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ADR in aviation: European and national perspectives

Naomi Creutzfeldt¹ and Christof Berlin²

INTRODUCTION

The air transport sector generates the largest share of cross-border consumer complaints, as a proportion of complaints received by the ECC-Net. Since the foundation of the ECC-Net in 2005, air passenger claims have made up around one fifth of the total caseload most years.³

A pan-European framework of bodies that handle consumer to business disputes will be implemented through the consumer ADR directive.⁴ Taking these developments into consideration, the aviation industry is an interesting sector to study. This paper looks at dispute resolution for air passengers in the United Kingdom (UK) and Germany, as well as at European level.

In the UK, the Civil Aviation Authority (CAA)⁵ operates a complaints handling service for air passengers. The CAA is a public corporation that was established by Parliament in 1972 as an independent specialist aviation regulator and provider of air traffic services. The UK Government requires that the CAA's costs are met entirely from its charges on those whom it regulates. Unlike many other countries, there is no direct Government funding of the CAA's work. Every year around 20,000 complaints⁶ from consumers about airlines or airports reach the CAA. The CAA is responsible for the enforcement of various international, European and domestic consumer protection legislation. This ranges from ensuring the UK aviation sector's

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³ The European Consumer Centres Network (2015) '10 years serving Europe's consumers Anniversary Report 2005-2015' available at: http://ec.europa.eu/consumers/solving_consumer_disputes/non-judicial_redress/ecc-net/docs/ecc_net_-_anniversary_report_2015_en.pdf, 22.

⁴ Directive on consumer ADR, 2013/11/EU.

⁵ The authors are very grateful to James Tallack, of the Civil Aviation Authority, for his comments and insightful suggestions to improve the paper.

⁶ 2014: 17,505; 2013: 25,301; 2012: 6,800 (the jump from 2012 onwards is due to the ECJ *Sturgeon* and *Nelson* judgements).

compliance with the rules, regulations and requirements of the International Civil Aviation Organization (ICAO), to EC legislation protecting air passenger's rights, European legislation on safety issues such as pilot licensing, and domestic regulation on the use of airspace.⁷ The CAA's Passenger Advice and Complaints Team (PACT) currently operates a complaints handling service and provides information about passenger rights. However, there is the potential for the complaints handling landscape in UK aviation to change dramatically in future.

The German example of air passengers' rights shows that sector-specific legislation is an efficient way to promote Consumer ADR. Compared to the UK, Consumer ADR is generally less developed in Germany and consumer awareness of existing schemes is still low.⁸ However, with its recent successful regulation on ADR for flight passenger rights, Germany is an interesting model to look to. The new law has produced high demand, especially for the private German Conciliation Body for Public Transport (söp)⁹, which most large airlines operating in Germany are now a member of. The söp is an independent and neutral organisation that offers its "inter-modal" service across Germany to customers of train, bus, flight and ship companies that are part of the scheme. Whilst it is free for the consumer to use söp, member transport companies meet the costs. The number of aviation related complaints has seen considerable and rapid growth as an increasing number of passengers become aware of its service.

Despite the high demand on the söp in Germany to resolve aviation complaints, there are other stories that have not been as successful. In the Netherlands, for example, a flight ADR scheme was established but failed only a few years later.

The developments in the UK and Germany are the focus of this paper. It is divided into 5 parts. First, the definition of consumer ADR is discussed (1); then EU legislation on consumer ADR (2); this is followed by aviation sector specific ADR regulations (3); the last part raises the question of whether ADR is actually an alternative or indeed mainstream (4). Finally the conclusions present comparative perspectives and future recommendations.

⁷ An overview can be found here: <http://www.caa.co.uk/default.aspx?catid=503>.

⁸ Hodges, C., Benöhr, I., and Creutzfeldt-Banda, N. (2012) *Consumer ADR in Europe*, Hart Publishing, chapter 4 Germany, 73-117.

⁹ <https://soep-online.de/welcome.html>.

