (3) (c) expressly provides that the ODR platform transfers the case to the ADR/ODR provider which the parties have agreed to use. Thus the ODR platform is envisaged to be used for transmitting the complaint to the relevant ADR/ODR provider. As the Explanatory Memorandum to the ODR Regulation points out, this would encourage consumers to conduct he whole procedure online.\(^{111}\)

What is odds with common ADR practice is how the procedure set out in the draft Regulation. It requires the consent of both parties before a case can be submitted to an ADR entity.\(^{112}\) More usual is a procedure whereby the claimant chooses the ADR provider and submits a claim and if the process is voluntary, such as mediation, the respondent will then decide whether to participate and file a response or not. The disadvantage of the procedure in draft Article 8 is that the disputant parties are unlikely to agree to use the same ADR provider, particularly if they are in different Member States. It is also at odds with existing ADR schemes.\(^{113}\)

Finally, the Enforcement Function is the most difficult to delineate. My idea behind this function is that complaints data should be used not only for the purpose of private dispute resolution, but also for public law enforcement. As has already been pointed out, the draft ADR Directive in Article 14 provides for co-operation, and in particular mutual information exchange between ADR bodies and law enforcement authorities.\(^{114}\) This is important, as systemic problems, such as widespread consumer scams or unfair commercial business

\(^{108}\) Draft Articles 5 (3) (b) and 7 (3)
\(^{109}\) Draft Articles 5 (3) (b) (g) (h) and (i), 7(3) and 8 (3)
\(^{110}\) Articles 5 (3) (a), 5 (3) (c), 5 (3) (e), 7(1) and 8(1)
\(^{111}\) COM (2011) 749 final p.2
\(^{112}\) Articles 5 (3) (c), 7 (3), 8 (2) (a)-(f)
\(^{113}\) See also P. Cortes “Improving the EU’s Proposals for Extra-judicial Consumer Redress” 23 (2) Computers & Law 26-29, 28
\(^{114}\) Although it is questionable whether this provision will survive the negotiations in the European Council
practices, may need a response by public law enforcement authorities in addition to, or instead of, dispute resolution in individual cases. However, as has been pointed out above, if consumers’ complaints do not reach beyond the ADR provider, law enforcement authorities do not find out about such systemic problems in time to deal with the problem, as the scammer may have taken his or her profits and disappeared. This information flow problem is worse in the international (and intra-European) cross-border context, where direct communication links only exist between the ECCs and between the ECC and its national consumer enforcement authority, but no direct communication link exists between an ECC and a foreign enforcement authority.

These existing communication links can be illustrated by the following figure:

![Diagram](https://example.com/diagram.png)

*Fig 2: The ECC in Member State A cannot directly communicate with the consumer protection law enforcement authorities in Member State B*

Therefore the information flow could be speeded up considerably if the consumer protection law enforcement authority in Member State B had direct access to consumer
complaints originating from consumers in Member State A (against traders in Member State B). In my view therefore, the consumer protection law enforcement agencies of the Member States should have access to (some of) the complaints data on the ODR platform.

This chimes with the current tendency by scholars and regulators to regard consumer protection law enforcement as a graduated mix of public and private law instruments and mechanisms, including ADR and collective mechanisms. If this perspective is correct (and in my opinion it is), this would mean that private and public law mechanisms need to be integrated more closely, certainly on the level of information exchange.

A precedent for such a platform/database can be found on an international basis in the shape of an initiative of the International Consumer Protection Enforcement Network (ICPEN). ICPEN is a co-operation network of consumer protection authorities of 42 member states, formed by the OECD (but not limited to OECD members) in 1992. ICPEN encourages consumers to file complaints at econsumer.gov, which is the gateway to the Consumer Sentinel database operated by the US Federal Trade Commission (FTC). This database is made available to participating consumer protection authorities in order to detect large scale scams and consumer fraud. However, the econsumer.gov initiative is limited in that it does not provide consumer redress in the form of dispute resolution. This raises the question of why consumers would file a complaint, as it would not be to their direct benefit, but only for the common good. While some consumers may be altruistic and file a complaint, it would be more efficient to combine complaints data for the purpose of dispute resolution and public enforcement.

