The EU Online Dispute Resolution Platform for Consumer Disputes: a step towards an EU Digital Single Market

Summary

The paper analyses the Online Dispute Resolution Platform which is designed and operated by the European Commission. The Author shows that this new instrument could not only increase the number of disputes which are resolved out-of-court, but also improve the EU digital single market. The latter impact is very important for the European Commission helmed by J.-C. Juncker because it is one of the most important goals for that EU institution. In the paper the most important regulation about the ODR platform is analysed followed by a description of how the platform works. In the conclusion the predicted benefits and concerns of the EU ODR platform are shown.

For many years a digital single market has been shown as the weakest area of the European single market. On the other side it is very often intimated that an alternative dispute resolution (ADR) between consumers and traders is not so popular in European societies. For those reasons the EU online dispute resolution (ODR) could be a crucial point which helps improve the situation in both areas. The ODR links the European digital single market and the ADR and could show that buying abroad within the EU is safe and in this way enable a higher number of disputes resolvable out-of-court. Explaining why the ODR platform is so important for the European digital single market is the main goal of this paper. It will be achieved by showing the most important resolutions in the regulation on consumer ODR and describing how the new ODR platform works. Documents prepared by the European Commission (EC), legal acts adopted by the European Parliament and the Council, surveys about digital single market and the ADR, and literature about the ODR will be analyzed to achieve that goal.

1. An EU Digital Single Market
Over the last decade, we saw the rapid evolution of the internet and mobile communications. That process has had influence on the European Single Market and will likely change the European economy and common market. Benefits from the current level of cross-border e-commerce are estimated at 0.27% of GDP\(^1\). 315 million Europeans use the internet every day and are therefore potential consumers for European traders and enterprises. This could have a huge influence on micro, small and medium enterprises (SME) because of the access to a potential customer base of 500 million people within the EU. International companies have no problem accessing the 28 member state markets, but for SMEs that is still difficult. The digital single market could make lower cross-border trade costs for SMEs which could increase their production, make lower production costs and make them more competitive\(^2\). Another advantage is that cross-border e-commerce allows EU residents and businesses to have access to a wider variety of goods and services, and at lower prices through increased price competition\(^3\). Some of these benefits will increase GDP, while others will improve quality of life\(^4\). But many barriers still exist within the EU single market, especially in the services and digital market.

Highlighting the importance of the topic and regardless of the many years of integration in the economic field, within the EU there are still 28 different national consumer protection and contract laws. That makes the European single market divided into 28 different areas, most notably for traders and consumers. Costs connected with this differentiation have a direct influence on SMEs causing only 7% of them selling cross-border.

Another effect of that differentiation is that only 38% of EU consumers feel confident about purchasing via the internet from another EU Member State (while it’s 61% from a retailer located in their own Member State)\(^5\). In 2014 20% of consumers had problems with purchasing via the internet

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2 Ibidem.
4 I.e. the option to buy a good or service which better corresponds to the consumer’s desire. See S. Pantea, B. Martens, *The Value of the Internet for Consumers*, “JRC Technical Reports. Digital Economy Working Paper” 2014, No 2014-08.
5 Flash Eurobarometer 397, *Consumer attitudes towards cross-border trade and consumer protection*, 2014, p. 9. There are only four Member States where at least half of consumers agree they are confident to buy online from another EU country: Ireland (62%), Luxembourg (56%), Malta (55%) and Denmark (51%).
from other EU Member States. It has been shown that 71% of EU consumers think that resolving disputes with foreign online shops is harder, compared to disputes with online shops in their own Member State. In 2014 22% of consumers experienced a problem buying or using goods or services which was a legitimate cause for complaint. Among them 76% have taken action to solve problem. In this group only 7% have complained to an out-of-court dispute resolution body, most complaining directly to the retailer or service provider (83%). It is important to notice that those who complained to an out-of-court dispute resolution body were more satisfied with the way their complaint was dealt with (68%). This information highlights the importance of the topic.

The European Parliament identified other barriers affecting e-commerce: the lack of interoperability and common standards, the lack of adequate information allowing consumers to make informed decisions, inadequate access to enhanced cross-border payments and, most importantly for this article, concerns about security with online shopping.

Different barriers have been identified by firms which have had experience selling on-line cross-border. The biggest causes were delivery costs (51%) and costs of guarantees and returns (42%). But in third place were the costs of resolving cross-border complaints and disputes (41%).