1. Alternative dispute resolution (ADR)

The term ADR has its origins in 1960s US literature.¹⁰ It developed out of the access to justice movement, where alternative forms of conflict resolution were tested and promoted. This was, inter alia, intended for those of the population who were less well off, providing them with a pathway to seek redress.¹¹ Despite ADR being an accessible, easy and speedy way to redress in specific types of disputes, it has also received criticism for being second-class justice and private justice.¹² Notwithstanding these criticisms, the ombudsman model has developed successfully as a consumer ADR model across Europe.¹³

Ombudsmen deal with complaints from ordinary people about goods and services in the private sector. The services provided by ombudsmen are free of charge to consumers. This means that ombudsmen are accessible to individuals who could not afford a court case. Ombudsmen have different mandates and within this, different powers. Typically, they can undertake investigations into multiple complaints about the same problem. Ideally, ombudsmen aim to find solutions to complaints without having to resort to final recommendations. A private sector ombudsman has the power to make recommendations that are binding on the bodies under their jurisdiction.

The term 'alternative dispute resolution' incorporates a variety of methods and procedures.¹⁴ The most popular procedures are mediation, conciliation, and arbitration. Due to the lack of clear distinctions between these procedures there is an increasing trend towards the use of a *functional* classifications for the different procedures, i.e. the 'functional' description of the

¹⁰ Creutzfeldt, N. (2013) 'The origins and evolution of consumer dispute resolution systems in Europe', in: Hodges & Stadler (Eds.), *Resolving Mass Disputes. ADR and settlement of mass claims*, Edward Elgar.

¹¹ Cappelletti, M., and Garth, B. (1978), 'Access to Justice: The Newest Wave in the Worldwide Movement to make Rights Effective', *27 Buffalo Law Review* 181; Hopt, K., Steffek, F. (eds) (2013) *Mediation: Principles and Regulation in Comparative Perspective*, OUP.

¹² Genn, H. (2012) 'What Is Civil Justice For? Reform, ADR, and Access to Justice', *Yale Journal of Law & the Humanities*: Vol. 24: Iss. 1, Article 18; Genn, H. (2009) *Judging Civil Justice (The Hamlyn Lectures)*, Cambridge.

¹³ Creutzfeldt, N. (2014) 'How Important is Procedural Justice for Consumer Dispute Resolution? A Case Study of an Ombudsman Model for European Consumers', *Journal of Consumer Policy* Volume 37, Issue 4, 527-546.

¹⁴ Hopt, K., Steffek, F. (eds) (2013) *Mediation: Principles and Regulation in Comparative Perspective*, OUP; Stuyck, J. et al., *Analysis and evaluation of consumer redress other than redress through ordinary judicial proceedings* (2007), available at: http://www.eurofinas.org/uploads/documents/policies/OTHER%20POLICY%20ISSUES/comparative_report_en.pdf.

procedures by the respective degree of third party intervention instead of inconsistent ‘labels’.¹⁵

2. The EU Directive on consumer ADR – across sectors

The adoption of the 2013 consumer ADR directive marks a preliminary endpoint of the legal foundations for ADR on the European level. Important milestones were the non-binding recommendations 98/257/EG¹⁶ and 2001/310/EG¹⁷; as well as the EU green book¹⁸ on alternative procedures of dispute resolution in civil and commercial law of 2002. In April 2011 the European Commission introduced the communication ‘Single Market Act Twelve levers to boost growth and strengthen confidence: Working together to create new growth’¹⁹, in which priority was given to creating legislation for alternative dispute resolution. A few months later the European Commission presented its Proposal for a Directive on consumer ADR.²⁰ Within a short period of time, suggestions and comments on the proposal were provided by the European Parliament and the European Council. After an informal negotiation between the three EU institutions, the final version of the directive was adopted on the 21.05.2013. EU member states now have until 9.07.2015 to implement the directive into national law.

The directive is the first tool to set out a uniform and compulsory regulatory framework for consumer ADR. The details of implementation into the national context are left to the member states. The core aim of the directive is to provide an ADR body for nearly all

¹⁵ ‘A productive classification of the procedures requires moving beyond aspects of terminology to focus on functional distinctions’; Hopt, K., Steffek, F. (eds) (2013) *Mediation: Principles and Regulation in Comparative Perspective*, OUP, 16.

¹⁶ 98/257/EC: Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes (Text with EEA relevance), 31.

¹⁷ Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (Text with EEA relevance) (notified under document number C(2001) 1016) Official Journal L 109 , 19/04/2001 P. 0056 - 0061, 56.

¹⁸ Green Paper on alternative dispute resolution in civil and commercial law 19.4.2002. COM (2002) 196.

¹⁹ Opinion of the European Economic and Social Committee on the ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Single Market Act — Twelve levers to boost growth and strengthen confidence — ‘Working together to create new growth’ COM (2011) 206.

