

# **The Impact of EU Law in the ADR Landscape in Italy, Spain and the UK: Time for Change or Missed Opportunity?**

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## **Abstract**

This paper examines the transformation of the consumer redress landscape in the EU and the impact that the Alternative Dispute Resolution Directive 2013/11/EU will have on three radically different redress cultures: Italy, Spain and the UK. In particular, this paper critically analyses the current regulation of the main ADR schemes and proposes key changes to improve the provision of redress in these jurisdictions. The paper also examines how these schemes can ensure an adequate coverage in the provision of consumer redress by fleshing out the procedural grounds set in the Directive upon which ADR entities can rely when refusing to deal with a consumer complaint. It argues that while the Directive creates an opportunity to increase the availability and awareness of quality ADR entities, it also poses the risk of undermining consumer trust in the whole ADR system if greater competition between ADR entities leads to forum shopping, traders refuse to participate in ADR processes and if procedural restrictions are not adequately monitored.

## **Keywords**

Alternative Dispute Resolution Directive

Consumer Redress

## **I. Introduction**

Consumer rights are only as effective as their enforcement,<sup>1</sup> which needs to be fast, user-friendly and economical. Although regulators, national enforcement bodies and consumer representative groups have a key role in ensuring compliance with consumer law, the two main avenues for consumers to enforce their rights individually are the courts and extra-judicial redress mechanisms. The low monetary value of the vast majority of consumer disputes makes courts often an unsuitable forum to obtain individual redress.<sup>2</sup> For this reason courts are seen as the last resort, and, when available, consumers increasingly opt for more informal alternative dispute resolution (ADR) methods, such as mediation and arbitration schemes. These ADR processes however are different from traditional ADR for civil and commercial

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<sup>1</sup> G. Howells and S. Weatherill [1], p. 660.

<sup>2</sup> Research found that 48% of EU consumers will not go to court for losses under €200 while 8% of consumers will never go to court regardless the amount of their claim. See Eurobarometer No. 342.

disputes. While traditional ADR is normally seen as an alternative to the court system, in that parties may compare what they might get in court to what is being offered in a settlement,<sup>3</sup> consumer ADR often presents itself as the only realistic option available for consumers to find redress in a cost-effective and proportionate manner, particularly when technology is used for settling low-value cross-border disputes.<sup>4</sup> Furthermore, consumer redress models are adapted to deal with parties (i.e. the consumer and the trader) between which there is a significant disparity of power; that is why the most popular model in the EU is the ombudsman scheme, where a case handler or ombudsman investigates and resolves consumer complaints. Even when more traditional ADR models, such as mediation and arbitration, are employed, these are adapted to reflect the disparity of power between the parties. This peculiarity of consumer ADR models has led scholars in the field to employ the ‘CADR’ acronym for consumer ADR as well as the term of ‘CDR’ for consumer dispute resolution – where CADR is not an alternative to the judicial process, but rather is the mainstream option for consumers seeking redress.<sup>5</sup>

This paper first critically analyses the new European legal framework on consumer ADR. Secondly, it examines the main consumer ADR bodies in three radically different redress cultures – namely, Italy, Spain and the UK – which have organically developed different redress models. Lastly, this paper analyses the grounds on which the CADR schemes can rely when refusing to deal with a consumer complaint. The main argument that this paper presents is that the implementation of the ADR Directive could represent a potential catalyst for real change in consumer redress – yet, its success will largely be dependent upon how much of an opportunity both national governments and businesses will actually see the Directive providing.

## **II. The New European Consumer ADR Landscape and the Risk of Forum Shopping**

The European Commission notes that in the EU the use of consumer ADR is well below its potential. It has been reported that in the EU only 9% of traders and 3% of consumers have used an ADR scheme.<sup>6</sup> Furthermore, the Commission has argued that a well-functioning and transparent ADR for consumers will have an important economic impact in the internal market.<sup>7</sup> These findings motivated the EU to pass two innovative legislative instruments: the Directive 2013/11/EU on Alternative Dispute Resolution for Consumers and the Regulation 524/2013 (EC) on Online Dispute Resolution for Consumers.<sup>8</sup> The new law aims to increase the availability of high

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<sup>3</sup> M. Moffitt [2], p. 1207.

<sup>4</sup> P. Cortés [3], chapter 2; R. Susskind [4], chapter 10.

<sup>5</sup> C. Hodges, I. Benöhr, N. Creutzfeldt-Banda [5], p. 199; C. Hodges [6].

<sup>6</sup> Flash Eurobarometer 300 [7], p. 45 and 76.

<sup>7</sup> The Commission estimated that effective ADR would save consumers around €22.5 billion a year, corresponding to 0.19% of EU GDP. See European Commission Staff Working Paper [8], p. 5.

<sup>8</sup> Directive 2013/11/EU on Alternative Dispute Resolution for Consumer Disputes OJ L165/63 (hereinafter the ADR Directive) and Regulation 524/2013 on Online Dispute Resolution for Consumer Disputes OJ L165/1 (hereinafter the ODR Regulation). It must be noted that there was a body of

quality ADR schemes as well as to encourage their use. By July 2015 all Member States must have complied with most of the requirements set in the ADR Directive, the main obligation of which requires Member States to ensure the provision and availability of certified ADR entities that comply with minimum legal standards when resolving disputes between traders and consumers.

The ODR Regulation complements the Directive mandating the European Commission to establish a pan-European ODR platform that will become a single point of entry for resolving consumer complaints arising from e-commerce. Consumers (and traders when allowed by the Member States where consumers reside) will be able to submit complaints in the ODR platform using an online standard form available in all the official languages. The complaint will be forwarded to the respondent and the ODR platform will help the parties to identify a certified ADR entity that can process the complaint online. The platform, which is expected to be fully operational from January 2016, will therefore simply link consumers to traders and to nationally-approved ADR entities, which will be able to use the ODR platform to resolve domestic and cross-border disputes that arise from online transactions. Hence, while e-commerce complaints may be channelled through the ODR platform, the other consumer complaints will only be able to rely on the support given by the ECC-Net for cross-border complaints and by the national consumer bodies for domestic disputes.

The first limitation in the design of the ODR platform is that it depends on the consumer complainant to input the necessary data, which includes the email address of the trader. Consumers may however face difficulties in finding the trader's correct email address as it may not be the one used by the trader to send confirmation of the transaction – if this proves to be an important hurdle, then the regulator should require traders to use the same email address. However, the main limitation of the ODR platform is that it will notify a certified ADR entity only when a trader has agreed to participate in the ADR process. Thus, in the event of disputes where traders have a legal obligation to opt into an ADR process, as is the case with the electricity and financial sectors, the platform will not forward the complaint automatically to the competent ADR if the trader has not replied to the complaint. This is something that will need to be monitored by the national contact points and ODR advisors, who may inform these consumers on how to approach those mandatory ADR entities directly – nonetheless, a more efficient referral would be that of complaints via the platform, instead of the referral of complainants by the national ODR advisors.

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legislation, mostly soft law, that preceded this new framework, and notably the Commission Recommendation 98/257/EC of 30 March 1998 on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes (O.J. 1998, L 115) and the Commission Recommendation 2001/310/EC of 4 April 2001 on the Principles for the Out-of-Court Bodies Involved in the Consensual Resolution of Consumer Disputes (O.J. 2001, L109/56). See also Communication on Alternative Dispute Resolution for Consumer Disputes in the Single Market COM(2011) 791; Civic Consulting, European Parliament Study Cross-border Alternative Dispute Resolution in the EU (2011).

While an ODR platform seems the natural place to resolve e-commerce disputes, it is not clear why its scope has been restricted to these disputes, as there will be many other disputes that could benefit from this platform to channel the solution. An explanation may be found in the need to narrow the scope to facilitate the design of complaint forms as well as to make the platform more manageable for the administrator. Hence, if the ODR platform becomes a useful instrument for resolving e-commerce disputes, it should in due course expand to other sectors to cover all types of consumer disputes.

