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Enforcing Consumer Rights through ADR at the Detriment of Consumer Law

Marco B.M. Loos*

Abstract: Alternative dispute resolution (ADR) is seen by the European legislator as a key instrument for the enforcement of consumer rights. To further ADR, the EU has adopted the ADR Directive, which was to be implemented by the Member States by 9 July 2015. This article shows that the Directive has shortcomings precisely where it is thought to provide solutions to existing problems with ADR. In addition, it is argued that while the current regulation of ADR may further the individual enforcement of EU consumer rights, it may also hinder the development of EU consumer law. To counteract this, it is suggested that a preliminary reference procedure is introduced for ADR entities at either the European or the national level.

Résumé: Le règlement extrajudiciaire des litiges (REL) est considéré par le législateur européen comme un instrument clé pour la mise en œuvre des droits des consommateurs. C'est dans cet ordre d'idées que l'UE a adopté la Directive sur le règlement extrajudiciaire des litiges qui devait être transposée dans les ordres juridiques nationaux avant le 9 juillet 2015. Le but de cet article est de montrer que la Directive présente des lacunes sur des points auxquels elle était précisément censée offrir des solutions, à savoir les problèmes existants de résolution extrajudiciaire des litiges. Par ailleurs, l'article soutient que, alors qu'elle peut renforcer la mise en œuvre des droits individuels des consommateurs, la réglementation actuelle de la résolution extrajudiciaire des litiges peut également constituer un obstacle au développement du droit européen de la consommation. Dans le but de limiter ce risque, l'article suggère l'introduction d'une procédure de renvoi préjudiciel concernant les entités de REL soit au niveau européen soit au niveau national.

Zusammenfassung: Der Europäische Gesetzgeber sieht alternative Streitschlichtung (ADR) als ein wichtiges Instrument zur Durchsetzung von Verbraucherrechten an. Um ADR weiter zu fördern, hat die EU die ADR-Richtlinie verabschiedet, die von den Mitgliedstaaten bis 9. Juli 2015 umzusetzen war. Dieser Beitrag zeigt, dass die Richtlinie genau dort zu kurz greift, wo sie Lösungen für bestehende Probleme mit ADR bieten will. Darüber hinaus wird dargestellt, dass die neue Regelung der ADR zwar die individuelle Durchsetzung von EU-Verbraucherrechten fördern mag, aber gleichzeitig die Entwicklung des EU-Verbraucherrechts beeinträchtigen kann. Um dem entgegenzuwirken, wird vorgeschlagen, ein Vorlageverfahren für Streitschlichtungsstellen entweder auf EU-Ebene oder im nationalen Recht einzuführen.

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1. Introduction

1. Alternative dispute resolution (ADR) may be described as an umbrella term covering all kinds of schemes through which consumer cases may be resolved outside the ordinary court system by the intervention of a third party and includes both schemes under which the third party *mediates* between the parties, i.e., tries to settle the case by facilitating an amicable solution, and schemes under which the third party decides the dispute by rendering a binding decision. Online dispute resolution (ODR) is in fact nothing more than online ADR. As such, it may be a very useful tool to adjudicate matters pertaining to consumer contracts concluded online, in particular where parties are established or live in different countries, given the fact that the monetary value of claims arising from such contracts is often too low to justify a court procedure in another country. The relatively low monetary value of claims may not be too problematic for multinational companies with subsidiaries in the consumer's country, but it will be a problem both for consumers that would have to go to court in another Member State and for small and medium-sized enterprises (SMEs) contracting cross-border. In this sense, the enactment of the Directive on consumer ADR (hereinafter referred to as the ADR Directive)¹ and the Regulation on consumer ODR (hereinafter referred to as the ODR Regulation)² are intended to contribute to the confidence of consumers and SMEs in the internal market and thus to a (presumably small) rise in cross-border contracts.³

2. In this article, I will answer the question of whether the ADR Directive in fact solves the problems that have led the European legislator to introduce the Directive. I will first discuss the problems with ADR as perceived by the European legislator (s. 2). I will then focus on four matters where, in my opinion, this instrument falls short (s. 3). Section 4 consists of some concluding remarks. In this article, I will discuss the ODR Regulation only to the extent that this contributes to the general understanding of the effectiveness of the ADR

1 Dir. 2013/11/EU of 21 May 2013 on alternative dispute resolution for consumer disputes, eur-lex.europa.eu/legal-content/ALL/?uri=CELEX:32015R1051. The ADR Directive was to be transposed by the Member States by 9 Jul. 2015, see Art. 25 ADR Directive.

2 Regulation (EU) 524/2013 of 21 May 2013 on online dispute resolution for consumer disputes, eur-lex.europa.eu/legal-content/ALL/?uri=CELEX:32015R1051. Art. 22 ODR Regulation provides that the Regulation will apply from 9 Jan. 2016. However, Art. 2, para. 3 and Art. 7, paras 1 and 5 apply from 9 Jul. 2015; Art. 5, paras 1 and 7, Arts 6 and 7, para. 7, Art. 8, paras 3 and 4, and Arts 11, 16, and 17 apply already from 8 Jul. 2013.

3 See Recital 4 of the preamble to the ADR Directive and Recital 2 to the ODR Regulation; critical as to the influence of harmonization on consumer confidence and the use of the internal market by consumers, V. MAK, *The Character of European Private Law*, inaugural address (Tilburg University, 2015), p 13.

Directive.⁴ Moreover, I will not delve into the question whether instead of further developing ADR schemes it is preferable to improve the settlement of disputes through the ordinary court system by furthering the possibility of collective action⁵ - here, it suffices to state that the one approach does not and, in my opinion, should not exclude the other.