It is easy to see that both consumers, firms and the EP defined the same problem – a concern about resolving cross-border disputes. These concerns were valid because before 2016 there were a lack of options which allowed consumers and traders to easily resolve disputes. This situation led to difficulties for consumers by acting as a barrier in cross-border online transactions. Very often this created an uneven playing field for dishonest traders and consumers. This hampered the overall development of online commerce and influenced the functioning of the European single market. It is obvious that without a secure and trustworthy digital single market, new digital services for consumers and businesses may happen later or to a lesser extent in the EU.

This information shows us where the problems are with selling via the internet and why the European digital single market doesn’t operate effectively. First of all, Europeans have no trust in cross-border buying and selling. They don’t believe that a dispute with a shop or provider from the

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7 Flash Eurobarometer 397, pp. 13-14.


9 Flash Eurobarometer 413, Companies engaged in online activities, 2015, p. 22.
other member states could be resolved effectively. Furthermore, they don’t know about the out-of-court dispute resolution body, which – in their opinion – brings the best results. In this area there is a lot of potential for the EU economy, especially for SMEs. The main problem is how to change the situation and make European citizens and firms more aware of this opportunity that exists within the digital single market.

2. Documents & legal acts

The Political Guidelines „A New Start for Europe: Agenda for Jobs, Growth, Fairness and Democratic Change“\textsuperscript{10} has established a number of goals for the new European Commission. One of the priorities is to establish a connected digital single market. In the opinion of the EC, by creating a connected digital single market, the EU can generate up to 250 billion euro of additional growth. Additionally, it can create “a fair level playing field where all companies offering their goods or services in the European Union are subject to the same (…) consumer rules”\textsuperscript{11}. The EC announced that it will take legislative steps towards a connected digital single market „by modernising and simplifying consumer rules for online and digital purchases”\textsuperscript{12}. It shows that establishing a digital single market is a very important aim for the new Commission, which could help generate a new source of economic growth and improve the situation in the labour market.

With regard to the above political guidelines, the EC published two documents concerning the digital single market. The first is a communication titled „Single Market Act II – Together for new growth“\textsuperscript{13}. The second – and more important for the issue presented here – is a communication titled „A Digital Single Market Strategy for Europe“\textsuperscript{14}, in which the EC announced an online dispute resolution (ODR) platform as a tool to increase cross-border trade. To some extent it was an effect of societal pressure. For several years businesses and scholars had called for the introduction of a pan-EU ODR tool\textsuperscript{15}.

\textsuperscript{11} Ibidem, p. 5.
\textsuperscript{12} Ibidem.
\textsuperscript{14} European Commission, A Digital….
The consumer dispute resolution is regulated by EU law. In article 169 para. 1 and article 169 para. 2 letter (a) The Treaty on the Functioning of the European Union\textsuperscript{16} it is stated that the Union is to contribute to the attainment of a high level of consumer protection. Moreover, the Charter of Fundamental Rights\textsuperscript{17} in article 38 states that Union policies are to ensure a high level of consumer protection. These are the legal basis for EU’s regulations directly concerning an alternative dispute resolution (ADR) and the online dispute resolution. First is the directive on consumer ADR\textsuperscript{18} which ensures consumers have access to alternative options for resolving disputes with traders. Member states have to ensure access to ADR no matter what product or service is being bought\textsuperscript{19} or whether via the internet or not\textsuperscript{20}. At the heart of these procedures are alternative dispute resolution bodies who seek to propose or impose a solution or bring together the parties concerned in both domestic and cross-border consumer disputes\textsuperscript{21}.

European institutions established two acts which are directly focused on the online dispute resolution. The first act, a legislation, is the regulation on consumer ODR\textsuperscript{22} which has established a European Online Dispute Resolution platform (the ODR platform)\textsuperscript{23}. The second act – but non-legislative – is an implementing regulation on the consumer ODR\textsuperscript{24}. Both acts regulate the web-based platform, which is designed to help consumers who have bought goods or services online and have problems with that purchase\textsuperscript{25}. As Z. S. Tang underlines the regulation on consumer ODR reflects the EU policy ensuring a high level of consumer protection by reducing barriers, caused by fragmentation and unevenness of national dispute resolution systems, and by improving consumer confidence in the

