

ADR-Rooted ODR Design in Europe

A Bet for the Future

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Abstract

The new European regulatory framework has a greater significance than it expressly declares, both for the development of online dispute resolution (ODR) in Europe and for the structure of alternative dispute resolution (ADR) entities of the Member States. A close reading of the ADR Directive reveals an implicit but clear mandate for the development and intensive use of ODR tools by certified ADR entities that could lead to the creation of new ODR platforms. The new ADR/ODR regulatory framework shows a clear tendency to produce important transformations in the traditional ADR structure in every Member State. This article aims to identify criteria for the development of ODR in Europe and to discover the European law's implicit mandates related to the redesign of the ADR structure in the Member States, while assessing the role of the Member States, the ADR entities and the European Union itself.

Keywords: ODR, dispute system design, European law, redesign of ADR systems, artificial intelligence.

1 Introduction

The ODR Regulation and the ADR Directive point the way towards the institutionalization of online dispute resolution (ODR) in Europe and represent a first point of balance between reaching efficiency through ODR and the submission of ODR to access to justice standards.

ODR has undoubtedly had a major positive impact on consumer dispute resolution. On the basis of the success experienced by ODR platforms created by traders like E-bay, Amazon or Alibaba, dispute resolution can be assessed as having become considerably easier and more accessible for consumers. Technology is now ready to facilitate consumer dispute resolution in the broadest sense. ODR, however, encompasses more than technology alone and has proved not to be self-sufficient. Theoretically, ODR functionalities may be offered by a trader (E-bay), by an alternative dispute resolution (ADR) entity or directly by a court. ODR may also be offered by regulators insofar as they can assume the resolution of consumer disputes. Whatever may be the case, ODR should abide by different requi-

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sites and depend on the peculiarities, aims and principles required by the specific entity. This article focuses on European ADR entities providing ODR services.

ODR was originally developed to attend to the necessities of ADR. Indeed, many of the developments in the field of ODR have been built upon the functions displayed by traditional ADR entities, the aim being “to mimic the dispute resolution channels of traditional ADR processes and offer online equivalents”.¹ As E. Katsh and O. Rabinovich note, attempts to copy ADR in the online setting proved to be a difficult task; ODR quickly began to develop processes with features that were clearly different from those of traditional dispute resolution. Today it is undisputable that the functions that ODR may provide (for instance, the negotiation tools through the fourth party, the possibility of organizing information, of sending automatic answers, of decrypting the claims of the parties and assigning them to a specific category of disputes, of planning meetings or providing a list of acceptable remedies) are self-standing and have significantly departed from the traditional concept of ADR.

The achievements in the field of artificial intelligence (AI), algorithms and blockchain accelerate the individualization of ODR and force its existing structure to face the challenge of new frontiers. This is received with enthusiasm as it enhances the promises of ODR for the future of dispute resolution. ODR does not want to be considered simply as a digital variant of ADR. Granted, ODR may help the activity of ADR entities in dispute resolution. But the range of possibilities that it may open up are far from being accounted for at the moment. ODR leaves plenty of room for imagination. It stems from and builds upon the basis of ADR, but technology enhances its breadth to unimagined dimensions. It is conceivable that in 20 years the ADR systems and schemes will be very different from what they are today. The development of ODR is putting ADR systems and schemes under pressure and will probably trigger the need for a huge transformation of the ADR concept; otherwise, ADR runs the risk of becoming obsolete. It is only a matter of time before the stakeholders decide to walk this path. ODR’s development may, however, support the survival of traditional ADR entities. In parallel to their transformation, the necessities uncovered by the traditional ADR entities and schemes can find their solution within the realm of ODR.

The process of transformation will have to provide answers to a host of issues. What criteria should be taken into consideration by stakeholders (legislators, administrators, traders, associations of traders, associations of consumers) in order to embrace the full advantages of technology? To what extent should embracing technology lead to modifying the features and character of the procedures before modern ADR entities? Which features should ADR entities retain in order to properly use the capabilities offered by technology? What ADR entities are equipped to display the whole potential of ODR? Should there be statutory changes striving for a merger between ADR and ODR in the interest of enhancing consumer access to justice?

1 See E. Katsh & O. Rabinovich-Einy, *Digital Justice. Technology and the Internet of Disputes*, New York, Oxford University Press, 2017, pp. 33-34.