2. The Problems the ADR Directive and the ODR Regulation are to Solve

3. Both the ADR Directive and the ODR Regulation aim at providing consumers with simple, efficient, fast, and low-cost ways of resolving cross-border disputes.⁶ The ADR Directive applies also to domestic disputes.⁷ The instruments are interlinked and complement one another: the ODR Regulation ‘provides for the establishment of an ODR platform which offers consumers and traders a single point of entry for the out-of-court resolution of online disputes, through ADR entities that are linked to the platform and offer ADR through quality ADR procedures.’⁸ The ADR Directive builds on the 2001 non-binding Commission Recommendation⁹ and declares some of the principles developed in that instrument binding.¹⁰

The reasons why a Directive on consumer ADR was considered to be necessary are explained in Recital 5 of the preamble to the ADR Directive. First, at this moment, ADR is not yet sufficiently and consistently developed across the Union (s. 2.1). Second, consumers and traders are insufficiently aware of the existing out-of-court redress mechanisms (s. 2.2). Moreover, and notwithstanding the fact that the 2001 Recommendation already contained quality principles regarding ADR procedures, the quality of ADR procedures still varies considerably in the Member States (s. 2.3), and in particular cross-border disputes are often not handled effectively by ADR entities (s. 2.4). These matters are briefly addressed in the following subsections.

4 For a critical discussion of the ODR Regulation, see P. CORTÉS & A.R. LODDER, ‘Consumer Dispute Resolution Goes Online: Reflections on the Evolution of European Law for Out-of-Court Redress’, 1. *MJ (Maastricht Journal)* 2014, pp 14–38.

5 On this, see the interesting article by G. WAGNER, ‘Private Law Enforcement through ADR: Wonder Drug or Snake Oil?’, 51. *CMLRev. (Common Market Law Review)* 2014, pp 165–194.

6 See Art. 1 and Recital 4 of the preamble to the ADR Directive and Art. 1 and Recital 8 of the preamble to the ODR Regulation.

7 See Art. 2, para. 1, ADR Directive.

8 Recital 12 of the preamble to the ADR Directive.

9 Commission Recommendation of 4 Apr. 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes, *OJ* 2001, L 109/56.

10 Cf. Recital 37 of the preamble to the ADR Directive.

2.1. EU-Wide Availability of ADR Procedures

4. Article 5, paragraph 1 of the ADR Directive requires the Member States to facilitate the access for consumers to ADR procedures and to ensure that disputes covered by the Directive that involve a trader established on their respective territories can be submitted to an ADR entity that complies with the requirements set out in this Directive. This Article therefore requires Member States to establish and to monitor the existence of ADR entities dealing with consumer disputes covered by the Directive. Article 2, paragraph 1 of the ADR Directive makes clear that the Directive may be applied to all sorts of cases concerning contractual obligations stemming from sales contracts or service contracts between a trader established in the Union and a consumer resident in the Union that are resolved outside the ordinary court system through the intervention of an ADR entity. The Directive may apply irrespective of whether the ADR entity tries to settle the case by facilitating an amicable solution or decides the case.¹¹ This suggests that the scope of the ADR Directive is rather wide and that many disputes will be covered by the Directive. However, Article 2, paragraph 2 of the ADR Directive excludes a whole series of procedures from the scope of the Directive, including all consumer complaint-handling procedures operated by the trader itself, direct negotiations between the consumer and the trader, settlement attempts by a judge in the course of a judicial proceeding, and procedures *initiated* by a trader against a consumer. This last exclusion implies that the ADR Directive is applicable only in cases where the *consumer* is the claimant.¹² National legislators therefore need not ensure that access to ADR is provided in cases where the *trader* is the claimant, even in those cases where the consumer agrees to ADR. Finally, as the use of ADR is voluntary (unless a Member State requires traders in a particular sector to adhere to ADR), ADR is available to consumers only if and when the trader agrees thereto.¹³

2.2. Information on the Availability of ADR Procedures

5. The Directive aims to stimulate consumers' and traders' awareness of ADR procedures in several ways. First, Article 15 ADR Directive requires the Member States to ensure that ADR entities, the European Consumer Centres, as well as the ODR contact point¹⁴ publish the list of ADR entities that have been recognized by the competent national authority¹⁵ on their websites by providing a link to the Commission's website. Since the Commission's website will contain the list of all ADR entities in the EU, this should also facilitate the use of ADR

11 Cf. Art. 2, para. 1, ADR Directive.

12 See Art. 2, para. 2, lit. g, ADR Directive.

13 See *infra*, s. 3.1.

14 See *infra*, s. 2.4.

15 See *infra*, s. 3.1.

schemes in cross-border disputes. In addition, consumer organizations and business associations should be encouraged to make the list available on their websites as well, and the European Commission and the Member States are called upon to ensure that appropriate information on ADR procedures is disseminated and to take accompanying measures to encourage consumer organizations and professional organizations to raise trader and consumer awareness of ADR entities and ADR procedures.

6. In addition, the recognized ADR entities are called upon to publish a lot of information on their own identity and the procedures they provide. To that extent, Article 7, paragraph 1 of the ADR Directive requires the Member States to ensure that ADR entities make information public as to the identity and the contact details of the ADR entity and of the person charged with ADR and as to the ADR procedure itself. The information must at least be provided on the ADR entity's website and, upon request, on a durable medium. Moreover, the ADR entity must also disclose whether or not it is a member in networks of ADR entities facilitating cross-border dispute resolution, which type of dispute it is competent to deal with, which preliminary requirements (such as the requirement that the consumer must first contact the trader) and which procedural rules apply to the dispute resolution, whether it will decide or mediate disputes on the basis of law, equity, or codes of conduct, or a combination thereof, what the legal effects of the procedure are and whether a decision is legally enforceable against the losing party, what costs are to be borne by the parties, what the average length of the ADR procedure is and in which languages the complaint may be submitted to the ADR entity and in which languages the ADR procedure is conducted.

