

ONLINE DISPUTE RESOLUTION
—ODR— BUILDING E-CONFIDENCE IN EUROPE

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SUMMARY: I. *E-Confidence*. II. *Developing online dispute resolution*
—ODR—in consumer redress. III. *ODR in spanish consumer law*.

I. E-CONFIDENCE

Over 493 million people are in the European internal market, even though many of the consumers are reluctant to use the web, especially if that involves a cross border transaction: An important part of the e-commerce depends on the confidence in the cross-border transaction, as of the 33% of Europeans who shopped online in 2008, out of whom only 7% did cross-border.¹ Confidence in the network is measured in terms of security: consumers will only be able to evaluate the advantages that e-commerce offers over traditional methods if they know the medium and understand how it works. But besides an appropriate regulatory framework, the e-confidence is also based on a responsive system of conflict resolution, perhaps more intensely than in offline relationships. In other words, the harmonisation of consumer law has tried to give same—or at least equivalent—contracting conditions all over Europe. But only when individual redress is able to be fast and cheap, consumers will feel comfortable with this type of transactions. For this reason, one of the lines started by the Commission is the development of tools to simplify the claim process.

For this reason, consumers need simple, fast and an inexpensive system to seek for redress; only in that case, consumers will take the risk of a default or defective performance by the enterprise. The current strategy for consumer protection 2009-2014, is again insisting on increasing consumer confidence

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¹ Special Eurobarometer 298: October 2008.

to new technological challenges as a way to increase the efficiency of their protection.² For this reason, it is soon understood that cross-border by its nature means an area created without borders, such as the internet, and therefore the greatest concern is to provide the new practices of e-commerce with alternative methods of dealing with disputes. It is this fact that is bringing about the change from ADRs to ODRs.

II. DEVELOPING ONLINE DISPUTE RESOLUTION —ODR— IN CONSUMER REDRESS

In the EU point of view, any alternative dispute resolution (ADR) that is used to deal with consumer complaints is considered to be a basic instrument for generating the so called consumer access to justice. ADRs have played a key role in enforcement for consumers across the EU. This situation stems from the actions initiated by the green paper on “*consumer access to justice in the internal market*” in 1993, which sought to design a regulatory framework in which mechanisms to ensure the effectiveness of consumer protection could be generated. This green paper on the state of the question observed the proliferation of various kinds of ADR for consumer complaints in EU member countries, to meet the demand for faster and cheaper processes than the court system.

In that sense, the consumer ADR system was laid down in two sets of regulations at the Community level: the Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes and the Commission Recommendation 2001/310/CE of 4 April on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes. The EU has been developing a high level task in this direction, especially from 2009 on, but in November 2011 an important step was done because the EU approved a Proposal of Directive on consumer ADR³ that tries to offer a standard level of consumers’ protection all over Europe. If that piece of regulation is definitive-

² This question has been referred to repeatedly in documents on e-commerce since the first e-Europe plan in 2002. The most recent document is the “Report on cross-border e-commerce in the EU”, SEC(2009) 283 final, of March 2009, compiled by the Commission Working Group. This reports that 21 per cent of individuals do not use the internet for shopping because they are worried about problems in the way complaints may be handled or failures on the part of businesses. See ec.europa.eu/consumers/strategy/docs/com_staff_wp2009_en.pdf, last accessed January 25th 2012.

³ Proposal for a Directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and

ly approved, a first and crucial step to harmonization of enforcement system will be done. So, the choice for individual redress in consumers' complaints through ADR is definitively done.

The intersection between the development of ADR in consumer law and electronic commerce, as well as a great opportunity to use ICT in consumer ADR, is very clear in the Communication 161/2001 and is seen as the best instrument for developing what we have called e-confidence.⁴ At present, the development of ODR is no longer only a question of consumer access to justice, but the generation of confidence in the new medium.⁵ In fact, the e-confidence has become the basis of ODR development in the EU and so, the consumer ODR value lies in the effectiveness of the system. Thus the search for efficiency along with cost reduction has made the classic ADR adapt to the online environment where experiences are numerous.

