Resolving consumer disputes: new obligations for ODR & ADR?

The Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015 (the "ODR Regulations") introduced the European Commission’s online dispute resolution platform (the "ODR Platform"), with effect from 15 February 2016.

Who does the ODR Platform apply to?

The ODR Platform applies to nearly all traders and marketplaces established in the EU who sell goods, services or digital content online or via other electronic means. This covers both online traders selling directly to consumers via their own websites, and those providing online marketplaces where consumers can buy goods, services, or digital content (such as Amazon or eBay). "Other electronic means" includes social media, email, telephone, fax and text messages.

What do I have to do to comply?

Provide a link to the platform: The ODR Regulations require that all traders and online marketplaces covered by them must incorporate an easily-accessible electronic link to the ODR Platform on their website by 15 February 2016 (the link can be found here). A logical place for this would be alongside existing complaints information.

Provide an e-mail address: In addition, an online trader must also state their email address (an online contact form not stating an e-mail address is insufficient).

Check you are not bound to use alternative dispute resolution (ADR) already: For traders already obliged or opting to use ADR (see below for further discussion of ADR), through signing up to an ADR scheme, through law, through being a member of a trade scheme, or by way of the terms of their

What is the ODR Platform?

The ODR Platform is intended to be used by online traders/market places to provide an easier and more efficient method of resolving disputes with consumers who have a complaint about goods or services they have bought online.

It will provide a portal for consumers to submit a complaint to a relevant, registered alternative dispute resolution ("ADR") provider with the aim of resolving the dispute (although traders are not obliged to use ADR).

Whilst focused primarily on facilitating the resolution of cross-border disputes for those selling online in the EU, the ODR Platform still applies to those selling only within the UK.

The ODR Platform was originally intended to go live on 9 January 2016, but will now be operational for both consumers and traders on 15 February 2016 here.
What is ADR?
ADR encompasses any process to resolve a dispute without recourse to court. The simplest and most common form of ADR is direct negotiation, but where it does not give rise to a satisfactory outcome, a range of other options is available.

Broadly, ADR can either allow:
- the parties to the dispute to decide their own outcome, often with the help of a neutral third party. This is typically the case for direct negotiation, conciliation and mediation; or
- someone who is not a party to the dispute to reach a binding decision. This is what happens in adjudication, arbitration and ombudsman schemes.

ADR has some distinct advantages, the most obvious of which are the potential to reach a satisfactory outcome more quickly and cheaply in a confidential environment. There is also more scope to be creative with how a dispute is settled.

Am I obliged to use the ODR Platform?
No, the ODR Regulations do not require the trader/marketplace to use the ODR Platform, simply to give notice of it. However, the ODR Regulations are intended to supplement additional regulations on consumer ADR brought into force in October 2015, and any trader must be aware of their obligations to provide information about ADR providers and whether they intend to use them or not.

A re-cap on ADR obligations
The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 (the "Consumer ADR Regulations") came into force on 1 October 2015 and implement the ADR Directive, intended to promote ADR as a means of redress for consumers in relation to unsatisfactory goods or services, particularly for online sales in the EU.

Is ADR compulsory?
There is no general rule in law that says that ADR must be used to resolve a dispute. However, in some sectors ADR is compulsory. For example, most financial services consumers can insist that their complaint be dealt with by the Financial Ombudsman Service. Also, estate agents and telecommunications businesses traders must belong to an ADR scheme, although they have a degree of choice about which one.

In sectors where ADR is not compulsory by law, traders may nevertheless be members of a trade association or a "trusted trader" scheme that requires its members to use ADR. Such schemes often provide or arrange the ADR scheme for their members.

A trader can also use their own contract terms to require themselves to use ADR, although they cannot insist that a consumer does so.

Even where there is no obligation requiring the use of ADR, the Civil Procedure Rules (CPR) require parties to any dispute to consider whether ADR is appropriate both before civil proceedings are commenced, and throughout the life of the case. Again, the CPR does not make ADR compulsory, but if a party chooses not to participate without good reason, then it may suffer adverse costs.

contract, the ODR Regulations impose additional obligations, to:
- inform consumers of the existence of and potential to use the ODR Platform to resolve disputes;
- provide a link to the ODR Platform in any offer made to a consumer by email; and
- include information about the ODR platform and a link to it in the general terms and conditions applicable to any online sales or service contracts.