\textsuperscript{16} O.J. 2012 C 326/47.
\textsuperscript{17} O.J. 2000 C 364/1.
\textsuperscript{19} Disputes regarding health and higher education are excluded. See article 2 para. 2 letters (h) and (i) of the Directive 2013/11/EU.
\textsuperscript{20} Alternative and Online Dispute Resolution (ADR/ODR), \url{http://ec.europa.eu/consumers/solving_consumer_disputes/non-judicial_redress/adr-odr/index_en.htm} (18.05.2016).
\textsuperscript{21} F. Wilman, \textit{Enforcement of EU Law Before National Courts. The EU Legislative Framework}, Cheltenham 2015, p. 188.
\textsuperscript{23} In 2010 UNCITRAL Working Group III begun to prepare draft procedural rules for ODR providers that deal with commercial and consumer cross-border disputes arising from e-commerce.
\textsuperscript{24} Commission Implementing Regulation (EU) 2015/1051 of 1 July 2015 on the modalities for the exercise of the functions of the online dispute resolution platform, on the modalities of the electronic complain form and on the modalities of the cooperation between contact points provided for in Regulation (EU) No 524/2013 of the European Parliament and of Council on online dispute resolution for consumer disputes, O.J. 2015 L 171/1.
\textsuperscript{25} Alternative....
digital single market\textsuperscript{26}. But it is obvious that one of the most important goals is fostering the EU digital market\textsuperscript{27}.

3. How the EU ODR platform works?

At the beginning it has to be underlined that the Online Dispute Resolution is an ADR procedure conducted entirely online. It means that regulation on consumer ODR should be used in combination with the directive on consumer ADR. They are two interlinked and complementary legislative instruments\textsuperscript{28}. Although the ADR directive and the ODR regulation are two different legal acts, they are interconnected. The ODR regulations are based on the principles of the ADR directive\textsuperscript{29}. But it is important to highlight that at the same time the scope of the ODR regulation is both wider and narrower than the ADR directive. It is wider because it can also be applied to business vs. consumers disputes initiated by a trader against a consumer\textsuperscript{30}. In contrast, the ADR directive only works in favour of the consumers\textsuperscript{31}. The regulation is narrower because it only applies in cases related to online sales or service contracts\textsuperscript{32}. I. Benöhr thinks that the mixture of ODR regulation and ADR directive is a promising move towards a comprehensive solution for consumers to access out-of-court solutions\textsuperscript{33}.

As mentioned above, based on the regulation on consumer ODR the EC established the European ODR platform which it develops and operates\textsuperscript{34}. This is a web-based platform designed to help consumers who have bought products or services online and have a problem with that purchase. It allows consumers to submit their dispute and conduct the ADR procedure online and in any official EU language. But, what has to be underlined, it is not an ADR entity. It transmits disputes only to bodies who are included in the national lists. This means that the regulation 524/2013 focuses only on improving cooperation between member states\textsuperscript{35}. But this legal act ensures the accessibility of the ADR process through the ODR platform that offers a means of remote communication between the parties.

\begin{itemize}
\item Z. S. Tang, \textit{op. cit.}, p. 348.
\item S. Wrbka, \textit{op. cit.}, p. 99.
\item Article 2 para. 2 Regulation 524/2013.
\item Article 2 para. 2 letter (g) Directive 2013/11/EU.
\item Article 2 ODR regulation. More: S. Wrbka, \textit{op. cit.}, p. 100.
\item Article 5 para. 1 Regulation 524/2013.
\item As perceived Z. S. Tang that solution is one option chosen from the three different. Z. S. Tang, \textit{op. cit.}, p. 350.
\end{itemize}
and ADR schemes\textsuperscript{36}. Undeniably, the ODR platform is an example of how modern technology and dispute resolution can interact\textsuperscript{37}. P. Cortés perceives that the role of technology in this online process is so fundamental that it could be named as the “fourth party” because it displaces, sometimes replaces, the role of the neutral third party – which is the ADR entity\textsuperscript{38}.

The ODR platform has been operational since 9 January 2016, but has been accessible to consumers and traders since 15 February 2016 (the link to the ODR platform is: http://ec.europa.eu/odr). In a few member states (for example Croatia, Germany, Lithuania, Luxembourg, Malta, Poland, Romania, and Spain) there are still some problems, and the platform is unavailable for their citizens. Often these issues are due to the nonexistence of the list of ADR bodies or the ODR contact points not being established\textsuperscript{39}.