The ADR Directive imposes an obligation on Member States to ensure the provision of ADR processes and their accessibility online for free or for a low cost for all consumer complaints in all sectors (with the exception of health care services and public providers of higher education),<sup>9</sup> so that consumers may have more adequate redress options against businesses without having to go to court. It applies to all contractual disputes, domestic and cross-border, where a trader is established in the EU and a consumer is a resident of the Union.<sup>10</sup> It only excludes complaints handling mechanisms established by the trader, direct negotiation between the consumer and the trader, and judicial settlement. Participation by businesses in ADR will remain voluntary in most economic sectors,<sup>11</sup> but businesses must state on their websites and in their T&Cs when they are adhered to a certified ADR entity. Interestingly, a number of Member States, such as Germany and Slovenia, have extended this obligation by requiring all those traders who are not committed to use ADR, to put a express statement of their decision (that they are not committed to participate in an ADR process) in their T&Cs, in both the paper format and in their websites. Also, businesses operating online must provide a link to the ODR platform.<sup>12</sup>

Furthermore when a dispute arises, all businesses must notify consumers about certified ADR entities operating in their sectors and whether or not they participate in any of them.<sup>13</sup> Although it appears a bit strange that traders are legally required to inform consumers about ADR entities even when they have no intention of using them, it is believed that this information obligation will encourage traders to opt into ADR entities as they are forced to consider in every case whether ADR is appropriate. In addition, the businesses' information obligation puts certified ADR entities ahead of those ADR schemes which have not been certified by the competent national authorities. In fact, if a business decides to use a non-certified ADR scheme, it would still be required to notify consumers about a certified ADR entity, which could create confusion among consumers.

Unlike the model ODR procedure that the UN Commission for International Trade Law (UNCITRAL Working Group III) is developing, the EU has designed a legal

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<sup>9</sup> Art. 2(2) ADR Directive.

<sup>10</sup> Art. 2(1) ADR Directive.

<sup>11</sup> Examples of regulated sectors where the provision of ADR is mandatory are the financial sector, telecoms, and some utility providers such as gas and electricity.

<sup>12</sup> Art. 14(1) ODR Regulation.

<sup>13</sup> Art. 13 ADR Directive.

framework aimed at improving the coordination and accessibility of quality ADR processes.<sup>14</sup> ADR schemes operating in the EU that would like to acquire certification as ADR entities by their competent national authorities will not need to offer a specific procedure; instead they will need to comply with minimum procedural standards.<sup>15</sup> Yet, if an ADR scheme does not obtain the accreditation from one national authority which may have set up higher standards, nothing will stop that scheme from requesting the certification from a competent authority based in another Member State. This situation could potentially raise questions of forum shopping and race to the bottom in complying with the procedural standards established in the ADR Directive.

A more concerning form of forum shopping occurs where traders, as repeat users, are enabled to choose from ADR entities that operate transparently and are required, for instance, to publish their annual activities with a break down on how often they uphold complaints. As it has been denounced for domain names,<sup>16</sup> transparency amongst certified ADR providers leads to forum shopping as those who pay the fees and choose the ADR entity will have economic incentives to choose one that is more likely to decide in their favour. A number of safeguards can be taken into consideration in order to minimise this risk.

Firstly, the Regulations implementing the Directive can require ADR applicants seeking to obtain the certification from the competent authority to be established in the Member State where they apply.<sup>17</sup> However, traders without an obligation to be part of a statutory ADR entity can opt into ADR entities that are not established in the Member State where they are established. This is more likely to happen in sectors such as aviation where traders often operate on a cross-border basis. For other sectors it may be less common for traders to operate in one Member State and to choose an ADR entity certified in another Member State. But if this happens, it could frustrate the consumer protection guarantees established by the national legislator. For instance, Germany will not certify arbitration schemes, but nothing will impede a German trader from opting into an arbitration entity certified in the UK or Spain. However consumers will be free to either go to arbitration or to the court as the agreement to participate in arbitration must be reached post-dispute.

Secondly, national laws may require certain sectors to adhere to a single statutory ADR entity. For instance, in most Member States there is a single ADR scheme that

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<sup>14</sup> UNCITRAL Working Group III (Online Dispute Resolution). See [http://www.uncitral.org/uncitral/commission/working\\_groups/3Online\\_Dispute\\_Resolution.html](http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html); P. Cortés and F. Esteban de la Rosa [9], p. 407.

<sup>15</sup> Certified ADR bodies must comply with six procedural principles: (i) expertise, independence and impartiality; (ii) transparency; (iii) effectiveness; (iv) fairness; (v) liberty; (vi) legality. Arts 6-11.

<sup>16</sup> M. Geist [10], p. 903 and P. Cortés [11], p. 349-359.

<sup>17</sup> See the UK example [12] in Reg 9(4)(a) Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015. It must be noted that this provision was subsequently amended by Reg 2(6) Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015.

deals with financial disputes, and traders operating in this sector cannot opt out of this ADR scheme.

Lastly, the European Commission and the competent national authorities will also monitor the certification and operation of ADR entities, so that if there are concerns of inherent bias, then they can adopt the necessary measures to reduce these risks, and remove the certification of those ADR entities that do not comply with the minimum standards. But these public bodies may not be able to identify subtle elements affecting the independence and impartiality of ADR entities as they will have the main task of ensuring that the entities comply with a simple set of operational rules with regard to issues such as time frames for resolving complaints and reporting. Therefore, competent authorities should be vigilant that ADR entities are fully independent and impartial, and when necessary, they should set up a statutory ADR entity to have a monopoly in a particular sector. Indeed, experience in the financial and energy sectors in the UK has demonstrated that the risk of competition outweighs its benefits.

### **III. Consumer ADR in Three Different Jurisdictions: Italy, Spain and the UK**

This section critically explores the main redress models operating in three different jurisdictions; namely Italy, Spain and the UK. Currently, the sector in which consumer ADR operates most widely is the telecoms sector; yet processes in this and other sectors vary significantly. While the leading redress models in Italy are mediation and ‘joint conciliation’, Spain has a public arbitration system and the UK relies mainly on sectorial ombudsman schemes.

#### **1. Consumer ADR in Italy**

The overloaded court system in Italy operates at a snail pace taking on average three years to process a civil claim in the first instance. The inefficient civil justice system has meant that mediation information meetings have become a pre-requisite before lodging most civil claims (including consumer issues) in court.<sup>18</sup> Attendance of these meetings is free but defendants are not compelled to go, and in fact they do so in only half of the cases. Claimants can invite defendants to participate in the information mediation meeting by sending a certified e-mail.<sup>19</sup> If the defendant agrees to participate in the information session, the meeting must be scheduled within 30 days. Parties will not be penalised if they do not choose to start a mediation process, but if one party has not participated in the informative session, then such party will need to justify this refusal to the judge and may face a fine and the obligation to pay legal costs.

Parties must bring legal representation to both the information session and the mediation process. This requirement, resulting from the lawyers’ lobbies,

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<sup>18</sup> Legislative Decree No 69/2013.

<sup>19</sup> The Italian government provides to those who request it a free certified e-mail address with the domain of gov.it. For further information see <https://www.postacertificata.gov.it/hom/index.dot>.

automatically excludes these mediation providers from the certification by the competent national authority, as legal representation contravenes the principle of effectiveness set out in the ADR Directive.<sup>20</sup> Hence, it is submitted that legal representation should not be mandatory in these mediation processes, and at the very least, it should not be mandatory in consumer cases.

