
ПРИВРЕДНИ СПОРОВИ - СУДСКИ И АРБИТРАЖНИ

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ODR AND ADR – NEW DEVELOPMENTS ON LEVEL OF THE EU FOR RESOLVING CONSUMER DISPUTES

Summary

The paper provides an outline of the Regulation (EU) No 524/2013 on consumer ODR and of the Directive 2013/11/EU on consumer ADR. They provide for simple, efficient, fast and low-cost out-of-court solutions to disputes between consumers and traders. The paper also discusses the transposition of the Directive on consumer ADR in Germany. The German Verbraucherstreitbeilegungsgesetz has entered into force on 1 April 2016. Information-duties in connection with the consumer dispute resolution are regulated by the Verbraucherstreitbeilegungs-Informationspflichtenverordnung.

Key words: *Regulation (EU) No 524/2013 on consumer ODR, Directive 2013/11/EU on consumer ADR, transposition in Germany, Verbraucherstreitbeilegungsgesetz.*

I Introduction

Consumer protection is among the primary concerns of the European Union, and numerous activities have been undertaken for safeguarding consumer rights throughout the Internal Market. Art. 4 of the Treaty on the Functioning of the European Union (TFEU)¹ insofar provides for a shared com-

¹ Consolidated version OJ C 326 of 26.10.2012, 47.

petence of the Union together with the Member States. Pursuant to Art. 12 TFEU, “Consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities.”² An overview of the recent development and trends may be found in the European Consumer Agenda 2012,³ as well as in Regulation (EU) No 254/2014 of 26 February 2014 on a multiannual consumer programme for the years 2014–20.⁴

Experience shows, that it does not suffice to adopt European legislation which creates new rights for consumers, as for example the well-known consumer directives. It is equally important to provide for effective mechanisms to enforce the rights of consumers, particularly in cross-border situations. To this purpose, various initiatives have been taken.

Thus, the European e-Justice Portal⁵ has generally facilitated access to justice. On the European e-Justice Portal the users are provided with detailed information which shall make it easier for them to identify the competent court. They are also instructed on how to bring cases to court, what will be the applicable law, how to apply for legal aid and which costs may be expected. Last not least, they also receive basic information on the legal systems of all Member States. Yet, litigation remains risky and may prevent consumers from going to court with their justified complaint.

As an alternative to judicial redress the EU sees a recognized need to facilitate also European cross-border out of court redress.

Non-judicial redress has been on the agenda of the European Union in various contexts. In a first step, the EU has determined basic rules for cross-border mediation in order to encourage alternative dispute resolution and to promote the amicable settlement of disputes.

- Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.⁶

2 See also Art. 169 TFEU.

3 Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions of 22.5.2012: “A European Consumer Agenda – Boosting confidence and growth”, COM(2012) 225 final.

4 Regulation (EU) No 254/2014 of the European Parliament and of the Council of 26 February 2014 on a multiannual consumer programme for the years 2014-20 and repealing Decision No 1926/2006/EC, OJ L 84 of 20.3.2014, 42.

5 Available at <https://e-justice.europa.eu/home.do?action=home&plang=en>.

6 OJ L 136 of 24.5.2008, 3.

The Mediation Directive was transposed in the Member States.⁷ It has also had a direct impact on legislative development in countries which are currently preparing for EU-accession. Thus, the Act on mediation in the resolution of disputes of the Republic of Serbia of 2014 is already harmonized with the *Acquis communautaire*.⁸

II Consumer ODR and ADR

On 21 May 2013, the European Union adopted new legislation on alternative dispute resolution, this time focusing on consumer disputes. This concerns the following acts:

- Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR);⁹
- Commission Implementing Regulation (EU) 2015/1051 of 1 July 2015 on the modalities for the exercise of the functions of the online dispute resolution platform, on the modalities of the electronic complaint form and on the modalities of the cooperation between contact points provided for in Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes¹⁰
- Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC¹¹ (Directive on consumer ADR).

It catches the eye that the EU has used different types of instruments for regulating consumer ODR (regulation) and ADR (directive). As is well known, the regulations of the European Union apply directly in all Member States (see Art. 288(2) TFEU). In contrast to the regulations, the directives of the EU are not directly applicable but need to be transposed into the national law of the Member States (Art. 288(3) TFEU).

The ODR-Regulation and the ADR-Directive have not only been adopted on the same day but are closely related and supplement each other. The declared

7 For further references see Hopt, Steffek (eds.), *Mediation – Principles and regulation in comparative perspective*, Oxford, 2013.

8 *Zakon o posredovanju u rešavanju sporova*, *Official gazette*, No. 55/2014.

