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- (a) public bodies or their representatives;
- (b) consumer organisations having a legitimate interest in protecting consumers;
- (c) professional organisations having a legitimate interest in acting.

Article 26: Penalties

1. Member States must lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and must take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.

2. Member States must notify those provisions to the Commission by ... and must notify it without delay of any subsequent amendment affecting them.

Article 27: Transposition

1. Member States must adopt and publish, by ..., the laws, regulations and administrative provisions necessary to comply with this Directive. They must forthwith communicate to

the Commission the text of these measures in the form of documents and inform the Commission of any subsequent amendments without delay. They must apply those measures from ... [6 months later than the date in the first sentence]. When Member States adopt those measures, they must contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States may determine how such reference is to be made.

2. The provisions of this Directive apply to contracts by ... [6 months later than the date in the first sentence of para (1)], irrespective of whether or not concluded before, on or after this date.

Article 28: Entry into force

This Directive enters into force on the 20th day following its publication in the Official Journal of the European Union.

Article 29: Addressees

This Directive is addressed to the Member States. ■

Naomi Creutzfeldt*

Implementation of the Consumer ADR Directive

Alternative dispute resolution (ADR) and online dispute resolution (ODR) are pathways to redress for consumers to resolve their complaints about goods and services. In July 2015 the consumer ADR directive (2013/11/EU) was implemented in EU member states. It requires member states to provide ADR bodies for most consumer to business (c2b) disputes. Additionally, the regulation on ODR (2013/524), implemented in February 2016, involves the creation of a pan-European platform as access point for complaints about e-commerce. Combined, the legislations cover dispute resolution for domestic, cross-border, and e-commerce consumer disputes. The aim is to provide an accessible and simple way for European consumers to access justice, to safeguard their rights and to engage in commercial transactions in the EU single market. Civil justice systems present obstacles for consumers to access courts, in the form of unpredictable costs, complexity of litigation, and lack of clear timescales. The legislation on ADR and ODR introduces significant change to the existing civil justice landscape in Europe by creating an additional pathway for consumers to obtain accessible, timely, and cost effective redress. The idea of this EU harmonisation measure is plausible and fills an access to justice gap. However, the reality on the ground, its implementation, is providing member states with challenges. This opinion piece offers comments on how some of the EU member states have implemented the new rules into national legislation, and discusses some of the challenges.

I. European legislation on consumer ADR & ODR

The EC special Eurobarometer 342 in 2011¹ reported that one in five EU consumers have encountered problems with goods and services purchased in the EU single market. This resulted in a financial loss of up to 0.4 % of the EU's GDP. European legislators hope that ADR instruments will save 22.5 billion Euros each year, totalling 0.19 % of EU's GDP.

In 2013 European legislators passed the Directive on consumer ADR (2013/11/EU) and the Regulation on ODR (EU) 524/2013.² These two legislations form part of an ongoing attempt to strengthen the EU internal market by protecting its consumers and providing access to ADR. Consumer ADR is a cost effective and proportionate additional pathway to redress, alongside national court systems.³ Two EC recommendations on ADR were passed in 1998 and 2001, without binding principles, but laying the foundations for the 2013 legislation.⁴ Additionally, in 2008 the Mediation Directive, aimed at court proceedings and extra judicial proceedings,

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1 European Commission, 'Special Eurobarometer 342: Consumer Empowerment' (2011) <http://ec.europa.eu/public_opinion/archives/ebs/ebs_342_en.pdf>.

2 Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on Consumer ADR) [2013] OJ L165/63; Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) [2013] OJ L165/1.

3 Christopher Hodges, Iris Benöhr and Naomi Creutzfeldt-Banda, *Consumer ADR in Europe* (Hart Publishing 2012); Naomi Creutzfeldt, 'The Origins and Evolution of Consumer Dispute Resolution Systems in Europe' in Christopher JS Hodges and Astrid Stadler (eds), *Resolving Mass Disputes: ADR and Settlement of Mass Claims* (Edward Elgar 2013) 223-46.

4 Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes [1998] OJ L 115/31; Commission Recommendation 2001/310/EC of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes [2001] OJ L 109/56.

was passed.⁵ Generally, ADR has developed in specific sectors, where legislation required it (eg financial services, energy, telecoms), and ADR has also encouraged the development of specialized networks (ECC Net, FIN Net).⁶

Currently, there are about 1,000 ADR bodies in the EU providing a variety of outcomes, reflecting a great diversity (eg funding, procedures) of gaps in sector coverage. The three main problems are: (1) Insufficient ADR coverage; (2) lack of ADR awareness; and (3) diverging policy levels. The new legislation tackles these problems. It requires: full ADR coverage (article 5); information obligation (article 13); harmonised, binding quality standards for ADR entities and ADR procedures (article 5-12); and control of compliance with quality standards through national competent authorities (article 20). The scope of the new legislation is set out in article 2 of the ADR Directive.

The ODR Regulation requires that an ODR portal is established. This provides consumers with one point of entry to assist in finding the right body to help them sort out their complaints about online purchases (e-commerce). The portal is hosted by the European Commission and was launched in February 2016.⁷ The scope of the ODR legislation also includes business to consumer (b2c) disputes, unlike the ADR directive, that deals only with c2b disputes.⁸ The platform has four steps to resolve a dispute: (1) submission of complaint online; (2) agreement on ADR entity; (3) case handling by ADR entity; and (4) outcome and closure.

