ODR and ADR: How Will the New EU Rules on Dispute Resolution Affect e-Commerce?

By Lokke Moerel and Laura Steen

EU member states are being required to implement new rules on procedures for out-of-court resolution of disputes between e-commerce traders and consumers.

In 2013, the EU enacted two laws intended to make dispute resolution easier for EU-based consumers: Directive 2013/11 on alternative dispute resolution for consumer disputes (“ADR Directive”) and Regulation 524/2013 on online dispute resolution for consumer disputes (“ODR Regulation”). July 2015 marked the deadline for the implementation of the ADR Directive and certain of the obligations under the ODR Regulation by EU member states.

International commerce and the free movement of goods within the EU present consumers with numerous advantages (e.g., cheaper goods, wider range of products) and disadvantages (e.g., traders being in different jurisdictions and not easily held accountable). The ever-increasing online marketplace also brings new and complex challenges for consumers, including how to file and resolve a complaint with online merchants located outside their home country.

The aim of the ADR Directive and the ODR Regulation is to remove barriers to the free movement of goods that exist due to variances in the alternative dispute resolution (ADR) procedures available in EU member states. The EU’s aim is to provide the same level of consumer protection and ADR procedures across the EU. It is hoped that the introduction of the ADR Directive and the ODR Regulation will lead consumers to have more confidence when buying from merchants outside their home country, thereby further opening the EU market.

THE ADR DIRECTIVE

The ADR Directive seeks to encourage traders and consumers to participate in ADR as much as possible but, interestingly, it does not go so far as to make ADR participation mandatory for consumers or traders. In order to facilitate ADR use, the ADR Directive requires member states to ensure that ADR procedures are available where both parties agree to undertake ADR to resolve their dispute. Despite such encouragement, member states remain free to make participation mandatory or to subject traders to further incentives or sanctions.

The ADR Directive further provides for the establishment of ADR entities to mediate disputes initiated by consumers against traders, with the aim of resolving disputes outside the court system. The ADR Directive does not deal with disputes initiated by traders or disputes amongst traders.

Importantly, the ADR Directive only applies to traders established in the EU and consumers resident in the EU and, therefore, does not have any effect on traders outside the EU, even when selling to consumers within the EU.
The purpose of the ADR Directive is to facilitate access to ADR procedures for consumers and to impose information obligations on traders. Where traders are obliged by law or membership of a trade association to engage in ADR or have otherwise committed to do so, traders must inform consumers (1) which ADR entity will apply to their disputes, (2) whether they will participate in ADR, and (3) about the website of the ADR entity in question. Such information may be provided on a trader’s website and (if applicable) in the general terms and conditions of sale or service contract between the trader and the consumer.

Traders that are not obliged or committed to use ADR must, if a dispute between the trader and a consumer has not been resolved using internal processes, provide the consumer via paper or a durable medium (e.g., email) with (1) the name of an ADR entity, (2) the ADR entity’s website address, and (3) confirmation as to whether or not the trader will engage in ADR. This requirement is intended to incentivize traders to engage in ADR in such situations because most traders would rather agree to the ADR process than expressly confirm an unwillingness to engage in ADR. These information requirements are in addition to any existing information requirements applicable to traders on out-of-court redress procedures under EU law.

While there is no obligation on either the trader or the consumer to participate in ADR under the ADR Directive, if the parties do agree to engage in ADR, either party may express its point of view, receive the arguments and evidence put forward by the other side, and respond with comments on such arguments and evidence. The ADR entity must provide a written award, setting out its findings, within 90 days of receiving the complaint. The UK Financial Ombudsman Service has already stated that it is unsure how it will deal with this tight timeline imposed by the ADR Directive.

Despite the absence of any obligation on the parties to engage in ADR, traders are obliged under the ADR Directive to provide consumers with certain information relating to the ADR entities and ADR schemes which are relevant to their sectors. For example, the UK Legal Ombudsman has applied to the Legal Services Board to become a certified ADR entity and, if approved, will be the relevant ADR entity for the legal services industry.

THE ODR REGULATION

Under the ODR Regulation, in July 2015, the Commission set up an Online Dispute Resolution Platform for the European Union (“ODR Platform”). The ODR Platform offers a single point of entry to EU consumers and traders seeking to resolve disputes out of court which arise from online transactions. Complaints can be filed electronically and free of charge in all official languages of the EU. The ODR Platform will subsequently transmit the online complaints to the ADR entity competent to deal with the specific dispute. The ODR Platform also provides for a free case management tool that enables the ADR entity to conduct the ADR procedure through the ODR Platform.

