

EU REGULATION ON ODR

An Introduction and Some Thoughts

by Graham Ross

The timeliness of the EMCOD project¹ was reinforced shortly before the final publication deadline for its report when, on the 29th November 2011, the European Commission issued a new , and first ever, regulation to cover Online Dispute Resolution (http://ec.europa.eu/consumers/redress_cons/docs/odr_regulation_en.pdf). The Regulation was issued at the same time as a new Directive on Alternative Dispute Resolution (ADR).

The context of this development lies in the "Digital Agenda for Europe" announcement² which set out an EU strategy to improve systems of Alternative Dispute Resolution (ADR) . The Commission proposed an "EU-wide online redress tool for e-commerce" to boost consumer and business confidence in the digital market. The 2011 Single Market Act³ included amongst its priorities the establishment of "simple, fast and affordable out-of-court settlement procedures for consumers" to include an " electronic commerce dimension".

The need being addressed is familiar to the EMCOD team and its work, being the need for effective, proportionate and accessible redress for consumers in cross-border online transactions. The problem, in a nutshell, is that the flexibility, speed and accessibility of consumer purchases of products and services on the Internet is not matched by effective redress for when complaints arise.

The Impact Assessment produced by the Commission following the extensive consultation period leading up to the issue of the Regulation and the connected proposed framework Directive on ADR also underlines the benefit to business itself. It pointed out that "Both businesses and consumers clearly state that concerns about potential redress problems in

1 <http://www.emcod.net>

2 Brussels, 19.05.2010 COM(2010) 245 and see http://ec.europa.eu/information_society/digital-agenda/documents/digital-agenda-communication-en.pdf

3 See http://ec.europa.eu/internal_market/smact/index_en.htm

another Member State discourage them from selling and buying across borders and thus not fully reaping the potential benefits of internal market".⁴

The Impact Assessment identified the option selected to achieve the objective, in conjunction with a framework Directive to facilitate consumer access to ADR services that meet with approved standards, was to be a "Regulation to establish a EU system, consisting of a web-based platform directly accessible by consumers, which will be based on national ADR schemes and will be able to deal with cross-border e-commerce disputes online (ODR); and to define common criteria for the functioning of the web-based platform ".

The objective of the Regulation can be seen to do all that can be done short of compulsion to encourage those businesses in Europe who sell products or services online to consumers from another EU country, to provide adequate signposting on their websites to a Commission built ODR platform from where they will be directed to one or other provider of ADR services offering a wholly online resolution to their complaints and disputes. Each member country will have a contact point organisation. It is anticipated that the platform will be operational by the middle of 2015. Taken as such this is a hugely important and helpful initiative taken by the Commission. The concern at this stage is as to the precise form and functionality of the platform and to what extent it impacts on the nature of the technology available.

The scope of the regulation is limited in its application to online transactions by consumers, that is to say persons buying products or services, otherwise than for the purpose of a business, trade or profession, in respect of which transaction the supplier is based in another EU country than that of the consumer.

Although such limitation appears at first sight to pay undue respect to the precise nature of the problem being addressed , i.e cross-border transactions, whilst the benefit of ODR clearly applies equally to local transactions, this limitation will have no practical negative impact since, as the Regulation is not mandating the use of ODR merely the provision of an EU landing page platform and signposting to providers , the links on the retail websites will, for obvious reasons, be displayed to all consumers.

⁴ Brussels, 29.11.2011 SEC(2011) 1408 at page 30 and see http://ec.europa.eu/consumers/redress_cons/docs/impact_assessment_adr_en.pdf

There will be no compulsion on the part of the retailer. The declared objective is to persuade retailers to participate through recognition of the benefits to the business from increased trust and confidence of consumers.

I think there is no doubt that this light hand approach is sensible. Whilst within the EU a Directive could be sought to be applied to require both ODR notification and participation by EU based traders, however, given the global reach on the Internet, it is beyond the Commission's ambit to effect total impact on the online experience of consumers by applying any such compulsion on non -EU traders. It is , of course a given, that consumers are able to make purchases of products and services outside of the EU on websites that may not contain ODR services or signposting or, if they do, link to services that fall short of the standards the Commission wishes to impose. It is for the protection of consumers, arguably, far better that those EU sites that respond to the Regulation will attract more trust and confidence in them by virtue of the fact that their participation, whilst encouraged and facilitated, is ultimately voluntary.

It is anticipated that the landing page to which consumers with complaints will be directed will amount to little more than signposting to approved suppliers of ODR services rather than an ODR service itself. Having said that it may also include some functionality, such as a Q&A section to help complainants to better select from alternate suppliers. However no ODR functionality will take place on the platform.

The Commission will refer on the platform to those ADR organisations who have applied for, and been included, in the existing notification system. To date that qualification appears to cover many public providers of ADR services, such adjudication based 'ombudsman' services for utilities and other major services , and does not presently include private sector generic services that have developed novel ODR technologies over recent years.

It may be helpful to what is planned by the Commission to look at the distinction between the human and the technology processes that are included within the broad definition of ODR.

