

Scrutinizing Access to Justice in Consumer ODR in Cross-Border Disputes

The Achilles' Heel of the EU ODR Platform

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I will focus my brief comment on the new European Union Online Dispute Resolution (ODR) Platform, mainly evaluating its role in promoting access to justice. I am not going to insist on how much Consumer Alternative Dispute Resolution, mainly consumer ODR, is a crucial element of the Access to Justice, beyond the traditional litigation frame. And not by chance it has been submitted that the development and deepening of the methods of dispute resolution outside the Courts of Justice is a good thermometer in which one can measure our civilization.¹

Europe has been a pioneer in recognizing the need for ODR in addressing conflicts that arise in the e-commerce setting. The EU ODR Platform has been created by the European Commission according to the Regulation 524/2013/UE. Finally, with a minor delay, the EU ODR Platform was launched on 15 February 2016. The EU ODR Platform is not still working cent per cent.² However, the commission has recently published some statistical data related to its first 2 years of operation.³ According to the report, 85% of the complaints filed in the EU ODR Platform were automatically closed, but 40% of these cases led to further direct contact between the trader and the consumer in an attempt to solve the problem. Another 9% of the complaints were refused by the trader, although in two-third of these cases, traders made a further direct contact with the consumer. For 4% of the complaints, both parties withdrew from the procedure before agreeing upon an alternative dispute resolution (ADR) body. Finally, only 2% of the complaints were submitted to a specific ADR body, with barely half of them resulting in a final outcome.

According to a first reading of these data, similar to the one made by the European Commission, the EU ODR Platform has shown its usefulness as it has helped consumer dispute resolution as a spillover effect, even if initially it was neither thought nor meant to achieve this goal beyond the proceedings conducted under the EU ODR Platform umbrella. But the data published cannot hide two

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1 Vid. C. Carnicer Díez, 'El acceso a la justicia en España', p. 228. Available at: <https://ifc.dpz.es/recursos/publicaciones/29/19/11carnicer.pdf>. (consulted the 23 July 2018).

2 As this article was being written, dispute resolution bodies are currently not available in Romania. Spain has just notified to the European Commission the first two ADR entities.

3 Data provided in the Report from the Commission to the European Parliament and the Council on the functioning of the European Online Dispute Resolution platform established under Regulation (EU) No. 524/2013 on online dispute resolution for consumer disputes, of December 2017.

realities. On the one hand, the EU ODR Platform continues to be seen, by Consumers and Traders, as a sophisticated and artificial mechanism that is regarded as not to be ready to truly help the parties, who nowadays, even if wanting to solve the disputes, prefer to continue the settlement backstage. On the other hand, the percentage of complaints (85%) which were automatically closed is too high.

For the sake of overcoming the first perspective, better efforts ought to be made to explaining how the platform works to traders and consumers. This is a not really easy task, as the 'intermediary function' developed by the EU ODR Platform does not contribute to its better understanding. Indeed, the EU ODR Platform is not an ADR entity which deals with direct resolution of disputes. This platform has the main aim of supporting consumer dispute resolution through the certified ADR entities established in every member state. The EU ODR Platform is structured to function according to the guidelines set forth by the ADR Directive, which has the task of listing the certified ADR entities.

Related to the second perspective, the legal framework of the EU ODR Platform is in sheer need of review in order to identify the gaps in its legal regime and find the formula to better accommodate a higher number of claims into the actual Dispute Resolution Phase.

The aim of this article is to critically analyse the EU ODR Platform, to discover if its current regime is consistent with the optimization of the access to justice through ODR. Before highlighting the shadows, let's have a look on the main features of the platform willing to promote the access to justice, especially in cross-border cases.

Consumers' access to justice is apparently made significantly easier via the EU ODR Platform. First of all, the platform provides a single entry point for consumers (and traders) for an out-of-court resolution of disputes. The very existence of a single entry point for the claims makes it easier to file a claim, as the consumer doesn't need to waste time and effort in discovering where, when and how to file a claim. Second, the EU ODR Platform provides an electronic complaint form which may be filled in every European language, not obliging the consumer to use a foreign language should the respondent be a foreign trader. The EU ODR Platform also offers an (optional) electronic management tool which enables the dispute resolution procedure online, not to mention free of charge to the parties. Furthermore, when measuring consumers' access to justice, the inclusion of offline claims (Art. 5.2(c) Directive 2013/11/UE) ought to count as a positive element.