The ODR platform is consumer friendly because everything can be done in four, easy steps\textsuperscript{40}. At the beginning the consumer has to fill in an online complaint form and submit it. Then the complaint is sent to the relevant trader, who proposes an ADR body to the consumer. Once consumer and trader agree on an ADR entity to handle their dispute, the ODR platform transfers the complaint automatically to that entity. In the fourth step the ADR body handles the case entirely online and reaches an outcome in a maximum of 90 days.

As mentioned above, the regulation 524/2013 does not provide any specific standards and principles for ODR. Within the ODR platform these same principles and standards which have been established in the directive on consumer ADR should be in force. That means the ODR platform should be based on principles of independence, impartiality, transparency, effectiveness, speed and fairness.

The EU regulation described some functions of the ODR platform. First of all, it has to provide an electronic complaint form which can be filled in by the customer or trader. The second function is to inform the respondent party about the complaint. This platform should also help the parties agree on a competent ADR entity and transmit the complaint to that body. The ODR platform should also offer an electronic case management tool free of charge, which enables the parties and the ADR body to


\textsuperscript{37} S. Wrbka, \textit{op. cit.}, p. 98.

\textsuperscript{38} P. Cortés, \textit{Online…}, p. 40.


\textsuperscript{40} Article 8 para. 1 Regulation 524/2013.
conduct the dispute resolution procedure online. The last function is to provide the parties and ADR entity with the translation of information which is necessary for the resolution of the dispute.\(^{41}\)

The Regulation on consumer ODR established some tasks for EU member states.\(^{42}\) The most important is an obligation to designate one ODR contact point. This contact point should provide support to the resolution of disputes relating to complaints submitted through the ODR platform. The contact point should also facilitate communication between the parties and the competent ADR body. That may include: assisting with the submission of the complaint and relevant documentation; providing the parties and ADR bodies with general information on consumer rights in relation to sales and service contracts; providing information on the functioning of the ODR platform; providing the parties with explanations on the procedural rules applied by the ADR entities identified; and informing the customer of other means of redress when a dispute cannot be resolved through the ODR platform.\(^ {43}\) The third task for the contact point is submitting an activity report to the European Commission and to the member states every two years based on practical experience gained.\(^ {44}\) The role of the ODR contact points is without doubt of practical importance in ensuring compliance with the regulatory regime of the ODR regulation and ADR directive, and to improve the usefulness of the ODR process. For that reason, it is obvious that each ODR contact point has to have a previous ODR or ADR experience.\(^ {45}\)

Traders which are established within the Union and engaged in online sales or service have a few obligations imposed by the regulation 524/2013.\(^ {46}\) They should provide on their websites an electronic link to the ODR platform and inform consumers about the existence of the ODR platform and the possibility of using it for resolving disputes.\(^ {47}\) If necessary, they have to change contractual terms.

In order to submit a complaint to the ODR platform, the customer should complete the electronic complaint form. Due to an annex to the regulation 524/2013, the information which has to be provided is: (1) whether the complainant party is a consumer or a trader; (2) the name and e-mail and geographical address of the consumer; (3) the name and e-mail, website and geographical address of

\(^{41}\) Article 5 para. 4 Regulation 524/2013.

\(^{42}\) Article 7 para. 1 Regulation 524/2013.

\(^{43}\) Article 7 para. 2 letter (a) Regulation 524/2013. It is important to notice, that the ODR contact point shall not be obliged to perform all these functions in the case of disputes where the parties are habitually resident in the same member state.

\(^{44}\) Article 7 para. 2 letter (b) Regulation 524/2013.

\(^{45}\) S. Wrbka, op. cit., p. 101.

\(^{46}\) Article 14 Regulation 524/2013.

\(^{47}\) For Ch. Hodges, I. Benôhr and N. Creutzfeldt-Banda that is the most important element of the Regulation 524/2013. More: Ch. Hodges, I. Benôhr, N. Creutzfeldt-Banda, op. cit., p. 22.
the trader; (4) the language of the complainant party and respondent party (if known); (5) the type of goods or service to which the complaint relates; (6) the price of the goods or service purchased; (7) the date on which the consumer purchased the goods or service; (8) whether the consumer has made direct contact with the trader; (9) whether the dispute is being or has previously been considered by an ADR entity or by a court; (10) the type of complaint; and (11) the description of the complaint.