Online Dispute Resolution is an expression which emphasizes the fact that the conflict resolution processes are online, as opposed to ADRs which are not. But from this almost tautological statement, there is a wide range of experiences. For that reason, we will use “ODR system” to refer, as Poblet states, to any process, methods or techniques that use information and communication technologies (ICT) to facilitate the resolution of disputes.⁶ Given that broad definition, some precisions have to be done. Firstly, ODR cannot be merely considered as an online adaptation of ADR. In fact, ODR can be larger than ADR as the online context also allows the cybercourts,

Directive 2009/22/EC (Directive on consumer ADR), COM, 2011, 793 final, 2011/0373 (COD).

⁴ Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes, *OJ L 109*, April 19th, 2001, pp. 56–61.

⁵ See Communication of July 2nd, 2009 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the enforcement of the consumer acquis: Nevertheless, these key factor is far from being achieved: as C stays European consumers remain reluctant to reap the benefits that market integration provides. One reason for this is that consumers do not feel confident that their rights will be equally protected when buying abroad. In a single market, consumers should not be concerned with where a trader is established since it should not influence the level of protection against unfair commercial practices. A particular challenge for the EU therefore is to secure a consistently high level of enforcement across its territory. It is the purpose of this Communication to take stock of ongoing Commission work and to explore the potential for future initiatives in the context of a comprehensive analysis of enforcement related activities.

⁶ Poblet, M., “Introduction: Bringing a new vision on online dispute resolution”, in Poblet (ed.), *Expanding horizons of ODR, Proceedings of the 5th International Workshop on online dispute resolution*, Firenze, 2008, p. 1.

that would not be an “alternative” way of resolving disputes.⁷ Secondly, ODR can be used in e-disputes or in conflicts arisen in traditional transactions, that is to say, offline. Nevertheless, as a way of building e-confidence, the natural field of analysis is online transactions conflicts.⁸ Thirdly, the use of ICT in a dispute resolution system offers a great variety of levels that can be outlined going from the use of ICT in the environment of conflict resolution to the generation of new ODR platforms mediated by the technical advances of the Internet, especially the www2, which promotes interoperability.

In that sense, not every use of ICT in a dispute resolution system would be considered as an ODR. The use of electronic mail in an ADR process can be considered as ODR only in a very large sense. And we can add the use of videoconferencing in some ADR steps —such as the hearing in an arbitration process—. ⁹ These practices can be described as a very initial step in ODR, but they are the first level in the adaptation of traditional ADRs to the new environment and these experiences support the ability to resolve conflicts between consumers and providers by “electronic means”.

The ODR system becomes more complex in case of greater interface between the technical instruments and the way of dispute resolution. So, the ODRs are to be analyzed bearing in mind that they have a large amount of conceptual independency as ICT allows a technical approach that in the offline world can simply not be possible.¹⁰ As Benyekhlef¹¹ states, technology already provides “*mechanisms that use a sound technological infrastructure to automate certain functions, model the relevant process and provide an interface through which all steps of the procedure can be accomplished, documented and archived*”. It is that automation, modelling and interfacing which can be developed in different levels, depending on the type of ODR. In this sense, the ODRs are a system to resolve or facilitate the resolution of disputes that only in a part can be considered as the online develop of ADRs for two reasons: ODRs include non alternative systems of dispute resolution, and ODRs also refer to brand

⁷ See, Kaufmann-Kohler, G. and Schultz, T., *Online dispute resolution. Challenges for Contemporary Justice*, The Hague, Kluwer Law International, 2004, pp. 5 to 10.

⁸ See Suquet, J., “Online dispute resolution (ODR): una visión jurídica del estado del arte tecnológico”, *Revista Vasca de Derecho Porcesal y Arbitraje*, 2010, t. XXII, pp. 62 y 63.

