

ESSAYS IN HONOUR
OF
MICHAEL BOGDAN

OFFPRINT

Juristförlaget i Lund
2013

JAN TRZASKOWSKI

PROCEDURAL CONSUMER PROTECTION IN CROSS-BORDER PURCHASES

If consumers are willing to purchase products from other Member States, their selection is substantially broadened; this selection is widened even further when they choose to shop online. Even though electronic commerce makes it easy for consumers to purchase products from other Member States, cross-border electronic commerce in the European Union is depressingly low. Increased cross-border trade will not only benefit the individual consumer, but also the competition in the internal market. There are many reasons why consumers are reluctant to buy products from other Member States. In the European Union's consumer policy, it is suggested that empowered and confident consumers can drive the European economy forward. The idea is that consumer policies are to enable consumers to make informed choices that reward competition, and such "empowered consumers" should actively participate in the market and make it work for them by exercising their power of choice and by having their rights properly enforced. By doing so, they should be able to rely on a robust framework ensuring *inter alia* a "means of redress and enforcement".¹

Consumers are generally assumed to be weaker than their commercial counterparts in consumer contracts and other B2C relations.² Consumers therefore benefit from various safeguards settled in law, including those related to products, marketing, contracts, performance, and redress. Products must be safe (*product safety*)³ and the trader may be liable if they are not (*product liability*).⁴ Commercial practices may not be unfair and the consumer must receive material information that he needs to take informed transactional decisions (marketing law).⁵ Contract

¹ European Commission: Communication on a European Consumer Agenda – Boosting confidence and growth, COM(2012) 225, p. 2.

² See e.g. Verica Trstenjak & Erwin Beyens: "European Consumer Protection Law: Curia Semper Dabit Remedium?", *Common Market Law Review* 48: 95-124, 2011, p. 121.

³ See in particular Directive 2001/95/EC on general product safety.

⁴ See in particular Directive 85/374/EEC concerning liability for defective products.

⁵ See in particular Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market (Unfair Commercial Practices Directive) and Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers.

terms in consumer contracts may not be unfair⁶ and in certain situations – e.g. distance selling – the trader is obliged to provide certain information and honour the consumer's right of withdrawal.⁷ Rules on performance are found in sales law.⁸ Consumers' access to redress is primarily found in procedural law, including private international and procedural law – and to some extent in national dispute settlement schemes.

A taxonomy of consumer protection could look like this:

	<i>Substantive Law</i>	<i>Procedural Law</i>
<i>Collective Consumer Protection</i>	- Product safety - Marketing law - Information requirements - etc.	- Injunctions - Cooperation - etc.
<i>Individual Consumer Protection</i>	- Product liability - Unfair contract terms - Contract law - Sales law - etc.	- International procedural law (choice of forum) - Private international law (choice of applicable law) - Alternative dispute resolution - etc.

This article deals only with procedural aspects of the individual consumer's protection, i.e. protection that is usually enforced by the individual consumer, in contrast to collective consumer protection which is usually enforced by public authorities or e.g. consumer organisations in order to protect consumers in general.⁹ In most instances, consumer protection provisions fall clearly under either substantive or procedural law. However, some issues may be placed in either category – e.g. whether the court must, may, or may not test unfair contract terms *ex officio*.¹⁰ Even though this is a procedural issue, it could also be perceived as a substantive issue affording certain rights to the consumer. As the taxonomy only serves an illustrative purpose, it is not absolutely necessary to settle such issues.

1. Procedural consumer protection

The procedural consumer protection provided in cross-border purchases concerns the choice of forum (jurisdiction) and the choice of applicable law

⁶ See in particular Directive 93/13/EEC on unfair terms in consumer contracts.

⁷ See in particular Directive 2011/83/EU on consumer rights.

⁸ See in particular Directive 99/44/EC on certain aspects of the sale of consumer goods and associated guarantees.

⁹ See in particular Directive 09/22/EC on injunctions for the protection of consumers' interests and Regulation EC 2006/2004 on Consumer Protection Cooperation.

¹⁰ See to the effect C-240-244/98 (Oceano Group).