Redesigning ADR should take into consideration several important factors. The most important is reaching efficiency in both the management and the resolution of disputes. At the same time, the efficiency principle cannot ignore the necessity of upholding the values and principles that ensure an ethical development of ODR, in full respect of fundamental rights in general and, more specifically, in consonance with the right of access to justice. That explains why, from the very beginning of ODR, the debate has centred on its development in the light of the risks and threats that the self-regulation of ODR mechanisms may represent.²

The European Union has pioneered the insertion of ODR and its capabilities into the core of the European ADR system. Regulation 524/2013/UE of 21 May 2013 on online dispute resolution for consumer disputes (ODR Regulation) and Directive 2013/11/EU of 21 May 2013 on alternative dispute resolution for consumer disputes (ADR Directive) point the way towards the institutionalization of ODR in Europe and represent a break-even between reaching efficiency through ODR and the submission of ODR to access to justice standards.³ But the new European legislation does not exhaustively regulate the development of ODR in Europe. The task of EU ODR development, and its implementation in the most diverse sectors of disputes, has been technically entrusted to the Member States and to the certified ADR entities in every Member State. In practice, however, the EU regulation conditions the development of ODR by setting express procedures and standards that both Member States and certified ADR entities have to abide by, leaving a significantly narrower margin of action for the following reason: the functions assigned to modern certified ADR entities can hardly be fulfilled without the aid of ODR, despite the lax language employed by the regulation.

This article has two aims. First, it determines the extent to which the ODR development in Europe is conditioned by the European regulatory framework, namely analysing the manner in which technology and ODR are envisaged in both the EU ODR platform and within the certified ADR entities. This requires setting the focus not only on the explicit mandates emanating from EU law, but also on the ones that emerge as an indirect effect and as a logical consequence of the need to carry out a massive treatment of claims by certified ADR entities, a task that cannot be achieved without the help of AI. Secondly, the article analyses the particular way in which ADR structures in EU Member States will have to adapt to fulfil the requirements of the European regulatory framework. To this end, it explores the criteria that stakeholders should take into consideration once the ADR system is reformed in order to allow efficiency, in terms of a higher level of technology use, and the fulfilment of the different functions that the EU legislation has assigned to the ADR entities. That means criteria aimed at discovering

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

3 For an analysis of the extent to which the ODR platform responds to the demands arising from the access to justice principle, see F. Esteban de la Rosa, 'Scrutinizing Access to Justice in Consumer ODR in Cross-Border Disputes. The Achilles' Heel of the EU ODR Platform', *International Journal of Online Dispute Resolution*, Vol. 4, No. 2, 2017, pp. 26-30.

how ADR redesign is being conditioned by the new functions assigned to ADR entities by European law, which indirectly entails the use of ODR tools.

Once those optimal traditional ADR entities are identified, the focus will briefly shift towards identifying how to better reconcile ADRs' proven value in consumer dispute resolution and ODR's potentiality while dealing with the limitations of technology and those of the European Union legal system.

2 Towards ODR Development

The EU law envisages the existence of ODR tools in the EU ODR platform and in the certified ADR entities. According to the ODR Regulation, the European Commission has developed and is responsible for the operation of the ODR platform, including all the translation functions necessary for the purpose of the regulation, its maintenance, funding and data security. The ODR Regulation describes the creation and technological functions assigned to the EU ODR platform in the process of consumer dispute resolution. These functions find expression in the role of intermediation that the European platform plays in the context of the European ADR System.⁴

The ODR platform is defined as a single point of entry for consumers and traders seeking the out-of-court resolution of disputes covered by the regulation. Its functions are defined in Article 5.4 ODR Regulation, where the use of technology is envisaged in several ways. The ODR platform provides users with an electronic complaint form available in all the official languages of the Union that can be filled in (the file a claim online function) and that is user friendly and easily accessible. The ODR platform is also obliged to inform the respondent party of the complaint, identify the competent ADR entity or entities and transmit the claim to the ADR entity agreed by the parties. The platform offers an electronic case management tool free of charge, which enables the parties and the ADR entity to conduct the dispute resolution procedures online through the ODR platform. The platform provides the parties with a translation function tool, allowing them the translated information that is necessary for the resolution of the dispute and that is exchanged through the ODR platform. It also provides a feedback system that allows the parties to express their views on the functioning of the ODR platform and on the ADR entity that has handled their dispute. The platform is conceived to make some information publicly available (such as information related to ADR as a means of out-of-court dispute resolution; to ADR