In terms of sectorial bodies, the most relevant consumer ADR scheme is in the sector of telecommunications. The ADR process is regulated under statute and it is provided locally by the Regional Committee for Communications (Corecom).<sup>21</sup> These are public ADR schemes that operate in the Italian regions offering a system of mediation, which in most regions is followed by an adjudication stage.<sup>22</sup> Corecom receives about 100,000 complaints a year from telecom users.<sup>23</sup> The participation of telecoms in mediation is voluntary, but telecoms participate in the great majority of mediations, and in over 70% of these cases the parties reach an agreement. Consumer associations may attend these mediations on behalf of complainants. The average settlement in mediation is around 450 Euros – an amount which is usually less than that claimed by the user. The reasons for the high level of participation are twofold: on the one hand settlements often allow telecoms to retain complainants as customers; on the other hand if the telecom does not opt into the mediation process, the claim will move in most regions to an effective adjudication stage, where most decisions are adjudicated in favour of claimants. The effectiveness of the ADR scheme has trickled down to the telecoms in-house complaint schemes. The telecoms have a statutory maximum of 45 days to resolve complaints internally, but in many cases the telecoms set a limit of 30 days in their contracts – as their priority is to keep their customers satisfied before they change operators. There is however room to speed up the mediation process. Indeed, the law requires the processing of complaints within a maximum period of 30 days, but in practice the average is around 60 days. Greater expediency could be achieved by enabling distance communications and incorporating ODR technology into the process. Instead of having the current piecemeal approach to technology, where only some regions offer online access to the process, a centralised system would benefit from economies of scale.

In addition to mediation, another important and innovative procedure used in Italy (for resolving telecom and other consumer disputes) is *conciliazione paritetica* or joint conciliation. This is a type of representative negotiation carried out by a consumer representative (normally someone drafted from a consumer organisation or a public authority in the particular sector) and a business representative. Consumers can request to be heard by the conciliation commission. Similar to the French in-house *mediateurs*, these joint conciliations take place in the premises of the business

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<sup>20</sup> Art. 8(b).

<sup>21</sup> Legislative Decree No 249/97.

<sup>22</sup> Currently there are six regions that do not have the adjudication stage in Sardinia and Sicily.

<sup>23</sup> Interview to Enrico Maria Cotugno, Vice-director of the Italian Communications Regulation Authority AGCOM (13/02/2015). From May 2013 to May 2014 Corecom received about 75,000 complaints.

and operate in various consumer sectors, including in the telecoms as an alternative to the process offered by the Corecom. The participation in a joint conciliation with the telecoms removes the obligation that consumers would otherwise have to attend a mediation information session with legal representation before lodging a claim in court.<sup>24</sup> The joint conciliations are regulated by *ad hoc* memorandums of understanding which are prepared by consumer associations and large businesses.<sup>25</sup> On average complaints take 60 days to be resolved, but the time may vary depending on the sector –for instance in banking it takes about 80 days whereas in transport it takes less than 30 days.<sup>26</sup>

The success of joint conciliations achieving a high level of settlements is due to the high expertise of the representatives, the persuasive nature of the public independent consumer representative, and the willingness to find a solution that would satisfy the consumer that often goes above and beyond what is strictly recognised by the substantive law. The proposed settlement is then passed on to the consumer, who can either accept it or reject it; leaving the consumer with the possibility of pursuing the matter in court. In practice however the majority of these proposed settlements are accepted by consumers who trust the expertise of their representatives. These ADR schemes can seek the certification as an ADR entity since this is not a direct negotiation between consumers and the traders, which are excluded from the scope of the Directive<sup>27</sup> - but negotiations between their representatives. Moreover, in accordance with the Directive, the process can only be initiated by the consumer complainant and it is free of cost for the consumer. The cost of the business representative is covered by the trader, while the cost for the consumer is covered by the consumer association or the public authorities that run the scheme.

Moreover, in Italy there are a number of regulators known as independent authorities that not only ensure the correct application of consumer law in their industries, but they also provide, or supervise the provision of, ADR to consumers.<sup>28</sup> These regulators are likely to carry out the certification process of ADR entities operating in their sectors, so it will be important to ensure that they outsource their ADR functions. Separating the certification and ADR functions seems logical; not only due to the obvious conflict of interests, but also because these regulators have enforcement functions, and, as public administrative bodies, are subject to judicial review.

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<sup>24</sup> L. 98/2013.

<sup>25</sup> The Memorandum of Understanding is a framework agreement regulated in art 137 of the Consumer Code.

<sup>26</sup> Consumatori 2.0, 'Online Consumers Rights' (2015) Available at [www.consumatoriduepuntozero.it](http://www.consumatoriduepuntozero.it). To see the businesses that have implemented joint conciliations see [www.consumatori.it/duepuntozero](http://www.consumatori.it/duepuntozero).

<sup>27</sup> Art. 2(e) ADR Directive.

<sup>28</sup> The most important ones are the Italian Communications Regulation Authority (AGCOM), the Antitrust Authority (AGCM), the Italian Data Protection Authority, the Italian Regulatory Authority for Electricity, Gas and Water, the Italian Aviation Authority (ENAC), the Bank of Italy, the Italian Insurance Supervisory Authority (IVASS) and the Italian Companies and Stock Exchange Commission (CONSOB).



Although at the time of writing the Directive has not been transposed, there is a bill that illustrates the main developments in the implementation, which does not depart significantly from the minimum requirements set in the Directive.<sup>29</sup> The bill allows for the certification of ADR entities that are funded exclusively by traders (e.g. in-house mediators hired by the traders). It will not certify arbitration schemes or other bodies that impose the outcome to the parties. Lastly, it allows certified ADR entities to impose the procedural restrictions recognised in the Directive.<sup>30</sup>

Italy ensures the full coverage required by the ADR Directive by certifying its Chambers of Commerce as residual ADR entities. Although these are public bodies that already operate *de facto* with general competence for consumer matters, it is important to emphasise that the mediation and arbitration services provided by the Chambers of Commerce are not by far the most important ADR entity in the consumer sector. They deal mostly with a handful of high-value consumer complaints. Therefore, Italy cannot expect that the Chambers of Commerce will improve the present consumer redress landscape. Instead, it is submitted that, similarly to what has been done in other jurisdictions, the Italian government should promote the development of effective sector-specific consumer ADR entities, such as Corecom and joint conciliations. A key reform that Italy needs to implement is that of making participation in consumer ADR entities mandatory for those sectors where consumer ADR is a better option than the courts – i.e. for most (if not for all) consumer cases. The easiest and most cost-effective way to achieve this would be to extend the current mandatory mediation system. It is however submitted that the new mediation system should depart from the current pre-action mediation in two fundamental ways. Firstly, it should make it mandatory for traders to participate not only in the information session, but also in the mediation process when recommended by the mediator; and secondly, it should not require consumers to have legal representation. Moreover, when the level of settlements is low, then the ADR scheme should also integrate an adjudication stage within its process. Parties should be allowed to challenge low-value decisions streaming from this proposed ADR system in court only in exceptional circumstances through a review process.

## **2. Consumer ADR in Spain**

The most important ADR processes in Spain are the statutory arbitration system, which operates as the residual ADR entity; mediation services provided by the local authorities; and a number of specialised ADR schemes, particularly operating in the financial sector,<sup>31</sup> which are expected to be consolidated soon into a single ADR entity.<sup>32</sup>

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<sup>29</sup> Schema di Decreto Legislativo 6 May 2015.

<sup>30</sup> See art. 5 of ADR Directive and part IV of this paper.

<sup>31</sup> At the time of writing, the three main ADR schemes in the financial sector are the Spanish Central Bank (Banco de España), the Directorate General of Insurance and Pensions Funds (Dirección General de Seguros y Fondos de Pensiones), and the Investors Office of the National Stock Exchange

The Spanish arbitration system incorporates an optional mediation stage (i.e. med-arb) into its procedure,<sup>33</sup> the use of which appears to be on the rise.<sup>34</sup> Even though the arbitral process may be carried out without an oral hearing by submitting documents, often the preference is to hold an oral hearing because it may help the parties to come to a settlement. Arbitrators resolve the dispute based on equity, unless the parties agree to obtain an arbitral award based on law, which would be very rare. Arbitral awards are binding and enforceable but may be reviewed in the provincial court for violations of due process. The arbitration scheme offers a voluntary procedure that is characterised for being quicker than court litigation (though in practice it can take around six months to resolve), confidential, without economic limit and binding.<sup>35</sup> Arbitration disputes under €300 are decided by one arbitrator, while higher value claims are decided by a panel of three arbitrators, the costs of which may arguably be difficult to justify for many low or medium value disputes.