²⁰ Directive 2013/11/EU on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR). Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR); COM (2011) 793; Isermann, E. & Berlin, C. (2012) ‘Außergerichtliche Streitbeilegung in Verbraucherangelegenheiten – Bestandsaufnahme und Maßnahmenpaket der EU für 2014/15’, *Verbraucher und Recht*, 47.

consumer to business disputes²¹ that both satisfies the directive²² and is accessible for the consumer.²³ This is also called a ‘state-level warranty’ for ADR.²⁴ According to the directive, the member states are (only) obliged to assure the availability of ADR, i.e., not the participation of the parties. This means that after the implementation of the ADR directive, ADR will not be automatically compulsory – certainly never for consumers and only with additional national regulation for businesses.²⁵ In other terms, it is up to the member states to make participation in ADR mandatory, for specific sectors or even for all businesses. Germany decided against a general obligation for all sectors and the UK is likely to do the same, outside the main regulated sectors where ADR is already mandatory.

The main focus of the legislation is the definition of binding quality criteria and their minimum standards.²⁶ Furthermore, the directive requires businesses to provide detailed information to consumers,²⁷ to support consumers to find an ADR body²⁸, and to provide information about certified ADR providers.²⁹ ADR bodies are further encouraged to exchange experience with each other³⁰ as well as with their national EU enforcement bodies.³¹ Every member state should name a national body that will collect information from all its ADR bodies and feed this back to the European Commission.³²

Consumer ADR is also an expression that covers many different procedures.³³ The phenomenon of consumer ADR is relatively new and we will see its continued development.³⁴ Some authors claim that consumer ADR is more than a collection of

²¹ Health and Education sectors are excluded according to Art. 2 (2) of the consumer ADR directive.

²² Article 5 (1) consumer ADR directive.

²³ Article 5 (2) consumer ADR directive.

²⁴ Hayungs, J., ‘ADR-Richtlinie und ODR-Verordnung’, *Zeitschrift für Konfliktmanagement (ZKM)* 2013, 87.

²⁵ Article 1 consumer ADR directive. According to Article 6 ECHR a consumers can always bring their claim to a court.

²⁶ Berlin, C. (2014) *Alternative Streitbeilegung in Verbraucherkonflikten – Qualitätskriterien, Interessen, Best Practice*, Nomos, chapter 2. The restriction to minimum standards breaks through the growing trend of full harmonization in other areas of EU consumer law.

²⁷ Article 13 consumer ADR directive. This provision will carry great importance in everyday use of an ADR body, as most consumers are unaware of service options.

²⁸ Article 14 consumer ADR directive.

²⁹ Article 15 consumer ADR directive.

³⁰ Article 16 consumer ADR directive.

³¹ Article 17 consumer ADR directive.

³² Article 18-20 consumer ADR directive.

³³ ADR schemes are highly diverse, not only across the European Union but also within Member States: Alleweldt *et al.* (2009) Study of the use of Alternative Dispute Resolution in the European Union, 13; Hodges, C., Benöhr, I., Creutzfeldt-Banda, N. (2012); Stuyck *et al.* (2007), 5.

³⁴ Creutzfeldt, N. (2013) ‘The origins and evolution of consumer dispute resolution systems in Europe’, in: Hodges, C & Stadler, A. (eds.), *Resolving Mass Disputes. ADR and settlement of mass claims*, Edward Elgar,

terminologies, but rather a whole new architecture in and of itself.³⁵ The directive on consumer ADR takes the above mentioned ‘functional’ classifications and divides consumer ADR into three categories of procedures.³⁶ The first of these aims “*to bring the parties together with the aim of an amicable settlement*”, the second “*to propose a solution*”, and the third “*to impose a solution*”.³⁷ The differentiation occurs according to the degree of intervention by the ADR body. Even though German and UK procedural definitions of mediation, conciliation, and arbitration fit this three-way separation,³⁸ the functional approach of the directive seems to provide a better fit to avoid terminological misunderstandings, and to enable an international understanding that reflects the openness and diversity of existing procedures. The directive further states that a combination of procedures is possible - the so-called hybrid procedures.³⁹

Guided by these classifications, the following procedural terminology is suggested:

- *Settlement procedure* – if the aim is to find an amicable settlement between consumer and company without a proposed solution by the ADR body.
- *Proposal procedure* – if the ADR body provides a non-binding solution for the consumer and the company.
- *Decision procedure* – if the ADR body provides a binding solution for the consumer and / or the business.