A factor closely related to access to justice through the EU ODR Platform has to do with the compliance, by member states' ADR entities connected to it, with the standards established by Directive 2013/11/EU. From this point of view, the principles to be fulfilled by the certified ADR entities may be considered as a genuine European development, especially for Business 2 Consumer disputes, of the ethical principles for ODR which has been an object of permanent attention from the beginning of ODR with the aim of reaching the online dispute resolution

going closer to the ideal of justice.⁴ The ADR Directive and the ODR Regulation develop an ODR System trying to endorse the principles of Accessibility, Expertise, Independence and Impartiality, Transparency, Effectiveness, Fairness, Liberty and Legality, principles at the core of European ADR since the commission's recommendations of 1998 and 2001.

The examination of the current regime of the European ODR Platform reveals elements that do not support the resolution of consumer complaints, and therefore prevent an optimized access to justice, as examined in this section.

The European regulation only allows filing of disputes stemming from online sales or service contracts (Art. 2.1 Regulation). This approach is consistent with a view where ODR was used, computer to computer, in cross-border transactions. However, as today's almost every transaction involves a digital (and online) footprint, the distinction between online and offline interactions or disputes is becoming blurred. This is the reason why professors Ethan Katsh and Orna Rabinovich maintain that the conception of ODR as 'a last resort' has become outdated. By not allowing for the admission of offline disputes, the European regulation is ignoring the fact that ODR is now more attractive for a wider array of disputes, many of which would not necessarily fall under the original scope of the ODR – small-scale cross-border consumer disputes that arose.

Following professors Katsh and Rabinovich, the European approach to ODR is rather limited, being perhaps better defined as *online*-ADR and consequently losing opportunities for enhancing access to justice. Besides the displacement of face-to-face interaction, ODR has supposed the shift from a human third party to an automated 'fourth party.' Automated tools have allowed ODR systems to address quantities of disputes impossible for a physically based human-operated dispute resolution process. The EU ODR Platform does not fully grasp the meaning of this shift and the growing reliance on algorithms, and the reliance on big data accompanied by a shift from dispute resolution to dispute prevention activities. The inexistence in the EU ODR Platform of tools for online negotiation and automated or assisted negotiation may be considered as one of the main deficiencies of the EU ODR Platform. Whereas EU law in this field is oriented to promote transparency and the monitoring of consumer disputes,⁵ this development is, however, left in the hands of the ADR entities in every member state, devaluating the EU ODR Platform and not rising up to the current challenges.

On the same note, it is important to pay attention to the close relationship between the more specialized character of the ADR entities, on the one hand, and the more efficient management of disputes and data, on the other hand. The possibilities for an efficient development of the fourth party in ODR may depend, in some extent, on the own ADR entities' structure in every European member state. For instance, the use of the fourth party will be leaner for a specialized ADR that

4 See especially the work of L. Wing, 'Ethical Principles for Online Dispute Resolution. A GPS Device for the Field', *International Journal on Online Dispute Resolution*, Vol. 3, No. 1, 2016, pp. 12-29.

5 Vid. Art. 7 Directive 2013/11/EU.

can sort claims by subject, provide information on outcomes of similar claims and provide statistical data and reliable information on recurrent claims.

According to the EU law (Art. 20.2(f) ADR Directive), even if the parties may file a claim in the single entry point of the EU ODR Platform, it does not guarantee a completely online procedure, as the physical presence of the parties may be required. This requirement bluntly betrays the generalization of ODR as prescribed by the ODR Regulation. Furthermore, the proclaimed full coverage by ADR entities becomes *de facto* faulty or fake, given that in practice online claims may be discarded if the face-to-face interaction cannot be achieved. We have seen that the EU ODR Platform offers an electronic management tool which enables the dispute resolution procedure online. But this tool is only offered as an option without prejudice of the member states establishing the must to attend. In any case, the Directive should grant the possibility of following an online procedure, being otherwise a violation of the principle of full coverage by ADR entities.