4 See C. Marques Cebola, 'La resolución en línea de litigios de consumo en la nueva plataforma europea ODR: perspectiva desde los sistemas español y portugués', en F. Esteban de la Rosa (dir.) y O. Olariu (coord.), *La resolución de conflictos de consumo. La adaptación del Derecho español al marco europeo de resolución alternativa (ADR) y en línea (ODR)*, Cizur Menor, Aranzadi, 2018, pp. 369-393; A. E. Vilalta Nicuesa & I. Barral Viñals, 'Puesta en marcha de la plataforma EUR ODR y obligaciones derivadas del Reglamento UE n° 524/2013', en *La Plataforma ODR. ¿Un mecanismo al alcance de todos los consumidores?*, Zaragoza, ADICAE, 2016, pp. 57-80; F. Esteban de la Rosa y P. Cortés, 'Un nuevo Derecho europeo para la resolución alternativa y en línea de litigios de consumo', and F. Esteban de la Rosa (Ed.), *La protección del consumidor en dos espacios de integración: Europa y América*, Valencia, Tirant lo Blanch, 2015, pp. 548-561.

entities listed in accordance with Article 20.2 of the ADR Directive; to guide the parties in the procedure of submitting complaints through the ODR platform to the ODR contact points designated by the Member States in accordance with Article 7(1) of this regulation, to statistical data on the outcome of the disputes).

European ODR design not only affects the EU ODR platform but also shapes the functioning of certified ADR entities. According to the directive, the ADR entities must fulfil some requisites pertaining to ODR in order to primarily boost the efficiency of the procedure: this leads to the use of specific ODR tools not expressly envisaged in the legislation and, in some cases, tools connected directly to AI.

The ADR Directive does provide that ADR entities must maintain an up-to-date website providing the parties with easy access to information concerning the ADR procedure and thus enabling consumers to submit complaints and supporting documents online; it also enables the exchange of information between the parties via electronic means (Art. 5.2 ADR Directive). Furthermore, the need to use ODR tools becomes clear when the ADR Directive lays down the obligation of ensuring that ADR entities make some information publicly available (specifically referring to the annual activity reports providing information on the number of disputes received and the types of complaints to which they were related; the systematic or significant problems that frequently occur and lead to disputes between consumers and traders, with recommendations on how such problems can be avoided or resolved in the future, in order to raise traders' standards and to facilitate the exchange of information and best practices; the rate of disputes the ADR entity has refused to deal with and the percentage share of the types of grounds for such refusal as referred to in Article 5(4); in the case of procedures referred to in point (a) of Article 2.2, the percentage shares of solutions proposed or imposed in favour of the consumer and in favour of the trader, and of disputes resolved by an amicable solution; the percentage share of ADR procedures that were discontinued and, if known, the reasons for their discontinuation; and the average time taken to resolve disputes; the rate of compliance, if known, with the outcomes of the ADR procedures). ODR tools may also be very instrumental in collecting the information that, according to Article 19.3 ADR Directive, has to be communicated to the competent authorities every 2 years by every certified ADR entity.⁵

5 Related to (a) the number of disputes received and the types of complaints to which they related; (b) the percentage share of ADR procedures that were discontinued before an outcome was reached; (c) the average time taken to resolve the disputes received; (d) the rate of compliance, if known, with the outcomes of the ADR procedures; (e) any systematic or significant problems that occur frequently and lead to disputes between consumers and traders. The information communicated in this regard may be accompanied by recommendations as to how such problems can be avoided or resolved in future; (f) where applicable, an assessment of the effectiveness of their cooperation within networks of ADR entities facilitating the resolution of cross-border disputes; (g) where applicable, the training provided to natural persons in charge of ADR in accordance with Art. 6(6); (h) an assessment of the effectiveness of the ADR procedure offered by the entity and of possible ways of improving its performance.

Evidently, this refers to information that could traditionally be obtained by incurring high costs of personnel and that traditional ADR entities did not provide. ODR has not only made it materially possible but has also introduced a silver lining of transparency in the functioning of certified ADR entities, and all due to the requirements put forward by the recent European Regulation. By introducing these requisites the ADR Directive is implicitly demanding the development of an ODR limb to the ADR-certified entities, considering it *via naturalis* to achieving these goals. This can be achieved only by creating their own ODR platforms servicing ADR-certified entities.