According to this functional perspective, the natural person who is entrusted with a dispute could be called universally a ‘person in charge of ADR or simply third party’ rather than a mediator, conciliator or arbitrator.

Moving away from the general guidelines for procedures and the persons entrusted with their delivery, the next part looks at sector-specific regulation for aviation.

226.

³⁵ Legal Services Consumer Panel (2014) *Remapping Consumer Redress*. Available at: http://www.legalservicesconsumerpanel.org.uk/ourwork/complaints/documents/BIS_ADRcallforevidence.pdf.

³⁶ Creutzfeldt (2013), 224.

³⁷ Page 2 consumer ADR directive; see also article 2 (1) consumer ADR directive.

³⁸ Hopt & Steffek (2013).

³⁹ Page 3 consumer ADR directive.

3. Sector specific regulation for aviation and its practise

When the regulation on compensation for infringement of air passengers' rights (Regulation (EC) no. 261/2004)⁴⁰ came into force, there was no regulation on EU or national level in Germany and the UK on ADR in aviation. Prior to the proposed revision of the regulation, law 'enforcement bodies' were mentioned, however there was no mention of conciliation or ADR bodies. These national enforcement bodies (NEB) are typically the state regulatory authorities, in Germany the *Luftfahrtbundesamt* (LBA), in the UK the CAA. Usually regulators can give sanctions following systematic violations of passengers' rights by airlines, but don't have the same powers to deal with individual air passengers' rights.

The ongoing effort to revise the regulation on air passengers' rights has a strong focus on improving ADR. The recommendation by the European Commission included in the new version of Sec. 16a states that "*in accordance with relevant EU and national law, each Member State shall designate a national body or bodies responsible for the out-of-court resolution of disputes between air carriers and passengers with regard to the rights covered by this Regulation*".⁴¹

For the time being, the revisions failed due to the lack of agreement between the member states in June 2014. Now it is to be seen if additionally to the directive on consumer ADR an aviation sector-specific commitment for ADR in all EU member states will be developed. The 2013 consumer ADR directive requires all member states to ensure ADR bodies are available for most types of consumer disputes. The implementation into national legislation was due in July 2015.

This part discusses the aviation sector regulations in the UK and Germany, and provides examples from the Netherlands and Sweden.

3.1. United Kingdom

⁴⁰ Air passenger rights Regulation (EC) 261/2004, available at: http://eurlex.europa.eu/resource.html?uri=cellar:439cd3a7-fd3c-4da7-8bf4b0f60600c1d6.0004.02/DOC_1&format=PDF.

⁴¹ Proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013PC0130&from=EN>.

The CAA is the national enforcement body for Regulation (EC) 261/2004, the Denied Boarding Regulation (DBR). Its responsibilities under the DBR are to receive complaints from passengers about possible infringements of their rights in relation to denied boarding, delays and cancellation of flights, and to take enforcement action to ensure compliance with the law. The CAA has the same responsibilities under Regulation (EC) 1107/2006, on the rights of disabled persons and persons with reduced mobility when travelling by air. Finally, The CAA has powers to take enforcement action on consumer law under Part 8 of the Enterprise Act 2002.

The CAA-funded Air Transport Users Council (AUC) used to be the complaint handling body for aviation. AUC was effectively internally independent from the CAA – its budget was ring-fenced and there was a transparent process for agreeing changes to that budget. In 2011 the AUC was closed and its complaint handling function was incorporated into the CAA and renamed the Passenger Advice and Complaints Team (PACT). PACT works closely with the CAA’s consumer enforcement team. PACT is a complaint handling service run by the regulator and is not a form of ADR. There is no mechanism (statutory or contractual) by which PACT can require a business to provide information to help it investigate an individual’s complaint. PACT would arguably also struggle to meet the independence requirement of the ADR directive, given the CAA’s duty to further the interests of ‘air transport users’ (consumers). There is also the challenge of sufficient and reliable funding – CAA fund PACT through regulatory charges rather than case fees, so the ‘polluter’ may not always pay. This is about to change. Following direction from the Department of Transport, the CAA must continue to provide the PACT service unless there is full ADR coverage for statutory complaints. To ensure there are still sufficient incentives for airlines to take up ADR voluntarily, from June 2016 and subject to consultation the CAA proposes to introduce a per-complaint charge of £150 for any complaint that PACT handles and invoice airlines accordingly. So there will be an element of ‘polluter pays’ in future