Having discussed what the ODR platform ought to provide in terms of the enforcement function (normative assessment), it should be next considered what it will provide (positive law). According to draft Article 9 (c) (iii), the ADR provider must inform the ODR platform of the date of conclusion of the process and its result. Furthermore according to draft Article 5 (3) (f) the ODR platform must enable consumers to leave feedback on the ADR provider and the ODR platform and Article 5 (3) (i) provides that the ODR platform must provide statistics on the outcomes of the dispute resolution processes of each ADR provider. Therefore, the ODR platform must collect data on the outcomes of the ADR processes and consumer feedback and make publicly available statistics. This provides a degree of transparency on the kind of processes dealt with by each ADR provider and its effectiveness. However there is no provision whatsoever for complaints data being made available to consumer

---

116 http://icpen.org/for-consumer-experts/who-we-are/participants
protection authorities for enforcement purposes and Article 11 of the Regulation limits this availability.

One argument against the making available of complaints data to the national consumer protection authorities of the Member States is that data protection law may impose restrictions on such disclosure. For this reason this article will analyse data protection law in this respect.

6. Integration of Private and Public Law Enforcement vs Data Protection Law

The Article 29 Working Party has examined the operation of the Consumer Protection Cooperation System, which creates an information and data sharing system among national consumer protection enforcement authorities in the EU and was established by Regulation EC/2006/2004. In its Opinion it points to the risks created by a centralised database of consumer enforcement data: (i) that more data is shared than is strictly necessary for enforcement purposes, (ii) that data may remain longer in the database than is necessary and (iii) that security may be an issue, as in any computer network, overall security is determined by the weakest link in the network.  

The European Charter of Human Rights has elevated data protection as a human right in Article 8 (1): “Everyone has the right to the protection of personal data concerning him or her. Article 8(2) stipulates that “such data must be processed fairly for specified purposes and on the basis of consent of the person concerned or some other legitimate basis laid down by law.” These principles are further fleshed out in the Data Protection Directive 1995/46/EC, which sets out an administrative regime and places obligations on data controllers to comply with eight data protection principles.

A data controller is the person who determines the purposes and means of processing. The Directive only applies to the processing of personal data, which is data relating to an identified or identifiable natural person. An individual is identifiable if he or she can be identified, directly or indirectly, in particular by reference to an identification number or to

---

119 Ibid p.4
120 OJ 2007 C 303, p. 1
121 OJ No 281/31 of 23. November 1995
123 The final shape of the outcome of data protection law is not yet clear, therefore this article will focus exclusively on the 1995 regime. For lack of space this discussion will not cover all eight principles, sensitive data or security issues, but will instead focus on the principles most relevant to this analysis. For a more detailed discussion of data protection law the reader is referred to P Carey Data Protection: A Practical Guide to UK and EU Law (3rd Edition, Oxford University Press 2009) and for the new Regulation see A Winton N Cohen “The General Data Protection Regulation” (2012) 18 (4) Computer and Telecommunications Law Review 97-101
124 Article 2 (d) Directive 1995/46/EC
one or more factors specific to his (or her) physical, physiological, mental, economic, cultural or social identity.\textsuperscript{124}

The concept of personal data is complex and multi-facetted and hence cannot be discussed conclusively in the framework of this article. However, it should be pointed out that the influential Article 29 Working Party has interpreted the concept widely\textsuperscript{125} and it includes, for example, complaints data such as names and addresses, email addresses, photographs of persons, billing information and other data linked to an individual. The caselaw of the Court of Justice of the European Union also shows a similar wide interpretation.

While it has been clear for a while that a person’s name combined with other information such as their earnings\textsuperscript{126} or their working conditions and hobbies\textsuperscript{127} or their telephone number\textsuperscript{128} counts as personal data, it is also clear that even without mentioning personal details such as names, information can count as personal data:

In Case T-300/10 \textit{Internationaler Hilfsfond}, the Court held: “Thus, in addition to names, it must be held that information concerning the professional or occupational activities of a person can also be regarded as personal data where, first, the information relates to the working conditions of the said persons and, second, the information is capable of indirectly identifying, where it can be related to a date or a precise calendar period, a physical person”.\textsuperscript{129}

So, if complaints data is capable of identifying an individual, it will be personal data.

Focusing on the disclosure of personal data to national consumer protection authorities, potential data controllers are (i) the ODR platform provider making the data available (which is likely to be the European Commission\textsuperscript{130}), (ii) the national Consumer Protection Authorities accessing and processing the data, (iii) the complainants when notifying the claim against the respondent and (iv) the ADR provider feeding back data to the ODR platform.