9 *OJ L 165 of 18.6.2013*, 1.

10 *OJ 2015 L 171*, 1.

11 *OJ L 165 of 18.6.2013*, 63.

intention of the Regulation on consumer ODR, as well as of the Directive on consumer ADR is to offer a simple, efficient, fast and low-cost out-of-court solution to disputes between consumers and traders. However, application of the Regulation is limited to online transactions (e-commerce), whereas the Directive is applicable for complaints regarding online as well as offline transactions.

The scope of the Regulation and of the Directive is limited to disputes between a consumer resident in the Union and a trader established in the Union. The legal definition of “consumer” is the same as in other instruments of the EU (any natural person who is acting for purposes which are outside his trade, business, craft or profession). The trader is defined as any person who is acting for purposes relating to his trade, business, craft or profession.

Out of court resolution of disputes is provided concerning sales or service contracts, with the exception of disputes regarding health care services or higher education.

It should be mentioned that a Network of European Consumer Centers (ECC-Net) was established in all Member States, Norway and Iceland whose task includes providing free advice and assistance to consumers in their complaints about purchases in another network-country.¹²

III Overview of the Regulation on Consumer ODR

The Regulation has created the legal basis for establishing a European online platform for resolving disputes arising from online sales and service contracts. The “European ODR platform” is accessible from 15.2.2016 and shall operate in all EU official languages.¹³ All 28 member states participate, including the United Kingdom, Ireland and Denmark.

Proceedings via this platform are initiated by submission of a complaint from a consumer against a trader, using an online complaint form. In some Member States (Belgium, Germany, Luxembourg and Poland) traders may also submit complaints against consumers. The Regulation does not apply to disputes between traders (Recital 15 ODR-Regulation).

Within 30 days after the complaint has been submitted, the parties need to agree on the competent dispute resolution body. The dispute resolution bodies must first be approved by their Member State whether they fulfill the required standards of transparency, independence, impartiality, fairness and effectivity and whether they are properly registered with the national aut-

¹² Available at http://ec.europa.eu/consumers/solving_consumer_disputes/non-judicial_redress/ecc-net/index_en.htm.

¹³ The platform is accessible under the following link: <http://ec.europa.eu/odr>.

horities. E.g., Austria has so far registered eight bodies. A list of suggested dispute resolution bodies will be forwarded to the parties through the EU online dispute resolution website.¹⁴ This website also provides additional information on the individual bodies.

The dispute resolution body which has been chosen by the parties shall have three weeks to decide, whether it will deal with the dispute or not. If the parties cannot reach an agreement on the competent resolution body, or if the body designated by them refuses to accept the assignment, the complaint will not be processed further. The dispute resolution body shall have an “outcome” for the dispute within 90 days and shall inform the parties accordingly. The outcome may be to bring the parties together with the aim of facilitating an amicable solution, or to issue a recommendation, or to render a decision which is binding on one or on both parties, depending on the type of resolution body.

Each Member State designates one ODR contact point which the parties can contact for advice and guidance through the process of submitting the complaint, or with questions on their rights as consumers in general.

The use of the EU online dispute resolution website as such is free of cost. The dispute resolution bodies may charge fees. No uniform tariff exists insofar.

At this moment, it is too early to evaluate the practical experience.

Details of application of the Regulation on consumer ODR in Germany have been determined in an implementing act.¹⁵

For the Republic of Serbia, the Regulation shall enter into force at the moment of EU-accession. Before that date, it will not be possible for consumers who are resident in Serbia or for traders established in Serbia to make use of the EU consumer ODR.

IV Directive on Consumer ADR

1. Contents and objectives of the Directive

The Directive applies to domestic and to cross-border disputes between consumers and traders concerning sales or services contracts, both online and offline (Art. 2 ADR-Directive).

14 Available at <https://webgate.ec.europa.eu/odr/main/?event=main.home.show>.

15 *Gesetz zur Umsetzung der Richtlinie über alternative Streitbeilegung in Verbrauchersachen und zur Durchführung der Verordnung über Online-Streitbeilegung in Verbraucherangelegenheiten* of 29.2.2016 (BGBl. I p. 254).

It is binding for all Member States, including Denmark, the United Kingdom and Ireland.

The ADR-Directive shall be without prejudice to the Mediation Directive 2008/52/EC (Art. 3 (2) ADR-Directive).

In principle, the ADR-Directive applies to complaints submitted by consumers against traders. However, member states may in addition provide for the out-of-court resolution of complaints submitted by traders against consumers or of disputes between traders (Recital 16 ADR-Directive).