The new legislation aims to improve consumer protection and consumer confidence, and to enforce consumer rights in the EU single market. Critics highlight that these legislative measures are merely (soft law) instruments to further Europeanise consumer law,⁹ and that these are symptomatic of a shift towards *better enforcement of less law*.¹⁰ Commentators fear the loss of cases brought to courts (no case law) and a rush towards privatised justice.¹¹

Further points to consider in the implementation and post-implementation stages of the legislation include the culture-specific relationships with the national legal system, and existing exposure to ADR. In some member states we can identify an existing and developed ADR culture, while in others it is an unfamiliar (and consequently less trusted) approach. For people to accept and build trust in an ADR body, they have to know what to look for, where they might find them, and what to expect.¹²

Ombudsmen, ADR bodies that are established in all member states, are concerned about the brand.¹³ A debate about protecting the ombudsman brand has arisen in the UK, as existing ombudsmen are worried that the ADR directive will encourage the emergence of new ombudsmen who are not subject to the long established quality criteria of the UK Ombudsman Association.¹⁴

It is a challenge to implement new laws within the diversity of EU national contexts. Distinct national characteristics of the legal system, political influences and peoples' experiences of these will have an impact on the acceptance of new legislation. As a result of the many aspects left to member states, consumer confusion will be inevitable. Questions arise as to how consumers will know who to turn to, as the Directive sets no restriction on the number of ADR bodies per sector. How will a common high standard be guaranteed, and how will the oversight be managed?

II. Implementation of the legislation in member states

The EU is made up of 28 member states, each with its own national priorities, procedures, policies and legal systems. EU legislation sets out what member states must achieve and transpose into their national laws. The form and method is up to national authorities and varies. Common national obstacles to implementation are procedural in nature, relating to the amount of change that is needed to national laws.¹⁵ Further frequent barriers to smooth national implementation are of a political nature, resulting in a lack of prioritisation of EU law matters.

The directive on consumer ADR requires member states to change existing national ADR frameworks to provide full coverage, name a competent authority, and *a body that notifies and reports to the EC*, amongst other things. Additional to the European legislation requirements, the implementation into national legal systems depends on the national context, other political priorities (eg elections), national court systems, and availability of legal aid, to only name a few factors.

Member states have to provide ADR entities for nearly every c2b dispute, and *'member states should have the possibility of fulfilling this obligation by building on existing properly functioning ADR entities and adjusting their scope of application, if needed, or by providing for the creation of new ADR entities.'*¹⁶ The Directive does not ask member states to create separate ADR entities for each retail sector. Rather, to provide the required geographical and sectoral coverage and access to ADR. Member states can create a residual body that deals with disputes that have no obvious home in other ADR entities.

5 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters [2008] OJ L 136/3.

6 The year 2015 marks the 10-year anniversary since the European Commission, together with national governments, established a network of European Consumer Centres (ECC) in all 28 member states of the European Union, Norway and Iceland. The ECC-Net promotes the understanding of EU consumers' rights and assists in resolving complaints about purchases made in another country of the network, when travelling or shopping online. 'European Consumer Centres' (European Commission: Consumers, 2015) <http://ec.europa.eu/consumers/solving_consumer_disputes/non-judicial_redress/ecc-net/index_en.htm>; 'Welcome to FIN-NET' (Financial Dispute Resolution Network) <http://ec.europa.eu/finance/fin-net/index_en.htm>.

7 See <<https://webgate.ec.europa.eu/odr/main/index.cfm?event=main.home.show&lng=EN>>.

8 ADR is also seen to be beneficial to businesses, since due to its conciliatory character the relations with their consumers can be maintained, they received feedback about their performance, and further time and money is saved by bypassing lengthy court processes.

9 Hans Schulte-Nölke, 'The Brave New World of EU Consumer Law – Without Consumers, or Even Without Law?' (2015) (4) EuCML 135-139.

10 *ibid* 139.

11 Horst Eidenmüller and Martin Engel, 'Against False Settlement: Designing Efficient Consumer Rights Enforcement Systems in Europe' (2014) 29 Ohio State Journal on Dispute Resolution 261.

12 Naomi Creutzfeldt, (2016) Project report: 'Trusting the Middle-man: Impact and Legitimacy of Ombudsmen in Europe', London: University of Westminster. Available at: <<https://www.law.ox.ac.uk/trusting-middle-man-impact-and-legitimacy-ombudsmen-europe/project-reports>>.

13 Creutzfeldt (n 4).

14 'Ombudsman Association' (Ombudsman Association 2015) <<http://www.ombudsmanassociation.org>>; 'About Ombudsmen' (Ombudsman Association 2015) <<http://www.ombudsmanassociation.org/about-the-role-of-an-ombudsman.php>>.

15 Marta Ballesteros and others, 'Tools for Ensuring Implementation and Application of EU Law and Evaluation of their Effectiveness' (European Parliament: Directorate-General for Internal Policies 2013) <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493014/IPOL-JURI_ET\(2013\)493014_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493014/IPOL-JURI_ET(2013)493014_EN.pdf)>.