Special attention must be placed on language issues in an increasingly global society. The EU ODR Platform guarantees that the consumers will be able to file a claim in their mother tongue. The possibility of filling the form in any language of the EU does not mean that the selected ADR entity has to process the claim in that language. Once the complaint is transmitted to the designated ADR entity, the platform is simply concerned with informing the consumer about the language in which the procedure will be carried out, even though consumers may have had the impression that they will be able to use their language during the whole process. However, the ADR Directive does not guarantee consumers the use of their mother tongue or even the language used for the purposes of the contract. The EU ODR Platform guarantees an automatic translation. However, this automated translation, although helpful, ends at the time the dispute has been transmitted to an ADR entity. In this field, the EU legislation should strive to prevent the increase of language barriers becoming an obstacle to the access to justice.

One of the reasons for the 85% of claims that were automated archived by the EU ODR Platform is related to the trader's response. If the trader does not answer the requirement, the EU ODR Platform will terminate the claim. According to the legal regime, the EU ODR Platform does not refer the dispute to a competent ADR entity in cases where the trader is obliged to participate in the procedure according to the law or according to a prior agreement. When the trader is adhered by law or because of an agreement to an ADR entity, the beginning of the procedure before that ADR entity should not depend on the existence of the trader's answer. Otherwise, the consumer may be induced to believe that ADR is not feasible, and access to alternative justice would be gravely hampered.

In order for that to happen, the regulation should incorporate specific rules for the processing and transmission of the complaint to ADR entities, taking into account international law. These criteria ought to be taken into account should the parties lack a specific agreement on the competent ADR entity and the complaint may be derived to an ADR entity without the need of acceptance by the parties.

EU legislation admits consumer arbitration to be implemented by the ADR entities in the member states. In cross-border cases, the submission to arbitration means excluding the jurisdictional way. To protect the parties from eventual and unexpected renunciations to the jurisdictional via, Article 10.2 ADR Directive requires a special and informed consent. Given the importance of these declarations, which imply the waiver of the consumer's right of access to court and also of the possibility of benefiting of the forums of his or her country of domicile, it should be required, in cross-border cases that such declarations be made in a language commanded by the consumer. As a consequence, where the solution is arbitration, in cross-border cases, the ODR declaration of consent should be allowed only through the European platform. Therefore, the possibility of giving effect to a declaration of acceptance of consumer arbitration through platforms that do not allow the use of the consumer's language for this purpose should be excluded. As an additional guarantee of the right of access to court, the violation of these language requirements should open up the possibility of challenging the validity of the consumer arbitration agreement.

This article had the aim of shedding light on some elements that shape the EU ODR Platform regime. The ADR Directive and ODR Regulation are called to improve access to justice in the EU. The EU ODR Platform is only a first step in the development of ODR in Europe, far from reaching its destination. However, it is true that EU law has shown some limitations, and a great part of the task is left in the hands of the member states and the ADR entities, as well as the rest of the stakeholders.

It seems that the European legislator chose for now not to further incentivize the alternative and online resolution of disputes, patently ignoring technological driven social changes of which the tip of the iceberg is the fourth party. However, and despite the EU ODR's Platform's limited functions, there is still scope for improvements in order to allow a better access to justice.

The EU ODR Platform should allow disputes stemming offline. Face-to-face procedure should no longer be a must, as this is not compatible with the full coverage by ADR entities established in the ADR Directive. It would also be desirable to incorporate some of the basic features of the fourth party to the EU ODR Platform, for instance a negotiation tool. We have also highlighted the need to pay attention to the difficulties related to language in a multilingual global market and create adequate mechanisms to monitor the results. The transmission of claims to ADR entities is also something that may be improved, taking into consideration a mandatory participation or a prior agreement of the trader. And finally, taking into consideration the consequences, the digital consent to arbitrate ought to be revised and improved, allowing a veritable informed consent of the consumer.

The EU ODR Platform is like a baby taking its first steps. As a pioneer legislative instrument, today it is not completely clear if it will be able to fill the shoes the EU legislator prepared for it. Meanwhile, to prevent the EU ODR Platform from becoming more of an Achilles' heel for EU ODR rather than the solution to a growing concern, the EU has to keep an open mind for improvement, so the creature will be able to grow healthy and not hinder an effective access to justice.