

Opinion of the European Economic and Social Committee on the ‘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) 794 final — 2011/0374 (COD)

(2012/C 181/18)

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On 13 and 14 December 2011 respectively, the European Parliament and the Council decided to consult the European Economic and Social Committee, under Article 114 of the Treaty on the Functioning of the European Union, on the

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) 794 final — 2011/0374 (COD).

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee’s work on the subject, adopted its opinion on 9 March 2012.

At its 479th plenary session, held on 28 and 29 March 2012 (meeting of 28 March), the European Economic and Social Committee adopted the following opinion by 117 votes in favour, with 6 abstentions.

1. Conclusions and recommendations

1.1 The EESC, which has been calling for an initiative of this nature for a long time, welcomes the Commission’s proposal and supports its choice of a regulation as the legal instrument.

1.2 However, the EESC believes that the most appropriate legal basis would be Article 169(2)(b) and (4) of the TFEU and not just Article 114, as well as Articles 38 and 47 of the Charter of Fundamental Rights of the European Union.

1.3 The EESC welcomes the Commission’s clear statement that the creation of such a system should not deprive consumers or traders of their rights to seek redress before the courts, should they wish to do so, or replace the normal operation of judicial processes.

1.4 However, the EESC considers that the proposal lacks ambition, even has a misleading title and falls far short of what might be hoped and what is desirable and feasible, especially as regards the use of a whole series of existing technological means and electronic information systems which have proven to be successful, under what is known as 2nd-generation ODR.

1.5 The EESC therefore recommends that the Commission should see this proposal as a first step towards effective online dispute resolution and develop the system’s potential as soon as possible to incorporate all compatible technological innovation, with legal security and certainty, and that a specific and separate system needs to be created *ex novo* for EU ODR in cross-border transactions.

1.6 The EESC believes that there is no justification for the exclusion from the system of conflicts that are not solely cross-border in nature and of conflicts that do not arise exclusively from transactions concluded via electronic means (offline conflicts).

1.7 The EESC does not agree that such mechanisms could also cover complaints by traders against consumers.

1.8 The EESC recommends that the possibility of the parties concerned being represented by lawyers or third parties, specifically consumer associations, in their online complaints be expressly provided for.

1.9 The EESC urges the Commission to clarify how the more complex issues which may arise in certain online disputes, such as the discussion of unfair contract terms and the law applicable to contracts, may be resolved by means of the platform.

1.10 The EESC has serious reservations regarding whether the deadlines set are realistic and fears that making them mandatory, together with the foreseeable practical difficulties in meeting them, may tend to discredit a system which has speed and effectiveness as one of its main objectives.

1.11 The EESC proposes linking this online platform to an ‘online complaints book’, which online traders’ websites should be obliged to feature.

1.12 The EESC recommends that the Commission adopt a quality assurance scheme for the system to be set up, proposes that trustmarks be set up by accredited and authorised entities, for economic operators that advertise (on their websites) and promote dispute resolution via this platform, and advocates including a reference to dispute resolution through this online platform in codes of conduct.

1.13 The EESC recommends that the issue of funding this system be addressed explicitly and head-on, given that consumer associations and some Member States cannot afford the increased costs of setting it up, and this issue is crucial to ensuring the system's impartiality and independence.

1.14 The EESC believes that too many crucial aspects of the legislative instrument and of the functioning of the system are left to future implementing or delegated acts, which go way beyond the limits laid down in Article 290 of the Treaty, with consequences in terms of the instrument's legal security and certainty.

1.15 The EESC believes that the wording of some requirements should be revised and can be improved to make them clearer and less ambiguous and their provisions more effective, and recommends that the Commission take account of this Committee's specific comments.

