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**ONLINE DISPUTE RESOLUTION
– AN ANSWER TO CONSUMER
COMPLAINTS ABOUT E-COMMERCE
TRANSACTIONS IN BOTH A NATIONAL
AND A EUROPEAN CONTEXT**

Introduction

B2C electronic commerce has become an important part of our economic system over the last years. It is a logical consequence of this increasing use that also more and more disputes can be observed in this field.

Electronic commerce has many particularities. Some obvious but important characteristics are:

- the convenience for consumers of being able to shop around the clock,
- the possibility for them to buy from online traders from other countries and the potentially international dimension of the contracts,
- the impersonality of an automated order process.

Disputes related to electronic commerce should be solved in a way that takes those specific aspects into account.

The focus of this article is therefore on the use of specialized online dispute resolution (ODR) as an adequate way to handle and solve disputes arising from B2C electronic commerce. The observations in this article are based on the practice of already existing ODR systems, in particular in Germany and Austria.

1. Main characteristics and advantages of ODR in the field of electronic commerce

Online Dispute Resolution (ODR) is a type of Alternative Dispute Resolution (ADR) that uses Information and Communications Technology (ICT) to facilitate the resolution of disputes.

The common point of ADR is that the case stays out of court, which has many advantages for both consumers and traders: the procedure is less formal, quicker and cheaper (http://ec.europa.eu/consumers/redress/out_of_court/index_en.htm). Additionally, specific ODR schemes in the field of electronic commerce can offer a high subject area expertise if they are specially designed for complaints related to the subject and employ specialized staff. Courts may lack this expertise (Cortés, 2010, p. 2).

1.1. No disproportionate costs or no costs at all for typically low-value disputes

Various already existing ODR schemes specialized in electronic-commerce complaints are totally free of charge if one takes a look for instance at the situation in Germany and Austria. Of course, a pre-condition for a cost-free service is a reliable funding, for instance from the state or from trade associations active in the field of electronic commerce.

It is most important to offer a free or a low-priced service as consumer disputes in field of electronic commerce are generally not about a huge value in litigation whereas the costs to take court action are comparatively high (Cortés, 2010, p. 2). For instance, the German ODR scheme Online-Schlichter Baden-Württemberg indicates that most of the cases concern values between 50 and 100 Euro (Euro-Info-Verbraucher e.V., Jahresbericht 2009, p. 16). The French ODR scheme Médiateur Du Net only registered 31% of disputes with a value of 300 Euro or more in 2008 (and 46 % with less than 120 Euro) and 27% in 2009 (47.8 % with less than 120 Euro), which confirms the experiences made in previous years (Forum des Droits sur l'Internet, Rapport d'activité, 2009, p. 38). The average value in litigation of the cases handled by the Austrian ODR Internet Ombudsmann was 131.10 Euro in 2010 and 106.56 Euro in 2009 (Internet Ombusmann, Jahresbericht 2010, p. 21). Furthermore, even if a consumer has subscribed to a legal costs insurance, in most of the cases he still has to pay an own contribution should he lose the case (in Germany a typical amount is 150 Euro, see a comparative study of the Stiftung Warentest: *Rechtsschutz-Versicherung...*, 2005). Of course, should he win the case, it is the adverse party who has to pay also that sum. But in a situation in which a consumer seeks a lawyer's advice, he will very often not be sure in advance if he will win the case or not. Additionally, the international dimension of electronic commerce already mentioned above can increase the complexity and the costs of a dispute, thus increasing the disproportion between costs and value in litigation (Hörnle, 2009, p. 37). As an ODR procedure is online, there are also no travel costs for any party. All those aspects are also significant for online traders, especially for small and medium sized online businesses which have not a specialized law department or lawyer.

1.2. Less formalism and more convenience

Apart from the financial argument that may stop consumers to claim their rights, there is another point worth consideration: it is not very common and convenient

for an average citizen to go to court. He may be obliged to take a day off work (or more), to travel maybe long distances and the situation itself can be considered as stressful because of the formal procedure. ADR procedures are generally less formal. ODR has the additional advantage that many if not all the stages of the procedure can be accomplished online from home or another place chosen by each party.

The strict use of the Internet to file a case cannot be regarded as an obstacle as the parties having a dispute in relation to electronic commerce have already contracted online and are thus familiar with the use of the Internet and its particularities.

1.3. Speedy procedures

What is more, when going to court, the solution to a rather small problem may take several months. For example, in Germany, a civil procedure in first instance (local court/Amtsgericht) takes about 4½ months (document issued by the German Federal Ministry of Justice: http://www.bmj.de/DE/Buerger/buergerMenschrechte/ueberlangeVerfahren/_doc/menschenrechte_ueberlange_verfahren_doc.html). A dispute involving parties from different countries can take much more time. A national as well as a cross-border procedure might even be prolonged if the party who loses the case does not respect the judgment and execution is therefore needed. Since the beginning of the service of the German Online-Schlichter, disputes handled by this ODR scheme were closed in 1 ½ months on an average (Press release 146/2011 of the Baden-Württemberg Ministry for Rural Areas and Consumer Protection, http://www.mlr.baden-wuerttemberg.de/Schlichtungsstelle_fuer_den_Online_Handel_wird_ausgebaut/98431.html). The Internet Ombudsmann foresees generally about one month for the whole resolution procedure (Internet Ombudsmann, Jahresbericht 2010, p. 31).