The first principle is that personal data must be processed fairly and lawfully\textsuperscript{131} and this means that one of the grounds of justification for processing listed in Article 7 of Directive

\textsuperscript{124} Article 2 (a) of Directive 95/46/EC and Regulation 45/2001/EC
\textsuperscript{125} See for example Article 29 Working Party Opinion WP 148 of 4. April 2008 (Search Engines)- stating that log files of a person’s search terms and IP addresses may constitute personal data, p.6 and WP 136 of 20. June 2005 (Concept of Personal Data), which mentions such examples as house prices or car service records when linked to an individual.
\textsuperscript{126} C-139/01 \textit{Österreichischer Rundfunk and Others} [2003] ECR I-4989, para 64; Case C-73/07 \textit{Markkinapörssi} [2008] ECR I-9831 para 35
\textsuperscript{127} Case C-101/01 \textit{Bodil Lindqvist} [2003] ECR I-12971 para 24
\textsuperscript{128} \textit{ibid}
\textsuperscript{129} Available on Westlaw, para 117
\textsuperscript{130} The European Commission will be responsible for the ODR Platform, see draft Article 5 (1) of the ODR Regulation; the European Commission’s data processing will be governed by Regulation EC/45/2001
\textsuperscript{131} Article 6 (1) Directive 1995/46/EC and Article 4 (1) (a) of Regulation 45/2001/EC
1996/46/EC must be applicable to the data controller’s processing. The ADR provider feeding the data back to the ODR platform would be covered by Article 7 (c), which is compliance with a legal obligation imposed on the controller, here the obligations imposed by the ODR Regulation. The complainant when notifying the claim and the respondent’s contact details would be justified by Article 7 (f), which is processing is necessary for protecting the legitimate interests of the data controller (here the complainant) balanced against the data protection rights of the respondent (unless the claim against the respondent is vexatious, malicious or trivial). Article 7 (f) requires a proportionality analysis balancing the rights of the respondent with that of the complainant. Weighing in favour of the complainant is his or her quest for justice, but to the extent that complaints data is irrelevant or excessive this would have to be anonymised and a complaint would also not be justified if it is an abuse of process.

The national consumer protection authority would be justified by Article 7 (e), which is that processing is necessary for a task carried out in the public interest or in the exercise of official authority. Finally the ODR platform provider would have to rely on the complainant’s consent under Article 7 (a) and in respect of the respondent on Article 7 (e).

The processing under Article 7 (e) would have to be necessary for the public interest, which involves weighing up the public interest with the data subjects interest. In this case, it is justified as it is in the interest of justice that a complainant can file his or her claim and it is in the public interest to have effective enforcement of consumer protection law, provided that there is a presumption of innocence of the respondent (in relation to public law enforcement) and the data collected is not excessive.

One of the most relevant principles here is the purpose limitation principle. This means that if the processing of personal data is justified for a particular purpose (such as dispute resolution or consumer protection law enforcement) it must not be used for another purpose (such as marketing). Furthermore, data subjects must be informed of the purposes of processing and again, personal data must not be processed for any other purpose. Hence

---

132 Member States may provide for exceptions to this principle when necessary to safeguard the prevention, detection, investigation and prosecution of criminal offences, Article 13 (d) of the Data Protection Directive 1995/46/EC and Member States have provided for such exceptions in their implementation legislation. To the extent that national consumer protection authorities have powers in respect of fraud and consumer scams this may mean that they do not need any further justification for processing the complaints data; see also Article 5 of Regulation EC/45/2000.
133 See for example draft Article 9 (c) ; see also fn 118 p.16
134 Case C-468/10 ASNEF of 24. November 2011, Westlaw Para 40
135 See also Article 29 Working Party Opinion WP 158 of 11. February 2009, p.10
136 Article 5 (d) of Regulation EC/45/2001
137 Article 5 (a) or (b), see Article 29 Working Party Opinion WP 139 Opinion 6/2007 of 21. September 2007, p.16
138 See also Case C-524/06 Heinz Huber [2008]ECR I-9705 Para 66
139 In respect of the EU Commission Article 6 of Regulation EC/45/2001 allows for limited change of purpose
140 This would have to be specifically defined, see Article 29 Working Party Opinion WP 139 Opinion 6/2007 of 21. September 2007, p.17
it is important that both the complainant and the respondent are informed about all the recipients of the complaints data (including law enforcement authorities) and the purposes and extent of processing (dispute resolution and consumer protection enforcement). The data controller must inform the data subject of his or her own accord. If the ODR platform collects personal data about the respondent from the complainant in the claim, the ODR platform must inform the respondent about the processing in an individual notice (unless this defeats law enforcement or through a privacy policy on the website.)