The Spanish consumer arbitration regulation only allows consumers to initiate the procedure<sup>36</sup> but the use of the system is free for both, consumers and businesses, which discourages the latter from investing in effective in-house complaints systems. This situation has recently prompted the region of Catalonia to impose a fee of €50 per case to all businesses that have over one hundred complaints per year – currently over 25 businesses.<sup>37</sup> This fee, which does not cover the cost of resolving complaints, could also be supplemented by a fine if the high volume of complaints triggers the regulator to investigate whether a business is systematically infringing consumer protection laws.

Moreover, under the current arbitration system, traders can issue a counter-claim when submitting their response. For example, if a consumer claims compensation for an undue bill against a mobile phone provider, the trader could issue a counter claim if the consumer as a result of the high bill has cancelled a contract without complying with the contractual period for acquiring the mobile phone. Given that the Spanish arbitration system is mainly paid by the public purse it does not seem justified that traders can benefit from this service free of cost, especially since traders do not have as many difficulties as consumers in accessing the courts.<sup>38</sup>

The adherence of the business is voluntary and those businesses that opt in are registered in a public list, which is not always easily available. Registered businesses

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Commission (Comisión de Nacional del Mercado de Valores). For an analysis of these schemes see Hodges et al. [5] supra 219-224.

<sup>32</sup> Disposición Adicional Cuarta, Anteproyecto de Ley de Resolución Alternativa de Conflictos de Consumo 2015.

<sup>33</sup> It is regulated under the Real Decreto 231/2008.

<sup>34</sup> I. Barral Viñals [13], forthcoming.

<sup>35</sup> Art.1 Real Decreto 231/2008 de 15 de febrero.

<sup>36</sup> Arts 33(1) and 34(1) RD 231/2008.

<sup>37</sup> The fee is applicable since April 2015. See ‘Una Treintena de Empresas Pagarán por el Número de Quejas de Clientes’ El País 23 Febrero 2015. Available at [http://ccaa.elpais.com/ccaa/2015/02/22/catalunya/1424630680\\_615825.html](http://ccaa.elpais.com/ccaa/2015/02/22/catalunya/1424630680_615825.html)

<sup>38</sup> F. J. Dávila González [14], p. 59.

must display the official logo or trustmark of the arbitration system on their premises and online, but it is not always placed in a prominent manner. Spanish businesses can also restrict their adherence to the arbitration scheme by setting out conditions, such as by only accepting complaints in a number of local or regional arbitration boards, setting up a shorter time limit or establishing an economic threshold to compensations. Although the trustmark of these businesses state “limited offer”, this leads to consumer confusion as businesses do not disclose these limitations clearly when displaying the trustmark.<sup>39</sup>

Overall there is a lot of room to improve the current consumer arbitration system. While maintaining its residual scope, it should develop sectorial expertise based on single panel arbitrators. It should also develop a more user-friendly ODR platform that allows for online access and resolves cases in less than 90 days. Participation should be mandatory for businesses, at least in a number of regulated sectors such as finance, utilities and transport. In these sectors the ADR model should not be arbitration but an ombudsman system, especially one that offers sectorial expertise. Decisions should remain binding for the parties (at least for the traders), with a limited opportunity to review it in court. An ombudsman system with some ties with the regulators coupled with an exceptional court review mechanism will ensure greater consistency in decisions. Also, traders should pay a case fee so that they have incentives to develop effective in-house complaints systems. Last but not least, traders should clearly inform consumers about the arbitration or an ombudsman system.

The provision of mediation services for consumer disputes is mostly carried out by local consumer organisations (*Oficinas Municipales de Información del Consumidor*) which advise consumers and facilitate settlements between consumers and businesses upon consumer request. The budget and the regulation of these bodies are controlled by the autonomous regions, so there is no national legal framework regulating these consumer mediations. The vast majority of these schemes are unlikely to apply for the certification as ADR entities.

In addition, Spain has developed a fast-track online mediation procedure to deal with low-value civil claims (under €600). Ironically, the law that regulates it excludes consumer disputes from its scope.<sup>40</sup> I submit that this exclusion is due to misinterpretation of the Mediation Directive that it implements.<sup>41</sup> Although it is clear that the Mediation Directive would have intended to exclude processes with adjudicative elements, such as ombudsman schemes, it has not intended to exclude consumer mediation schemes from its scope of application. This interpretation is confirmed by the transposition of the Mediation Directive in other Member States,

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<sup>39</sup> C. Hodges et al. [5], supra 227.

<sup>40</sup> Art 2(2)(d) of Ley 5/2012, de 6 de Julio, de mediación en asuntos civiles y mercantiles.

<sup>41</sup> Act 5/2012, whereas 11 states: “This Directive should not apply to pre-contractual negotiations or to processes of an adjudicatory nature such as certain judicial conciliation schemes, consumer complaint schemes, arbitration and expert determination or to processes administered by persons or bodies issuing a formal recommendation, whether or not it be legally binding as to the resolution of the dispute” (emphasis added).

which have not excluded consumer issues. Furthermore, the new ADR Directive, which is applicable exclusively in the consumer sector, acknowledges its partial overlap with the Mediation Directive.<sup>42</sup> It is therefore plain that the Spanish exclusion of consumer mediation is mistaken, and possibly due to an inadequate interpretation of the original European text. Consequently, the fast-track online mediation is unjustifiably restricted to non-consumer cases where there is no dispute on a point of law and the claim does not exceed €600.<sup>43</sup> It should not last more than a month,<sup>44</sup> and arguably could incorporate automated or blind-bidding negotiation processes<sup>45</sup> if such negotiations are assisted or supervised by a neutral third party.<sup>46</sup> It is not clear how the fast-track mediation operates in practice (even if it is used at all), as the legislation does not require the government to provide an ODR platform, nor does it impose an obligation on mediators and mediation institutions to use it.

At the time of writing the Spanish government is finalising the transposition of the ADR Directive into statute. The current bill sets AECOSAN as the point of contact and competent authority, while it will also recognise a number of competent sectorial authorities.<sup>47</sup> As mentioned above with Italy, it is important to separate the role of competent authorities with that of certified ADR. Yet, in Spain it appears that the same entity, AECOSAN, will certify and provide the main ADR entity: the consumer arbitration system.

According to the bill implementing the ADR Directive, the key developments of the Spanish law are as follows: the inclusion of legal persons in the definition of consumers,<sup>48</sup> which follows the same approach contained in the arbitration system; it establishes a €30 cap to filing fees that ADR entities may require to consumers;<sup>49</sup> it sets a minimum of three days as a period of reflection for consumers to accept a mediated settlement;<sup>50</sup> ADR entities may reject claims under €50 and over €3,000;<sup>51</sup> when ADR entities issue binding decisions to consumers (i.e. arbitration processes) they will only obtain the certification if they are statutory bodies;<sup>52</sup> and, neutral third

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<sup>42</sup> Recital 19 and Art. 3(2) ADR Directive 2013/11/EU.

<sup>43</sup> Art. 24(2).

<sup>44</sup> For the online mediation procedure see arts. 30-35 of the Royal Decree 980/2013.

<sup>45</sup> For the online mediation procedure see arts. 30-35 of the Royal Decree 980/2013.

Automated or blind-bidding negotiations are those where the software compares parties' offers and counter-offers, and settles the claim when they overlap or reach a figure within a pre-agreed range. See P. Cortés [15], pp. 172.

<sup>46</sup> E. Vázquez de Castro [16], pp. 227.

<sup>47</sup> The bill only recognises those that operate in the financial sector –namely Banco de España, la Comisión Nacional del Mercado de Valores, and la Dirección General de Seguros y Fondos de Pensiones. See art. 27(2).