The Civil Aviation Act 2012⁴² placed a duty on the CAA to provide information to consumers to help them compare air transport services. This could potentially extend to requiring disclosure of (non-) membership of ADR, a step the CAA has not yet taken. This might be an option if the ADR Directive obligations don’t appear to be having the desired effect of encouraging participation in ADR. The use of information to incentivise ADR

⁴² <http://www.legislation.gov.uk/ukpga/2012/19/contents/enacted>.

uptake is supported by the CAA consumer panel⁴³, which was set up in October 2012 as a ‘critical friend’, designed to challenge the work of the CAA’s policy development teams. The consumer panel described the “*duty [placed] on the CAA [by the 2012 Act] to provide information to consumers about services and facilities available in the aviation market*” as “*a long overdue addition to the CAA’s regulatory toolkit*”.⁴⁴

The CAA does not have the power however to force the airlines to join an ADR scheme. A consultation in spring 2014 by the Department for Business, Innovation & Skills (BIS) on the implementation of the ADR directive in the UK hinted at the idea of primary legislation that may force airlines to an ADR membership. It seems, for the time being though, that the UK government intends to ensure that the voluntary option is fully exhausted first. The evolution of European legislation that moved from encouraging ADR to requiring it is evident in several sectors, and can be seen for the aviation sector in recent proposed revisions of the regulation 261/2004.

There is the possibility of major shifts in the way aviation complaints are handled in the next few years, as the CAA seeks to use the implementation of the ADR directive as an incentive to create an ADR body for aviation. This means a move away from the CAA directly handling complaints in order to encourage the establishment of a private air ombudsman, directly funded by the airline industry but with independent governance and regulatory oversight by the CAA as a competent authority.⁴⁵ The UK is looking to other European ADR models for aviation for inspiration, with the German model (söp) being used as a reference point.

Recent developments

The current PACT service run by the CAA is based on adjudication. They aim to apply the law to anticipate what a court might offer – it is not mandatory for business to accept PACT’s decision. The CAA writes: “*As the UK’s enforcement body, we have also successfully resolved many consumers’ complaints through our free mediation service for any passenger having trouble resolving issues with airlines or airports. Since October 2012, we have*

⁴³ Consumer Panel Annual Report 2013, available at:

<https://www.caa.co.uk/docs/33/CAP%201211%20Consumer%20Panel%20annual%20report.pdf>.

⁴⁴ Consumer Panel Annual Report 2014, available at:

<https://www.caa.co.uk/docs/33/CAP%201211%20Consumer%20Panel%20annual%20report.pdf>.

⁴⁵ Hodges, C. (2014) ‘New EU Frameworks for consumer complaints: time for an air ombudsman?’ *Travel Law Quarterly*, 192 – 201.

*secured over £2.2 million in compensation. However, a huge increase in passengers unhappy with their airlines' responses to their compensation claims following delays and cancellations meant it has taken longer than we would have wished to process claims. We have now put in place improved systems and dealt with that backlog".*⁴⁶ Most existing UK ADR bodies provide an early resolution that caters for both sides, without the need to escalate complaints to a full investigation stage and its accompanying costs. Examples for this are the Financial Ombudsman Service⁴⁷ and Ombudsman Services⁴⁸.

The CAA has recently outlined its desire for the industry to voluntarily establish an ADR body, or several bodies, to meet the requirements of the ADR Directive and address key shortcomings in the PACT services. These include the opportunity to fund complaint handling activities on a more efficient and fairer 'polluter pays' basis, and to introduce binding-on-trader decisions. The CAA has therefore made it its policy to encourage the voluntary uptake of ADR by airlines. These include rigorous enforcement of the trader information obligations in the ADR directive, as well as introducing a direct charge on airlines whose complaints continue to come to PACT. The Civil Aviation Authority Consumer Panel strongly supports this objective. Further, the CAA has commissioned consumer research into ADR for the UK aviation sector in August 2014.⁴⁹

The CAA, as a public enforcement body, faces a number of challenges that would not apply to commercial providers of ADR. These include: susceptibility of ADR decisions to judicial review; the need for information barriers between ADR and enforcement functions; and concerns about independence, e.g. if the CAA was taking enforcement action against a particular airline that was also involved in an ADR case at the same time. The CAA has chosen to accept designation as a competent authority and seek an end to its complaint handling role through the incentivisation of ADR uptake because the role is far better suited to their core skills and expertise as a regulator. In other words, it allows the CAA to expand their influence beyond being merely a complaint handler, instead allowing them to set parameters and rules regarding regulation. There is a strategic goal around promoting the interests of consumers as well as ensuring the best fit between competencies and activities.