– harmonised in the Brussels I Regulation¹¹ and the Rome I Regulation,¹² respectively. Both acts apply to contractual obligations in civil and commercial matters such as those in consumer contracts. However, arbitration agreements fall outside the scope.¹³ The main principles are that persons should be sued in courts of the Member State in which they are domiciled and that a contract is governed by the law chosen by the parties.¹⁴ The parties may also make a choice of jurisdiction, and in the absence of a choice of applicable law, contracts concerning goods and services shall be governed by the law of the country in which the trader has his habitual residence.¹⁵

The consumer protection found in these acts entails: 1) that proceedings may only be brought in the courts of the Member State in which the consumer is domiciled,¹⁶ unless the consumer chooses to bring proceedings in the Member State in which the trader is domiciled;¹⁷ and 2) that the contract is to be governed by the law of the country in which the consumer has his habitual residence.¹⁸ After a dispute has arisen, the parties are free to depart from the provisions on jurisdiction and the parties may also agree that the consumer – in addition – may bring proceedings in courts other than those mentioned above. If the consumer and the trader were domiciled or habitually resident in the same Member State at the time of conclusion of their contract, a choice of jurisdiction is valid if it confers jurisdiction on the courts of that Member State and provided that such an agreement is not contrary to the law of that Member State.¹⁹ The parties may choose the law applicable to a contract, but such a choice may not result in the consumer being deprived of the protection afforded to him by provisions which cannot be derogated from by agreement, by virtue of the law which, in the absence of choice, would have been applicable.²⁰

This procedural consumer protection applies to consumer contracts in situations where: a) the trader pursues commercial or professional activities in the Member State of the consumer's domicile or habitual residence; or b) by

¹¹ Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. See also the revised Brussels I Regulation—Regulation No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters—which applies from 10 January 2015 and repeals Regulation No 44/2001.

¹² Regulation 593/2008 on the law applicable to contractual obligations.

¹³ Article 1(2)(d) in both the Brussels I Regulation and the Rome I Regulation.

¹⁴ Brussels I Regulation Article 2(1) and Rome I Regulation Article 3(1).

¹⁵ Brussels I Regulation Article 23 and Rome I Regulation Article 4.

¹⁶ In the revised version of the Brussels I Regulation the scope is expanded to allow consumers to sue traders “regardless of the domicile of the other party”. See Article 18.

¹⁷ Brussels I Regulation Article 16.

¹⁸ Rome I Regulation Article 6.

¹⁹ Brussels I Regulation Article 17.

²⁰ Rome I Regulation Article 6(2).

any means, directs such activities to that Member State and the contract falls within the scope of such activities. The consumer protection in jurisdiction also applies if the contract concerns the sale of goods on credit.

Another issue related to procedural consumer protection is e.g. small claims procedures in which a regulation²¹ simplifies, speeds up and reduces the cost of litigation in cross-border cases for claims up to € 2,000. In 2013, the Commission intends to make the small claims forms available online and report on the operation of the procedure as a whole, including any need to revise the level of the cost threshold.²² Legal aid schemes – which also constitute procedural consumer protection – are available in various forms in all Member States, but the area is not harmonised in the European Union.

1.1 Access to justice and consumer empowerment

In the current agenda for a consumer policy strategy, two main goals are to raise awareness of consumer rights and to give consumers efficient ways to solve disputes. “Empowered consumers make optimal decisions by understanding their own preferences and the choices available to them. They know their rights, recognise when these have been breached and if so, complain and seek redress when necessary.”²³ The problem is that there are not many empowered consumers in the European Union. According to a consumer empowerment survey²⁴ (Eurobarometer Report), only two percent could correctly answer questions on their rights of withdrawal, guarantees and protection from unfair commercial practices. Consumers appear not to know which law applies in a cross-border transaction. Only 35 percent of consumers who used the Internet thought that their own country’s consumer protection law applied, which is essentially the case, when a trader aims to sell across borders. Slightly more thought that the law of the country from which they were buying applied.²⁵ This lack of awareness undermines the ability of consumers to uphold their rights.

Chapter 5 of the Eurobarometer Report deals *inter alia* with consumers’ redress behaviour. Twenty-one percent of the respondents had encountered a problem with a good, a service, a retailer or a provider in the past 12 months,

²¹ Regulation No 861/2007 establishing a European Small Claims Procedure.

²² European Commission: *Communication on a European Consumer Agenda – Boosting confidence and growth*, COM(2012) 225, p. 12.