⁹ For different opinions about the kind of electronic means that would be essential for a system to be considered ODR, see Suquet, *op. cit.*, p. 63.

¹⁰ Poblet, M. *et al.*, “ODR y mediación en línea: estado del arte i escenarios de uso”, Poblet, M. *et al.* (eds.), *Materiales para el Libro Blanco de Mediación en Catalunya*, Barcelona, Centre d’Estudis Jurídics i Formació Continuada, Departament de Justícia de la Generalitat de Catalunya, Colección Justicia y Sociedad, pp. 159-169.

¹¹ Benyekhlef, K. and Gélina, F. “Online Dispute Resolution”, *Lex Electronica*, vol.10, num. 2, Été-Summer 2005, p. 95, http://www.lex-electronica.org/articles/v10-2/Benyekhlef_Gelinas.pdf.

new technical means of solving disputes that are away from the definition of the ADR types. And that means a different juridical approach because of the versatility of new technology.

Nevertheless, as it has been stressed by Hörnle, ODR in consumer issues are of added value because they can be easily adapted to every type of claim depending on the economic value of the complaint and the use of some standards that are able to guarantee the main principles of dispute resolution systems.¹² Regarding consumer disputes in e-commerce, the role of alternative dispute resolution is stressed on two important pieces of regulation: the art 17 D 2001/31/EC¹³ —the e-commerce Directive—; and the Joint declaration by the Council and the Commission made when the “Brussels I” Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters was adopted.¹⁴ For that reason, in November 2011, the EU has approved a *proposal of Regulation on consumer ODR*.¹⁵ This piece of regulation will develop an online platform for the resolution of consumer complaints in electronic commerce when they would be cross-border. The proposal for a regulation is targeting a very specific area: cross-border complaints in the field of electronic commerce, but with enough depth and breadth. It deals, therefore, clearly the requirements of the resolution of consumer disputes and their adaptation to the online environment.

III. ODR IN SPANISH CONSUMER LAW

1. “*Electronic arbitration*” in the spanish system od consumer arbitration

Since 2008, Spain has opted to regulate a specific type of ODR: that is, consumer arbitration understood as a system that combines procedures of

¹² Hornle, J, “Online Dispute Resolution in Business to Consumer E-commerce Transactions”, *The Journal of Information Law and Technology (JILT)*, 2002 (2). http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2002_2/hornle. Last accessed October 5th, 2010.

¹³ Directive 2000/31/EC of 8 June 2000 concerning certain judicial aspects of the services of the information society, and in particular electronic commerce, within the internal market, OJ L 178.

¹⁴ Joint declaration of the Council and the Commission concerning Articles 15 and 73 of the Regulation in the minutes of the Council meeting of December 22nd, 2000 which adopted this Regulation. See Council Regulation (EC) num. 44/2001, of December 22nd, 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the Brussels Regulation).

¹⁵ Proposal for a Regulation of the European Parliament and of the Council on online dispute resolution for consumer disputes (Regulation on consumer ODR) COM(2011) 794 final, 2011/0374 (COD) .

mediation and arbitration in keeping with the description provided above. In fact, the regulation of electronic consumer arbitration is presented in the Preamble to Regulation 231/2008 as its principal novelty.¹⁶ This innovation represents the development of a system that combines the use of ICTs for consumer arbitration and mediation and the building of on-line platforms for ODR in such matters, the main aim of which is to make the procedure swifter and to eliminate costs.¹⁷

The regulation lays down, in a number of precepts, the procedures for electronic consumer arbitration. Here, a clear distinction is drawn between electronic arbitration and “procedural steps taken on-line” as part of a conventional arbitration process (article 3.3). Following this distinction, in both instances it deems applicable Act 11/22 June 2007 (insofar as this is not provided for in Regulation 231/2008), governing a citizen’s electronic access to public services. This reference can be attributed to the fact that consumer arbitration is of an institutional nature which means it is subject to the authority of administrative law as regards the use of electronic media for giving legal notice and for other effects.