<sup>48</sup> Art. 1(2).

<sup>49</sup> Art. 11.

<sup>50</sup> Art. 13(2).

<sup>51</sup> Art. 15(1)(e).

<sup>52</sup> Art. 17(3).

parties must be covered by insurance, except when these services are delivered by public officials or civil servants.<sup>53</sup>

An important element of the Spanish law is the certification of ADR entities that are employed by the traders (or a business representative group) so long as they operate in sectors where there is a high level of disputes and limited adherence to ADR schemes.<sup>54</sup> Thus, the certification of these entities will only occur in exceptional circumstances when the ADR entities, in addition to meeting the safeguards contained in the Directive, comply with the following criteria in providing for: the publication of the percentage of decisions decided in favour of consumers and traders; the training of the neutral parties; the appointment must be made by a body with equal representation from consumer and business groups; and the neutral parties must be appointed for a minimum of three years (and they will not be able to work for the trader or business group for a further period of three years).<sup>55</sup> It appears that the Spanish legislator thought about this exceptional route with the financial sector in mind while a statutory ADR entity, akin to the Financial Ombudsman Service in the UK, is being developed.

Another important development is categorising a trader's noncompliance with information obligation as a serious offence,<sup>56</sup> which includes notifying consumers about certified ADR entities when resolving a complaint in-house, and this must be done within one month if the complaint is not being dealt with in-house.<sup>57</sup> An important limitation of the Spanish law is that it states that the compliance with this law will not be supported by public funds, which makes one wonder how it will be funded, especially as the keystone of the Spanish redress system is arbitration which is, with the limited exception of Catalonia, free of cost for all parties.

In order to improve consumer redress, the Spanish government will need to invest in a national ODR platform that supports the arbitration phase as well as the mediation phase. This platform should be available to other processes, such as ombudsman models. It should complement the EU ODR platform processing cases outside its scope (notably non e-commerce transactions) following the example of equivalent platforms designed in other jurisdictions such as the Belgium platform.<sup>58</sup> The availability of an effective ODR platform could also be extended for the fast-track online mediations system developed by the Mediation Act. Furthermore, as is being proposed in other jurisdictions,<sup>59</sup> for certain categories of disputes parties should be

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<sup>53</sup> Art. 22(2).

<sup>54</sup> Art. 17(4).

<sup>55</sup> Art. 26.

<sup>56</sup> Art. 36.

<sup>57</sup> Art. 35(1).

<sup>58</sup> See [http://economie.fgov.be/en/disputes/complaints/where\\_how\\_submit\\_complaint/](http://economie.fgov.be/en/disputes/complaints/where_how_submit_complaint/).

<sup>59</sup> See for example the UK proposal for Online Courts: Online Dispute Resolution Advisory Board of the Civil Justice Council, Online Dispute Resolution for Low Value Civil Claims (February 2015). Available at <https://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version.pdf>

required to consider online mediation or the participation in an ombudsman entity before they are allowed to escalate their dispute into the judicial process.

### **3. Consumer ADR in the United Kingdom**

The taxonomy of ADR schemes in the UK is characterised for being specialised, and for operating in specific economic sectors. Its growth, like in most jurisdictions, has been organic, blooming in many economic sectors in a piecemeal manner, often through a sector-specific regulation.

In the UK it is possible to classify ADR schemes into two basic categories. In the first category we can find the ADR schemes operating in regulated sectors; in other words, when there is legislation that establishes a requirement for all businesses operating in that sector to adhere to a certified ADR scheme, which may be public such as the Legal Ombudsman, or private such as the Financial Ombudsman Service. In this category we can also include those sectors where businesses are required to adhere to an ADR scheme, but they are free to choose from several private certified ADR schemes. For example, telecommunications service providers can choose to join either the Ombudsman Service or the Communications and Internet Services Adjudication Scheme. The economic sectors in which there is a legal obligation for businesses to adhere to an ADR scheme are: energy, financial services, higher education, gambling, legal services, telecommunications, pensions, postal services, real estate and green deal.<sup>60</sup>

In the other broad category we can include ADR schemes operating in unregulated sectors, where there is no legal requirement for businesses to participate in an ADR scheme. However, it should be noted that in some of these unregulated sectors a requirement to participate in an ADR scheme may come from the membership of a professional association, such as the Association of British Travel Agents that gathers most of the tourist operators in the UK. Tourist agencies belonging to this professional association agree to give the consumer the option to settle their claims through an arbitration system (preceded by a mediation stage) operated by a private company called IDRS Limited.

In the UK the main consumer ADR model is a private ombudsman scheme. Ombudsmen are normally funded by the sector in which they operate,<sup>61</sup> and they provide feedback to the adhering traders, enforcement bodies and the regulators, especially where they operate in a regulated sector. The dispute resolution process is free for consumers, and they do not only provide redress, but also operate *de facto* as

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<sup>60</sup> Green deal is a government sponsored program of loans for energy saving measures for properties in Great Britain.

<sup>61</sup> Consumer ADR in the UK is largely privately funded by businesses paying a combination of an annual membership fee and case fees (though normally there is no requirement to pay a case fee for the first few cases). The impartiality of these schemes is assured through appropriate governance and structural arrangements. See BIS, Alternative Dispute Resolution for Consumers, Implementing the Alternative Dispute Resolution Directive and Online Dispute Resolution Regulation (March 2014) p. 13.

an advisory body resolving consumer queries.<sup>62</sup> In doing so, they filter out complaints, which may not be meritorious – this function is often referred as triage or diagnosis. The dispute resolution process is somehow similar to med-arb, but the final outcome is not legally binding on the consumer, while it will normally be binding on the businesses when the consumer had accepted the final recommendation provided by an adjudicator or by a more senior ombudsman. The process is therefore pyramidal due to its triage function, where the majority of disputes are resolved through informal conciliation carried out by investigators (or case managers), followed by recommendations issued by them when parties are unable to reach a settlement. If the consumer accepts the recommendation, then it becomes automatically binding on the trader. But when parties do not accept the recommendation, the dispute escalates to a senior investigator (the ombudsman), who will make a final decision. Although consumers may challenge the final decision in court, in practice this option would be extremely rare.

The UK government has identified over 70 ADR schemes operating in the UK for resolving consumer disputes.<sup>63</sup> While it has acknowledged that not all of these ADR schemes will seek to obtain certification as ADR entities, there is an expectation that all statutory ADR schemes will do so.

The largest ombudsman scheme in the UK (as well as in the EU) is the Financial Ombudsman Service (FOS), which was established under the Financial Services and Markets Act 2000. FOS has the authority to settle claims up to the value of £150,000. According to its latest annual review at the time of writing, which accounts for the financial year of 2013/14, FOS has around 4,500 staff (including more than 200 ombudsmen).<sup>64</sup> FOS addresses over 2.3 million enquires a year in various languages, and over half a million are turned into formal complaints –where only around 6% of the claims reached the ‘appeal stage’ with the ombudsman. 78% of these are related to personal protection insurance (PPI). Most of the other complaints relate to pay day loans, credit card, current accounts, and mortgages. The next largest ADR in the UK is the Ombudsman Services (OS), whose 300 staff mostly deal with telecoms and energy enquiries (i.e. 80,000 and 87,000 p.a. respectively) and complaints (i.e. 28,000 in total).<sup>65</sup> Their processes rely heavily on ICT (phone and email) and the limit of settlements in these two sectors is capped at £50,000. Data from the OS indicates that around 75% of complaints are resolved in favour of the consumer complainant, though it must be noted that many of the potential complaints do not escalate from the enquiry stage and consumers may not receive the compensation that they originally claimed.

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<sup>62</sup> C. Hodges [17], pp. 195.

<sup>63</sup> See BIS Consultation [18], supra p. 33.

<sup>64</sup> Financial Ombudsman Service Annual Review 2013/14. Available at <http://www.financial-ombudsman.org.uk/publications/ar14/index.html#a2>.

<sup>65</sup> OS Annual Report 2013/14.