The earlier implementation of the ADR Directive is not accidental. In order for the ODR Regulation to be properly effective, ADR entities and a common ADR procedure had to be put in place in the EU to allow the ODR Platform to operate. Note that the ODR Regulation only applies to disputes between traders and consumers where the sale/contract took place online and, therefore, will deal with only a subset of the traders and consumers that the ADR Directive will cover.
In line with the ADR Directive, the ODR Regulation is only applicable to traders established in the EU and consumers resident within the EU. In addition to the information requirements for traders under the ADR Directive, the ODR Regulation requires that online traders provide their email addresses on their website as a first point of contact, as well as a link to the ODR Platform. Further, traders that are obliged to engage in ADR or those that have committed to engage in ADR must inform consumers of the ODR Platform as well as a link thereto (1) on their websites; (2) if offers are made for services or products by email, in the emails and (3) in the general terms and conditions applicable to the online contracts. As under the ADR Directive, these information requirements are in addition to any existing information requirements under EU law of traders on out-of-court redress procedures. The information requirements for online traders will apply from 9 January 2016.

IMPLEMENTATION IN THE UK

The UK’s implementation of the ADR Directive takes the form of the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities) Regulations 2015 (SI 2015/542) in conjunction with the Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015 (SI 2015/1392) (“UK Regulation”). Despite the ADR Directive requiring implementation of the rules by 9 July 2015, the operative provisions of the UK Regulation will come into force on 1 October 2015. The UK Regulation has taken a minimalistic approach to the adoption of the ADR Directive, simply implementing the minimum requirements and, therefore, the UK has not made ADR mandatory for traders (beyond the sectors and industries in which it is already mandatory) nor does the UK Regulation provide for further incentives or sanctions.

Under the UK Regulation, a consumer is anyone acting for purposes that are wholly unrelated to that person’s trade or business and a trader is a person acting for purposes related to his or her trade or business, either personally or through another person acting under his or her own trading name or on the trader’s behalf.

The UK Regulation will introduce the following measures:

- It will set the standard which ADR entities must meet in order to achieve certification, e.g., impartiality, independence, and quality of expertise.

- It will designate the competent authorities that will vet ADR entities to become certified to offer ADR services to consumers and traders, e.g., the Financial Conduct Authority and the Legal Services Board. The ADR entity need not be established in the UK.

- Most importantly for online traders, the UK Regulation will impose information requirements on businesses selling to consumers. The information requirements include the following:
  - Where a trader is obliged to use ADR services provided by an ADR entity, by law or by the rules of a trade association, the trader must provide both the name and website address of the ADR entity on its website (if it has a website) and in the general terms and conditions of sales or service contracts made between it and consumers.
  - Where a trader has exhausted its internal complaints handling procedure, the trader must inform the consumer (1) that the dispute cannot be settled, (2) of the name and address of an ADR entity that would be competent to handle the dispute, and (3) if the trader is obliged (by law or by the rules of a trade association) or willing to submit to ADR procedures run by the ADR entity identified.
As the operative provisions of the UK Regulation with respect to traders take effect on 1 October 2015, this presents traders with potential compliance issues. While the ADR Directive does not make it mandatory for traders to enter into ADR, traders that wish to participate must provide the information outlined above. A trader may, however, be obliged by its trade association or legislation to use ADR (e.g., traders in the financial services, energy, and telecom sectors). The impact of this rule change is that traders must review their standard terms and conditions, template agreements, and online content to ensure that they comply with the requirements of the UK Regulation.

IMPLEMENTATION OF THE NEW RULES ACROSS THE EU

While the deadline for implementation of the new rules under the ADR Directive is 9 July 2015, as the UK Regulation illustrates, not all countries will adhere to the imminent deadline. In Germany, while the ADR Directive and the ODR Regulation were proposed as new laws in June 2015, no date has been set for the parliament to debate the adoption of the laws and, therefore, it is, as yet, unclear when the new rules will be implemented in Germany.

In contrast, Belgium has been the forerunner in implementing the new provisions, and adopted the ADR Directive in April 2014. The new rules in Belgium go beyond the minimum requirements of the ADR Directive with respect to the requirements to become an ADR entity. Under its new law, Belgium has created a Consumer Ombudsman Service which will deal with residual claims and act as an umbrella structure for various other existing ADR services within the fields of telecom, railways, insurance, energy, financial services, and postal services.

CONCLUSION

The ADR Directive and the ODR Regulation will enable consumers to bring disputes and claims more easily, and the EU hopes that a unified EU approach to consumer disputes should result. In addition, both the ADR Directive and the ODR Regulation provide that the cost of the ADR or the ODR procedure should be nominal or entirely free of charge, which further reinforces the aim of the EU to encourage the free movement of goods.

But apart from a few information provision requirements imposed on online merchants, use of the new procedures will not be mandatory and the procedures will not apply to traders established outside the EU that sell to consumers within the EU.

Contact:

Lokke Moerel
+49 (30) 726221278
lmoerel@mofo.com

Laura Steen
+44 (20) 79204171
lsteen@mofo.com
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