

Alternative dispute resolution for consumer disputes

1 Background

Three years ago, the European Union adopted legislation on alternative dispute resolution for consumer disputes (“**ADR**”) and online dispute resolution for consumer disputes (“**ODR**”) to allow consumers and traders to resolve their disputes without going to court in an easy, fast and inexpensive way. However, it was not until this year that this European regime was implemented and became fully operational.

The main texts governing ADR/ODR are:

- Directive 2013/11/EU of 21 May 2013 on alternative dispute resolution for consumer disputes (the “**ADR Directive**”), as implemented into Luxembourg law by the law of 17 February 2016 introducing alternative dispute resolution into the Consumer Code (the “**ADR Law**”) which was published in the official gazette (*Mémorial A*) on 14 April 2016; and
- Regulation (EU) No 524/2013 of 21 May 2013 on online dispute resolution for consumer disputes (the “**ODR Regulation**”).

So what is ADR/ODR exactly and how does it work?

2 ADR/ODR

2.1 Relationship between ADR and ODR

The ADR Law defines “alternative dispute resolution for consumer disputes” as any intervention by an entity which

Contents

1	Background	1
2	ADR/ODR	1
3	Structural framework .	3
4	Procedure	5
5	Obligations on traders	8
6	Relationship with other instruments	9
7	Sanctions.....	9

proposes a solution or brings together the relevant parties, in each case in view of facilitating the finding of an amicable solution to a national or cross-border dispute between a consumer and a trader arising from a sales contract or a service contract.

ODR is a specific ADR procedure conducted entirely online through a dedicated ODR platform operated by the European Commission which offers consumers and traders a single point of entry for the out-of-court resolution of online disputes. Given that the ODR platform relies on the proper functioning of the ADR framework introduced by the ADR Directive, the ADR Directive and the ODR Regulation are interlinked and complementary.

2.2 Scope

In line with the above definition of “alternative dispute resolution for consumer disputes”, the ADR Law does not apply to:

- situations not involving a third party whose mission is to facilitate the settlement of the dispute (e.g., direct discussions between a consumer and a trader); and
- procedures resulting in a binding solution (e.g., arbitration governed by articles 1224 ff. of the New Code of Civil Procedure (“**NCCP**”).

The ADR Law further specifically excludes a number of matters, among which:

- attempts made by a judge to settle a dispute in the course of a judicial proceeding concerning that dispute (e.g., conciliation governed by articles 70 ff. of the NCCP and judicial mediation governed by articles 1251-12 ff. of the NCCP);
- procedures before dispute resolution entities where the natural persons in charge of dispute resolution are employed or remunerated exclusively by the individual trader (in-house mediation);
- procedures before consumer complaint-handling systems operated by the trader; and
- disputes between traders.

Interestingly, the ADR Law applies both to disputes initiated by consumers and to disputes initiated by traders, whereas the ADR Directive only requires Member States to cover the

former, but not the latter. This seems to be a political choice to create a level playing field among market participants and to incentivise both consumers and traders to use ADR as an alternative to court-based redress mechanisms whenever possible.

The ODR Regulation also applies both to disputes initiated by consumers and to disputes initiated by traders.

3 Structural framework

The framework introduced by the ADR/ODR legislation relies on a number of third parties as well as on the ODR platform to ensure that ADR quality, coverage and awareness are adequately promoted.

3.1 Service national du Médiateur de la consommation

The “*Service national du Médiateur de la consommation*” (the “**Mediator**”) is a public service under the authority of the Minister of Economy.

Firstly, the Mediator is a point of first contact for consumers and traders wishing to enquire about the possibilities to settle consumer disputes through the use of an ADR procedure. This includes the provision of information on the rights and obligations of consumers and traders and on the ADR procedures which are available in Luxembourg.

Secondly, the Mediator is the point of entry for all complaints by which an ADR procedure is commenced. The Mediator will either forward such complaints to the relevant ADR entity (as to which see the next section) or handle such complaints itself (in case no other ADR entity is competent to handle the relevant dispute). In the latter case, the Mediator acts as residual ADR entity to ensure full sectoral and geographical coverage by and access to ADR. As residual ADR entity, the Mediator is intended to be a safeguard for consumers and traders by ensuring that there are no gaps in access to an ADR entity.

3.2 ADR entities

An ADR entity is any entity that is established on a durable basis, offers the resolution of a dispute between a consumer and a trader through an ADR procedure and is listed in accordance with the ADR Law and the ADR Directive.

ADR entities must be licensed by the Minister of Economy and registered on an official list held by the Ministry and notified to

the European Commission. This is to ensure that the entities offering ADR meet all relevant legal requirements, including, but not limited to, expertise, independence, impartiality and transparency.