Failure to comply: Trading standards services may apply for a court order requiring any online trader or marketplace failing to comply with the information requirements above to do so, although in practice the trader will normally be warned first. Continued failure following such a court order may lead to an unlimited fine and up to two years’ imprisonment.

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Key Issues for Retailers to Consider

In assessing whether or not to sign up to an ADR scheme, traders should consider the following:

- How much will it cost? – including both the membership fee and any charges for processing claims.
- Is the decision binding, and for whom? - it is common for the outcome of the ADR to be automatically binding upon the trader (but not upon the consumer).
- What are my competitors doing? – widespread take-up by competitors may cause negative PR issues for any retailer refusing to engage with ADR.

consequences. That said, most consumer claims are brought under the small claims track where adverse costs orders are less likely to be an issue.

The Impact of the Consumer ADR Regulations

The Consumer ADR Regulations provide for the designation of competent authorities to vet and approve those who apply to become an ADR provider, together with the standards that a certified ADR entity must meet. For those in the retail sector, the Chartered Trading Standards Institute (the "CTSI") is the competent authority. ADR providers which have already been approved by the CTSI are listed on its website here. The ADR mechanism which these providers will offer under the Regulations is designed to be quick (generally concluded within 90 days of receiving the complete complaint file) and free of charge to consumers, or available at a nominal fee.

The Consumer ADR Regulations apply to all business in the UK that sell goods, services or digital content to consumers (with some limited exceptions), and impose certain obligations on traders to provide information to consumers about ADR entities. For example, a trader who is obliged by law, or its trade association rules, or the terms of a contract to use ADR services, must make the name and website address of the relevant ADR entity available on its website and in its general terms and conditions.

In addition, any trader, including those who are not obliged to use ADR services, who receives a complaint from a consumer about a contract, and is unable to resolve the complaint with them using its own internal complaints procedure, must inform the consumer in writing:

- that it cannot settle the complaint;
- the name and website address of an ADR provider that would deal with the complaint, if the consumer wishes to use ADR; and
- whether the trader is obliged or prepared to make use of the ADR provider.

In other words, the trader has to give a consumer details of an ADR provider but does not have to agree to use ADR. The information should be given in durable form, such as an email or a letter – most likely, the final deadlock letter in response to a consumer complaint.

Consequences for retail businesses

Notwithstanding the Regulations, it remains the case that whilst providing ADR information is now mandatory, actually using ADR continues to be voluntary, as long as the trader is not separately obliged to do so.

Having said that, traders may feel compelled to adopt an ADR process if their competitors are seen to be doing so. If there is widespread take-up, then it may generate negative PR for a trader to inform consumers of the existence of an ADR provider but to state that it is not prepared to use it.

In addition, if a trader fails to comply with the information requirements, Trading Standards can apply for a court order obliging compliance, breach of which can lead to a maximum penalty of an unlimited fine and two years’ imprisonment.
Furthermore, quite apart from the Regulations, one should not overlook the obligation on all parties to consider ADR under the CPR. We anticipate that offering the sort of ADR process envisaged by the Regulations will be good evidence that a party has fulfilled those obligations, at least at the pre-action stage of litigation. That said, there may be good reasons for not agreeing to ADR, for example where a trader has its own robust complaints-handling procedures.

Key Points

- **No general obligation to use ADR in business to consumer disputes.**

  **BUT**

- **All traders must:** (i) provide information about the ODR Platform on their websites by 15 February 2016; and (ii) provide information about ADR providers (and willingness to use ADR) where a complaint is unresolved.

- **Some traders** may be under an obligation to use ADR as a result of the other sector-specific regulatory regimes or voluntary membership or a code of practice requiring use of ADR. In these cases, information about ADR and the ODR Platform must be provided on the trader’s website and in its general terms and conditions.

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