²³ *Commission Staff Working Paper on Consumer Empowerment in the EU*, 7 April 2011, (SEC(2011)0469), paragraph 1.

²⁴ Eurobarometer report No 342; April 2010. Published in April 2011 and based on 56,471 interviews carried out in February to April 2010.

²⁵ *Commission Staff Working Paper on Consumer Empowerment in the EU*, 7 April 2011, (SEC(2011)0469), paragraph 21.

and for which they had legitimate cause for complaint. 77 percent of those respondents took some form of action in response to their problems, while 23 percent took no action at all. 65 percent of all those who experienced a problem made a complaint to the trader. Comparatively fewer consumers made a complaint to the manufacturer (13 percent) and even fewer took more formal action, in the form of utilising an out-of-court dispute settlement body (ADR) (five percent) or taking the traders concerned to court (two percent).

The most frequently cited reason for not making a complaint to a public authority or consumer organisation was that the individual had already received a satisfactory result from the trader (44 percent). The next most common reason was that the sums involved were too small (24 percent). According to the Eurobarometer report, the reasons people give for not taking a business to court are similar to the reasons given for not taking the complaint to the public authorities, with 40 percent of respondents saying they had already received a satisfactory result from the trader. Around a quarter (26 percent) say that the sums involved were too small, with 16 percent saying it would have taken too much effort. 13 percent of respondents gave as a reason that they thought the procedure would be too expensive with respect to the sum involved and 12 percent said they thought it would take too long. 11 percent of the respondents thought the procedure would be too complicated and nine percent did not know how to proceed. A minority of consumers expressed the view that they did not want to take a business to court on their own (four percent). A third of the respondents gave at least one of the following four reasons: “too much effort”, “too expensive”, “too long” or “too complicated”.²⁶

Those respondents who had experienced problems were asked to estimate the total financial loss associated with their most recent problem. In general it appeared that the financial detriment in most cases involves small sums, although the amounts were considerably larger in areas like financial services and real estate. The average self-estimated value of such losses was € 375 – the median estimated value was € 18. One third of the respondents found that the problem did not cost them anything from a financial point of view. The amount of loss reported was found to have an impact on the actions undertaken. 14 percent of respondents who reported a loss of € 200 took the business to an out-of-court dispute settlement body. By contrast only four percent of those who reported a loss which was less than € 200 took this action. Nine percent of those who reported a loss of € 500 or more took the business to court, whereas this was the case for only one percent of those who experienced a loss of less than

²⁶ Eurobarometer report No 342; April 2010, p. 204.

€ 500 Euros. Those consumers who did not experience a problem were also asked about the level of financial loss which they anticipate would cause them to take a trader to court. The majority (53 percent) gave a figure somewhere between € 101 and € 2,500, but five percent said they would go to court for a loss of under € 20 and 3 percent would only go to court over a financial loss in excess of € 5,000. A relatively large proportion of consumers either refused or felt unable to answer this question (17 percent) and eight percent said they would never take a trader to court, no matter the sum involved.²⁷

Most consumers are likely to complain to the trader which, in many cases, leads to an acceptable solution. However, consumers appear unwilling to seek further redress if complaints are not satisfactorily resolved.²⁸ Analysis of consumer confidence showed that the confident consumers, the knowledgeable consumers, and those who feel protected by consumer law are more likely to make a complaint.²⁹ Even though the numbers demonstrate some willingness to take disputes to courts, consumers are faced with substantial litigation cost – in terms of money, time, and distress. In many consumer disputes these costs will be prohibitively high compared to the value of the legal claim, thus preventing the consumer from benefiting from the procedural consumer protection. One may also assume that certain groups of vulnerable consumers will be unlikely to seek redress.

1.2 Out-of-court dispute settlement

As an alternative to taking the dispute to court, consumers often have the opportunity to seek settlement out of court (*alternative dispute resolution*) which may take form of e.g. an arbitrator, a conciliator, a mediator, an ombudsman, or a complaints board. The process is usually cheaper for the consumer and less cumbersome than traditional litigation. The reduced cost also means that the consumer will not be required to pay further litigation costs should he lose the case. A complaint board decision is not necessarily binding, but failure to honour such decisions may damage the reputation of the trader – either by unfavourable commenting in social media or on official websites.³⁰ According to the Mediation Directive³¹ the parties may request – *if they agree*

²⁷ Eurobarometer report No 342; April 2010, pp. 187 and 216.