The UK government has transposed the core provisions of the ADR Directive through the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 and the (Amendment) Regulations 2015.<sup>66</sup> The new Regulations, which apply to the whole of the UK,<sup>67</sup> designate the Secretary of State as the contact point and as a competent authority, together with a number of regulators as the competent authorities in their sectors.<sup>68</sup> They also incorporate the procedural standards contained in the Directive for those ADR schemes that seek certification as ADR entities, and the information obligations about these ADR entities that traders have towards consumers. The scope of the Regulations includes public providers of higher education and adjudicative schemes such as arbitration bodies, but excludes in-house ADR schemes provided or funded directly by the trader. Although the Regulations do not include any additional procedural standards for ADR schemes that apply for the certification, it does recognise that the designated competent authorities may have the power to increase these minimum standards. Competent authorities could for instance require ADR entities operating in one sector to issue binding decisions on traders. With regard to the Directive's requirement to set up "effective, proportionate and dissuasive penalties" when traders do not comply with the information obligations, the Regulations simply refer to the Enterprise Act which allows an enforcer to apply for an enforcement order from the court.<sup>69</sup>

The UK government considered funding the setting up costs of a residual ADR scheme that would operate an ombudsman process capturing all the consumer complaints which are not already covered by the existing sectorial ADR entities.<sup>70</sup> However, it decided to withdraw its procurement call for a residual ADR entity because after making the call it emerged that numerous suppliers were offering to fill the gaps in the provision of ADR services, thus this legal requirement could be filled by the open market, without the need to use public funds to ensure compliance with the ADR Directive. It also appears that the UK government received assurances from OS that it would act as a residual scheme, processing all types of consumer disputes. Whilst the increasing demand for ADR makes it likely that the market will continue to provide ADR services in all sectors, the UK government might reconsider this call again if gaps were to appear in the future.

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<sup>66</sup> Explanatory Memorandum to the ADR Regulations 2015, para. 9.

<sup>67</sup> It should be noted that the Directive could have been implemented by Northern Ireland as consumer policy is one of its competences, but it was agreed to have the transposition on a UK basis.

<sup>68</sup> Trading Standards Institute (TSI) will act on behalf of the Secretary of State as the competent authority covering ADR schemes in non-regulated sectors. The sector specific competent authorities are: The Financial Conduct Authority, the Legal Services Board, the Civil Aviation Authority, Gambling Commission, the Gas and Electricity Markets Authority, Office of Communications, and the lead enforcement authority for the purposes of the Estate Agents Act 1979(a). See Reg 17 and Sch 1.

<sup>69</sup> See Part 8 of the Enterprise Act 2002 and Regulation 19 of the ADR Regulations 2015.

<sup>70</sup> See the prior information notice with the call for tender to choose the residual ADR entity at <http://ted.europa.eu/udl?uri=TED:NOTICE:394225-2014:TEXT:EN:HTML&src=0>. The gaps identified were retail, home improvements, installation services, second hand cars and car repair and servicing. Yet, it is believed that in some sectors, such as aviation or non-regulated legal services would be difficult to envisage businesses to opt in a residual ADR entity without technical expertise in their sectors. BIS Response [19], supra p. 15 para. 33.



The UK government decided to fund the creation of a helpdesk run by the Citizens Advice Bureau. Its primary aim is to help consumers navigate through the ADR landscape. It also informs traders about their information and signposting obligations, and when asked, it provides information for businesses considering joining an ADR entity.<sup>71</sup> The helpdesk is accessible online and by telephone, assisting consumers who seek information on how to resolve their dispute, where to go, and if necessary also assisting them in filing a dispute and advice on how to include the supporting information that would be necessary for an ADR entity to consider a complaint. But, the actual assessment of the circumstances surrounding the complaint is left to the ADR entity and its case handlers. The government intends to automate this service as far as possible, in including a searchable database with information on all the certified ADR entities and all the traders adhering to an ADR entity or with a legal obligation to adhere. The role of the helpdesk focuses on domestic disputes and its role is complementary to that of the ODR contact point and its two ODR advisers assisting consumers with e-commerce, and especially cross-border, disputes. This division of labour intends to avoid the risk of duplicating activities and ensuring that the ODR contact point has enough resources to cover cross-border complaints. Although the ODR contact point may be able to help (if it so chooses) consumers with domestic complaints, it does not consider complaints submitted by businesses. Hence, consumers with e-commerce disputes will be able to find information about certified ADR entities in the EU ODR platform, while consumers with ‘off-line’ domestic disputes could obtain this information through the national helpdesk, and for cross-border disputes will continue to use the European Consumer Centres. Consequently, the role of the helpdesk may in time become less necessary, and possibly even confusing, if this role is already carried out adequately by the traders who already have the obligation to point consumers towards ADR entities.

Furthermore, the helpdesk will become unnecessary if the ADR landscape becomes simplified. The UK government is currently looking beyond the requirements of the Directive and considering whether future reforms are necessary in order to rationalise the disperse structure of ADR schemes in order to improve the provision of consumer redress. The call for evidence to simplify the ADR landscape found support for an umbrella organisation, where consumers could submit their complaints to a single body, which would then allocate each case to an appropriate sector ADR entity. The government is also pondering whether it should retain the mixed approach making it compulsory for traders operating in certain regulated sectors, or whether this obligation should be extended to all sectors in order to make it less confusing and easier for consumers to obtain individual redress. It is submitted that full mandatory coverage is likely to occur in due course. Yet, this is more likely to happen in an incremental and piecemeal manner, expanding first in other regulated sectors, such as transport, starting with the airlines. Additional factors driving full mandatory coverage depend on the political will of the government and the time and the impact

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<sup>71</sup> BIS Response [19], p. 16.

that the implementation of the Directive may have – thus, if the majority of traders opt in voluntarily, it will be easier for the government to make it mandatory for the rest (the minority) to join an ADR entity.

#### **IV. Procedural Restrictions for Processing Consumer Complaints by Certified ADR Schemes**

This section examines from a normative and doctrinal approach the grounds contained in the ADR Directive upon which, according to the national law that implements it, a certified ADR entity may refuse to process a consumer complaint. Article 5(4) of the ADR Directive provides that Member States may permit certified ADR entities to refuse to process a complaint based on six procedural rules. It should be noted that these six grounds are exhaustive, so new grounds cannot be added. The only two possible exceptions are (i) complaints outside the scope of the ADR entity and (ii) complaints that do not deal with the nature of the dispute but with the behaviour of the parties.<sup>72</sup> The former would happen when a consumer submits a complaint outside the economic sector where the ADR entity operates, but this option is unlikely to happen because traders must inform consumers of the relevant ADR entity operating in their sectors.<sup>73</sup> The other exception relates to the internal rules that an ADR entity may have to discontinue a complaint due to the behaviour of the parties –for example, when they have settled the dispute, when parties have missed deadlines,<sup>74</sup> fabricated evidence or have been abusive.<sup>75</sup>

The refusal must be reasoned and communicated to the complainant within three weeks of receiving the complete complaint file. After this period, ADR entities are required to process the dispute. By contrast, it is argued that if these procedural restrictions are not monitored, they pose the risk of undermining consumer trust in the whole ADR system. Thus, regulators and competent authorities must ensure that new barriers to consumers' access to redress are not created when allowing ADR entities to reject complaints. The six procedural grounds upon which a complaint may be dismissed are discussed below.

##### **1. When the Consumer Has Not Attempted to Resolve the Complaint Directly with the Trader**

This is by far the most significant restriction. Its objective is to favour an early resolution of complaints. Yet, this can only occur if traders have provided consumers with the contact details of a person or department in charge of handling complaints. It would also be important for online traders to offer distance means of communication, such as simple online forms that can be submitted through the traders' website or via email, and not to establish fax as the only means of communication as a notorious

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<sup>72</sup> BIS Guidance [20], p. 2-3.

<sup>73</sup> Art. 13 ADR Directive.