2. Gist of the proposal

2.1 Whereas very few out-of-court consumer alternative dispute regulation (ADR) entities offer European consumers the possibility of conducting the entire procedure online;

Whereas the lack of effective redress for complaints resulting from cross-border online transactions has adverse consequences for both consumers and businesses;

Whereas the content and conclusions of several studies commissioned on the matter suggest that there is widespread support for developing online consumer dispute resolution tools (ODR) through EU-level action;

Whereas the results of the impact assessment SEC(2011) 1408 final of 29 November 2011 state that only a combination of the two instruments on ADR and ODR (online dispute resolution) can ensure access to impartial, transparent and effective means to resolve consumer disputes linked to cross-border e-commerce transactions out-of-court;

With this proposal for a regulation, the Commission aims to establish an EU-wide ODR system that will facilitate the online

resolution of disputes relating to the cross-border online sale of goods or provision of services between traders and consumers.

2.2 To achieve this aim, the Commission uses as its sole legal base Article 114 of the Treaty on the Functioning of the European Union, concerning completion of the internal market, in order to:

- a) establish an online dispute resolution platform at European level, in the form of an interactive website which can be accessed electronically and free of charge in all official EU languages. The ODR platform will offer a single point of entry to consumers and traders who seek settlements to any out-of-court disputes arising from cross-border e-commerce transactions in which all parties are established or resident in different EU Member States; and
- b) set up a Network of online dispute resolution facilitators, consisting of one ODR contact point for each Member State - the competent authority designated under the terms of the ADR directive as responsible for providing support to the resolution of disputes relating to complaints submitted via the platform.

2.3 The proposed regulation will only apply to disputes between consumers and traders arising from the online sale of goods or provision of services across borders.

2.4 The system to be put in place should build on existing ADR entities and respect Member States' legal traditions as regards their respective national procedural rules, specifically those concerning costs, while adhering to a set of common operating standards, in order to safeguard their effectiveness and speed. This does not prevent the operation of any existing online ADR entity operating within the Union, nor should it prevent ADR entities from dealing with cross-border disputes which have been submitted to them by any means other than the ODR platform.

2.5 ODR procedures are not intended to replace court procedures or to deprive consumers or traders of their rights to seek redress before the courts. The proposed regulation will cover any entity that is established on a durable basis and offers dispute resolution through ADR procedures, including official arbitration procedures not created on an ad hoc basis.

3. General comments

3.1 In some of its most recent opinions, in particular following the adoption of the Digital Agenda⁽¹⁾, the 50 proposed measures⁽²⁾ and the 12 levers for the internal market⁽³⁾, the EESC has called for an online dispute resolution system to be set up and therefore can only welcome this Commission initiative. The Committee also supports the Commission's choice of legal instrument: a regulation.

⁽¹⁾ COM(2010) 245 final.

⁽²⁾ COM(2010) 608 final.

⁽³⁾ COM(2011) 206 final.

3.2 Concerning the legal basis, the EESC considers that beyond the mere completion of the internal market, what is also at stake here is an instrument to protect consumers, and the most appropriate legal basis, if Article 81 of the TFEU is not adopted, would therefore be Articles 169(2)(b) and (4) of the Treaty and not just Article 114, as well as Articles 38 and 47 of the Charter of Fundamental Rights of the European Union.

3.3 The EESC welcomes the Commission's clear statement that the creation of such a system should not deprive consumers or traders of their rights to seek redress before the courts, should they wish to do so, or replace the normal operation of judicial processes.

3.4 It is pleased to note that the concept of the consumer has been broadened, along the same lines as the proposal for a directive on ADR and following on from the new Directive on Consumer Rights⁽⁴⁾, so as to cover dual purpose contracts, where the trade purpose is not predominant in the overall context of the contract. It would, however, like to see this concept appear explicitly in the text of the directive.

3.5 The EESC notes the Commission's concern to respect Member States' legal traditions and not to attempt to replace or diminish the role of existing ADR procedures under this system, but doubts whether this represents a significant step forwards in dematerialising disputes, allowing them to be processed online.

3.6 The EESC acknowledges that, in practice, this proposal confines itself to setting up a type of 'electronic postmark' or an 'online mailbox' to which complaints are sent and, after a purely formal sorting process, are forwarded to the different ADR entities, thus constituting a cumbersome bureaucratic and administrative delivery system.