Developments within ODR , both as to its procedures and its technological solutions, have been discussed and examined by a global ODR community that was formed in 2002 in Geneva at the first annual United Nations International Forum on Online Dispute Resolu-

tion. This network, which continues to meet around the world each year (and next meets in Prague⁵ in 2012 being the first time it has been held in Europe since the 2007 event in Liverpool) has seen the involvement of academics, technology developers, lawyers and ADR providers almost all of whom appear to be outside of the Commission's notification register. These two loops need to be joined together. This disconnect was seen a few years back extirpated by myself when I found that I have to split myself between an E Jnet meeting on MDR and a meeting of it and you've funded project called si si form test Tikrit and OGR signposting page much like the commissions current regulation Much advanced technology is being developed to significantly improve the various systems that could come within the definition of ODR, such as blind bidding, expert analysis and games theory. It would be unfortunate if the plan of the Commission results merely in the setting up of a specific low technology solution that simply uses the Internet as a form of communication between consumers, traders and ADR providers. Most of the online forms of ADR such as have been seen with in the discussions within EEJ-Net members are merely online versions of written adjudication based ADR ,albeit perhaps with occasionally simple forms of neutral facilitation that may term itself 'mediation' but that falls short of the full extent of the skills of mediation.

Given the average modest values involved in consumer dispute, in comparison to the costly man hours applied to their resolution, and given the significant increases in workload that will inevitably follow from the Commission's plans, and the resultant pressure to increase turnover of cases per person employed in the process, the risk is that the plans may lead to higher levels of dissatisfaction, through quality and delays, with the core dispute resolution processes themselves. In other words, ODR will have achieved little other than to significantly increase the workload on existing systems, through increased consumer awareness and increased speed of communication, without introducing any processes that can improve the level of fair and just handling of disputes.

The way to avoid , or at least reduce, the extent of such an unintended consequence, must lie in the encouragement by the Commission of the use of the emerging creative applications of technology that can, in going beyond merely providing a platform for discourse by adjudicators or mediators, reduce human intervention, so as to enable systems to be scalable to cope with increased demand and, at the same time, to do so, as many such systems can, in a way that increases,not reduces, the level, and sense, of justice and fairness

5 See <http://www.odr2012.org/>

resulting from the form of ODR applied. It would be a great mistake to assume that the greater the level of human contribution to the dispute resolution process, the greater the quality and degree of justice and fairness. On the contrary, technology and machine intelligence can have the opposite effect and offer significant advantages over human limitations.

Two examples of how technology itself can have this effect can be found in the products currently being refined by Modria (www.modria.com), a spin-off of eBay and PayPal whose CEO, Colin Rule, was Head of ODR at those companies for over 10 years and, as such, helped develop the novel systems used in handling literally millions of disputes. Modria continues to operate these novel ODR solutions for both eBay and PayPal but which now are available for general use. One system constantly trawls the internet for the content of reviews of products and services and uses machine learning techniques to build up a library of content and patterns to help identify those reviews that may be fake. This process can be adapted to look at the words and phrases used in complaints to identify content that might challenge the genuine nature of the complaint or indeed reinforce its strength. No human facilitator could possibly undertake such tasks yet their value to delivering justice to the supplier is clear. The point should also be made that justice in dispute resolution in consumer transactions should not be focused entirely on the consumer. The power of internet networking to facilitate less than genuine complaints, just as with less than genuine product/service reviews, shows that traders are as entitled to the justice from ODR as do consumers. In fact, there is arguably a more direct correlation with the objectives of the Commission in that, given the voluntary nature of the linkage to the eventual EU ODR platform, trust in what is delivered as a service needs to be built up equally if not more so, with the traders as with the consumers. The less trust in the system by traders, the less participation by traders and thus the less access to ODR for the consumers.

The second example of how technology can directly improve the level of justice through ODR being developed by Modria is in the empowering of consumers to control more of the dispute analysis and resolution process itself in a more automated manner. This can be achieved through automated systems that take consumers with complaints through a self-administered process which evaluates the nature and strength of the complaint as well as the evidence in support and then ultimately provides a machine selected series of appropriate, fair and just outcomes to select. Whilst the technology may not resolve all of the disputes it should manage a large majority of them and thus better assist the human hand-

ling , albeit with online communication, of the remainder. The real gain of such systems is that they learn from the outcomes selected by the parties to constantly improve the level of justice as perceived by the consumer community as a whole whilst at the same time building up a knowledge base of how disputes are best handled so that consumers can learn themselves how to moderate their expectations and thus resolve more disputes themselves.

Considering these observations about technology leads me to the view that, rather than leaving it up to the referred ADR organisations to individually consider adopting technology solutions beyond online communication, so that access to best practice ODR and the higher levels of justice that can uniquely be provided by technology, is driven in a piecemeal and unco-ordinated way, that the Commission also sets up a system for notification of specific technologies and provides on the EU ODR platform access to them for consumers and ADR organisations alike. Such would lead to faster implementation of best practice in ODR and better empower consumers/businesses and ADR organisations to select the latest technology for their use without having to make individual research/investment/implementation decisions

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