The ADR Directive subtly points the way from traditional ADR entities to modern ADR entities whose growing role in the market goes beyond simple dispute resolution and allows for data aggregation, provides information to the public for the purpose of prevention and helps the market function well. In the way Professor C. Hodges has indicated, the European legislation has taken the view that dispute resolution is only one of the pillars on which the proper functioning of the market is based; ADR is the second. Hence, data aggregation, information and prevention are complementary functions for ADR entities. At the same time it allows the detection and punishment of cases of fraud by public authorities.⁶

It goes without saying that the further development of ODR combined with that of AI aims to directly help the dispute resolution process by employing tools such as solution explorers, automated negotiation or blind bidding tools, thus facilitating the settlement of the dispute. Unfortunately, the EU legislation is silent on this matter, and there are no direct European criteria applicable at the moment. Even if the ADR Directive envisages that certified ADR entities will have to provide functions such as issuing recommendations and detecting cases of fraud, for example, it fails to provide a comprehensive flight plan: it falls short of introducing the online version of the last step of the procedure: for example, the AI Model for ODR.⁷ The ADR Directive takes the steps of data aggregation, that of prevention and the one of recommendation related to any systematic or significant problem that occurs frequently but, surprisingly, leaps over the step of classifying the disputes and offering solutions for them, a typical task that could belong to an ODR tool. At the same time, it seems difficult to imagine the possibility of offering the information related to the systematic and significant problems without using the technology to prepare this classification, counting disputes and offering solutions. It somehow diminishes the value of the innovative steps taken by the EU to regulate ADR by rendering the process incomplete. In any case, the developments in this way will have to be weighed carefully, taking into consideration the perspectives related to access to justice and paying attention, for instance, to whether the AI Model is going to resolve the dispute with a bind-

6 With this aim, Art. 17 ADR Directive establishes the cooperation between ADR entities and national authorities enforcing Union legal acts on consumer protection.

7 See J. Zeleznikow, 'Can artificial Intelligence and Online Dispute Resolution Enhance Efficiency and Effectiveness in Courts', *International Journal for Court Administration*, Vol. 8, No. 2, May 2017, pp. 30-45.

ing decision or is only going to keep it in the field of legal advice, allowing the parties to settle.⁸

The European platform and the ADR Directive are a significant step in responding to the generalization of ODR. They represent a solid pillar for this development and point the path to the development of ODR in Europe. The main task for the development of ODR, and its implementation in the most diverse sectors of litigation, has been fundamentally entrusted to the Member States and to the certified ADR entities. The certified ADR entities will be called to use the ODR functionalities much more than the EU ODR platform, to some extent precisely for fulfilling, in an efficient way, the requirements that come from the ADR Directive, as many of them will be easily fulfilled with the use of ODR tools. According to this view, and taking into consideration the difficulties that the ADR entities and the Member States may have in developing their own ODR tools, and the possibility of having different kinds of growth in the Member States, and the difficulties in finding the investment needed to further this aim, it will be most appropriate to officially involve the European Union in these efforts.

3 Criteria for the Transformation of the ADR Structure in the Member States after the ADR/ODR European Regulatory Framework

The political success of the ADR Regulatory Framework has been based on its minimally invasive character on the existing ADR structures of the Member States. As provided in section 15 of the Preamble ADR Directive, “the development within the Union of properly functioning ADR is necessary to strengthen consumers’ confidence in the internal market, including in the area of online commerce, and to fulfil the potential for and opportunities of cross-border and online trade. *Such development should build on existing ADR procedures in the Member States and respect their legal traditions*” (emphasis added). However, the reading of the ADR Directive, and the way in which the obligations of the Member States are conceived, raises serious doubts as to the declared minimal impact of the European law on the ADR structure in any Member State.

First, some ADR structures in Member States have been developed on a territorial basis (for instance, the Consumer Arbitration System or the Local Offices for Consumer Information in Spain). For some reasons the territorial structure does not fit well with the functions assigned to the ADR entities by the ADR Directive. The digital age entailed the redefinition of proximity of the consumer to an ADR entity by considering, for instance, whether the merchant’s website includes the link to a specific ADR entity. The existence of a web page with information concerning all the accredited ADR entities, with their respective links, represents an excellent means of improving the position of consumers, as the path to file a claim online thereby becomes easier to find. On the other hand,

8 On the different character of the processes and the consequences on ODR, see F. Gélina, ‘The Management of procedural expectations in consumer and Small claims ODR’, in I. Barral Viñals (Ed.), *La resolución de conflictos con consumidores: de la mediación a las ODR*, Madrid, Reus, 2018, pp. 164-165.

taking into consideration the functions given to the ADR entities by the ADR Directive, a territorial based ADR structure does not contribute to the most suitable fulfilment of some functions, as the data generated and offered could not be significant and may produce biases.