Paragraph 2 adds that Member States must ensure that the ADR entities make their annual reports available on their websites and, upon request, on a durable medium. It contains detailed requirements as to the content of these reports, among which are the number of disputes received and the types of complaints to which they related, the percentage shares of solutions proposed or imposed in favour of the consumer and in favour of the trader, and of disputes resolved by an amicable solution, the average time taken to resolve disputes, and the rate of compliance, if known, with the outcomes of the ADR procedures. This general information may help to facilitate the public scrutiny of the entities to some extent¹⁶ but may also help a consumer in deciding whether or not to submit

16 See J.A. LUZAK, 'The New ADR Directive: Designed to Fail? A Short but Hole-Ridden Stairway to Consumer Justice', 1. *ERPL (European Review of Private Law)* 2016 (elsewhere in this issue of *ERPL*), s. 2.1.2.

a complaint to the ADR entity. However, it will not inform consumers as to the outcome of similar cases and therefore about the chances of winning or losing.¹⁷

7. Finally, Article 13 ADR Directive provides that Member States must ensure that traders established on their territories inform consumers about the ADR entity or ADR entities by which those traders are covered, when those traders commit to or are obliged to use those entities to resolve disputes with consumers. That information shall include the website address of the relevant ADR entity or ADR entities. The information must be provided on the trader's website and in the trader's applicable general terms and conditions. Moreover, traders will be required to inform consumers that have contacted them with regard to a complaint that could be settled with the information as to the ADR entity and the ADR procedure and whether the trader will adhere to that procedure if the consumer chooses to submit the dispute to the ADR entity. However, the trader is not under such obligation if he does not commit to the ADR procedure and is not obliged to do so either.¹⁸ Worse, neither the ADR Directive nor the Consumer Rights Directive requires the trader to inform consumers that the trader does *not* adhere to any ADR scheme.¹⁹ In particular in countries where ADR is well known by consumers, an obligation to inform them of the absence of such procedure could influence the decision of these consumers whether or not to conclude a contract with that trader in the first place. Similarly, and although the ODR Regulation does require online traders to provide on their websites an electronic link to the ODR platform, online traders have to inform consumers of the existence of the ODR platform and the possibility of using the ODR platform for resolving their disputes only if they have committed or are obliged to use one or more ADR entities to resolve disputes with consumers.²⁰ Cortés and Lodder rightly argue that by construing the information obligation in such a way it could even be counterproductive as it may mislead consumers by sending them (via the hyperlink) to an ODR platform that cannot help them to settle their claims.²¹

2.3. Quality of ADR Procedures

8. The ADR Directive further aims to introduce harmonized quality requirements for ADR entities and ADR procedures 'in order to ensure that, after its

17 LUZAK, 1. *ERPL* 2016, s. 2.1.2, rightly argues that consumers would have benefitted more from an obligation in the ADR Directive requiring ADR entities to establish an online database with details of all the cases decided by these entities. See also C. HODGES, 'Mass Collective Redress: Consumer ADR and Regulatory Techniques', 5. *ERPL* 2015, p (829) at 863.

18 See Art. 13, para. 1, ADR Directive.

19 Art. 6, para. 1, lit. t, Consumer Rights Directive merely requires the trader 'where applicable' to inform the consumer of the possibility of having recourse to an out-of-court complaint and redress mechanism.

20 See Art. 14, paras 1 and 2, ODR Regulation.

21 Cf. CORTÉS & LODDER, 1. *MJ* 2014, pp 29-30.

implementation, consumers have access to high-quality, transparent, effective and fair out-of-court redress mechanisms no matter where they reside in the Union'. The Directive merely sets out minimum harmonization in this regard: Member States may maintain or introduce rules that offer a higher level of consumer protection.²²

In addition to the transparency requirements of Article 7 ADR Directive, the harmonized quality requirements include requirements as to the expertise, independence, and impartiality 'of the natural persons in charge of the ADR', i.e., the persons that mediate or decide the dispute.²³ The parties are entitled but not required to invoke legal representation, and the ADR procedure should be made available either free of charge or at a nominal fee for consumers. Moreover, the outcome of the ADR procedure should be made available within a period of 90 calendar days from the date on which the ADR entity has received the complete complaint file. However, the ADR entity is allowed at its own discretion to extend the time period in the case of highly complex disputes but is required to inform the parties thereof and to indicate when the procedure is likely to be concluded.²⁴ No maximum period for the extension is indicated. This suggests that in complex disputes the ADR entity may take all the time it needs to ensure the quality of the procedure rather than that rushing it in order to decide on time. Since it is also entirely up to the ADR entity's discretion to determine whether or not a dispute is 'highly complex', in practice the ADR procedure need not be much shorter than an ordinary court procedure would have been.

2.4. Cross-Border ADR and ODR

9. The final reason to introduce the ADR Directive and the ODR Regulation is to further cross-border ADR and ODR. The idea is that if ADR and ODR are made available also for cross-border disputes, this raises consumer confidence in the internal market and thus may stimulate the number of contracts concluded cross-border. To that end, the ADR Directive requires Member States to ensure that consumers can obtain assistance to access the competent ADR entity operating in the trader's Member State. The assistance is to be provided by the local centre of the European Consumer Centre Network, by consumer organizations, or by any other body appointed by the Member State. This contact point therefore acts as an intermediary between the consumer and the ADR entity in the trader's Member State.

10. In addition, the ODR Regulation comes into play. In essence, that Regulation does nothing more than to facilitate the out-of-court resolution of international disputes concerning contractual obligations stemming from online sales or service

22 Art. 2, para. 3, ADR Directive.

23 Art. 6 ADR Directive.

24 See Art. 8 ADR Directive.

contracts between consumers that live in one Member State and traders established in another Member State.²⁵ For this, the intervention of a recognized ADR entity and the use of the ODR platform are needed.²⁶ Moreover, the Member State where the consumer lives must allow for the dispute to be resolved through the intervention of an ADR entity.²⁷ The ODR platform is construed as a single point of entry for consumers and traders seeking the out-of-court resolution of disputes covered by the Regulation. It consists of an interactive website that can be accessed electronically and free of charge in all the official languages of the institutions of the European Union.²⁸ To that extent, the parties must be able to submit and contest a claim electronically,²⁹ and both parties³⁰ must agree to the dispute being dealt with by the ADR entity.³¹ Moreover, a recognized ADR entity must be willing to decide the dispute.³² Where the parties do not agree within 30 calendar days after submission of the complaint form on an ADR entity, or the ADR entity refuses to deal with the dispute, ‘the complaint shall not be processed further’.³³ The ODR platform is then required to inform the party that has instigated the claim ‘of the possibility of contacting an ODR advisor for general information on other means of redress’.³⁴ In practice, this means that the dispute will then have to be settled through the ordinary court procedure.