²⁸ *Commission Staff Working Paper on Consumer Empowerment in the EU*, 7 April 2011, (SEC(2011)0469), paragraphs 9 and 10.

²⁹ Eurobarometer report No 342; April 2010, p. 183.

³⁰ See e.g. firmatjek.dk where consumers may search for traders who have failed to comply with a decision taken by the Danish Consumer Complaint Board.

³¹ Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters, Article 6.

hereto – that the content of a written agreement resulting from mediation is made enforceable. The Directive also gives courts the right to invite the parties to reach an amicable settlement of their dispute.

The Commission adopted recommendations in 1998³² and 2001³³, setting out a number of core quality criteria that ADR entities should respect.³⁴ Both in the 2011 Commission Work Programme³⁵ and in the Single Market Act³⁶, alternative dispute resolution and online dispute resolution are identified as one of the key actions for re-launching growth and strengthening consumer confidence in the Single Market. A number of studies have been carried out, including the “Study on the use of Alternative Dispute Resolution in the European Union” (2009),³⁷ on “Consumer redress in the EU: consumers’ experiences, perceptions and opinions” (2009),³⁸ on the “assessment of the compliance costs including administrative costs/burdens on businesses linked to the use of Alternative Dispute Resolution (ADR)” (2011), and on “Cross-border ADR in the European Union” (2011).³⁹

Out-of-court dispute settlement is also dealt with in Article 17 of the Electronic Commerce Directive.⁴⁰ Here it is provided that Member States must ensure that national legislation may not hamper the use of out-of-court schemes, available under national law, for dispute settlement, including appropriate electronic means. Member States are to encourage bodies responsible for the out-of-court settlement of, in particular, consumer disputes to operate in a way which provides adequate procedural guarantees for the parties concerned – which is a implied reference to the above-mentioned recommendations.

The Commission has established two networks dealing with ADR: ECC-NET⁴¹

³² Commission Recommendation 98/257/EC on the principles applicable to the bodies responsible for the out-of-court settlement of consumer disputes, OJ 115, 17.4.1998, p. 31.

³³ Commission Recommendation 2001/310/EC on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes, OJ 109, 19.4.2001, p.56.

³⁴ See also European Commission’s Green Paper on Access of Consumers to Justice and the Settlement of Consumer Disputes in the Single Market, COM(93) 576.

³⁵ Commission Legislative Work Programme for 2011, COM(2010) 623.

³⁶ European Commission: Communication on Single Market Act – Twelve levers to boost growth and strengthen confidence, “Working together to create new growth”, COM (2011) 206, p. 9.

³⁷ http://www.cc.cec/home/dgserv/sg/evaluation/pages/eims_en.htm. An in-depth analysis of existing ADR entities and their functioning in all Member States.

³⁸ http://ec.europa.eu/consumers/redress_cons/docs/cons_redress_EU_qual_study_report_en.pdf.

³⁹ http://www.europarl.europa.eu/meetdocs/2009_2014/documents/imco/dv/adr_study/_adr_study_en.pdf.

⁴⁰ Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

⁴¹ http://ec.europa.eu/consumers/cec/index_en.htm. The European Consumer Centre network (ECC-Net) helps consumers to access the appropriate ADR entity in another Member State in case of cross-border disputes.

and FIN-NET.⁴² Furthermore, the Mediation Directive⁴³ – which also includes consumer disputes – aims to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings. The number of cross-border complaints received by European Consumer Centres (ECCs) amounted to 35,000 in 2009, an increase of 55 percent compared with 2005. The share of complaints relating to e-commerce transactions amounted to more than 55 percent in 2009 and 2010 and this share has doubled since 2006. In 2009, 38 FIN-NET members reported having handled 1,542 disputes, while in 2010, 32 members reported 1,800 disputes.⁴⁴