16 Directive on Consumer ADR (n 3) para 24.

All ADR bodies need to be evaluated and found to meet the required quality criteria, and encourage best practise, as set out in the directive. This extends to ADR bodies from member state A covering disputes with traders from member state B, for example. Therefore it is essential to create a high quality standard for these bodies, observed throughout the EU.

Another requirement of the Directive is for member states to name a competent authority that is then responsible for collecting information, communicating with the registered ADR entities, and feeding this back to the European Commission. The competent authorities have the task to assess whether notified ADR bodies fulfil the quality criteria (see Chapter II of directive) and national provisions implementing it.

To date (as of June 2016), twenty-four of the member states have notified a complete transposition of the ADR Directive, two partial transpositions and two member states have not yet notified the European Commission about transposition into national law.¹⁷ A small number of member states' transposition will be late, for assorted reasons. As mentioned above, the main reasons for the lack of prioritization of EU law matters are political, such as national elections, or the time it takes to pass a law, for example. This has a knock on effect, as the list of notified national ADR bodies is essential for the functioning and signposting of the ODR platform. The ODR platform will direct consumers to national ADR bodies, and if those bodies do not exist or are not notified the consumer will not be able to have their dispute settled promptly.

III. National implementation

As mentioned above, the member states are at different stages of the implementation process. The process is ongoing, and this opinion piece can therefore offer an overview of the current status quo (May 2016). It is likely, however, that at the time of the publication of this piece some further changes have occurred. In an attempt to impose some structure onto a largely unfinished job, I will focus on broad dimensions of the implementation requirements. These are: existing ADR institutions, transposition into national law, decision on competent authorities and residual bodies, by way of some national examples.

The following presents a brief overview of six countries' implementation status (Ireland, Italy, France, Spain, the Netherlands, and the United Kingdom) and some issues that they face.¹⁸

1. Ireland

Ireland has a very inconsistent consumer ADR network, with large gaps in sector coverage. The implementation of the consumer ADR Directive offers a huge opportunity for Ireland to build a culture of ADR through a uniform approach.

The consumer ADR Directive has been implemented in Ireland, and can be found in the Irish Statute Book.¹⁹ The Consumer and Competition Commission will authorise consumer bodies, and together with the ECC Ireland will notify and report on ADR bodies to the EC.²⁰ There are five notified ADR entities, some public and some private. To date there is no residual ADR body. There are around ten other bodies providing ADR, although not many of those stand a chance of becoming notified bodies, due to existing procedures, structures and closeness to businesses. The required

full sector coverage does not exist, and how this will be solved remains a big question. Ireland could take the opportunity and follow through on their consultation on a consumer ombudsman. Ireland is a small market, with nine existing public ombudsmen. It would be relatively straightforward to create a single consumer ombudsman, especially as the existing ombudsmen favour this approach. Another advantage is that law, in Ireland, protects the name Ombudsman. If Ireland were to choose this path, it would provide a straightforward way for consumers to access redress and hopefully avoid confusion.

2. Italy

Italy's laws on ADR used to be very general and cross-sectoral General ADR in the form of civil and commercial mediation is mandatory and has a broad scope; assisted (by lawyers) negotiation is also mandatory and compulsory for road accidents and in claims up to 50,000 euros – excluding the claims of consumers. Italy's courts have a huge number of pending cases, with a massive backlog of 5 million civil cases, an average length of proceedings of ten years, limited public resources, and widespread social dissatisfaction with the legal system. Despite this, litigation remains the dominant means of redress in Italy, with professional opposition to extrajudicial reforms, and a lack of consumer protection. As such, we can say that there is a lack of ADR culture in Italy.

Italy's consumer code (Legislative Decree no 206 of 6 September 2005) has been amended to accommodate the scope of the new ADR procedures, while articles 140-140-*decies* have been added to regulate consumer ADR.²¹ Since 3 September 2015 the Legislative Decree of 6 August 2015 no 130 is in force, implementing the consumer ADR Directive.²² This has brought about important changes to the Italian consumer ADR architecture. The legislation connects sectors and sets new procedural standards. However, this needs to be matched by regulation and cultural acceptance.

For consumers there are some ADR models that are popular. These include telephone mediation and representative negotiations / joint conciliations. The main regulatory change the consumer ADR legislation brings is that it only allows non-adjudicative ADR methods (gathering of the parties and proposal of a solution). Public officers and civil servants typically manage ADR in Italy. The regulatory autonomy of ADR bodies is expressed through the recognition of the power to reject a claim. One problem Italy faces is the coordination of the move from mandatory to voluntary ADR schemes. The law also includes a financial invariance clause, which means that reform relies on a combined financing scheme. Further challenges faced with adapting to new EU standards include

17 Information obtained from a member of the European Commission June 2016.

18 Two recent conferences informed this piece: one at the University of Leicester (The Transformation of Consumer Dispute Resolution in the EU Conference, 10-11 September 2015) <<http://www2.le.ac.uk/departments/law/news-events/transformation-consumer-dispute-resolution-eu/>>; and one at the University of Oxford (Fourth Annual Civil Justice Conference on consumer ADR/ODR 18-20 April 2016) <<https://www.law.ox.ac.uk/trusting-middle-man-impact-and-legitimacy-ombudsmen-europe/fourth-annual-civil-justice-conferences>>.