3. Problems Solved?

11. Consumer behaviour research suggests that pre-contractual information obligations probably are not a very effective means to ensure that consumers are aware of the availability of ADR once a dispute has arisen - post-contractual information obligations, i.e., information obligations once a dispute has arisen, are far more likely to have an effect as this information is then salient to consumers and they would be willing to invest time and effort in actually

25 As indicated above, the ADR Directive is applicable only in cases where the *consumer* is the claimant. National law may, however, determine that also traders may access the ADR procedure as claimant. In that case, the ODR Regulation is applicable as well; see Art. 2, para. 2, ODR Regulation.

26 Cf. Art. 2, para. 1, ODR Regulation.

27 Cf. Art. 2, para. 2, ODR Regulation.

28 Art. 5, para. 2, ODR Regulation.

29 Cf. Art. 8, para. 1 and Art. 10, lit. b, ODR Regulation.

30 The trader may under national law be obliged to use a specific ADR entity; see Art. 9, para. 3, lit. c and d, ODR Regulation.

31 See Art. 9, para. 3, lit. a, ODR Regulation.

32 Cf. Art. 9, para. 7, ODR Regulation.

33 See Art. 9, para. 8, ODR Regulation.

34 See Art. 9, para. 8, ODR Regulation. The ODR advisors are hosted by the ODR contact point, which may, for instance, be a European Consumer Centre or a consumer organization; see Art. 7, para. 1, ODR Regulation.

investigating whether ADR could be of interest to them. I will leave this matter here and refer to the article by *Joasia Luzak* elsewhere in this volume.

12. The other goals set by the European legislator focus on the availability of ADR procedures in domestic and cross-border situations (ss 2.1 and 2.4) and on the quality of such procedures (s. 2.3). In this section, I will discuss whether the ADR Directive and the ODR Regulation indeed contribute to a better access to ADR (s. 3.1) and to better ADR procedures (s. 3.2). In addition, I will point to two problems that are *created* by the ADR Directive and the ODR Regulation: the instruments undermine the protection of the jurisdiction rules in EU private international law (s. 3.3) and undermine the development of EU consumer law (s. 3.4).

3.1. EU-Wide Availability of ADR Procedures

13. Section 2.1 already indicated that the scope of the ADR Directive is in fact much more restricted than one would at first sight think. In particular, under Article 2, paragraph 2, lit. g, ADR Directive, procedures initiated by a *trader* against a consumer are excluded from the scope of the Directive.³⁵ This implies that Member States are not required to offer ADR procedures for cases where the trader is the claimant. And worse, if in a Member State an ADR procedure is open for claims by a trader against a consumer, the Member State is not required to ensure that the harmonized quality requirements of Articles 6-8 ADR Directive apply also to such procedures - even though the need to protect the consumer from partiality of the ADR entity and the guarantees as to the expertise of the persons adjudicating the case will not be any less.

14. The scope of the ADR procedure is in fact much more restricted. Several provisions underline the voluntary nature of ADR.³⁶ This is important in particular where the ADR entity is allowed to decide a dispute between the parties, as the ADR procedure would otherwise deprive the consumer from the possibility to submit a claim to the otherwise competent court, which would even be contrary to Article 47 of the Charter and Article 6 of the European Convention on Human Rights.³⁷ This can be seen as beneficial to consumers in the sense that they can only be bound by such a procedure if they consent to it. However, the voluntary nature of ADR procedures implies that also *traders* may benefit from the non-obligatory nature of the ADR procedure. That implies that in cases where the consumer would like the ADR entity to intervene the trader could frustrate

35 This was different under the original proposal for the ADR Directive; see M. BECKLEIN, 'Verbessertes Zugang zum Recht für Verbraucher? Eine Bewertung der Regelungsvorschläge der EU-Kommission zur Alternativen Streitbeilegung', 5. *GPR (Zeitschrift für Gemeinschaftsprivatrecht)* 2012, p (232) at 234.

36 See for instance Art. 1, 9, para. 2 and Art. 10 ADR Directive.

37 See in this respect explicitly also Recital 49 of the preamble to the Directive.

this by not agreeing to the case being handled in that manner. The trader may have very good and justifiable reasons for this. For instance, whereas the ADR Directive requires that the ADR procedure is free of charge or available at a nominal fee for consumers,³⁸ there is no such provision for traders. This implies that unless the ADR entity is funded by the State, the costs of the ADR entity and the ADR procedure are in fact paid for by the traders or their trade associations.³⁹ Where the trader is a member of the trade association, these costs may be included in the membership fee - in which case the use of the ADR scheme need not lead to (substantive) additional costs for the trader - but where this is not the case, it seems likely that the ADR entity will charge the trader with the costs associated with the procedure and possibly also for the establishment of the entity itself. These costs may be prohibitive for the trader, in which case the consumer will need to go to court or abandon her claim.

15. However, the trader may also have less respectable reasons for not agreeing to ADR: if ADR is to facilitate simple, fast, and low-cost out-of-court solution to disputes between consumers and traders, as Recital 5 of the preamble to the ADR Directive indicates, for that very reason rogue traders have an incentive not to participate in such a scheme as it may endanger their (illegitimate) business model - if a trader make its living from selling goods or services that it knows to be defective or of questionable quality, it is not likely to respect its customer's consumer rights either. If - as the preamble suggests - a procedure through the ordinary court system is indeed too complicated, time-consuming, and costly, the ultimate consequence of the voluntary nature of the ADR scheme then is that consumers are more or less forced to abandon their claim. This problem can only partially be solved through private law regulation. The Directive allows Member States to provide that the trader is required to participate in an ADR procedure launched by the consumer and to accept the binding nature of a decision.⁴⁰ Such requirement may follow directly from the law itself or *de facto* from other legal acts, e.g., by requiring the trader to participate in ADR procedures as a condition

38 See Art. 8 lit. c, ADR Directive and Recital 41 of the preamble to the Directive.

39 See also Recital 46 of the preamble to the ADR Directive that clearly states that the question of whether ADR entities should be publicly or privately funded or funded through a combination of public and private funding is outside the scope of the Directive, but ADR entities are specifically encouraged to specifically consider private forms of funding and the Directive is not to stand in the way of the possibility for businesses or for professional organizations or business associations to fund ADR entities.