<sup>74</sup> For instance, OS:C rules state that if a consumer does not reply to the ombudsman within 28 days, then the case will be automatically withdrawn.

<sup>75</sup> BIS Guidance [20], p. 2.

Irish airline used to do. Telephone support should also be accepted as a valid means of distance communications as long as the helpline does not charge more than the 'basic rate' for its use.<sup>76</sup> Consumers should also be allowed to go to the ADR entity if the traders' internal complaints process is offered in a language that the consumer cannot understand, which as a minimum should be in the language of the consumer transaction that led to the complaint.

But most importantly, there must be a short deadline for the trader to reply to complaints. One of the largest ADR schemes in the UK, OS, reported that the main reason for accepting complaints against telecoms and energy suppliers was that businesses did not resolve a consumer complaint within the timeframe of eight weeks – which seems to be the standard period used in most sectors.<sup>77</sup> According to a recent report, only a very small proportion of consumers (5%) who receive a so-called 'deadlock letter' from energy suppliers, which states that a complaint could not be resolved in the eight weeks' timeframe and that they can escalate to the ombudsman, actually do this.<sup>78</sup> The report found that this was partly due to the lack of awareness and understanding of what the OS is and how to access it. A more worrying interpretation of this finding is that energy suppliers have an economic incentive to use up the eight weeks because they know that after this period the majority of complaints will not be pursued.

While some consumer sectors, such as pensions, or even energy, may need time to resolve complaints due to their complexity - or because for instance they may require an onsite inspector to do a meter reading or run some tests - it is vital that traders have incentives to process complaints internally within a reasonable period of time. Swift resolution of complaints also benefits traders. Empirical research has demonstrated that consumer satisfaction would only be maintained when these deadlines are kept short, especially if complaints arise from e-commerce.<sup>79</sup> Hence, if the purpose of ADR is not just to improve access to justice, but also to enable trade, then it is in the business interest to resolve disputes faster than what they currently do. With the increase of technology communications, the eight weeks period may be too long, especially when consumer complaints are factual and relatively straight forward. It is therefore proposed that the competent authorities in charge of monitoring certified ADR entities should provide rules (or at least guidelines) on the timeframe that businesses have to investigate complaints. For most cases one to four weeks should be sufficient, but an adequate time-limit could only be set once the competent authorities know the time it takes for complaints to be resolved in-house.

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<sup>76</sup> Art. 21 Directive 2011/83/EU.

<sup>77</sup> OS:C annual report 2011/12, p. 12.

<sup>78</sup> The reasons for not complaining varied, but often weighed the lack of awareness about the ombudsman scheme and the perception that escalating the complaint will add additional hassle and more stress. See Report for Ofgem [21] exploring why few consumers refer their complaint to ombudsman services.

<sup>79</sup> A study on eBay found that the resolution of disputes between sellers and buyers increased their trade regardless of whether they win or lose their case, but as long as the dispute was resolved fast, within a matter of days. See C. Rule [22], pp. 767.

## **2. Complaints that are Frivolous or Vexatious**

The ADR Directive distinguishes between frivolous and vexatious complaints. In general terms a frivolous complaint is considered one that is not adequately evidenced or justified, while a vexatious complaint normally refers to a meritless claim brought forward with the sole purpose of aggravating the respondent. The rationale behind this ground for refusal is to restrict the misuse of ADR entities by complainants. But the ability to refuse complaints that are considered to be frivolous or vexatious is a discretionary power that can be easily abused if it is not properly monitored by the competent national authorities. A key element would be to determine what can be considered a frivolous or vexatious complaint. It could be a complaint of very low-value or one that on its face does not have any merit. A way to discourage these types of claims may be to introduce a fee for complainants. Although court fees are used in court litigation partly to discourage these claims, many consumer ADR entities have reported that they do not experience them often.<sup>80</sup> Yet some sectors, such as aviation, have expressed concerns that free access to ADR would incentivize spurious or meritless complaints seeking to obtain financial compensation.<sup>81</sup> Thus, if fees were considered necessary for this purpose, they should be nominal and refundable upon complainants succeeding in their claims. In addition to ADR entities, ODR advisers and national bodies in charge of dealing with consumer queries could also help in filtering out frivolous and vexatious complaints.

## **3. Disputes that Have Been Considered by Another ADR Scheme or by a Court**

Consumer complaints may be rejected by another certified entity on the basis that such a complaint has already been considered by another ADR entity or by a court. Similarly, according to English law a court can also dismiss or dispose summarily a claim which has already been resolved by an ADR scheme.<sup>82</sup> But, legislators and competent authorities must take into account whether the previous ADR entity had the power to adjudicate the complaint or whether it only offered a consensual method of dispute resolution; especially if parties have used an in-house mediation service. Indeed, the certification of in-house mediators as ADR entities is not recommended, as these bodies are not fully independent and cannot ensure a final resolution of complaints, which could potentially undermine consumer trust in the whole ADR system. Another exception may be included when new evidence appears. In these cases, the same ADR entity should reconsider the complaint. Also, when a claim is being considered by a court, litigants can request the court to stay proceedings so that they can attempt to resolve the dispute via ADR. In this case the complaint is not being considered by the court at the same time, so in such an event this ground for refusal should not be applied.

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<sup>80</sup> . Hodges [6] and C. Hodges, N. Creutzfeldt and S. Macleod [23], p. 2.

<sup>81</sup> Civil Aviation Authority [24], para. 72.

<sup>82</sup> *Binns v Firstplus Financial Group LPC* [2013] EWHC 2436 (QB) 24 July 2013. In this case the English High Court struck out a claim for being unreasonable because claimant had already obtained a remedy under an ADR scheme. Furthermore, the claimant was not entitled to request the court for an award in his favour of legal costs for bringing the claim through ADR.

#### **4. The Value of the Claim Falls Below or Above a Pre-Specified Monetary Threshold**

This restriction revolves around the need to balance consumer access to ADR while avoiding disproportionate costs. The UK has decided that it should be each ADR entity that decides whether to set caps, however such caps must be appropriate since the Directive states that a threshold cannot “significantly impair the consumers’ access to” ADR.<sup>83</sup> As noted above, a small minimum fee may help in stopping vexatious claims, but there must be proportionality in setting up these economic thresholds. For most cases the fee should not be higher than that charged by the courts in small claims procedures. Economic limits must take the particular economic sector and the value of the average transactions into consideration. For example, while the Spanish threshold of €30 would be unreasonably high for low-value digital sales of music and games, it would not be for disputes related to car sales. Sometimes a complainant may not seek economic compensation, but rather an apology, an explanation or changes to the trader’s way of operating. There is some evidence that suggests that the absence of a cap on the level of compensation is likely to deter traders from opting voluntarily into an ADR entity. This may explain why some ADR entities have only set maximum limits.

#### **5. Complaints Over One Year**

ADR entities may be allowed to reject a complaint that was submitted to the trader over a year ago. Hence, the minimum time limit of one year does not start counting from the moment of the transaction, but from the moment when the consumer submitted the complaint to the trader. It could therefore catch many disputes dealing with consumer guarantees, whereby under EU law sellers must guarantee the conformity of the goods with the contract for a period of two years after delivery.<sup>84</sup> While a one year time-limit seems appropriate, this timeline should not run if the trader has not notified the consumer about the possibility of elevating the complaint to an ADR entity, particularly if the trader is under compulsory jurisdiction.<sup>85</sup> The end of the prescription period would encourage traders to comply with their information obligations.

In any event, this ground of refusal, like the others, is discretionary, so an ADR entity could accept a complaint which arose more than a year ago. Indeed, some ADR entities, such as the Legal Ombudsman in England and Wales, state that they may in exceptional circumstances accept older complaints

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<sup>83</sup> Art. 5(5).

<sup>84</sup> Arts 3 and 5 of the Consumer Sales and Guarantee Directive 99/44/EC.