Secondly, the use of technology offers best results when the field of action is narrower: thus when applied to specific sectors of disputes it is easier to identify specific and recurrent problems and transmit accurate information about them. For that reason, in an ADR structure embodying ODR tools specialization becomes an important paradigm. An AI Model for ODR would have the best results if run by ADR entities with the competence to resolve disputes in a specific sector. It is doubtful that an AI Model for ODR could deliver equally good results in the context of a general ADR-certified entity.

While general ADR entities would primarily accommodate the blind bidding tool, specialized ADR entities would entail a much better use of ODR tools. A specialized ADR entity ODR may be used to show the parties what would be the solution of the case if the negotiations were to fail, in the form of the best alternative negotiated agreement. This knowledge would help the parties to know their positions and would exert psychological pressure before the negotiations begin, making the agreement easier.

In connection with this perspective, if we consider the additional functions that the ADR Directive assigns to the ADR entities (data aggregation, information, prevention), there are some ADR entities that may be seen as more suitable to the fulfilment of these functions, because they have their own interest to do it. In this situation are, for instance, the regulators in charge of the supervision and inspection of an economic sector (the so-called regulators, but also having the competence for redress) or the Ombudsmen (public or private) in whose procedures all the traders of an economic area are obliged to participate. As they have their own reasons for collecting such information they are well placed to be certified ADR entities. Regulators, as public regulatory or enforcement bodies, usually have a wide range of powers that may typically include powers to cease an infringement (injunction), to investigate and obtain evidence, to require changes in behaviour (undertakings), to require redress and to impose or seek sanctions. The existence of these powers means that cases are rarely resolved by issuing court proceedings but are settled through negotiated settlements between authorities and traders that cover agreement on infringement, actions to reduce reoccurrence, payment of redress and any sanction.⁹ A regulator providing redress, using ODR tools and having the specific powers mentioned would in all likelihood be in an optimal position to enhance the protection of consumers and the market.¹⁰

9 See C. Hodges, 'Collective Redress: The Need for New Technologies', *Journal of Consumer Policy*, Vol. 18 August 2018, pp. 1-32.

10 There are many examples in Europe. For Italy, see M. P. Gasperini, 'La resolución alternativa de litigious de consumo en Italia a la luz de la aplicación de la directiva 2013/11/UE: entre buenas prácticas y problemas abiertos', en F. Esteban de la Rosa (dir.) & O. Olariu (coord.), *La resolución de conflictos de consumo*, Cizur Menor, Aranzadi, 2018, pp. 313-317.

The reform of the system should also consider the customs and habits of consumers and traders by resolving disputes. As shown by the data provided by the European Commission related to the first 2 years of operation of the EU ODR platform,¹¹ offering a completely new ODR platform, or a new ADR entity, with the highest level of ODR functionalities, does not guarantee success. As trust is a question of time and perseverance, reform of the system cannot occur but by considering ADR structures, with their lights and shadows, as a point of departure.

Another important consideration in the reform of the ADR structure should be to enhance the functionalities and possibilities that allow the parties to negotiate and find a solution, in a wider way related to the traditional ADR entities. Hence, every legal system should establish suitable incentives to help the parties find a solution. The reflection should identify the best incentives for the parties to submit to an ADR entity, to reach agreements and, finally, to voluntarily comply with the decision or the settlement. ODR could also be instrumental in disputes admitting of determination of the amount of compensation due once the infringement has occurred, in a system similar to the compensation envisaged by the Flight Compensation Regulation 261/2004, or also through smart contracts, which allow the compensation to be conditioned on a determined event (*e.g.* the delay in flight arrival by more than 2 hours). The potential of ODR in this field needs to be explored further.

4 Conclusion

The new European regulatory framework for ADR/ODR may be seen as the fundamental pillar of ODR development in Europe. It not only directly supports the development of ODR through the EU platform, but also obliges Member States to fulfil many obligations that go far beyond the resolution of a particular dispute; it indirectly encourages the development of ODR in Europe.

However, for ODR to become real and to display its full potential in resolving disputes and to contribute to the proper functioning of the markets, both Member States and certified ADR entities must join forces, and the European Union should get actively involved in steering this project into clear waters, by financing the launch of the new platforms needed. On the other hand, the ADR/ODR regulatory framework has the potential to change the whole structure of the ADR entities in every Member State, especially in countries like Spain, where the most popular ADR entities have a wide competence for consumer dispute resolution. Time alone will tell whether the EU, Member States and ADR entities will sync in rowing in the same direction in order to achieve a state of the art ODR design in Europe.

11 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.