40 Cf. Art. 1 of the ADR Directive and Recital 49 of the preamble to the Directive. The trader must, however, be able to exercise its constitutional right of access to the judicial system under Art. 47 of the Charter of Fundamental Rights of the European Union. This can, for instance, be ensured by allowing the trader to challenge the outcome of the ADR procedure in court. However, whether that court is to test the outcome of the ADR procedure in full or only marginally is for national law to determine.

for being allowed to be active in regulated branches of the economy such as energy, telecom, or financial services. Member State law may, for instance, provide that the trader is bound by the outcome of a mediation procedure once the consumer has accepted the proposed solution.⁴¹ An express acceptance of the binding nature of the decision of the ADR entity by the trader is not required if national law provides that solutions are binding on traders.⁴² In addition, trade associations may require their members on the basis of their articles of association to allow consumers to submit claims to an ADR entity as a condition for the membership of the trade association. However, whereas it is not uncommon that such an obligation exists in regulated branches of the economy, a *general* obligation for traders in all branches of the economy to submit to ADR seems highly unlikely.

16. A further restriction is even more hidden. Article 2, paragraph 1 of the ADR Directive provides that the Directive is applicable to disputes between a consumer-claimant and a trader-defendant that are resolved ‘through the intervention of an ADR entity’. Article 4, lit. h, ADR Directive defines ‘ADR entity’ as an entity ‘which is established on a durable basis and offers the resolution of a dispute through an ADR procedure and that is listed in accordance with Article 20(2)’. This definition in fact contains several restrictions as to the scope of the Directive. First, it follows that only ADR institutions that are established on a durable basis may be recognized as an ADR entity within the meaning of the Directive.⁴³ Second, ADR entities themselves have to indicate to the competent national authority that they wish to be recognized as an ADR entity within the meaning of the Directive.⁴⁴ Third, the competent national authority must determine whether the ADR entity that wishes to be recognized as an ADR entity complies with the quality requirements set out in the Directive and any further-reaching national provisions. If so, the competent national authority will place the ADR entity on a list of recognized ADR entities; that list is to be notified to the European Commission.⁴⁵ Any ADR institution that does not meet one or more of these requirements falls outside the definition of an ADR entity. The result is not that such an ADR institution is illegal or that its decisions cannot bind the parties but merely that the ADR Directive is not applicable.⁴⁶ More specifically, this implies that none of the requirements set out in Articles 6–12 of the Directive apply to such an ADR institution or the procedure it offers

41 Cf. Art. 9, para. 3, ADR Directive.

42 Art. 10, para. 2, last sentence, ADR Directive.

43 See critical in this respect Y. FARAH & L.V.P. DE OLIVEIRA, ‘The Ambivalence of Consumer Arbitration: A Missed Opportunity in the ADR Directive to Impose an EU Coherent Approach to Consumer Arbitration’, *ERPL* 2016 (elsewhere in this issue of *ERPL*), s. 4.1.

44 See Art. 19 ADR Directive.

45 Cf. Art. 20 ADR Directive.

46 See critical also BECKLEIN, 5. *GPR* 2012, p 234.

to the parties. This, of course, does not mean that ADR institutions that have not been notified to the European Commission as a recognized ADR entity offer substandard procedures, but the Member State is under no EU obligation to guarantee the quality of such an ADR institution. ADR entities not able or willing to meet the standards set out in the ADR Directive can therefore simply continue to operate in the manner they did, unless the national legislator has expanded the scope of the law implementing the Directive to cover also non-recognized ADR institutions with regard to (at least) the quality requirements.⁴⁷

3.2. *Quality of ADR Procedures*

17. For ADR institutions that qualify as an ADR entity under the Directive and that offer an ADR procedure within the scope of the Directive, the harmonized quality requirements do apply. As indicated above in section 2.3, these include requirements as to the expertise, independence, and impartiality ‘of the natural persons in charge of the ADR’, i.e., the persons that mediate or decide the dispute.⁴⁸ To that extent, Article 6, paragraph 1 of the ADR Directive requires the Member States to ensure that ‘the natural persons in charge of ADR possess the necessary expertise and are independent and impartial’. The expertise must be guaranteed by ensuring, *inter alia*, that such persons ‘possess the necessary knowledge and skills in the field of alternative or judicial resolution of consumer disputes, *as well as a general understanding of law*’ (Art. 6, para. 1, lit. a, ADR Directive; emphasis added). The text in italic makes clear that persons involved in an ADR procedure need not be lawyers.⁴⁹ However, where the ADR procedure leads to a binding decision, Article 11, paragraph 1 of the ADR Directive requires the Member State to ensure that the consumer shall not be deprived of the protection of the applicable mandatory law. This implies that in any ADR procedure under the Directive that leads to a binding decision one or more lawyers must be involved as ‘a general understanding of law’ does not suffice to guarantee that mandatory law is not disregarded.⁵⁰ Moreover, whereas the Court of Justice requires national courts to test the compliance of the trader’s behaviour

47 See also BECKLEIN, 5. *GPR* 2012, pp 237-238, who warns for a race to the bottom here as ADR institutions offering proper quality standards may be pushed out of the market for ADR by ADR institutions offering lower quality (against, for instance, lower fees for the traders).

48 Art. 6 ADR Directive.

49 See also J. KOTZUR, ‘Der Referentenentwurf zur Umsetzung der Richtlinie über die alternative Beilegung verbraucherrechtlicher Streitigkeiten - Fortschritt oder Rückschritt’, 7. *VuR (Verbraucher und Recht)* 2015, p (243) at 245-247, with references to an extensive debate in Germany whether ‘a general understanding of law’ should suffice or that the involvement of lawyers should be guaranteed.