The ODR platform should transmit to the respondent party information that the parties have to agree on an ADR entity in order for the complaint to be transmitted, together with information about the ADR entity or entities which are competent to deal with the complaint, and the name and contact details of the ODR contact point in the member state where the respondent party is established or resident. This information should be transmitted in one of the official languages chosen by the party. This has to be done in an easily understandable way and without delay.\(^48\)

The ADR body, which has been chosen to deal with the dispute, has a few obligations established by the regulation on consumer ODR. First of all, this entity should conclude the ADR procedure within the deadline. Secondly it should transmit without delay information to the ODR platform about the date of receipt of the complaint, the subject-matter of the dispute, the date of conclusion of the ADR procedure, and the result of the ADR procedure.\(^49\)

4. Conclusions: benefits and concerns of the EU ODR platform

Some benefits connected with establishing the ODR platform could be shown. First of all, consumers and traders will know that they are able to settle their disputes out of court in a simple, fast and low-cost way. The obligation for traders to provide on their websites an electronic link to the ODR platform and to inform consumers about the possibility of using that platform for resolving their disputes, could increase the knowledge in the European societies about the ADR procedure. That could increase the confidence of European consumers and traders in online trading and across borders. Secondly, there is a chance that the ODR platform will develop a new culture of out-of-court, conciliatory dispute resolution between consumers and traders in the EU. In some member states – for example in post-authoritarian, Eastern European countries – the culture of compromise and conciliation is weak and the ODR platform could change this situation. Finally, the ODR platform may help to

\(^{48}\) Article 9 para. 3 Regulation 524/2013.

\(^{49}\) Article 10 Regulation 524/2013.
develop a European digital single market, which is important for the European Commission and for the European economy. It is estimated that the European digital single market as a part of the single market of the EU could lead to 415 billion Euro in additional growth and hundreds of thousands of new jobs. This is important because of a huge amount of unemployment, especially among young people. Additionally, EU consumers could save 11.7 billion Euro which may be spent on other products or services, thereby increasing the European economy.

Based on the above, the mixture of ODR regulation and the ADR directive is a promising move towards a comprehensive solution for consumers to access out-of-court schemes in cross-border disputes. However, it remains to be seen how these rules will be operated in practice. There are some doubts about efficiency of this platform. The most common doubt is connected with an enforceability of ODR results. P. Cortés, Ch. Liebscher and S. Wrbka underline that absence of enforcement rules for ODR decisions is regrettable. The authors suggest that we should wait to see how member state courts react when issues of recognition and enforceability of ODR decisions are brought before them. The positive results of litigations could increase coverage and encourage consumers and traders to use this platform.

Another limitation of the EU ODR platform is that it does not have a system of automatic referral to an ADR scheme if the business does not reply to the consumer’s claim. However, P. Cortés found that, although currently it is voluntary for most traders to opt into these schemes, the day when the participation in ADR/ODR schemes becomes mandatory as the primary forum for resolving these disputes is not far away. For that reason, in his opinion, the ODR platform could be an important change in the civil justice system which no longer sees the court as the default forum to resolve these types of disputes.

S. Wrbka defines another problem. The ODR platform, especially from a consumer perspective, is not a necessarily problem-free alternative to traditional litigation. As P. Cortes observes, the ODR platform hasn’t been proven to be consumer-friendly as yet. These concerns are justified. L. Edwards

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52 P. Cortés, Online Dispute Resolution for Consumers..., p. 41.
53 Ibidem, p. 41.
54 S. Wrbka, op. cit., p. 98.
55 P. Cortés, Online Dispute Resolution for Consumers..., p. 223.
and C. Wilson, for example, critically analysed the potential and risks of the ODR in Europe and came to the conclusion that due process issues could pose a threat for the success of the ODR\textsuperscript{56}. Notwithstanding, the ODR platform had been created as a consumer-friendly tool, which is very clearly defined in the ODR Regulation\textsuperscript{57}. The S. Wrbka concern could be true in some member states, especially with the highly efficient civil justice system. But in other countries, for example in Eastern Europe, an ADR/ODR procedure could be an enticing alternative to litigation. Furthermore, usage of the ODR platform will be especially high for European consumers in cross-border disputes, when their knowledge about the civil justice system in the other member states is very often low. As a standardised, well-monitored and well-implemented pan-EU system, it would offer the chance to provide consumers with a real alternative\textsuperscript{58}. This could increase cross-border trade within the EU single digital market.


\textsuperscript{57} Article 5 para. 1 and article 8 para. 1 Regulation 524/2013.

\textsuperscript{58} S. Wrbka, \textit{op. cit.}, p. 101