

# Client Alert

15 May 2013

## New EU rules on online and alternative dispute resolution - a win/win?

By Sarah Wells and Susan McLean

On 22 April 2013, the Council of the European Union (the “Council”) adopted a regulation on online dispute resolution (“ODR”) and a directive on alternative dispute resolution (“ADR”). Tonio Borg, the EU's Commissioner for Health and Consumer Policy has described the new regime as a “...win-win for consumers, who will be able to resolve their disputes out-of-court in a simple, fast and low-cost manner, and also for traders who will be able to keep good relations with customers and avoid litigation costs.”

### ODR REGULATION (THE “REGULATION”)

The Regulation has been developed to apply to:

- disputes arising out of online sales or service contracts between an EU consumer and an EU trader; and
- disputes initiated by a trader against an EU consumer where the Member State in which the consumer is resident allows for such disputes to be resolved via ADR.

An online sales or service contract is one in which a trader, or its intermediary, has offered goods or services through a website or by other electronic means and the consumer has ordered those goods or services on that website or by other electronic means (including via a mobile phone).

The planned online dispute resolution regime will operate through a free-to-access interactive website established by the European Commission (the “ODR Platform”).

If a dispute arises under a contract to which the regime applies, the complainant party will be able to submit a complaint via the ODR Platform. The complaint (and any related documentation) will be submitted to the ODR Platform via an electronic form. The form will be submitted to an independent ADR entity able to deal with the dispute in question. The ADR entity will be selected based on the information in the complaint form or on the basis of the trader having committed to refer disputes to a particular ADR entity.

The ODR Platform will also offer an optional case management tool enabling ADR entities to conduct the dispute resolution procedure with the parties through the ODR Platform if they wish to do so. It is important to note that any ADR conducted under the Regulation will not oblige the parties to be physically present, unless the ADR procedure provides for this and the parties agree.

### What is the difference between a Directive and a Regulation?

EU regulations become law in the UK and each other EU member state automatically, without the need for local state-level implementing laws; whereas EU directives require separate action by each member state to bring them into force in each country within a given timescale. Issues can emerge if, as often happens, different member states convert EU directives into local laws through different routes and using varying language.

# Client Alert

The Regulation also obliges traders who engage in online sales throughout the EU (including via any online marketplace) to provide an electronic link to the ODR Platform on their website as well as an e-mail address via which the consumer can contact the trader in the event of a dispute. The ODR Platform must also make certain general information available, including information on the ADR entities, on the relevant ODR contact points for each Member State and statistical data on dispute outcomes submitted via the ODR Platform.

## ADR DIRECTIVE (THE "DIRECTIVE")

The Directive is designed to aid harmonisation of ADR across the EU and, in particular, help consumers by providing them with information on how to file a complaint with an ADR entity, as well as ensuring that any such ADR is carried out in a consistent manner. It is linked with the Regulation in that each Member State will submit to the European Commission a list of ADR entities qualifying under the Directive and this list will be made available on the European Commission website. In turn, the ODR Platform will be designed to link to this list.

The Directive applies to out-of-court disputes concerning sales contracts or service contracts between a trader established in the EU and a consumer resident in the EU. It does not apply to disputes between traders, or procedures initiated by a trader against a consumer.

The Directive requires Member States to ensure that ADR entities have an up-to-date website allowing consumers to submit a complaint and related documents (preferably online, but offline if deemed appropriate) as well as containing information including but not limited to:

- contact details;
- network membership;
- types of dispute it is competent to deal with;
- languages in which complaints can be submitted to it;
- types of rules the ADR entity may use in dispute resolution;
- whether or not the parties can withdraw from the procedure;
- average length of the procedure;
- number of disputes it has received;
- number of disputes it has resolved and in what time; and
- costs of the ADR procedure.

## How does the Regulation impact on traders outside the EU?

The Regulation applies between a consumer resident in the EU and a trader established in the EU. However, it also applies between a trader resident outside the EU if such trader engages in sales or service contracts (including sales contracts having as their object both goods and services) with a consumer resident in the EU and such EU Member State allows for such disputes to be resolved through the intervention of an ADR entity.

Whether such a dispute is able to be resolved through the intervention of an ADR entity would be determined by the list submitted by each Member State to the European Commission under the ADR Directive. Certain Member States, such as the United Kingdom, are likely to have a greater body of qualifying ADR entities and therefore the Regulation would have a wider impact, as compared to another Member State where ADR is less developed.

Traders based outside the EU who sell goods or services to European consumers will have to consider where their customers are based, in order to assess the likely impact of the Regulation on their business.

# Client Alert

---

An ADR entity is required to appoint persons to be in charge of ADR who possess the requisite knowledge and skills and have the requisite independence. The Directive encourages all ADR disputes to be resolved within 90 days of the entity receiving a complaint file.

## IMPLICATIONS

In May 2012, the UK Government was somewhat critical of the proposed regime. The Department for Business, Innovation and Skills, following consultation with a number of UK stakeholders such as the National Association of Citizens Advice Bureaux (“CAB”) and Office of Fair Trading (“OFT”), said that the European Commission had placed too much emphasis on a few high value claims and therefore over-estimated the costs of consumer complaints to businesses. Furthermore, the OFT and CAB suggested that the fact ADR was not made mandatory meant that the new regime didn’t go far enough.

Member States have two years to apply the new rules. The ODR Platform will then come into operation. How the UK chooses to implement the Directive remains to be seen.

Whether or not the new regime implemented by the Regulation and the Directive meets the Council’s aims and truly provides a win-win for both consumers and traders depends on the extent to which the new platform is used and how effective it is in practice. If a provider’s own complaints procedure proves to be a speedier route to settlement of a dispute, this may continue to be a consumer’s first port of call in the event of a problem.

## Contact:

**Susan McLean**

44 20 7920 4045

[smclean@mofo.com](mailto:smclean@mofo.com)

**Alistair Maughan**

44 20 7920 4066

[amaughan@mofo.com](mailto:amaughan@mofo.com)

## About Morrison & Foerster:

We are Morrison & Foerster—a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We’ve been included on *The American Lawyer’s* A-List for nine straight years, and *Fortune* named us one of the “100 Best Companies to Work For.” Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at [www.mofo.com](http://www.mofo.com).

*Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. Prior results do not guarantee a similar outcome.*