All in all, Regulation 231/2008 has a somewhat restrictive view of electronic arbitration since it only considers procedures that are conducted “wholly” by electronic media, although it then recognizes that some steps might be completed face to face. Such an approach gives rise to problems of definition: how many face-to-face operations are necessary before the arbitration will no longer be considered electronic? Art. 45, in discussing the instruction and administration of evidence in an electronic arbitration, states that “In an electronic arbitration when the instruction and administration of evidence is agreed to be conducted face-to-face, the procedure shall be undertaken by videoconference or by any other technical means that allows identification and direct communication between parties”. We can conclude from the forgoing that the use of videoconferencing constitutes a face-to-face procedural step, even though it is conducted by electronic means and, strictly speaking, it is not conducted face-to-face. As such article 45 provides a good example of what was discussed earlier: the use of videoconferencing represents an ICT application to mediation and arbitration procedures that achieves an equivalent effect to that of a face-to-face hearing based on techniques of distance communication that allow the emission of images.

¹⁶ The importance of this approach had previously been identified in the *Libro Blanco sobre Mecanismos Extrajudiciales de Solución de Conflictos en España*, *op. cit.*, p. 97.

¹⁷ For a further discussion, see Montesinos García, A., “*El arbitraje de consumo virtual*” in Cotino Hueso, L. (coord.), *Consumidores y usuarios ante las nuevas tecnologías*, Valencia, 2008, p. 264.

However, what Regulation 231/2008 actually foresees as constituting electronic arbitration is a centralized computer application that the Ministry of Health and Consumer Affairs received the mandate to create (article 51.2) as an equivalent system to that of conventional consumer arbitration only conducted by electronic means. In other words, it is a procedure, adapted to the provisions laid down in the Regulation, that is carried out virtually and in which the problems that have to be overcome involve determining which board of arbitration has jurisdiction (article 52); how legal notices can be served (article 54); where the arbitration should take place (article 55) and how the electronic signature mechanism can be implemented so as to guarantee the identity of the parties and the integrity of the communication (article 53).

2. *Mandatory electronic mediation in small claims*

There is an intense relation between ODR and small claims, i.e. the claim does not have a great economic value. So, an important practical point to bear in mind is the fact that most consumer disputes fall into that category of small claims. Two consequences arise from this: on the one hand, if there is no swift, cheap mechanism of resolution, these claims are unlikely to reach the courts;¹⁸ and, on the other hand, although the redress sought by each separate consumer may be of little value, there might be a very large sum involved if all the consumers are considered together. Take, for example —at the EU level— the SANCO (Directorate-General for Health and Consumers) study into commercial practices relating to the sale of flight tickets via the Internet, which led to the drawing up of a list of good and bad practices.¹⁹ This sector is, therefore, one in which disputes will only be settled if this mechanism of resolution is chosen.

For that reason, the Spanish Royal-Decree 5/2012 on civil and commercial mediation provides online mediation for claims of less than 600 euros (article 24). This provision will be mandatory, provided that parties have possible access to the system. It supported the same idea as DF4a, which envisages the creation of an application for simplified electronic mediation

¹⁸ Point 2 of preamble to R 98: most consumer disputes, by their nature, are characterized by a disproportion between the economic value at stake and the cost of its judicial settlement; the difficulties that court procedures may involve may discourage consumers from exercising their rights in practice, especially in the case of cross-border conflicts.

¹⁹ See the website of the Directorate-General for Health and Consumers: http://ec.europa.eu/consumers/enforcement/sweep/index_en.htm.

for quantity claims with no dispute on law grounds. This can be the start point for a real development of consumers ODR in Spain.

In short, the commitment to ODRs for consumer complaints has enormous potential and this will undoubtedly be expanded in the near future.