The Eurobarometer Report shows that the financial threshold at which consumers would turn to alternative dispute resolution mechanisms tend to be lower than those at which they would take a trader to court. 38 percent of respondents identified a threshold point at € 200 or below (compared to 27 percent for taking a trader to court), but 15 percent selected a value in the range of € 101–€ 200. A quarter of respondents would go to alternative dispute resolution for values in the range € 200–€ 1,000 and 11 percent would only go to ADR for values of € 1,000 or even higher. The remaining respondents either answered don't know/refused (19 percent) or said they would never use ADR (seven percent). The report concludes that there is a similar pattern in reasons for not taking a trader to an out-of-court dispute settlement body and the reasons for not taking the complaint to court. However, one in twelve of respondents reported that they did not know about the out-of-court dispute settlement body.⁴⁵ The Commission has deduced from the Eurobarometer Report that “consumers feel that they lack adequate formal and informal means to remedy the problems they face, which prevents them from enforcing their rights” and that “[i]mproving access to out-of-court and court redress mechanisms, in particular including small losses in such mechanisms, could have significant benefits for consumers, as well as making business more efficient and responsive to consumer needs.”⁴⁶

⁴² Consisting of ADR schemes that handle cross-border disputes between consumers and financial services providers.

⁴³ Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters.

⁴⁴ European Commission: Communication on Alternative dispute resolution for consumer disputes in the Single Market, COM(2011) 791, p. 2, fn. 6.

⁴⁵ Eurobarometer report No 342; April 2010, p. 224 f.

⁴⁶ Commission Staff Working Paper on Consumer Empowerment in the EU, 7 April 2011, (SEC(2011)0469), paragraph 32.

2. The newly adopted ADR directive and ODR regulation

Because the consumers' trust in the Internal Market is affected by the lack of confidence that their problems related to purchases of goods and services can be addressed efficiently, on 29 November 2011 the European Commission presented proposals on alternative dispute resolution⁴⁷ (ADR) and Online Dispute Resolution⁴⁸ (ODR) in order to contribute to promoting access to swift, cheap and effective dispute resolution through alternative dispute resolution procedures, as a means to empower consumers and put them at the heart of the single market.⁴⁹ This legislative framework was adopted on 21 May 2013⁵⁰ and the ADR/ODR rules must be implemented by July 2015, and the ODR Platform will be operational in January 2016.

These two acts form part of the twelve key actions of the Single Market Act,⁵¹ and aim to grant all EU consumers access to simple and speedy procedures to defend their rights.⁵² The two instruments complement each other in the sense that 1) the ADR Directive will make quality ADR entities available across the EU for all consumer complaints related to contractual disputes arising from the sale of goods or the provision of services, and 2) the ODR Regulation will establish an online platform, facilitating easy access to and cooperation between the various national ADR schemes. The ODR Regulation establishes a European online dispute resolution platform (*the ODR Platform*) which will enable consumers and traders to access an online platform directly. This will help to resolve contractual disputes arising from cross-border online transactions through the intervention of an ADR entity complying with the ADR Directive. The ODR Platform is to be established by the European Commission.

⁴⁷ Proposal for a directive on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), COM(2011) 793, 2011/0373 (COD).

⁴⁸ Proposal for a regulation on online dispute resolution for consumer disputes (Regulation on consumer ODR), COM(2011) 794, 2011/0374 (COD).

⁴⁹ European Commission: Communication on alternative dispute resolution for consumer disputes in the Single Market, COM(2011) 791.

⁵⁰ See Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes.

⁵¹ European Commission: Communication on Single Market Act – Twelve levers to boost growth and strengthen confidence, “Working together to create new growth”, COM (2011) 206, p. 9.

⁵² European Commission: Communication on a European Consumer Agenda – Boosting confidence and growth, COM(2012) 225, p. 12.

2.1 Information to the consumer

As a means of creating awareness of ADR and ODR, both acts require traders to inform consumers of available ADR and ODR schemes. According to Article 14 of the ODR Regulation, traders established within the European Union engaging in online sales or service contracts, and online marketplaces established within the Union, must provide on their websites an electronic link to the ODR Platform. If the trader is committed or obliged to use an ADR entity he must also to some extent make reference to the ODR Platform in e-mails and general terms and conditions. It follows from Article 13 of the ADR Directive that Member States shall ensure that traders established on their territories inform consumers about the ADR entity or ADR entities by which those traders are covered, when those traders commit to or are obliged to use those entities to resolve disputes with consumers. That information shall include the website address of the relevant ADR entity or ADR entities. Further, the Member States must also ensure that ADR entities, the centres of the European Consumer Centres Network, the national ODR contact establish electronic links to the ODR Platform – consumer associations and business associations are to be encouraged by the Member States to do the same.