19 European Union (Alternative Dispute Resolution for Consumer Disputes) Regulations (SI No 343 of 2015).

20 'Competition and Consumer Protection Commission' (Competition and Consumer Protection Commission) <<http://www.cpc.ie/>>; 'European Consumer Centre Ireland' (European Consumer Centre Ireland 2015) <<http://www.eccireland.ie>>.

21 *Decreto Legge 6 settembre 2005*, no 206, Arts 140-140-*decies*.

22 *Decreto Legge 6 agosto 2015*, no 130.

the coordination between general and sector specific regulations.²³

Italy has decided to name distinct competent authorities for each sector; currently there are six. The ministry of Economic Development will report to the European Commission. As in other member states the national ECC Network will be the contact point for the ODR platform.

3. France

France has a variety of consumer ADR (*médiateurs*). The main three types are: (1) consumer *médiateur* operating in-house at the top tier of a company's consumer satisfaction services;²⁴ (2) a *médiateur* specific to a sector (set up by a federation of companies); (3) a *médiateur* established by statute (eg, a financial mediator).²⁵ All three are in place for different reasons, designed to fulfil different purposes. This also means, however, that a consumer has to go through several stages and procedures to seek redress.

The *Ordonnance* 2015-1033 of 20 August 2015 implemented the ADR Directive.²⁶ It was complemented by a decree (published October 30th 2015)²⁷ and it created a new part in the consumer code.²⁸ The decree specifies the procedural rules of mediation procedures, the independence and impartiality of the mediators, and their obligations to inform and communicate to the public. This has three effects on the existing ADR landscape. First, the scope of consumer ADR is extended to fill existing gaps. Second, a reinforcement of the guarantees offered by consumer mediators, especially those embedded within a business. Article L 155-1 of the consumer code sets out the creation of consumer mediation evaluation and a control commission, of which judges will be a part. Third, the relationship between company Mediators and public Mediators in the same business sector may be affected. Currently the consumer may contact the company mediator first and at a later stage the public mediator. In art L 152-2 c) Consumer Code: *where a mediator has examined or is examining the same claim, another mediator may not examine it*. An exception is made in the energy sector where a national energy *médiateur* exists additionally to the in-house energy *médiateur*. This doubling up is a challenge and can create consumer confusion and dissatisfaction.

The competent authority is an ad hoc commission that evaluates and controls the mediation procedures.²⁹ Its members were appointed by the minister of finance on 18 December 2015. The commission is composed of representatives of consumer associations, professional bodies, contracting parties, a member of the council of state and a member of the highest appeals court (*cour de cassation*). The directorates general of competition, consumers and fraud provide the secretariat for the commission.

4. Spain

Spain has public and private ADR entities. Public entities include the consumer arbitration system (SCAS), OMICs (local offices for the information of the consumers), arbitration boards for transport (created within the administration; there is one in every region), office for the attention of the telecommunication, claims service of the Spanish Central Bank, investors' department of the National Stock exchange commission, general directorate for Insurance and Pension Funds, minister of industry, energy and tourism, and minister for infrastructures (postal disputes). Private entities include consumer associations and chambers of commerce, which are

not for profit, and ombudsmen (eg banks, insurance) that can be run as profitable models.³⁰

There is great variety in funding of existing ADR bodies. Membership fees fund the Spanish consumer agencies whereas the ombudsmen are funded by industry.

Spain will not meet the implementation deadline of the Directive, one reason for the delay being the general elections that were held in December 2015 and repeated in June 2016. A draft bill of 16 April 2015 is written (this is not yet accessible online); however, many questions remain. The implementation will entail the adaptation of the SCAS and the creation of the new public ADR entity. Since the legislative process is taking a lot of time, it is possible that the Directive will be implemented through a Royal Decree Law, which will then have to be validated by Parliament.

The legal framework for mediation is laid down in Royal Decree Law 5/2012.³¹ Consumer mediation takes place in the Spanish consumer arbitration system under the rule of arts 37 and 38 of Royal Decree 231/2008.³²

Spain will name the AECOSAN³³ (Spanish agency for consumer affairs) as the competent authority. There are two exceptions. First, the competent authorities of the financial sector will be shared between the Spanish Central Bank, the Office of attention to the Investor of the National Stock Exchange Commission, and the General Directorate of Insurance and Pension Funds. Second, competent authorities are allowed in sectors that are prone to very complex and specialised dispute resolution.

The accreditation procedure of an ADR body will be filed to the AECOSAN. The directive leaves the scope of an ADR entity very broad: natural person, public entity, and private entity. For Spain this poses some challenges. Legislation has to be adapted in order to include new legal measures (eg SCAS the ADR body for financial services), which leaves other public ADR bodies without legal criteria (Arbitration for Transport, Tele Office, Minister of Industry, Energy and Tourism, Minister of infrastructures, Bank and Insurance).