3.7 The EESC considers that the proposal lacks ambition and falls far short of what might be hoped and what is desirable and feasible, especially as regards:

- a) The 2009-2013 Multiannual Action Plan on European Electronic Justice⁽⁵⁾;
- b) The groundbreaking document of the United Nations Commission on International Trade Law⁽⁶⁾ (UNCITRAL), A/CN.9/706, entitled *Possible future work on online dispute resolution in cross-border electronic commerce transactions*;
- c) The exclusion of disputes that are not solely cross-border in nature, obliging Member States that so wish to put in place purely national systems for cross-border disputes, even if the

parties concerned are of different nationalities, but happen to reside, permanently or temporarily, in the same Member State;

- d) The exclusion of disputes that do not arise exclusively from transactions concluded via electronic means (in other words, offline), not having adopted the broader definition of electronic commerce set out in Directive 2000/31/EC, including conflicts arising from online commercial communications that do not result in a transaction. There is also the possibility, now recognised by some ADR, of handling by electronic means disputes arising from transactions concluded at a distance via non-electronic means (such as catalogue sales or sales made in the home). Account could furthermore have been taken of on-the-spot transactions taking place on trips to other Member States, in cases where disputes arise some time after the transactions have been concluded;
- e) The failure to adopt what is today commonly known as a 2nd-generation ODR (*Online Dispute Resolution*) system⁽⁷⁾ in which the technology (inherent to this platform) plays an active role and functions as a genuine *fourth party*⁽⁸⁾ (in addition to the two parties and the mediator/arbitrator) in the online consumer dispute resolution process; this would enable the parties to communicate remotely, in real time or with a time lag, via the new information and communication technologies, instead of all parties having to be physically present.
- f) The absence of any reference to a quality assurance system for the system set up, such as that provided by standard ISO 10003 – 'Guidelines for dispute resolution external to organisations', which could even be used to standardise a prospectus providing information on the mechanism's workings, or of the existence of a 'watch list', on which complaints against professionals can be recorded.

3.8 Although the regulation states the ODR platform will have the function of 'enabling the parties and the ADR entity to conduct the dispute resolution procedure online' (Article 5(3)(d)), the EESC had hoped that the foundations would be laid for an ODR system that would contribute to the legitimacy of online or electronic justice; it would hope that the system would be shaped in such a way as to re-use and copy existing infrastructure and technological resources, synchronous or asynchronous, such as chat, electronic forums, mailing lists, email, tele-conferencing, audio- and video-conferencing, virtual meeting rooms etc.; that it would improve justice applications and advocate first- and second-generation ODR tools for the process (online negotiation, mediation and arbitration), promoting e-mediation between the parties, a more robust production process and more easily observable and predictable procedures.

⁽⁴⁾ Directive 2011/83/EU in OJ L 304, 22.11.2011, p. 64.

⁽⁵⁾ OJ C 75, 31.3.2009, p. 1.

⁽⁶⁾ Can be consulted at: http://www.uncitral.org/uncitral/publications/online_resources_ODR.html.

⁽⁷⁾ Cf. G. Peruginelli and G. Chiti *Artificial Intelligence Dispute Resolution* in Proceedings of the Workshop on the Law of electronic agents – LEA 2002.

⁽⁸⁾ Cf. amongst others, the CYBERSETTLE (<http://www.cybersettle.com>) SMARTSETTLE (<http://www.smartsettle.com>) and SQUARETRADE procedures (<http://www.squaretrade.com>). The latter is responsible for having settled over 200 000 disputes in 120 countries since 1999, ECODIR (available at <http://www.ecodir.org/>).