It follows from Article 27 of the Services Directive⁵³ that Member States shall take measures to ensure that traders (service providers): 1) supply contact details to which consumers can send a complaint, 2) respond to such complaints in the shortest possible time and make their best efforts to find a satisfactory solution, and 3) inform the consumer about “non-judicial means of dispute settlement” if the trader is subject to a code of conduct, or member of a trade association or professional body, which provides for such recourse. According to Article 7(5) of the Unfair Commercial Practices Directive, information requirements – such as those suggested in the two acts – are to be regarded as “material”, which according to Article 7(1) renders it misleading and thus an unfair commercial practice, if the omission causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

2.2 The directive on consumer alternative dispute resolution

The aim of the ADR Directive is to ensure that consumers, on a voluntary basis, can submit complaints against traders to entities offering independent, impartial, transparent, effective, fast and fair alternative dispute resolution procedures. The Directive applies to procedures for the out-of-court resolu-

⁵³ Directive 2006/123/EC on services in the internal market.

tion of domestic and cross-border disputes concerning contractual obligations stemming from sales contracts or service contracts between a trader established in the Union and a consumer resident in the Union through the intervention of an ADR entity which proposes or imposes a solution or brings the parties together with the aim of facilitating an amicable solution. However, the Directive does not apply to procedures before consumer complaint-handling systems operated by the trader, direct negotiation between the consumer and the trader, or attempts made by a judge to settle a dispute in the course of a judicial proceeding concerning that dispute.⁵⁴

According to Article 5, Member States must ensure that disputes on their respective territories can be submitted to an ADR entity which complies with the requirements set out in the Directive. Member States may rely on ADR entities established in another Member State or regional, transnational or pan-European dispute resolution entities, where traders from different Member States are covered by the same ADR entity, without prejudice to their responsibility to ensure full coverage and access to ADR entities. Member States must also ensure that ADR entities *inter alia* maintain a website with information concerning the ADR procedure, and which enables consumers to submit a complaint, enable the exchange of information between the parties via electronic means, accept both domestic and cross-border disputes.

Building upon the Commission's earlier recommendations on ADR, the Directive imposes requirements for expertise, independence, impartiality, transparency, effectiveness, and fairness.⁵⁵ As part of the effectiveness requirement, it is provided that the parties should have access to the procedure without being obliged to retain a lawyer or a legal advisor and that the ADR procedure is free of charge or available at a nominal fee for consumers. The outcome of the ADR procedure must be made available within a period of 90 calendar days from the date on which the ADR entity has received the complete complaint, however, in the case of complex disputes, the ADR entity may extend this time period.

2.3 The regulation on consumer online dispute resolution

The aim of the ODR Regulation is to provide a European ODR Platform facilitating the independent, impartial, transparent, effective, fast and fair out-of-court resolution of disputes between consumers and traders online.⁵⁶

⁵⁴ Articles 1 and 2.

⁵⁵ Articles 6, 7, 8, and 9, respectively.

⁵⁶ Article 1.

According to Article 5 the Commission shall establish a “user-friendly” online dispute resolution platform (*ODR Platform*) in the guise of an interactive website, which can be accessed electronically and free of charge in all official languages of the European Union. The ODR Platform shall thus be a single point of entry for consumers and traders seeking the out-of-court resolution of disputes covered by the ODR Regulation. The functions of the ODR Platform consist of (Article 5(4)):

- a) providing an electronic complaint form which can be filled in by the complainant party
- b) informing the respondent party about the complaint;
- c) identifying the competent ADR entity or entities and transmit the complaint to the ADR entity, which the parties have agreed to use;
- d) offering an electronic case management tool free of charge, which enables the parties and the ADR entity to conduct the dispute resolution procedure online through the ODR Platform;
- e) providing the parties and ADR entity with the translation of information which is necessary for the resolution of the dispute and is exchanged through the ODR Platform;
- f) providing an electronic form by means of which ADR entities shall transmit basic information about the case (see Article 10(1)(c));
- g) providing a feedback system which allows the parties to express their views on the functioning of the ODR Platform and on the ADR entity which has handled their dispute;
- h) making publicly available various information about the availability of ADR, existing ADR entities, procedures, contact points, and statistics about ADR outcomes.