2. Adequate ADR method for an ODR scheme specialized in electronic – commerce cases

However, there are different ways to settle a dispute out of court depending on the choice of a certain ADR method. For instance, the parties can turn to an independent and impartial third person who suggests a solution based on law as well as on equity. However, the parties are free to follow the proposed solution

or not. Another method would be to bring the parties together and the third person is only there to help them to find a solution by themselves. In that case, the third person will not suggest a solution himself.

The first approach seems to be more adequate with regard to electronic commerce. Despite a low value in litigation, the legal situation can be complicated both for consumers and traders. For instance, there are cases in which a consumer who withdraws from a contract can be obliged to pay compensation to the seller, but the conditions set out by the Court of Justice of the European Union in Case C-489/07 need careful examination. Due to such rather complicated legal questions, the proposed solution will be more easily accepted if both parties know on which legal basis they agree and what their rights and obligations exactly are. Therefore it is also necessary that the third person who suggests the solution is a fully qualified lawyer specialized in the relevant field of law.

3. Quality standards for ODR schemes in the European Union

The European Commission established several minimum criteria for ADR schemes in two recommendations from 1998 and 2001 (Recommendations 98/257/EC and 2001/310/EC). Seven minimum standards can be identified:

1. Independence/Impartiality of the ADR body.
2. Transparency of the proceeding.
3. Adversarial principle (Opportunity for response and comment).
4. Efficiency of the proceeding (Free of charges or moderate costs, short procedure, no legal representative needed).
5. Observance of fairness, law and equity.
6. Freedom of action (voluntary participation).
7. Right of each party to be represented by a third person.

In order to enhance consumer confidence – especially in countries in which ADR has not a long tradition – those criteria seem appropriate and also an ODR scheme should respect them. Furthermore, these standards are common throughout the European Union. In cross-border cases, a consumer might be redirected to a national ADR scheme based in another country. As cross-border cases are inherent to electronic commerce, it is utile to internationalize the procedure to some extent by establishing procedures in accordance with the recommendations from 1998 and 2001.

Moreover, on the website of the European Commission, an ADR database is available which lists all the ADR bodies responsible for the out-of-court settlement of consumer disputes and which Member States and EEA countries consider to fulfill the recommendations named above (http://ec.europa.eu/consumers/redress_cons/adr_en.htm). The different ODR schemes already mentioned above can be found in this database.

4. Proven efficiency in practice

It is interesting to examine two ODR schemes developed in two Member States that have not a long tradition of organized out-of-court dispute resolution, Germany and Austria.

In Austria, the Internet Ombudsmann exists since 1999. According to its Annual Report 2010, 89.2% of the submitted cases were closed with a satisfying result for the consumer (Internet Ombudsmann, Jahresbericht 2010, p. 19). In 0.5% of the cases, the trader won the procedure. However, it is specified that also cases in which consumers were just give sample letters to defend themselves against fraudulent online subscription website are counted in the 89.2%-success rate. The Online-Schlichter Baden-Württemberg, a pilot project funded by the Baden-Württemberg Ministry for Rural Areas and Consumer Protection, has a very constant percentage of successfully closed cases since its start in June 2009. According to the Annual Report issued by its host structure, already in the first 6½ months the success rate was over 70%. Contrarily to the Internet Ombudsmann, only those cases in which a solution was really agreed on by both parties are counted as success cases. Nevertheless, the consumers are not left alone should they address to the service with a fraudulent online subscription website case, but redirected to other services. According to a press release issued by the Ministries of Consumer Protection of the Federal States Baden-Württemberg and Hessen, the latter state participating in the project since the 1st of July, 2011, the total success rate from the beginning of the project until the date of the press release – more than two years – reached nearly three fourths (Press release 146/2011 of the Baden-Württemberg Ministry for Rural Areas and Consumer Protection, http://www.mlr.baden-wuerttemberg.de/Schlichtungsstelle_fuer_den_Online_Handel_wird_ausgebaut/98431.html).

Considering that Germany is not a country with a long established and traditionally accepted ADR-culture and that the parties are totally free to participate, this rate is quite satisfying. Besides, a fact which is too often forgotten and which is

specific to the ADR method depicted above, even in the event of a case in which no solution is obtained, the parties have gained something nonetheless: a free analysis by a lawyer specialized in the field of electronic commerce. Thus, the parties can judge much more easily if it is worth to carry the case to court or not. Taking the example of a consumer who now positively knows that he has a lawful claim against the trader, he can be rather sure that he should win the case and therefore his risk of losing even more money due to court and lawyer fees are quite limited. Therefore, it is important to opt for the adequate ADR method as outlined above: the ODR scheme should suggest a solution based on law.