50 See also H. SCHULTE-NÖLKE, ‘The Brave New World of EU Consumer Law. Without Consumers, or even without Law?’, 4. *EuCML (European Review of Consumer and Market Law)* 2015, p (135) at 137; LUZAK, 1. *ERPL* 2016, s. 2.1.1.2; KOTZUR, 7. *VuR* 2015, p 250.

with European law and, if necessary, to investigate of their own motion whether the conditions for application of the relevant European instrument are met,⁵¹ the ADR Directive does not require the Member States to ensure that ADR entities have similar investigative powers as the courts must have.⁵²

18. However, even when lawyers are involved in deciding an ADR dispute, it remains doubtful whether a Member State can ensure that the requirements of Article 11, paragraph 1 of the ADR Directive can be met. This is demonstrated by a recent study by Pavillon⁵³ regarding decisions of the Dutch *Geschillencommissie*, the main ADR entity in the Netherlands, which as such is well respected.⁵⁴ She shows that of the selected 266 cases she has studied, in no less than 58 cases it is doubtful whether the consumer was offered the minimum protection of the law. Even though the selection of cases was not random – more than half of the cases were previously published in the Dutch consumer law review *Tijdschrift voor Consumentenrecht en handelspraktijken*, and therefore were found to be relevant, important, interesting, or otherwise noteworthy by the editorial board thereof – the sheer number of wrong or doubtful decisions does indicate a potential problem. Moreover, the cases studied by Pavillon pertain to purely domestic disputes. If it is doubtful that applicable mandatory law is properly applied in such disputes, there is even more reason for doubt in cross-border cases. Article 11, paragraph 1, lit. b, ADR Directive explicitly indicates that in cross-border disputes the protection of Article 6 of the Rome I Regulation⁵⁵ must be respected. This implies that if the trader has directed her commercial activities to the country where the consumer lives and the contract falls within the scope of these activities, the ADR entity is required to either apply the law of the consumer's country of habitual residence or – in case of a valid choice of law – to apply that law but safeguard that this does not deprive the consumer of the protection of the otherwise applicable mandatory law of the consumer's country of residence. This implies that the ADR entity should not (only) be able to apply the law of the

51 See, for instance, CJEU 30 May 2013, *Asbeek Brusse*, ECLI:EU:C:2013:341, curia.europa.eu/juris/liste.jsf?num=C-488/11; CJEU 4 Jun. 2015, *Faber*, Case C-497/13, ECLI:EU:C:2015:357, curia.europa.eu/juris/liste.jsf?num=C-497/13.

52 See also F. WEBER, 'Is ADR the Superior Mechanism for Consumer Contractual Disputes? An Assessment of the Incentivizing Effects of the ADR Directive', 38. *JCP (Journal of Consumer Policy)* 2015, p (265) at 280; critical also LUZAK, 1. *ERPL* 2016, s. 3.3.

53 C.M.D.S. PAVILLON, 'Geschillencommissies en dwingend recht. Over de gevolgen van een door de ADR-richtlijn gedwongen huwelijk', 5. *TvC (Tijdschrift voor Consumentenrecht en handelspraktijken)* 2015, pp 239-252.

54 The separate ADR bodies of this ADR entity consist of 3 persons – a representative from the consumer organizations, a representative from the trade organization, and an independent chairman. The chairman must be a lawyer and is typically a judge or a law professor.

55 Reg. (EC) 593/2008 of 17 Jun. 2008 on the law applicable to contractual obligations, eur-lex.europa.eu/legal-content/ALL/?uri=CELEX:32008R0593. The Regulation will be referred to as Rome I Regulation.

country where it is established but also that of the country where the consumer lives. It seems rather unlikely that the persons charged with deciding the disputes actually possess such knowledge – although I am experienced in comparative legal research, I would most certainly not be able to guarantee such knowledge even for the foreign legal systems I know best. This suggests that in cross-border cases, consumers may very well lose the protection of the mandatory law of their place of residence in cases where the European legislator intended them to be protected by those rules.

3.3. *Cross-Border ADR*

19. The need to be aware of the content of the mandatory law of the country where the consumer lives is less demanding of the person deciding the claim if and to the extent that consumers would be able to bring their claims in their own country. In case of a claim that is brought before a *court*, Articles 17-19 of the Brussels I Regulation (recast)⁵⁶ create specific jurisdiction for consumer contracts for the court in the country where the consumer is domiciled in case of so-called passive consumers, i.e., consumers that have been targeted in their home country by a trader to conclude a cross-border contract. The Brussels I Regulation (recast) therefore aims to protect ‘passive’ consumers from being subjected to the jurisdiction of a foreign court.

20. The ADR Directive and the ODR Regulation are formally not in conflict with these provisions as the use of ADR and ODR is dependent on a voluntary decision, which is to be taken after the dispute has arisen.⁵⁷ Moreover, both the ADR Directive and the ODR Regulation indicate in their recitals that these instruments should not prevent parties from exercising their right of access to the judicial system in accordance with Article 47 of the Charter of Fundamental Rights of the European Union.⁵⁸ However, the ADR Directive makes clear that *if* the parties agree to a dispute being decided by an ADR entity, it is typically the ADR entity in the *trader's* country that is competent.⁵⁹ ADR and ODR therefore *in effect* may undermine the consumer protection rules of private international

56 Reg. (EU) 1215/2012 of 12 Dec. 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32012R1215. The Regulation will be referred to as Brussels I Regulation (recast). The Regulation applies as of 10 Jan. 2015 (Art. 81 Brussels I Regulation (recast)). Before that date, Reg. (EC) 44/2001 of 22 Dec. 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, eur-lex.europa.eu/legal-content/ALL/?uri=URI:SERV:l33054, applied, which contained the same provisions in Arts 15-17.

57 See in particular Art. 10, para. 1, ADR Directive.

58 Cf. Recital 45 of the ADR Directive and Recital 26 of the ODR Regulation.

59 See in particular Art. 5, para. 1 and Art. 14, para. 1, ADR Directive.

law.⁶⁰ From the viewpoint of access to justice, this is problematic in particular in those cases where the consumer is not allowed to communicate in the ADR proceedings in his own tongue. The communication with the ODR platform will be in a language the consumer masters, but any follow-up communication once the complaint is to be submitted to the ADR entity is governed by the ADR Directive.⁶¹ Under that Directive, the ADR entity may determine in which languages the consumer may submit her claim and in which the dispute is dealt with.⁶² Since the ADR entity is not located in the consumer's country of residence but in the trader's country of establishment, the chances are that the trader can communicate in his own language, whereas the consumer is forced to communicate in a foreign language, in which she (almost by definition) is less fluent than she is in her native tongue.⁶³ Moreover, although the ADR Directive ensures that the ADR procedure is available and easily accessible online and offline to both parties irrespective of where they are,⁶⁴ in practice this means that if and when a hearing is organized consumers will have the possibility to be heard online - e.g., via a video call program such as Skype - but the trader can be present in person. This undoubtedly offers the trader a psychological advantage even if the ADR entity fully respects the principle of fair hearing.