There is no mandatory legal form for ADR entities, though. An ADR entity can be a natural person, a legal person or an association between natural or legal persons. It can furthermore be a private entity or a public body (e.g., the *Commission de Surveillance du Secteur Financier* for consumer disputes in the financial sector, the *Commissariat aux Assurances* for consumer disputes in the insurance sector).

3.3 Centre Européen des Consommateurs GIE, Luxembourg

The “*Centre Européen des Consommateurs GIE, Luxembourg*” (the “**CEC**”) is the member for Luxembourg of the European Consumer Centre Network (ECC-Net).

The CEC’s main mission is to inform and assist consumers with respect to any cross-border consumer-related questions and problems. The CEC was therefore the logical choice to serve as point of contact for consumers wanting to initiate an ADR procedure against a trader established in another Member State. The CEC is notably tasked with assisting consumers in determining which ADR entity in that other Member State is competent to deal with their disputes with traders.

In the specific case of online dispute resolution for consumer disputes, the CEC further assists consumers with certain matters relating to the ODR platform, including, but not limited to, its functioning and the procedure to be followed.

3.4 ODR platform

The ODR platform takes the form of an interactive website offering a single point of entry to consumers and traders seeking to resolve disputes out-of-court which have arisen from online transactions. The ODR platform is available under <http://ec.europa.eu/odr>.

It provides general information regarding the out-of-court resolution of contractual disputes between traders and consumers arising from online sales and service contracts.

More importantly however, it allows consumers and traders to submit complaints by filling in an electronic complaint form available in all the official languages of the institutions of the European Union, to attach relevant documents and to identify a

competent ADR entity and, provided that the parties have agreed to use a given ADR entity, transmit the complaint to such entity.

The ODR platform further offers, free of charge, an electronic case management tool which enables ADR entities to conduct the dispute resolution procedure with the parties through the ODR platform.

4 Procedure

4.1 General principles

Any ADR procedure must comply with a number of basic principles, among which effectiveness, fairness and liberty.

The ADR procedure must for instance be available and easily accessible online and offline to both parties irrespective of where they are and the parties must have access to the procedure without being obliged to retain a lawyer or a legal advisor, but the procedure shall not deprive the parties of their right to independent advice or to be represented or assisted by a third party at any stage of the procedure.

The parties further must have the possibility, within a reasonable period of time, of expressing their point of view, of being provided by the ADR entity with the arguments, evidence, documents and facts put forward by the other party, any statements made and opinions given by experts, and of being able to comment on them.

The parties also have the possibility of withdrawing from the procedure at any stage if they are dissatisfied with the performance or the operation of the procedure.

From a procedural point of view, prescription periods will be suspended during the ADR procedure.

4.2 Conduct

The procedure will vary depending on whether the procedure is a “normal” ADR procedure or an ODR procedure.

4.2.1 “Normal” ADR procedure

As mentioned previously, “normal” ADR procedures are initiated by filing a complaint with the Mediator. The Mediator will then either forward the complaint to the relevant ADR entity or handle the complaint itself (in

case no other ADR entity is competent to handle the relevant dispute).

The fees for an ADR procedure must only be nominal. For instance, the draft bill of the Law suggests that in case the Mediator acts as residual ADR entity, the fee should be EUR 25, regardless of whether a consumer or a trader initiates the procedure.

Within three weeks of the receipt of the complete complaint file, the ADR entity must notify the parties whether it will consider the dispute or not.

In case the ADR entity accepts to consider the dispute, the outcome of the ADR procedure must be made available within a period of 90 calendar days from the date on which the ADR entity has received the complete complaint file. In the case of highly complex disputes, the ADR entity in charge may, at its own discretion, extend the 90 calendar days' time period. The parties must be informed of any extension of that period and of the expected length of time that will be needed for the conclusion of the dispute.

In case the ADR entity is unable to consider the dispute that has been submitted to it, it must provide both parties with a reasoned explanation of the grounds for not considering the dispute.

Such grounds may include:

- the consumer did not attempt to contact the trader concerned in order to discuss his complaint and seek, as a first step, to resolve the matter directly with the trader;
- the dispute is frivolous or vexatious ("*abusif, fantaisiste ou vexatoire*");
- the dispute is being or has previously been considered by another ADR entity, by an arbitral tribunal or by a court, in each case whether national or foreign;
- the value of the claim falls below or above a pre-specified monetary threshold (this ground of refusal cannot be invoked by the Mediator acting as residual ADR entity);

- the consumer has not submitted the complaint to the ADR entity within a pre-specified time limit, which cannot be set at less than one year from the date upon which the consumer submitted the complaint to the trader;
- dealing with such a type of dispute would otherwise seriously impair the effective operation of the ADR entity (for example where the dispute is too complex and would therefore be better resolved in court); and/or
- the complaint is not a consumer dispute.

4.2.2 ODR procedure

In order to submit a complaint to the ODR platform the complainant party must fill in the electronic complaint form.