Complaints shall be submitted by a consumer on a voluntary basis only. The Directive shall not negatively affect the right of the consumers to bring an action before the courts. Therefore, any agreement between a consumer and a trader to submit complaints exclusively to an ADR entity shall not be binding on the consumer if it was concluded before the dispute has materialized (Art. 10 ADR-Directive).

The Directive does not require the participation of traders in ADR procedures to be mandatory, when a consumer has lodged a complaint against them. The traders should rather be “encouraged” to participate in ADR procedures. However, member states may in their national rules make the participation of traders mandatory (Recital 49 ADR-Directive).

The main focus of the Directive is on the access to and the requirements applicable to ADR entities and procedures (see Articles 5-12 ADR-Directive). The Member States shall provide national lists of ADR bodies, which shall respect binding quality requirements. All consumers shall have access to high-quality out-of-court redress mechanisms no matter where they reside in the Union. The Directive insofar provides for minimum harmonization, by allowing the member states to adopt rules on the national level which ensure an even higher level of consumer protection (Art. 2 (3) ADR-Directive).

The alternative dispute resolution procedures must be independent, impartial, transparent, effective, fast and fair (Articles 1, 6 et seq. ADR-Directive).

At this point, it suffices to mention that the ADR procedure must be available and easily accessible online and offline; that the parties shall not be obliged to engage a lawyer, but may do so if they wish; that the ADR procedure is free of charge or available at a nominal fee for consumers, and that the outcome of the ADR procedure shall be made available within a period of 90 days from the date on which the ADR entity has received the complete com-

plaint file. Only in the case of highly complex disputes, the ADR entity may extend the 90 days' time period.

The transparency requirement includes the requirement to provide information on the types of rules the ADR entity may use as a basis for the dispute resolution, such as: legal provisions, considerations of equity or codes of conduct (Art. 7 (1) I ADR-Directive).

The effects of ADR procedures on limitation and prescription periods are addressed in Art. 12 ADR-Directive.

The success of the ADR-Directive will to a large extent depend on whether it will be possible to gain the confidence of consumers in the EU in this method of resolving consumer disputes. A crucial issue in this context will be to provide the consumers with proper information (see also Articles 13-15 ADR-Directive).

The member states must make sure that penalties applicable to infringements of the ADR-Directive shall be effective, proportionate and "dissuasive" (Art. 21 ADR-Directive).

2. Transposition in Germany of the Directive on Consumer ADR

The member states were obliged to transpose the ADR-Directive by 9 July 2015 (Art. 25 ADR-Directive). Not all of them have met the deadline. In Germany, the Directive has been transposed¹⁶ in the Act on resolution of consumer disputes ("VSBG") of 19.2.2016¹⁷ which has entered into force on 1.4.2016. This act is supplemented by the Regulation on the duty to supply information in consumer disputes ("VSBInfoV")¹⁸. The *Bundesamt für Justiz in Bonn* has been appointed as the central authority for consumer disputes (Sec. 32 *et seq.* VSBG).

The Directive requires the creation of a comprehensive network of consumer dispute resolution bodies. These will normally be private consumer dispute resolution bodies which must then be recognized by the competent authorities (Sec. 24 *et seq.* VSBG). Under German law, the provider of such a

16 See also Gössl, "Das Gesetz über die alternative Streitbeilegung in Verbrauchersachen – Chancen und Risiken", *NJW*, 2016, 838; Engel, "Außergerichtliche Streitbeilegung in Verbraucherangelegenheiten – Mehr Zugang zu weniger Recht", *NJW*, 2015, 1633; Hirsch, "Außergerichtliche Beilegung von Verbraucherstreitigkeiten – ein alternativer Zugang zum Recht entsteht", *NJW*, 2013, 2088.

17 *Verbraucherstreitbeilegungsgesetz (BGBl. I p. 254)*.

18 *Verbraucherstreitbeilegungs-Informationspflichtenverordnung* of 28.2.2016 (*BGBl. I p. 326*).

body must be a registered association (Sec. 3 VSBG). These bodies will limit their activities to certain economic sectors, types of contracts or traders.

Public consumer dispute resolution bodies may also be established (Sec. 28 VSBG). On the federal level, a General consumer dispute resolution body has been established in Kehl¹⁹ which provides detailed information on all sector-specific ADR bodies, but may also step in in cases when no sector-specific body is available.

In case the consumer submits a dispute to an ADR entity the traders are on principle free to participate in the proceedings. In case a trader chooses not to participate, he must inform the consumers accordingly. For certain groups of traders, participation is mandatory under the German law. Thus, the Federal Lawyers' Act²⁰ provides for a conciliation board. Similar provisions are to be found in the Air Traffic Act²¹ and in the Energy Industry Act²².