3.4. Development of EU Consumer Law

21. The problem that ADR entities may not be sufficiently equipped to deal with the content of the mandatory rules of the consumer's national law may, to a large extent, be obviated where these rules follow from EU directives or regulations, in particular in the case of full harmonization, as in such cases the rules are the same anyway. However, this does not take away a final problem that ADR entities face. Even though the European legislator strives to develop clear rules in its legislation, often many questions as to the correct interpretation of EU law rise. This may be true even if 15 years or more have passed since a directive or regulation has been implemented in the laws of the Member States, as the growing case law of the Court of Justice on the Unfair Contract Terms Directive and the Consumer Sales Directive shows. However, if and where ADR is successful, the case load shifts from the ordinary court system to ADR entities - in the Netherlands, the bulk of consumer cases have since long been handled by

60 See critical also N. REICH, 'A "Trojan Horse" in the Access to Justice. Party Autonomy and Consumer Arbitration in Conflict in the ADR-Directive 2013/11/EU?', 2. *ERCL (European Review of Contract Law)* 2014, p (258) at 270-272.

61 See CORTÉS & LODDER, 1. *MJ* 2014, pp 34-35.

62 Cf. Art. 7, para. 1, lit. h, ADR Directive.

63 See in this sense also LUZAK, 1. *ERPL* 2016, s. 1; KOTZUR, 7. *VuR* 2015, p 248.

64 Cf. Art. 8, lit. a, ADR Directive. Since the ADR entity is not required to conduct the procedure through the ODR platform (see Art. 10, lit. d, ODR Regulation), this is true also in the case of cross-border dispute.

ADR institutions rather than by the courts.⁶⁵ As Article 11 ADR Directive requires the Member States to ensure that a consumer is not deprived of the protection of the applicable mandatory rules, it follows indirectly that ADR entities are required to apply the rules deriving from European consumer law.⁶⁶ However, these ADR entities are not courts or tribunals within the meaning of Article 267 of the Treaty on the Functioning of the European Union (TFEU), since they can operate only if the parties agree to have their dispute being decided by such entity. As a consequence, in accordance with standing case law of the Court of Justice, these ADR entities are not allowed to refer their questions as to the correct interpretation of EU legislation to the Court of Justice for prejudicial ruling.⁶⁷ In practice, this means that these ADR entities will have to decide the questions themselves without any possibility of checking whether their interpretation of EU law is correct.⁶⁸ This necessarily implies that the ADR entities will develop their own ‘case-law’, which subsequently will differ from one ADR entity to the next, and will most certainly lead to diverging interpretations in different countries.⁶⁹ This suggests that the success of ADR may, in fact, undermine the potential success of harmonization.⁷⁰ Moreover, this also guarantees that consumers may be denied the protection of European consumer law in spite of the legal obligation of the Member States to ensure that ADR entities comply with the applicable mandatory law rules.⁷¹

22. There are, of course, ways out of this dilemma. The first would be to explicitly grant ADR entities recognized under the ADR Directive the power to submit a

65 See P. ROTT, ‘Claims Management Services – An Alternative to ADR?’, 1. *ERPL* 2016 (elsewhere in this issue of *ERPL*), s. VII. Cf. also in more generic sense, on the basis of empirical research in the United States, also T.J. STIPANOWICH, ‘ADR and the “Vanishing Trial”: The Growth and Impact of “Alternative Dispute Resolution”’, 3. *JES (Journal of Empirical Legal Studies)* 2004, pp 843-912, available online at papers.ssrn.com/sol3/papers.cfm?abstract_id=1380922.

66 See also I. BRAND, ‘De invloed van Europees recht op alternatieve wijzen van geschillenbeslechting (ADR)’, 7-8. *MvV (Maandblad voor Vermogensrecht)* 2015, p (208) at 211-212.

67 Cf. CJEU 23 Mar. 1982, *Nordsee Hochseefischerei*, ECLI:EU:C:1982:107, curia.europa.eu/juris/documents.jsf?num=C-497/13; CJEU 27 Jan. 2005, *Denuit*, ECLI:EU:C:2005:69, curia.europa.eu/juris/liste.jsf?num=C-125/04; CJEU 10 Dec. 2009, *Umweltanwalt von Kärnten/Kärntner Landesregierung*, ECLI:EU:C:2009:767, curia.europa.eu/juris/liste.jsf?num=C-205/08.

68 This indeed is one of the reasons identified by Pavillon why so many decisions of the Dutch *Geschillencommissie* that she studied are either wrong or doubtful; see PAVILLON, 5. *ToC* 2015, pp 247-248.

69 Cf. WEBER, 38. *JCP* 2015, p 282, who argues that the ADR Directive explicitly allows for different outcomes between court and ADR procedures. See also FARAH & DE OLIVEIRA, *ERPL* 2016, s. 2.1.

70 A similar problem exists with regard claims management services; see on this point ROTT, 1. *ERPL* 2016, s. VII.

71 See critical also WAGNER, 51. *CMLRev.* 2014, p 178; WEBER, 38. *JCP* 2015, p 281.

question to the Court of Justice.⁷² This would, however, most likely require a change of the Treaty on the Functioning of the European Union itself and therefore does not seem to be a particularly attractive approach. Two other alternatives were already mentioned by the Court of Justice itself in the 1982 case.⁷³ First, any ADR decision – whether rendered by an arbitrator or by another type of third party – is subject to some form of judicial review. The competent court may then subsequently refer the substantive question to the Court of Justice for prejudicial ruling. However, since cases that have initially been dealt with by an ADR entity hardly reach the courts afterwards, the courts are mostly not in a position to submit a question for a prejudicial reference either.⁷⁴ Moreover, this approach leaves the enforcement of European consumer law to the decision of individual parties (consumers and traders) to challenge the outcome of an individual dispute by an ADR entity. Such possibility of an ‘appeal’ to an ordinary court is contrary to the whole purpose of ADR as offering a simple, efficient, fast, and low-cost way to render decisions in consumer cases and rather imposes an additional obstacle in the enforcement of consumer rights. In his article elsewhere in this volume, *Peter Rott* rightly mentions the risk of litigation fatigue preventing consumers from pursuing their claim – even when they have a valid claim and both the ADR entity and the court are likely to recognize that claim.⁷⁵ This approach is therefore legally viable but rather takes away the benefits that ADR may have for the parties. Moreover, this alternative does not offer a solution to the ADR entity’s problem that it lacks guidance in matters of law.