23 For more information see: 'Mediatori Mediterranei' (*Mediatori Mediterranei ONLUS*) <<http://www.mediatorimediterranei.org>>; 'ADR, ok from EU Parliament. But how is important in Italy?' (Active Citizenship Network) <<http://activecitizenship.net/gallery-home/105-adr-ok-from-eu-parliament-but-how-much-is-important-in-italy.html>>.

24 'Mediator' (Engie) <<http://www.engie.com/en/mediator/>>.

25 'Welcome to the AMF Ombudsman's Office' (*Autorité des Marchés Financiers*) <http://www.amf-france.org/en_US/Le-mediateur-de-l-AMF/Presentation.html?langSwitch=true>.

26 Ordonnance n° 2015-1033 du 21 août 2015 *relative au règlement extrajudiciaire des litiges de consommation* (JO 21 août). This Ordinance implements, into French Law, the Directive on consumer ADR (n 3).

27 *Décret n° 2015-1382 du 30 octobre 2015 relatif à la médiation des litiges de la consommation* (JO 31 octobre).

28 Sabine Bernheim-Desvaux, 'La transposition de la directive 213/11/UE du 21 mai 2013 relative au règlement extrajudiciaire des litiges de consommation (RELC) par l'ordonnance n 2015-1033 du aout 2015' [2015] (10) *Contrats, Concurrence, Consommation* <<http://www.lexisnexis.fr/droit-document/numeros/contrats-concurrence-consommation.htm>>.

29 See <<http://www.economie.gouv.fr/mediation-conso/commission>>.

30 Pablo Cortes, 'The Impact of EU Law in the ADR Landscape in Italy, Spain and the UK: Time for Change or Missed Opportunity?' (ERA Conference: ADR and ODR in the EU, Trier, 5-6 March 2015) <<https://ira.le.ac.uk/bitstream/2381/33050/4/ADR%20in%20Italy,%20Spain%20and%20UK,%20and%20art%205.pdf>>.

31 Real Decreto Ley 5/2012, de 5 de marzo, de mediación en asuntos civiles y mercantiles (approved by the Council of Ministers on March 2, 2012).

32 *Real Decreto* 231/2008, de 15 de febrero, por el que se regula el Sistema Arbitral de Consumo.

33 'About AECOSAN' (aecosan) <http://aesan.msssi.gob.es/en/AESAN/web/sobre_aesan/sobre_aecosan.shtml>.

5. The Netherlands

The main ADR providers in the Netherlands are the Foundation for the Consumer Complaint Commissions (SGC); the Financial Services Complaints Institute Foundation (KiFiD); and the Health Insurance Complaints and Disputes Boards (SKGZ). The Dutch consumer ADR system is self-regulated by the market. The ADR system offers binding advice as the outcome of a procedure and a payment guarantee through the trade association.

The Netherlands has a well-established ADR and settlement culture.³⁴ In other words, ADR is part of the national approach to settling disputes and there is no work to be done for citizens to learn about or accept ADR. People know where to go if they have a complaint and they also know what to expect from the procedure.

Although the Netherlands has a very broad coverage of ADR provision, it is not comprehensive. However, the existing system of self-regulation is compatible with the implementation of the ADR directive. The Dutch Implementation Act 'Implementatiewet buitengerechtelijke geschillenbeslechting consumenten' was published on 30 April 2015 and entered into force on 9 July 2015.³⁵ The main objectives of implementation are finalising the implementation act and deciding on who the residual body will be. The Netherlands decided to provide a framework law rather than implementing the Directive into various existing laws, such as the Dutch civil code or the code of civil procedure.

The SGC, KiFiD, and SKGZ are certified ADR entities under the ADR Directive. The competent authorities are: the Minister of Security and Justice for the SGC; the Minister of Finance for KiFiD; and the Minister of Finance and the Minister of Public Health, Welfare and Sport for SKGZ. The residual body is funded by the state.

6. The United Kingdom

The ADR landscape in the UK does not provide full sector coverage and, similar to other countries, has different ADR models in operation. There is mandatory ADR in some sectors with a single body overseeing matters (financial services and legal services), and there are private ADR bodies covering other sectors (estate agents, telecommunications and energy). The UK consumer faces a complex ADR offering, and it is a challenge to navigate the maze. There was a discussion about creating a single consumer ombudsman for the UK, intended to make access to ADR easier, but this fell through due to the level of competition amongst existing ADR bodies.

In November 2014 the UK released a policy document on the implementation of the ADR directive.³⁶ The UK government issued a consultation on the implementation of the ADR Directive in March 2014,³⁷ a response in November 2014³⁸ and, in March 2015, the implementation document.³⁹ A House of Commons briefing paper outlines the background and main provisions.⁴⁰ The UK government has got Citizens Advice to establish a citizen's helpdesk for assisting consumers to find an ADR body. This is centrally funded and accessible both online and over the phone. The government has appointed the Trading Standards Institute (TSI) to act as the competent authority covering ADR schemes in the non-regulated sectors. Sector regulators are the competent authorities for their own sectors. TSI is also responsible for information to business and consumers about ADR. Further, an ODR contact point has been created to help cross-border e-commerce complaints to reach the ODR platform. Finally, the UK government has indicated that it will not recognise in-

house mediation as an appropriate ADR body when implementing the Directive.