Each Member State must designate one ODR contact point which could be e.g. the entity that forms part of the European Consumer Centre Network or a consumer association. Each ODR contact point shall host at least two online dispute resolution facilitators, who shall provide support to the resolution of disputes relating to complaints submitted through the platform by fulfilling a number of functions, including facilitating communication between the parties and the competent ADR entity and informing consumers of other means of redress when a dispute cannot be resolved through the platform, for example when the trader fails to agree to the use of ADR. The European Commission is to establish a network of contact points (*ODR contact points network*) which shall enable cooperation between contact points which are to meet at least twice a year.

In order to submit a complaint to the ODR Platform the complainant party

must fill an electronic complaint form and provide information described in the Annex, including information sufficient to determine the competent ADR entity. Upon receipt of a fully completed complaint form, the ODR Platform must without delay, transmit to the respondent party – in one of the official languages of the institutions of the Union chosen by that party – the complaint together with *inter alia* the information that the parties have to agree on an ADR entity in order for the complaint to be transmitted to it and information about competent ADR entities and the ODR contact point. The information about competent ADR entities must include a) name, contact details and website address, b) applicable fees, c) languages in which the ADR procedure can be conducted, d) the average length of the ADR procedure, e) the binding nature of the outcome, and f) the grounds on which the ADR entity may refuse to deal with a given dispute.⁵⁷

The ADR entity to which the complaint has been transmitted must without delay inform the parties about whether it agrees or refuses to deal with the dispute in accordance with Article 5(4) of the ADR Directive. Member States may, according to this provision, permit ADR entities to maintain and introduce procedural rules that allow them to refuse to deal with a given dispute on the grounds that: a) the consumer did not attempt to contact the trader concerned in order to discuss his complaint and seek, as a first step, to resolve the matter directly with the trader, b) the dispute is frivolous or vexatious, c) the dispute is being or has previously been considered by another ADR entity or by a court, d) the value of the claim falls below or above a pre-specified monetary threshold, e) the consumer has not submitted the complaint to the ADR entity within a pre-specified time limit, which shall not be set at less than one year from the date upon which the consumer submitted the complaint to the trader, and f) dealing with such a type of dispute would otherwise seriously impair the effective operation of the ADR entity.

The ADR entity which has agreed to deal with the dispute shall also inform the parties of its procedural rules and, if applicable, of the costs of the dispute resolution procedure concerned. The entity may not require the physical presence of the parties or their representatives, unless its procedural rules provide for that possibility and the parties agree.⁵⁸

⁵⁷ Article 9.

⁵⁸ Article 10.

3. Conclusions

Consumers are provided with good procedural consumer protection in the context of disputes arising from cross-border purchases; this protection consists in particular of the possibility to benefit from jurisdiction in the consumer's home court and in not being deprived of national consumer protection in the country in which he has his habitual residence. However, as the Eurobarometer Report demonstrates, litigation is not an efficient way to seek redress, as consumers are not likely to take their disputes to court. Even though this reluctance is also significant for the willingness to take a dispute to ADR, it has been found that around four in ten of the respondents would have to lose € 500 or less to go to court, compared to four in ten who say they would have to lose only € 200 to turn to an out-of-court dispute settlement body.⁵⁹ Thus the ADR/ODR scheme will help mitigate some of the practical difficulties facing a consumer seeking redress. The information requirements will ensure that consumers in general will be (substantially) more likely to know about the possibilities of taking their dispute to ADR. Of course the effectiveness of ADR/ODR will also depend on, for instance, the amount of bureaucracy and the costs involved.

There are many reasons why cross-border consumer sales are so depressingly low. In light of the possible litigation costs – and other costs/uncertainties associated with buying abroad – it may be an efficient strategy for consumers to purchase products from domestic traders. By providing effective means of redress these litigation costs are likely to be lowered and will – all other things being equal – benefit the Internal Market. Effective redress may not be the most important obstacle, but the availability hereof will contribute to a welfare gain for consumers and it may also increase the trader's willingness to sort out problems – he may also have an interest in doing so in order to improve his reputation and to secure repeat sales. It is important to note that – unless provided otherwise by national law – both parties to a dispute must *agree* to seek an amicable solution under the adopted ADR/ODR regime. It follows from Article 10(2) that a solution may be binding for the parties (only) if they were informed of its binding nature in advance and specifically accepted this.

⁵⁹ Eurobarometer report No 342; April 2010, p. 224 f.