⁴⁶ Civil Aviation Authority annual report 2014, available at: http://www.caa.co.uk/docs/1743/CAP1193_Annual_Report_Financial_Statements_2014_web.pdf.

⁴⁷ <http://www.financial-ombudsman.org.uk>.

⁴⁸ <http://www.ombudsman-services.org>.

⁴⁹ Alternative Dispute Resolution Airline Workshop September 2014, available at: http://www.bar-uk.org/i/Workshops/CAAADRPresentation30September2014_vFinal.pdf.

As a competent authority, the CAA will ensure that ADR schemes operate in the general consumer interest by ensuring that the criteria in the ADR Directive (and any additional criteria the CAA believes should be applied in the consumer interest, but which could not be introduced from their position as a complaint handler) are adhered to, while remaining unencumbered by negotiations or disputes with individual airlines over funding, service quality or ADR decisions, and with no conflict arising with CAA's primary role as an enforcement body.

3.2. Germany

Despite the fact that several thousand claims from air passengers made it to *söp* since it was established in 2009, the requests for conciliation have been unsuccessful due to airlines' refusal to participate in *söp*'s conciliation procedure. As a result, most passengers either went to commercial claim-management companies (who kept a percentage of any compensation gained in return for their service) or simply gave up their case. The German Federal Government decided to close this gap between existing passenger rights and the lack of enforcement by ADR. With a new law on ADR in aviation, airlines are obliged to participate in any ADR scheme which meets the legal quality standards and which is officially approved by the Federal German Government.

The widely complained about lack of enforcement of air passengers' rights, as well as the shared resistance of the aviation industry to voluntarily participate in consumer ADR, led to the new regulations in Germany: On 1.11.2013 a new law on ADR in the aviation sector came into force.⁵⁰ The most important provisions are changes in the German Air Traffic Act *Luftverkehrsgesetz* (LuftVG), which main points are summarised below.

The law states that - unlike providers of other modes of transportation including train⁵¹, bus⁵² and ship⁵³ - aviation companies have a legal obligation to take part in ADR procedures. For consumers, ADR is only an additional route to the existing judicial system and they can chose to go to court at any time during the procedure. Ideally, the airlines should be part of a private settlement procedure, §57 LuftVG. For those air passengers of the few airlines that are not part of a private and accredited ADR procedure, the federal office for justice *Bundesamt für*

⁵⁰ Law on ADR in the aviation sector (Gesetz zur Schlichtung im Luftverkehr) 11.06.2013, 1545.

⁵¹ § 37 rail traffic regulation (Eisenbahnverkehrsordnung) (EVO).

⁵² § 6 EU passengers rights bill.

⁵³ § 6 EU maritime passengers rights law.

Justiz created a residual public ADR scheme, as specified in § 57a para 1 LuftVG. For both private and (residual) public settlement procedures the same regulations apply, as specified in § 57 b LuftVG. The costs of the procedure are to be paid by the airlines.⁵⁴ Details are regulated on the basis of the law § 57 c LuftVG.⁵⁵

Recent developments

The söp is the only private approved ADR scheme. Within a few months all German airlines and over 30 international airlines joined söp.⁵⁶ All other airlines are automatically subjected to the residual ADR scheme at the Federal Office for Justice. In 2014, the first year after the new legislation entered into force, the söp received around 5,000 conciliation requests. The number of cases is rapidly growing as more and more consumers become aware of the ADR service.⁵⁷ This rise in caseload demonstrates that parties utilise means that are made available to them. According to a recent study from Oxford University, consumers appreciate the non-bureaucratic, fast, independent and amicable way of resolving disputes at söp.⁵⁸ At the same time, airlines are overcoming their longstanding scepticism towards ADR through a positive practical experience; ‘learning by doing’.⁵⁹

3.3. ADR in aviation in other European countries

The following examples provide a brief account of obstacles and additions to ADR for aviation on a national level, as well as discussing the possibility of a pan-European ADR system for aviation.

a. The Netherlands

The development in the Netherlands shows that ADR in air passengers’ rights is also marked by drawbacks. With high expectations, in July 2009, the ADR scheme *Geschillencommissie Luchtvaart* was set up under the umbrella of the Dutch Foundation of Consumer Conflict

⁵⁴ The amount varies between public and private ADR bodies.