<sup>85</sup> According to the Financial Conduct Authority, which determines the jurisdiction of FOS, only 5-10% of claims are referred to FOS. There are some concerns that part of the low take up may be due to financial firms not informing consumers about the scope of FOS. See Financial Conduct Authority, Consultation Paper, Improving Complaints Handling (December 2014) p. 13.

## **6. Complaints that would Seriously Impair the Effective Operation of the ADR Scheme**

The exclusion of complaints that may seriously impair the effective operation of the ADR entity could potentially be interpreted too widely. The UK government stated that “it should be included only if the provision – and the basis on which a dispute could be rejected under it – are fully explained and the risk of it operating unfairly against consumers is mitigated”.<sup>86</sup> However, it also observed that a very complex dispute may be excluded by the certified ADR entity if there are valid reasons to believe that the dispute should be better resolved by the courts.<sup>87</sup> According to the Financial Conduct Authority in the UK, examples of this exception may include where there are multiple complainants to one complaint, so that appropriate consent is obtained before the investigation.<sup>88</sup>

Finally, it must be noted that the Directive requires ADR entities to publish annual activity reports on their websites. These reports must include information on the percentage of disputes that ADR entities have refused to deal with based on each of the grounds discussed above.<sup>89</sup> This safeguard seeks to provide an extra layer of transparency which no doubt will be monitored by users and competent authorities.

## **V. Conclusion**

This paper has submitted that competent national authorities and regulators should be vigilant in order to ensure that greater competition between ADR entities does not lead to forum shopping. If competition dents the independence and impartiality of ADR entities, then legislators should consider setting up a single ADR entity to operate in a particular sector. The paper also evaluated how the consumer redress models employed in Italy, Spain and the UK should develop; and it suggested that observing the minimum criteria set in the ADR Directive will be a missed opportunity. If businesses comply with their information obligations and understand the value of ADR, this could create momentum, increasing the take up of ADR while installing greater trust in consumer transactions. By contrast, if businesses are reluctant to go to ADR, then the legislator should consider making sectorial or general adherence to ADR compulsory. Lastly, this paper argued that in order to provide adequate coverage, competent national authorities must be vigilant to ensure that proper safeguards are put into place so that legitimate complaints are not refused by certified ADR entities. Indeed, if adequate monitoring is not put into place, consumer trust in the whole ADR system would be jeopardised.

## **References**

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<sup>86</sup> Ibid, para. 33.

<sup>87</sup> BIS Checklist [19].

<sup>88</sup> Financial Conduct Authority, Consultation (2014) p. 31.

<sup>89</sup> Art. 7(2)(c).

1. *Geraint G. Howells, Stephen Weatherill*: Consumer Protection Law, Second Edition, Ashgate, June 2005
2. *Michael Moffitt*: Three Things to Be Against (“Settlement Not Included”). In: Fordham Law Review 2009/78, 1203-1245
3. *Pablo Cortés*: Online Dispute Resolution for Consumers in the European Union, Routledge, 2011
4. *Richard Susskind*: Tomorrow’s Lawyers: An Introduction to Your Future, Oxford University Press, 2013
5. *Christopher Hodges, Iris Benöhr, Naomi Creutzfeldt-Banda*: Consumer-to-Business Dispute Resolution: The Power of CADR. In: ERA Forum 13, 199 (2012)
6. *Christopher Hodges*: Consumer Ombudsmen: Better Regulation and Dispute Resolution. In: ERA Forum 15 (1) 2014, 593-608
7. Flash Eurobarometer 300: Retailers’ Attitudes Towards Cross-Border Trade and Consumer Protection. Analytical Report. Requested by the Directorate-General Health and Consumers and coordinated by Directorate-General Communication of the EC, March 2011, available at: [http://ec.europa.eu/public\\_opinion/flash/fl\\_300\\_en.pdf](http://ec.europa.eu/public_opinion/flash/fl_300_en.pdf)
8. Commission Staff Working Paper: Impact Assessment Accompanying the document ‘Proposal for a Directive of the European parliament and of the Council on Alternative Dispute Resolution for consumer disputes (Directive on consumer ADR) and Proposal for a Regulation of the European parliament and of the Council on Online Dispute Resolution for consumer disputes (Regulation on consumer ODR)’, {COM(2011) 793 final}, {SEC(2011) 1409 final}, Brussels 29.11.2011, SEC(2011) 1408 final
9. *Pablo Cortés, Fernando Esteban de la Rosa*: Building a global redress system for low-value cross-border disputes. In: International and Comparative Law Quarterly, Volume 62, Issue 02, April 2013, pp. 407-440
10. *Michael Geist*: Fair.com?: An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP, August 2001, (2002) 27 Brooklyn Journal of International Law 903
11. *Pablo Cortés*: An Analysis of the UDRP Experience: Is it Time for Reform? 27.08.2007, Computer Law and Security Report, Vol. 24, No. 4, 2008, 349-359
12. Statutory Instruments, 2015 No. 542: The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015
13. *Imma Barral Viñals*: La Mediación de Consumo: Determinación del Marco Normativo y Diseño de la Mediación Institucional’ in F. Esteban de la Rosa (ed) La Resolución Alternativa de Litigios de Consumo en los Estados Miembros de la UE: Impacto del Nuevo Derecho Europeo (2015, Tirant) forthcoming
14. *Francisco Javier Dávila González*: La tramitación de la resolución de conflictos sometidos a las Juntas Arbitrales de Consumo mediante medios electrónicos. Problemas prácticos y propuestas "de lege ferenda. In : Estudios sobre Justicia online, 2013, pp. 43-60
15. *Pablo Cortés*: Online Dispute Resolution Services: A Selected Number of Case Studies’ (2014) 20(6) Computer and Telecommunications Law Review 172-178

16. *Eduardo Vázquez de Castro*: Estudios sobre la Justicia Online. 01.02.2014, Editorial Comares 2013, S.L., 227
17. *Christopher Hodges*: New EU Frameworks for Consumer Complaints: Time for an Air Ombudsman. In: Travel Law Quarterly 2014, 195
18. Department for Business, Innovation & Skills: Consultation: Alternative dispute resolution for consumers: Implementing the Alternative Dispute Resolution Directive and Online Dispute Resolution Regulation, March 2014, BIS/14/575
19. Department for Business, Innovation & Skills: Alternative dispute resolution for consumers: government response to the consultation on implementing the Alternative Dispute Resolution Directive and the Online Dispute Resolution Regulation, 18 November 2014, BIS/14/1122
20. Department for Business, Innovation & Skills: Guidance on Specific Points of Checklist for Attributes of ADR Entities, April 2014, available at: [www.civilmediation.org/downloads-get?id=629](http://www.civilmediation.org/downloads-get?id=629);  
Referring to: Department for Business, Innovation & Skills: Checklist for Requirements for Providers of Alternative Dispute Resolution Services who wish to Become Certified 'ADR Entities' for the Purposes of the ADR Directive, April 2014, available at: [www.civilmediation.org/downloads-get?id=628](http://www.civilmediation.org/downloads-get?id=628)
21. GfK NOP: Report for the Office of Gas and Electricity Markets (Ofgem), Complaints to Ombudsman Services: Energy – research report, 11.12.2013, available at: <https://www.ofgem.gov.uk/publications-and-updates/complaints-ombudsman-services-energy-%E2%80%93-research-report>
22. *Colin Rule*: Quantifying the Economic Benefits of Effective Redress: Large E-Commerce Data Sets and the Cost-Benefit Case for Investing In Dispute Resolution, 34 University of Arkansas Little Rock Law Review 767 (2012), Available at: <http://lawrepository.uarl.edu/lawreview/vol34/iss4/6>
23. *Christopher Hodges, Naomi Creutzfeldt, and Sonia MacLeod*: Reforming the EU Consumer ADR Landscape: Implementation and its Issues, Third Oxford Consumer Conference Report (30-31 October 2014), 12.12.2014  
Civil Aviation Authority: Consumer complaints handling and ADR. CAA policy statement and notice of approval criteria for applicant ADR bodies, CAP 1286