The information to be submitted by the complainant party must be sufficient to determine the competent ADR entity. This information is listed in the annex to the ODR Regulation. The complainant party may attach documents in support of the complaint.

Upon receipt of a fully completed complaint form, the ODR platform must, in an easily understandable way and without delay, transmit to the respondent party, in one of the official languages of the institutions of the European Union chosen by that party, the complaint together with, among other data:

- information that the parties have to agree on an ADR entity in order for the complaint to be transmitted to it, and that, if no agreement is reached by the parties or no competent ADR entity is identified, the complaint will not be processed further; and
- information about the ADR entity or entities which are competent to deal with the complaint, if any are referred to in the electronic complaint form or are identified by the ODR platform on the basis of the information provided in that form.

Where the parties fail to agree within 30 calendar days after submission of the complaint form on an ADR entity, or the ADR entity refuses to deal with the dispute, the complaint shall not be processed further.

If the ADR entity accepts to consider the dispute, the “normal” ADR procedure (with slight changes) will apply.

5 Obligations on traders

Before entering into a sales contract or a service contract with a consumer, traders must inform consumers about the ADR entity or ADR entities by which those traders are covered, when those traders commit to or are obliged to use those entities to resolve disputes with consumers. This information includes the website address of the relevant ADR entity or ADR entities and must be provided in a clear, comprehensible and easily accessible way on the traders’ website, where one exists, and, if applicable, in the general terms and conditions of sales or service contracts between the trader and a consumer.

In cases where a dispute between a consumer and a trader established could not be settled further to a complaint submitted directly by the consumer to the trader, the trader must provide the consumer with the information referred to in the preceding paragraph, specifying whether he will make use of the relevant ADR entities to settle the dispute. This information shall be provided on paper or on another durable medium. This obligation applies to all traders, including those to which the preceding paragraph does not apply.

Traders established within the European Union engaging in online sales or service contracts, and online marketplaces established within the European Union, must provide on their websites an electronic link to the ODR platform. This link must be easily accessible for consumers. Traders established within the European Union engaging in online sales or service contracts must also state their e-mail addresses.

Traders established within the European Union engaging in online sales or service contracts, which are committed or obliged to use one or more ADR entities to resolve disputes with consumers, must further inform consumers about the existence of the ODR platform and the possibility of using the ODR platform for resolving their disputes. They must provide an electronic link to the ODR platform on their websites and, if the offer is made by e-mail, in that e-mail. The information must also be provided, where applicable, in the general terms and conditions applicable to online sales and service contracts.

Any information obtained as part of an ADR/ODR procedure is confidential. This obligation is reciprocal and also applies to consumers.

6 Relationship with other instruments

The information obligations laid down by the ADR Directive, as implemented by the ADR Law, and the ODR Regulation are without prejudice to provisions on consumer information on out-of-court redress procedures contained in other European Union legal acts. This means that such acts apply in addition to the provisions described in the previous section.

Situations where cumulative information obligations may apply include, but may not be limited to, distance contracts (“*contrats à distance*”) and contracts negotiated away from business premises (“*contrats hors établissement*”) which are regulated by the Consumer Code.

Certain other legal instruments also contain information obligations which may cumulatively apply, including, but not limited to, the law of 10 November 2009 on payment services, the law of 27 July 1997 on insurance contracts and, in the future, the provisions implementing Directive 2014/17/EU of 4 February 2014 on credit agreements for consumers relating to residential immovable property.

7 Sanctions

The ADR law provides for a number of sanctions in the broad sense of word.

7.1 Violation of confidentiality obligation

A violation of the confidentiality obligation by a party to an ADR procedure potentially exposes it to damages. Any confidential documents which have been unlawfully disclosed or invoked must be *de jure* dismissed from the hearings of any court or arbitral tribunal.

The foregoing is in addition and without prejudice to general confidentiality obligations such as professional secrecy rules (e.g., article 41 of the law of 5 April 1993 on the financial sector, article 458 of the Criminal Code).

7.2 Violation of other obligations

An agreement between a consumer and a trader to submit complaints to an ADR entity is not binding on the consumer if it

was concluded before the dispute has materialised and if it has the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the dispute. Any clause to the contrary will be deemed to be null and void. This defence can only be invoked by the consumer.

Any clause stipulating that the burden of proof of the existence and the accuracy of any information provided to the consumer and of the date on which such information was provided is on the consumer will be considered “abusive” and hence will be deemed to be null and void.

Any action by a trader in violation of the two preceding paragraphs or, more generally, of the information obligations described in the section on “Obligations on traders” above may be sanctioned by a prohibitory injunction (“*action en cessation*”). The court may in addition order that the relevant court decision be publicly displayed and/or be published in the newspapers. Failure to comply may give rise to criminal liability and a fine of EUR 251 to EUR 50,000.

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