3.9 Even without progressing towards the second-generation models referred to above, the Commission should nonetheless, in order to meet expectations for this initiative and secure the benefits announced, at least have considered the possibility of including decision support systems in the platform's functions for the parties in an ODR system. In these second-generation models, the use of telematic tools and assistance from artificial intelligence based on mathematical models facilitate rulings on disputes through the systematic evaluation of the parties' proposals, in turn supported by IT specialists with equal capacity ('intelligent interfaces') in a interactive process based on standard negotiating patterns such as BATNA (*Best Alternative to a Negotiated Agreement*), WATNA (*Worst Alternative to a Negotiated Agreement*) and finally ZOPA (*Zone of Possible Agreement*). Examples of decision support systems include expert systems, systems of information based on previous cases, computer database access systems (case-based reasoning or 'CBR' in international literature) and online dispute resolution based on the parties' different approaches to dispute resolution.

3.10 The EESC also wonders how the Commission envisaged online resolution for cases concerning not just typical market disagreements, covering problems such as products being 'defective', 'not working properly' or 'delays in delivery or failure to deliver', but also the debate on unfair contract terms and the law applicable to contracts.

3.11 The EESC would like to see a specific reference to the possibility of the parties concerned being represented by lawyers or by third parties, specifically associations representing the interests of consumers in their online complaints.

3.12 The Committee is surprised that the issue of funding for the implementation of this new instrument is not addressed explicitly and head-on, given that in the consultations that were held, consumers' representative associations definitely deemed this to be essential. Some Member States cannot afford the increased costs of setting up new bodies, training 'facilitators' and other support staff, providing information and assistance to consumers and carrying out new administrative tasks. This issue was considered across the board to be crucial to ensuring the system's impartiality and independence.

4. Specific comments

4.1 Article 1 – Subject matter

The subject matter of this regulation should also include the principle of access to law and to justice for the parties concerned. In addition to dispute resolution, the platform could be used to prevent disputes arising, providing relevant information aimed at remedying problems.

4.2 Article 2 - Scope

For economic reasons too, the EESC would like to see the regulation apply also to disputes that arise offline, as is already common practice among a number of ADR providers who work with information technologies to mediate between the parties concerned.

As a purely formal issue, it is suggested that exclusions from the scope be covered by Article 2 and not Article 4, which covers definitions.

4.3 Article 3 - Relationship with other EU legislation

The EESC proposes including the directives on Electronic Commerce, the Sale of Consumer Goods and Distance Contracts⁽⁹⁾.

4.4 Chapter II - European online dispute resolution platform

For the sake of greater clarity, the EESC would prefer that material on the platform's design and on procedures be covered by different chapters.

4.5 Article 5, para. 3(b)

The EESC harbours doubts as to the practicality of the parties selecting an ADR entity, for lack of criteria for doing so. It would also make sense for the parties themselves to be able to appoint an entity with which they have already previously worked.

4.6 Article 5, para. 3(i)

The EESC fears that this information might not be enough. The Committee proposes that, in addition to statistics on the outcome of disputes, the platform should indicate the most commonly used methodologies and statistical data broken down into the different subjects dealt with. The platform should also include a process management system, with management indicators, including cases that have been opened or completed or are pending, and the duration and costs of the case. The EESC believes, furthermore, that simply indicating or suggesting one or more ADR entities to the parties does not guarantee the goal that the certificate is supposed to secure: access to justice for the parties. The EESC wishes to draw attention to the fact that if only one of the parties does not agree with the ADR entity suggested, the procedure could end up being dropped (see Articles 7(3), 8(2)(b) and (4)), which actually dooms the system to failure.

⁽⁹⁾ Directive No 2000/31/EC, OJ L 178, 17.7.2000, p. 1, Directive No 1999/44/EC, OJ L 171, 7.7.1999, p. 12 and Directive No 97/7/EC, OJ L 144, 4.6.1997, p. 19.

4.7 Article 6 - Network of online dispute resolution facilitators

The EESC considers the term 'online dispute resolution facilitators' to be misleading; it should be avoided because in actual fact, the process of dispute resolution cannot be carried out online, but only through traditional ADR methods. It is only the complaint that is submitted electronically.