IV. Accessibility, national context and sectoral differences

Consumers can access most existing ADR bodies online. The ADR entities provide consumers with information and advice, but there is no standardised quality assurance or continuity throughout the system as a whole. Following, the availability of ADR bodies does not guarantee their quality, despite the implementation of the legislation. A lot of work has to be done to make consumers aware of ADR bodies as well as to build trust in the system.⁴¹ It is advisable to make most of the existing ADR bodies that are well established to inform and build others, to share expertise and best practise.

The national context cannot be ignored. What works well in one member state, in a specific sector, might not work in another. This is due to a number of factors, including the way the ADR body is set up, its visibility, its signposting, and the outcomes it produces. I have written a piece on German, UK and French energy ombudsmen elsewhere.⁴² Here a brief example of the energy sector in the UK and Germany. Both countries have energy ADR bodies. Ombudsman Services⁴³ (set up in 2002) in the UK received 61,640 energy complaints in 2014/15.⁴⁴ The number of complaints is growing and Ombudsman Services is expanding. The situation looks different in Germany. The *Schlichtungsstelle Energie*⁴⁵ (set up by law in 2011) handles about 3,500 complaints per year and is not receiving the flood of work it expected. They are now forced to downsize and let go of staff.

34 Erhard Blankenburg, *Patterns of Legal Culture: The Netherlands Compared to Neighboring Germany* (Duitsland Instituut, Universiteit van Amsterdam, 1997).

35 Wet van 16 april 2015 tot implementatie van de Richtlijn 2013/11/EU van het Europees Parlement en de Raad van 21 mei 2013 betreffende alternatieve beslechting van consumentengeschillen en tot wijziging van Verordening (EG) nr 2006/2004 en Richtlijn 2009/22/EG en uitvoering van de Verordening (EU) nr 524/2013 van het Europees Parlement en de Raad van 21 mei 2013 betreffende onlinebeslechting van consumentengeschillen en tot wijziging van Verordening (EG) nr 2006/2004 en Richtlijn 2009/22/EG (Implementatiewet buitengerechtelijke geschillenbeslechting consumenten), Staatsblad 2015, 160.

36 Department for Business, Innovation and Skills, 'Alternative Dispute Resolution for Customers: Government Response to the Consultation on implementing the Alternative Dispute Resolution Directive and the Online Dispute Resolution Regulation' (2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/377522/bis-14-1122-alternative-dispute-resolution-for-consumers.pdf>.

37 Department for Business, Innovation and Skills, 'Implementing the Alternative Dispute Resolution Directive and Online Dispute Resolution Regulation' (2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288199/bis-14-575-implementing-alternative-dispute-resolution-directive-and-online-dispute-resolution-regulation-consultation.pdf>.

38 Department for Business, Innovation and Skills (n 35).

39 The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015, SI 2015/542.

40 Lorraine Conway, 'Alternative Dispute Resolution (ADR)' (House of Commons Library Briefing Paper, 2015) <researchbriefings.files.parliament.uk/documents/CBP-7336/CBP-7336.pdf>.

41 'Trusting the Middle-Man: Impact and Legitimacy of Ombudsmen in Europe' (Oxford Faculty of Law) <<https://www.law.ox.ac.uk/trusting-middle-man-impact-and-legitimacy-ombudsmen-europe>>.

42 Naomi Creutzfeldt 'Ombudsman Schemes' in Pablo Cortes (ed) *The Transformation of Consumer Dispute Resolution in the European Union: A Renewed Approach to Consumer Protection* (OUP, forthcoming 2016).

43 'Ombudsman Services' (Ombudsman Services) <<http://www.ombudsman-services.org>>.

44 Ombudsman Services, 'Energy Sector Report 2014/15' <http://www.ombudsman-services.org/downloads/OS_annualreport_energy_2015.pdf>.

45 'Schlichtungsstelle Energie e.V.' (*Schlichtungsstelle Energie*) <<https://www.schlichtungsstelle-energie.de>>.

Why are there such stark differences within the same sector? Assuming that all energy providers will have a continual number of dissatisfied customers, why are there such notable differences? I can think of various reasons, and will briefly outline a few here.

First of all, there are differences in the levels of acceptance of ADR in national contexts. In Germany, for example, ADR is not used much and the legal profession (and some academics) do not see the added value of ADR as the courts are efficient and deal promptly with cases. Energy companies are required by law to alert consumers to an ADR body, which not many are doing currently. Further, more educating needs to be done regarding what type of resolution an ADR body can offer for people to understand and gain trust in the procedure.

In the UK, however, the situation is different. ADR is fairly well known and used. This may be enforced by the fact that the UK courts are overloaded with cases, slow, expensive and unpredictable. Further, energy companies' signpost the ADR body on their bills and websites and Ombudsman Services Energy is growing.

In France, the situation – especially in the Energy sector – is strikingly confusing. Here there are ADR providers within an energy company (in-house), as well as a national energy *médiateur*. French energy consumers have to approach the in-house energy mediator first, hope that their problem will be resolved and, if not, either give up or approach the national energy *médiateur*. Having reached that stage, the consumer has spent a lot of energy and time on trying to resolve their complaint. Then they start their journey through the national energy *médiateurs'* procedure.