⁵⁵ Aviation settlement regulation (Luftverkehrsschlichtungsverordnung) of 11.10.2013, BGBI.I, 3820.

⁵⁶ For an up to date list of members of the söp governing body: <https://soep-online.de/assets/files/Schlichtungsstelle-Traegerverein/soep-Vereinsmitglieder.pdf>.

⁵⁷ Estimations for 2015 are around 10,000 cases at söp.

⁵⁸ Trusting the middle-man: impact and legitimacy of ombudsmen in Europe (<http://www.law.ox.ac.uk/projects/Ombudsmen>); söp report: <https://soep-online.de/assets/files/Service-Dokumente/Oxford-Studie.söp.pdf>.

⁵⁹ Employees of airlines have, in personal conversations, revised their pre-existing reservations, especially regarding neutrality and sector-specific expertise of the söp.

Boards (*‘Stichting De Geschillencommissies’*).⁶⁰ Similar to the other 50 or so sector-specific conflict boards, the ADR scheme for aviation was created as a result of negotiations between the national consumer organisation *‘Consumentenverbond’*⁶¹ and the industry association BARIN⁶² overseen by the government.

Only a few years later, however, BARIN left the scheme, stating that not all airlines (non-BARIN members) that operate in the Netherlands are part of the scheme and the resulting competitive distortion could not be tolerated.⁶³ The ADR scheme *Geschillencommissie Luchtvaart* was finally knocked off on 1.01.2012.

b. Sweden

In the Nordic countries there have been comparably fewer changes. The general Swedish complaints office, the state-funded *Allmänna Reklamationsnämnden* (ARN)⁶⁴ is still responsible for aviation complaints. It is a public authority that functions similarly to a court and deals with disputes between consumers and business operators. Alongside twelve further ‘departments’ there is a specific one for air, rail and package tours. Air passengers can bring complaints against any airline operating in Sweden, which means it is not essential for the airlines to be part of the ADR body.

4. ADR as alternative or mainstream

The growing presence of consumer ADR is also reflected in the literature. The example of the söp clearly demonstrates that consumer ADR (with the appropriate design) is no competition to the formal justice system. ADR is an addition to the existing options if a consumer does not get a solution to a complaint directly from the company. Settlement through the söp is an alternative for the consumer in two ways – not only to the courts but also to taking no action.

⁶⁰ <http://www.degeschillencommissie.nl/home>.

⁶¹ <http://www.consumentenbond.nl>.

⁶² <http://www.barin.nl>.

⁶³ BARIN website: http://www.barin.nl/show_pubnews.php?publ_id=2884.

⁶⁴ <http://www.arn.se>.

4.1. Germany

a. An alternative to taking no action ('avoidance')

For low value consumer disputes the transaction costs for processing a conflict seems “prohibitively high”.⁶⁵ Therefore it is not surprising that consumer disputes frequently avoid any form of further processing if they are rejected or ignored by the company they are made against.⁶⁶ If an informed consumer waives the enforcement of a material-legal claim because of a disproportionate relationship between the degree of the dispute and the time and cost for its enforcement, the literature labels that consumer to have a ‘rational disinterest’.⁶⁷ According to a recent survey from the Allensbach Institute, German consumers consider taking a cases with an average value of 1,950 Euro to court.⁶⁸

Experiences from everyday ADR practice confirm the assumption that consumers do not even consider taking low value claims to court. They are usually upset after a rejection of their complaint by the company and will not pursue it any further. The advantages of the settlement procedure for the consumer are apparent: making a claim is simple and informal, for example through the söp online form.⁶⁹ The procedure is free of charge for the consumer and typically does not take long⁷⁰ to complete. ADR also offers advantages for participating businesses. In the settlement procedure both sides are taken into consideration and weighed against each other, with the independent conciliators presenting the legal position and communicating the position of the business. This enables a better understanding between the parties and thereby a diffusion of the conflict. At this stage a business has the opportunity to win back a previously unsatisfied consumer.

⁶⁵ Eidenmüller, H. & Engel, M. (2013) ‘Die Schlichtungsfalle: Verbraucherrechtsdurchsetzung nach der ADR-Richtlinie und der ODR-Verordnung der EU, *Zeitschrift für Wirtschaftsrecht* (ZIP), 1706.

⁶⁶ Stuyck et al. (2007), 115 f.