23. A third way seems more promising. In *Nordsee Hochseefischerei*, the Court of Justice also stated ‘that if questions of Community law are raised in an arbitration resorted to by agreement the ordinary courts may be called upon to examine them either in the context of their collaboration with arbitration tribunals, in particular in order to assist them in certain procedural matters or to interpret the law applicable’. Thus, the Court of Justice suggested that the ADR entity itself could be given the possibility (under national law) to refer a matter of law to the ordinary courts. In turn, the court may then subsequently refer questions regarding the application or interpretation of European law to the Court of

72 Cf. M.B.M. Loos, ‘Individuele handhaving van het consumentenrecht’, in M.B.M. Loos & W.H. van Boom, *Handhaving van het consumentenrecht*, Preadviezen Vereniging voor Burgerlijk Recht 2009, (Deventer: Kluwer 2010), p 115.

73 CJEU 23 Mar. 1982, *Nordsee Hochseefischerei*, ECLI:EU:C:1982:107, curia.europa.eu/juris/documents.jsf?num=C-497/13, point 14.

74 This would be different if the ADR entity would be required or allowed to refrain from deciding the dispute if a matter of law is concerned; see ROTT, 1. *ERPL* 2016, s. VII.

75 Cf. ROTT, 1. *ERPL* 2016, s. IV.3. See in a similar fashion also KOTZUR, 7. *VuR* 2015, p 246, regarding non-binding ADR.

Justice.⁷⁶ Obviously, one may think of introducing instruments to prevent an overload of cases, e.g., by allowing the court to deny hearing the case referred to it by the ADR entity where it deems the underlying legal point in question to be self-evident (*acte clair*) or already resolved (*acte éclairé*). The Court of Justice has similar powers to refuse to answer questions in such situations.

This third approach does not require a change of the Treaty and does not depend on the individual decision of the parties but would require a change of national procedural laws. Unfortunately, the ADR Directive does not require the Member States to introduce such a system of prejudicial references.

4. Concluding Remarks

24. The ADR Directive and the ODR Regulation may be seen as a step in the right direction, as they provide better regulated access to high-quality ADR for those ADR procedures covered by these instruments. However, in many respects, the instruments do not go far enough to solve the existing problems with ADR that have led the European legislator to act in this area in the first place. First, the voluntary nature of ADR leaves the possibility for rogue traders to evade the procedure altogether. In addition, ADR institutions themselves must *want* to apply for the status of an ADR entity within the meaning of the ADR Directive. Where they choose not to opt for the recognition, the procedures they offer are not covered by the Directive, which implies that the quality requirements laid down by the Directive do not apply either. Moreover, any ADR procedure instigated by a trader also falls outside the scope of the ADR Directive, which again implies that the quality requirements of the Directive do not apply either. In short, the scope of the ADR Directive is far too restricted to be effective.

25. Second, there are serious reasons to doubt whether ADR entities are capable of dealing with the mandatory rules intended to protect consumers, in particular in cross-border cases. The ADR Directive effectively leads to an undermining of Article 6 of the Brussels I Regulation (recast) as it leads to cases being decided by the ADR entity of the country where the trader is established instead of that of the country of the consumer's residence. Moreover, even if the ADR entity is aware of the mandatory rules protecting consumers in the country where the ADR entity is established, it seems highly unlikely that it is sufficiently knowledgeable as to the content of the mandatory law of the *consumer*, which may not be derogated from to the detriment of the consumer under the Rome I Regulation and under Article 11 ADR Directive.

26. Finally, whereas ADR may contribute to the *enforcement* of EU consumer rights, it may stand in the way of the *development* of EU consumer law and the

⁷⁶ LOOS, in: *Handhaving van het consumentenrecht*, p 115; in this sense also CH.J.S. HODGES, I. BENÖHR & N. CREUTZFELDT-BANDA, *Consumer ADR in Europe* (Oxford/Portland: Hart Publishing 2012), p 415; BRAND, 7-8. *MvV* 2015, p 213.

proper enforcement of consumer rights. ADR entities that – on the basis of Article 11 ADR Directive – are required to apply EU consumer law are frequently confronted with uncertainties as to the correct interpretation thereof law. However, ADR entities are not allowed to submit questions for prejudicial ruling to the Court of Justice. Given the relatively low monetary value of claims arising from consumer contracts, submitting an ADR decision for judicial review by an ordinary court normally is not a rational choice for an individual party. By definition, this means that the number of ADR decisions subjected to judicial review will be low. Questions as to the interpretation of EU consumer law could also reach the courts if ADR entities were given the opportunity to refer questions of law to the national courts, which in turn could refer the question to the Court of Justice. Unfortunately, the ADR Directive does not require Member States to introduce such a procedure of prejudicial ruling, and a country such as the Netherlands – where ADR entities indeed decide the bulk of consumer cases – did not introduce such a procedure of its own motion. This means that there are no effective mechanisms to resolve the uncertainties as to the correct interpretation of EU consumer law. Moreover, since the decisions of ADR institutions are often not published – and the ADR Directive only requires the publication of annual reports – any structural flaws in the interpretation of national and European consumer laws may not even come to light. In this respect, it is almost impossible for consumers and regulators to determine whether even recognized ADR entities provide the quality the ADR Directive requires.

27. There is, therefore, an urgent need for improvement of the ADR Directive. We may hope that the report on the application of the ADR Directive, which must be submitted to the European Parliament, the Council, and the European Economic and Social Committee in 2019, will prepare the way for these improvements.