The potential of ADR to fulfil its purpose of being easily identifiable, accessible and *the* pathway to choose for consumers to resolve their complaints might be weakened by incomplete or minimum implementation of the Directive. This will have a direct effect on the ODR regulation.

V. Legislation on consumer ODR

Regulation on ODR underlines the importance of cross-border complaints in consumer ADR. It is also aimed at providing access to justice in the internal market. Consumer ODR provides a virtual link between all the ADR bodies. In other words, the ODR platform will only be able to deliver a good service if the national ADR entities are available and working to a high quality.

The law focuses on national and cross-border disputes. Due to the rise in e-commerce it is expected that cross-border disputes will increase. Member states can cover disputes if a trader is located in a third country.

A crucial aspect of the day-to-day working of the platform is that of language.⁴⁶ The EC created a tool that recognises all the official EU languages and provides translations.⁴⁷ The platform is not intending to use human translators due to cost. Further, coordination through ECC-Net and communication between member states will be essential for the functioning of the ODR platform.

There are further concerns with the implementation – the principle of legality, for example. The ADR Directive does not distinguish between ADR procedures applying the law or equity principles. As mentioned above, the amount of ADR bodies that cover specific sectors is not limited which enables competition and forum shopping. This is not advantageous

for establishing a new and trustworthy pathway for consumer redress.

VI. A few things to consider along the way

The new legislative measures for ADR place an incentive on many sectors to improve their dispute resolution. There are, however, obstacles to smooth implementation. The question at this stage is how to maximise implementation and foster the acceptance of the new laws without creating consumer confusion. ADR is not well known to the public and hence not used as much as it could be. Further, consumers also need to gain trust in ADR as it is not yet part of the common mind-set. Unlike the courts, police and other public bodies, most member states have had no socialisation in the use of ADR (Creutzfeldt, *forthcoming*).

My current research project,⁴⁸ comparing levels of trust and engagement in ombudsman systems in France, Germany and the UK, produced a large empirical dataset. The results show clearly that the expectations of people who use an ombudsman model are far too high from the outset, and that these need to be managed early on to avoid satisfaction levels plummeting.⁴⁹

A crucial point that cannot be underestimated is ADR bodies competing for business both within their own country and across borders. There is no requirement for just one ADR body per sector, which can create consumer confusion if the bodies are not properly signposted or notified to the EC. A further problem arises here – that of forum shopping. This means that an informed consumer can choose to bring their complaint to a specific ADR body from which they expect a favourable outcome.

Another important aspect to consider in the wave of ADR is the maintaining of quality and provision of consistent outcomes. This means that there ought to be streamlined training for staff of ADR bodies, as well as outcomes that are somewhat predictable. At the moment it is possible to get different outcomes for a similar complaint from different ombudsmen within the same ADR body; needless to say a comparison across sectors is not possible.

The ADR model has great scope to provide: (1) a system of consumer advice (ADR systems get a lot of requests for information; a dispute can be checked and it can dissolve based on the information that is given); (2) dispute resolution; (3) aggregation of data; and (4) feeding the data back to businesses and regulators to improve their work.⁵⁰ If all these four tasks were to be implemented and consistently practised

46 'Alternative and Online Dispute Resolution (ADR/ODR)' (European Commission: Consumers 2015) <http://ec.europa.eu/consumers/solving_consumer_disputes/non-judicial_redress/adr-odr/index_en.htm>; European Commission, 'The Online Dispute Resolution (ODR) Platform' (Presentation to IMCO, Brussels, 3 March 2015) <http://www.europarl.europa.eu/meetdocs/2014_2019/documents/imco/dv/odr_ppt/odr_ppt_en.pdf>.

47 There is an automatic translation tool/machine as part of the ODR platform. It will improve over time and develop with its use. Human translation is only envisaged for selected final outcomes of procedures and will be done by the *Translation Centre for the bodies of the EU*; the EC will pay for that.

48 'Trusting the Middle-Man: Impact and Legitimacy of Ombudsmen in Europe' (n 40).

49 Reports of the project are available here: <<https://www.law.ox.ac.uk/trusting-middle-man-impact-and-legitimacy-ombudsmen-europe/project-reports>>.

50 Christopher Hodges, 'Corporate Behaviour: Enforcement, Support or Ethical Culture?' (April 28, 2015). Oxford Legal Studies Research Paper No 19/2015. Available at SSRN: <<http://ssrn.com/abstract=2599961>> or <<http://dx.doi.org/10.2139/ssrn.2599961>>.

by the ADR bodies, it would have a positive effect on consumer confidence in the market.

VII. Conclusions: Improving access to justice, or flying beneath consumers' radar?

This opinion piece has offered a window into the ongoing implementation process of the ADR and ODR European legislations. Several questions arise at this stage.

First, will the legislation have the anticipated impact and acceptance in the member states? I am, by no means, suggesting that ADR is the solution to redress all types of disputes and thus makes the courts obsolete. On the contrary, ADR is well suited to deal with certain types of disputes, thereby providing an extension to the provision of redress in the justice systems. Furthermore, consumer ADR deals with low-value complaints that would typically not make it to a courtroom. A survey (Special Eurobarometer, 2011) showed that Europeans would only go to courts for a claim that exceeds 500 euros.⁵¹ Therefore, consumer ADR is aimed at helping people solve their grievances with companies in an accessible, efficient, speedy and reliable manner. Consequently, ADR is a good pathway to redress for consumers, but I am worried by the fact that European consumers are very likely to be overwhelmed with confusing information and lack of signposting, and therefore may remain dissatisfied and unable to exploit the full potential of ADR.