The data minimisation principle, ie the principle that a data controller must no process excessive data, ie personal data which is not necessary for the purpose of processing, means that national consumer protection authorities should only have access to complaints data to the extent that this is necessary for their enforcement function. In other words access should be on a strict “need to know” basis. This could mean for example that they should only have access to complaints data if it relates to repeated complaints against the same supplier or complaints showing a similar pattern of infringement or complaints data which indicates fraud. Safeguards must be built into the system which prevents that companies against whom consumer have complained are not automatically blacklisted as companies who are suspected of fraud and who are not to be trusted.

Furthermore personal data must not be kept any longer than it is needed for the purpose of processing and data must be accurate and kept up to date. Therefore, it is important to ensure that complaints data is deleted when no longer needed and after a certain time limit or immediately, when it becomes clear that a complaint is unfounded.

In conclusion, therefore, the ODR platform could be opened up for data sharing with CPC consumer protection enforcement authorities, provided certain safeguards are built in to ensure compliance with data protection law.

6. CONCLUSION

The EU Proposals on ADR and ODR are a great opportunity to provide improved redress for consumers in intra-EU, cross-border e-commerce disputes. As has been pointed out above, ODR has been discussed as a magic bullet for increasing cross-border redress in e-commerce for a long-time and the EU Proposals will help to kick-start ODR in the EU. They therefore

141 Article 10 and 11 Directive 1995/46/EC
142 Case C-553/07 Rijkeboer [2009] ECR I-3889 Para 68
143 See Article 11 and fn 142 and Recital 21 of the draft ODR Regulation
144 Article 6 (1) (c) Directive 1995/46/EC: “data must be adequate, relevant and not excessive” for the purposes for which it is collected, Article 4 (c) Regulation EC/45/2001
145 In relation to the function of dispute resolution, see draft ODR Regulation Article 7 (6)
148 Article 6 (1) (e)
149 Article 6 (1) (d)
150 See fn 118
are of enormous significance to the EU consumer *acquis* as theoretical rights under consumer protection laws which cannot be enforced before the courts because of the cost of (cross-border) litigation do little to enhance consumer protection by themselves.

The main innovation of the EU Proposals, once implemented into national law, will be threefold: (i) providing for a consumer ADR scheme in each sector available in each Member State, thereby closing the current gaps, (ii) providing for *binding* minimum standards for ADR to ensure fairness and create trust and, finally (iii) integrating ADR schemes into one single ODR platform, which will create a single entry point or gateway for the filing of a complaint.

The focus on consumer protection and minimum due process standards will mean that consumers trust ADR procedures and procedures are fair. However it is far from clear yet how Member States eventually tasked with the implementation of the Proposals will deal with the costs of ADR. Since the procedures must be free or low cost for consumers this raises the question who will have to pay for the process? In times of recession, businesses and in particular small and medium sized business are unlikely to be willing or able to foot the bill and since the use of ADR under the Proposals is not binding on businesses they are unlikely to adopt it, unless there are clear commercial advantages for doing so. The EU Proposals are providing some incentives for businesses (such as having to inform consumers whether the business commits to ADR), but whether these are sufficient remains to be seen. Two main criticisms of the EU Proposal relate to their effectiveness- first it has been argued that a greater degree of transparency is required in the form of publishing examples or summaries of decisions to ensure that cases are settled as early in the procedure as possible. Secondly it has been argued that co-operation with consumer protection law enforcement authorities is necessary to ensure effectiveness in the case of large-scale, low-value consumer scams. This would require disclosure of complaints data to law enforcement authorities and given the data protection concerns, the Proposals have refrained from giving the consumer protection law enforcement authorities access to the ODR platform. This Article has shown that such data protection compliant access can be achieved subject to appropriate safeguards.

The consumer protection focused approach of the EU can be contrasted with the UNCITRAL Proposals, which focus on encouraging ODR but impose fewer quality standards as their stated ambit is narrowed to run of the mill, low-cost high volume cases. This may be more realistic and pragmatic, but may mean that consumers do not trust such procedures. This is even more pronounced by the fact that their scope is not clearly defined.

This lack of definition is highly regrettable as this concept of low-cost high volume disputes is central to UNCITRAL’s pragmatic approach. The draft Procedural Rules move away from due process as was shown in the discussion above and justify this with the argument that
cross-border low-value and high volume disputes cannot be solved other than through very efficient, highly automated, and hence, cost-effective procedures.

It remains to be seen which of the two approaches, that of the EU or that of UNCITRAL will be more successful in encouraging ODR.