Section 36 *VSBInfoV* obliges a trader who has a website or uses general terms and conditions to inform the consumers on that website or in his general terms and conditions in a clear, comprehensible and easily accessible way to what extent he is willing or obliged to participate in dispute resolution before a consumer ADR entity. In case the trader commits to, or is obliged to use those entities to resolve disputes with consumers such trader must also inform consumers in detail about the ADR entity or entities by which he is covered. The general information duty does not apply to traders who employ no more than ten persons.

For the consumers, participation shall always be voluntary. The provisions of the German Civil Code on general terms and conditions have been amended as follows:

Sec. 309 BGB concerning prohibited clauses without the possibility of evaluation

“Even to the extent that a deviation from the statutory provisions is permissible, the following are ineffective in standard business terms:

1-13 (...)

19 “Zentrum für Schlichtung e.V.”, available at www.verbraucher-schlichter.de.

20 Section 191f of *Bundesrechtsanwaltsordnung* “BRAO”.

21 Section 57a *Luftverkehrsgesetz* “LuftVG”.

22 Section 111b *Energiewirtschaftsgesetz* “ENWG”.

14. (lawsuit waiver) a provision by which the other contracting party may only pursue their claims by judicial process after having attempted an amicable settlement in a procedure of extrajudicial resolution.”

The effects of ADR procedures on limitation are in the German Civil Code regulated as follows:

Sec. 204 (1) No. 4 BGB

“The limitation period is suspended by:

4. arranging for notice to be given of an application filed with

a) a dispute resolution body established or recognised by the state or

b) if the parties seek conciliation in mutual agreement, with any other conciliation body which settles disputes;

if notice is arranged to be given shortly after the filing of the application, the limitation period is suspended immediately once the application is filed.”

In the proceedings the parties may be represented only by lawyers (not by any third persons), see Sec. 13 VSBG.

Each consumer dispute resolution body must employ at least one so-called “*Streitmittler*” (conciliator). That person must be a fully qualified lawyer or a certified mediator with special experience in consumer law and dispute resolution (Sec. 6 VSBG). The *Streitmittler* shall be independent, impartial and not bound by directions (Sec. 7 VSBG).

The proceedings shall normally be conducted in German language (Sec. 12 VSBG). An oral hearing is not mandatory, but the parties must be guaranteed fair hearing (Sec. 17 VSBG).

The dispute resolution must not necessary be based on the legal provisions (Art. 7 (1) (i) ADR-Directive). However, the rules of procedure may in the individual case provide that the *Streitmitter* shall make a settlement proposal to the parties. For such settlement proposals, the requirements are somewhat stricter in the sense that under the German law they must be “oriented to” the existing law.²³ This expression is not entirely clear but should be understood as is less than “based on the law”.

23 “*Am geltenden Recht ausgerichtet sein*”.

Under German law, the “outcome” of the proceedings may be only a settlement agreement between the parties. In other words, the proceedings shall not lead to an enforcement instrument for either of them.

The costs of the dispute resolution are on principle on the traders, from whom the dispute resolution body may charge “reasonable compensation”. For the consumers, the procedure is normally free of cost. In cases of abuse, they may be charged a maximum of 30 Euros (for details see Sec. 23 VSBG).

In Germany it is expected that the new rules for resolving consumer disputes shall lead to substantial changes in relation between traders and consumers.

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ONLINE И АЛТЕРНАТИВНО РЕШАВАЊЕ ПОТРОШАЧКИХ СПОРОВА – НОВА ДЕШАВАЊА НА НИВОУ ЕУ У ВЕЗИ СА РЕШАВАЊЕМ ПОТРОШАЧКИХ СПОРОВА

Резиме

У раду је представљен концепт Регулативе ЕУ бр. 524/2013 о online решавању потрошачких спорова и Директиве ЕУ бр. 11/2013 о алтернативном решавању потрошачких спорова. У њима су предвиђена једноставна, ефикасна, брза и јефтина вансудска решења за спорове између потрошача и трговаца. У раду се расправља и о питању транспонувања Директиве о алтернативном решавању потрошачких спорова у немачко право. Немачки Verbraucherstreitbeilegungsgesetz је ступио на снагу 1. априла 2016. године. Дужност информисања у вези са решавањем потрошачких спорова регулисана је Verbraucherstreitbeilegungs-Informationspflichtenverordnung.

Кључне речи: *Уредба ЕУ бр. 524/2013 о online решавању потрошачких спорова, Директива ЕУ бр. 11/2013 о алтернативном решавању потрошачких спорова, транспонување у немачко право, Verbraucherstreitbeilegungsgesetz.*