The EESC has serious concerns that this system could affect or jeopardise the speed and effectiveness advocated in the aims of the proposed regulation, resulting in excessive red tape, given the three-phase re-routing system being recommended, and clearly calling into question the possibility of effective compliance with the 30-day limit laid down in Article 9(b). It should be noted that until the parties engage in proper dispute resolution with the ADR provider, the complaint must be submitted to the platform electronically, then examined and proposed to the competent ADR entities and re-routed by the ODR facilitators to the ADR entity selected, entailing unavoidable bottlenecks for the parties, incurring costs due to delays as well as opportunity costs.

4.8 Article 7 - Submission of a complaint

The EESC recommends that due regard be paid to the need for the complaint and the appended documents to be translated reliably and affordably for the parties. This matter is crucial to the success of the system but is not addressed in the proposal, which does not even refer to the automated translation technology that already exists and which should be used in this scheme.

4.9 Article 7, paras. 2 and 6

The EESC would emphasise that the document in the annex, entitled *Information to be provided when filling in the electronic complaint form*, is so totally inadequate in terms of its content and the way it is supposed to be filled in that it requires no comment.

In the EESC's view, this website, as well as providing a form, should offer an online instruction manual covering how to fill in the form. It should include specific guidance for this purpose (prior instructions enabling users to familiarise themselves with the software, together with a support website with instructions, assistance and answers to frequently asked questions). An interactive area should be made available for the parties to set out their problems and receive immediate online responses. The website should make it possible to state the facts orally in the different languages with an immediate translation, making use of the new communication technologies already in existence. It should also provide a system for automatically detecting forms filled out incorrectly or incompletely, providing the information required to correct them and thereby obviating the need for a new complaint to be submitted.

The EESC considers that certain vague legal concepts such as i) 'sufficient' (paragraph 2) and ii) 'data which are ... relevant and

not excessive in relation to the purposes for which they are collected' (paragraph 6) should be clarified so as to secure concrete information.

The Committee would suggest that provision be made not only for an obligation as to the means employed (making an online form available) but also to ensure that filling in the form is an intuitive, consumer-friendly, simple and straightforward process ⁽¹⁰⁾.

The EESC furthermore proposes linking this online platform to an 'online complaints book', which online traders' websites should feature. Once this form is filled in, it could be forwarded directly, automatically and electronically through an interface to the central ODR platform, to ensure that the dispute resolution actually takes place.

4.10 Article 8(1)

The EESC would point out that the average consumer is generally somewhat illiterate, (as well as suffering from digital exclusion) and fears that the effect of the sanction provided for in paragraph 1 will run counter to the initiative's aims and result in a deliberate formal tactic for not resolving disputes.

4.11 Article 12 - Data confidentiality and security

The EESC wishes to point out that the rules concerning professional secrecy and confidentiality are subject to national legislation and that no provision is required for the burden of proof or for solutions should these requirements not be met.

4.12 Article 13 - Consumer information

The EESC proposes that trustmarks be set up by accredited and authorised entities, for economic operators that advertise (on their websites) and promote dispute resolution via this platform, such as 'TRUSTe', the Euro-Label or the Global Trustmark Alliance.

The EESC advocates including a reference to dispute resolution through this online platform in codes of conduct, to be drawn up by economic operators, consumer and supplier organisations and also government bodies.

⁽¹⁰⁾ Important communications can undeniably be spoiled by poor spelling or grammatical or typing mistakes. Spelling mistakes can give rise to hasty conclusions regarding the other party or sow doubts concerning the quality of the dispute resolution process. To this end, spell-checking tools would be useful, as used for example at <http://www.juripax.com/>.

4.13 *Articles 15 and 16 – Implementing acts and delegated acts*

In some of the proposal's provisions (Article 6(5) and Article 7(4) and (5)), crucial aspects of the legislative instrument and of the functioning of the system are left to future implementing or delegated acts, which the EESC believes go way beyond the limits laid down in Article 290 of the Treaty and stipulated in the Commission Communication on the Implementation of Article 290 of the Treaty on the Functioning of the European Union (COM(2009) 673 final of 9.12.2009), with consequences in terms of the instrument's legal security and certainty.

Brussels, 28 March 2012.

The president
of the European Economic and Social Committee
Staffan NILSSON