Second, as outlined above, the national implementation process and availability of ADR providers in member states is happening at a very different pace throughout the Union. Additionally to this, there are different levels of quality provided by the existing ADR bodies. This leads to the next point of national acceptance of ADR.

Third, the acceptance and use of ADR is influenced by people's experience and expectations of the national legal system. My research shows that people's expectations of ADR providers vary according to different assumptions about the law and its role.⁵² These assumptions are formed through their (national) legal socialization and legal consciousness.⁵³

To sum up, existing ADR bodies in the member states offer diverse quality, procedures and outcomes. Further work has to be done to meet the Directive's requirements for consumer ADR and ODR to reach their potential. It will be fascinating to study how these systems develop over the next decade, and how European consumers learn to accept them. ■

51 European Commission (Special Eurobarometer 342) consumer empowerment, available at: <http://ec.europa.eu/consumers/consumer_empowerment/docs/report_eurobarometer_342_en.pdf>.

52 Naomi Creutzfeldt, 'What do we expect of Ombudsmen?' (2016) *International Journal of Law in Context* (forthcoming).

53 Creutzfeldt (forthcoming).

Piotr Tereszkiewicz*

The reform of Polish Sales Law – Re-implementing the Consumer Sales Directive

I. Introduction

The recent implementation of the Consumer Rights Directive to Polish law¹ provided an opportunity for a re-implementation of Directive 99/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees,² resulting in an important reform of Polish sales law. The Act of 30 May 2014 on consumer rights³ not only implements the Consumer Rights Directive, but also serves the objective of re-implementing the Consumer Sales Directive to Polish Law.⁴

Originally, the Consumer Sales Directive was implemented to Polish law by means of the Act of 27 July 2002 on the Certain Conditions of Consumer Sale and on the Amendment of the Civil Code.⁵ The process of the original implementation of the Consumer Sales Directive to Polish law, undertaken by a legislator without any experience in the implementing of EU law, while acting under the political pressure of the pre-Accession period,⁶ produced a questionable result. The 2002 Act on Conditions of Consumer Sale was restricted to transposing the provisions of the Consumer Sales Directive to Polish law. At the same time the body of rules on sales

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1 On which see U. Ernst, 'Implementation of the Consumer Rights Directive: Poland' EUVR 2014, 183.

2 Directive 99/44/EC of the European Parliament and of the Council on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171/12 (Consumer Sales Directive).

3 The Act of 30 May 2014 on consumer rights [2014] Official Journal, Pos. 827. The Act entered into force on 25 December 2014. For reasons of clarity, the 2014 Act on Consumer Rights is referred to as 'the Reform Act 2014'.

4 On the 2014 Reform Act in general see B. Kaczmarek-Templin, P. Stec and D. Szostek, *Ustawa o prawach konsumenta. Kodeks cywilny (wyciąg). Komentarz* (C.H.Beck 2014); M. Namysłowska and D. Lubasz (eds), *Ustawa o prawach konsumenta. Komentarz* (Wolters Kluwers SA 2015); D. Karczewska, M. Namysłowska and T. Skoczny (eds), *Ustawa o prawach konsumenta* (C.H.Beck 2015). On new sales law see J. Pisu-

liński 'Die Gewährleistungshaftung nach dem gemeinsamen europäischen Kaufrecht und dem neuen polnischen Kaufrecht' in C. Stumpf, F. Kainer and C. Baldus (eds), *Privatrecht, Wirtschaftsrecht, Verfassungsrecht: Privatinitiative und Gemeinwohlorizonte in der europäischen Integration* in 'Festschrift für Peter-Christian Müller-Graff' (Nomos 2015) 152; J. Pisuński, 'Neue Regulierung des Kaufvertrages im polnischen Zivilgesetzbuch' in 'Zeitschrift für Europäisches Privatrecht' [2015] 147.

5 The Act of 27 July 2002 on the Certain Conditions of Consumer Sale and on the Amendment of the Civil Code [2002] Official Journal, No. 141, Pos. 1176 with subsequent amendments, subsequently referred to as 'the 2002 Act on conditions of consumer sale', on which see E. Łętowska, *Prawo umów konsumenckich* (C.H.Beck 2002); M. Pecyna, *Ustawa o sprzedaży konsumenckiej* (Wolters Kluwers SA 2007); J. Pisuński 'Sprzedaż konsumencka' in J. Rajski (ed), 'System prawa prywatnego', Vol. III, *Prawo zobowiązań – część szczegółowa* (C.H.Beck 2004).

6 See the realistic assessment of A. Wiewiórska-Domagalska, 'O celu i metodzie transpozycji dyrektyw unijnych – na przykładzie projektu ustawy o prawach konsumenta' in 'Kwartalnik Prawa Prywatnego' [2014] Vol. XXIII 130.