The fact that the whole procedure is online enhances its effectiveness. As explained above, the procedure is less time-consuming than a traditional court procedure. An explanation for that fact is also that the communication between the parties can take place asynchronously. Scheduling problems can therefore not delay the procedure and parties can comment on the case 24 hours a day and 7 days a week. The advantages of the asynchronous nature of ODR procedure were already perceived years ago (Goodman, 2003; Rule, 2002, p. 71). Besides, the possibility to comment on the case at any moment of the day corresponds to the nature of electronic commerce, also available all the time.

ODR is sometimes criticized as the dynamics of traditional face-to-face mediation can be lost because the procedure takes place at distance and online (Eisen, 2001, p. 1305, 1308). The distance of the parties and the online procedure are also sometimes seen as a disadvantage of ODR in contrast to face-to-face mediation in which a mediator can build up an atmosphere of trust (Eisen, 2001, p. 1305, 1308). It is obvious that such a particular atmosphere may be useful in case of mediation concerning a divorce; however, it can be doubted whether it is necessary in case of electronic commerce matters. In any event, the distance and the lack of face-to-face immediacy have other advantages as it prevents verbal escalation and generally helps to control emotions. This effect is increased by the asynchronous communication: The parties have more time to reflect before commenting to early and in a non-rational way (Rule, 2002, p. 66, 71). Last but not least, electronic commerce transactions being mostly far distance transactions (not seldom even crossing national borders) are themselves characterized by the distance of the parties. A procedure with a real meeting is therefore not adequate and in any case disproportionate. The high success-rate that can be observed when looking both at the Online-Schlichter's and the Internet Ombusmann's results shows that the system of dispute resolution without face-to-face

meeting is also working out fine in practice. The French Médiateur Du Net even had an average success-rate of 87% with over 13,000 disputes in seven years (<http://www.foruminternet.org/particuliers/mediation/>).

Another reason for the efficiency of the ODR schemes mentioned above is certainly the high specialization of the third person handling the case. The advantage of such a subject area expertise was already identified at an early stage (Rule, 2002, p. 69). For instance, when filing a complaint on the website of the Online-Schlichter, consumers can select between three forms referring to three different standard cases. The form cover all necessary information and mirror the relevant legal conditions. The advantage of such forms is that the ODR lawyer thus avoids getting back to the consumer asking for more information but gets a rather complete case that he can directly analyze. Having all the necessary elements, he can almost immediately contact the other side. The saved time on those standard cases can be used for more complicated matters and atypical cases for which a free text form is available.

5. ODR for cross-border cases

As in the European Union there are differences from one Member State to another with regard to language, culture and law it seems complicated to create one single ODR scheme competent for all the complaints arising out of electronic commerce transactions in the European Union. For instance, the gain of efficiency due to specially designed complaint forms mirroring the conditions of legal disposition as described above can much more easily be maintained if the form concentrates on the law of one specific country – at least now, at a stage in which many sometimes small, but important differences in consumer law subsist. Nevertheless, ODR schemes as described above are already able to handle cross-border complaints, which is obvious when looking at their annual reports and rules of procedure, as they are accepting cases from consumers from other Member States (at least) as long as the online trader they complain about is based in the same Member State as the ODR scheme.

It is true that it will be very difficult for a consumer coming from one Member State to file a complaint on the website of an ODR scheme based in another member state – just because of different languages. But the European Consumer Centres' Network, ECC-Net, launched by the European Commission in 2005, provides consumers with information and assistance to access an ODR scheme

in the Member State where the trader is from (http://ec.europa.eu/consumers/redress_cons/adr_en.htm). The ECC-Net can also inform the ODR scheme should another law be applicable, for instance the law of the country where the consumer has his habitual residence (whereas the ODR scheme is installed in the traders country).

The fact that the ODR scheme is usually located in the country of the trader in case of cross-border cases seems to be adequate as the opinion of a lawyer coming from the same country has more weight than the expertise of a lawyer not familiar to the legal system of the state where the trader is situated. It is important to convince the trader to accept the proposed solution since in most cases consumers complain about traders and not vice-versa. Besides, the respect of the ADR-recommendations of the European Commission already assures a common ground which can create consumer confidence, even if the consumer might have to turn to an ODR scheme outside of his own country.

Conclusions

To sum up, ODR schemes specialized in electronic commerce are already now a valuable help to consumers in the European Union, even in countries which have not a long lasting ODR tradition. Thanks to the intervention of the ECC-Net, they can easily handle cross-border cases within the European Union. Both in a national and a cross-border context, it is much more appropriate for a consumer to file a complaint regarding an electronic commerce transaction than to go directly to court. Nevertheless, if an out-of-court settlement is not possible, the consumer still has that possibility. Besides, it is also in the interest of the trader to avoid that the case goes to court since a solution found out of court can be beneficial for a future customer to trader relationship.

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