⁶⁷ Faure, M. (2013) ‘CADR and Settlement of Claims. A Few Economic Observations’. Chapter in: Hodges, C. and Stadler, A. (eds.) *Resolving mass disputes. ADR and settlement of mass claims*, Edward Elgar, 38-60; Scherpe, A. (2002) *Außergerichtliche Streitbeilegung in Verbrauchersachen*, Mohr Siebeck, 19.

⁶⁸ Roland-Rechtsreport (2014), 36, available at: <https://www.roland-konzern.de/presse/publikationen/rolandrechtsreport/rolandrechtsreport.jsp>.

⁶⁹ For example, the söp online form: <https://soep-online.de/ihre-beschwerde.html>; and the CAA online form: <http://www.caa.co.uk/default.aspx?catid=2211&pageid=12725>.

⁷⁰ The average time it takes söp to deal with flight claims is 4-6 weeks.

b. An alternative to the courts

ADR procedures and courts have different focuses; this means that there is no “*competition between judge and conciliator*”.⁷¹ Rather, the relationship between ADR procedures and courts is intended as one of “*complementing legal protection*”.⁷² The German Federal Constitutional Court argues similarly that “*to reach an amicable solution to a problem should be favoured over a judicial decision*”.⁷³

The settlement practice of the *söp* is a complementary function to the courts. The main aim is the pacification of the conflict through impartial analysis of the facts and legal situation, leading to the mediation of a solution that is acceptable to both sides. This way all participants can save time, cost and vexation. If the facts cannot be clearly identified, pragmatic suggestions for a compromise are given based on exposition and burden of proof. Even in those cases where the ADR body finds that the consumer has no legal claim it can lead to conciliation of the claim: in these cases the *söp* receives feedback from consumers stating that they did not perceive the rejection of their claim as a defeat but rather that the detailed communication through the *söp* provided sufficient explanation to satisfy the consumer.

The procedural regulations of the *söp* specify the division of tasks between the ADR body and the courts: Firstly, the ADR at *söp* is voluntary for consumers and they can go to court if they are not satisfied with the non-binding conciliation proposal. Furthermore, the *söp* can recuse itself of an ADR procedure at any stage if the case brought to them seems unsuitable.⁷⁴ The complainant can, at any stage of the procedure, ask the *söp* to suspend its involvement as long as the complainant can show that his complaint is a matter of the law and needs a judgement (test case).⁷⁵ In this case the respondent is obliged to bear the cost of the court at first instance and lawyers fees, irrespective of the outcome of the judgement about the procedural costs.⁷⁶

⁷¹ Hirsch, G. (2013) ‘Außergerichtliche Beilegung von Verbraucherstreitigkeiten’, *Neue Juristische Wochenschrift* (NJW), 2093.

⁷² *Ibid*, 2094.

⁷³ Decision, 14.02.2007 - 1 BvR 1351/01; marginal number 35.

⁷⁴ § 7 para.1 *söp*-procedural rules.

⁷⁵ § 7 para. 2 S. 1 *söp*-procedural rules.

⁷⁶ § 7 para. 2 S. 2 *söp*-procedural rules.

Finally, ADR is also complementary to collective legal actions.⁷⁷ The consumer ADR directive emphasises the importance of collective procedures, stating that “*The existence of an effective system for collective claims and easy recourse to ADR should be complementary and they should not be mutually exclusive procedures*”.⁷⁸

The UK

As discussed above, the development of ADR for aviation in the UK is in its infancy compared to Germany. Therefore, the current debate focuses on how best to encourage the voluntary development of ADR in the aviation sector. The CAA has voiced a desire for the aviation industry to take ownership of complaint handling and overseeing the creation of a privately funded aviation ADR body. Ideally, this ADR body would have industry participation. In September 2014 the CAA released a consultation document⁷⁹ to airlines to gauge the different approaches and appetite within the aviation sector to engage with establishing an ADR body. The report⁸⁰ has been published, and presents a clear vision as a set of objectives: “*Our objective is to ensure that all consumers flying in and out of the UK have access to high quality ADR mechanisms if they cannot resolve their complaint with an airline. In line with the ADR Directive, ADR must be independent, impartial, and a quicker, cheaper and more attractive option than court action. It must also be able to provide the consumer with a final decision on their complaint, avoiding the need for consumers to have to go to court (ibid, p.12).*” Furthermore, the CAA is planning to withdraw PACT in order to enable the development of private ADR (ibid, p.20). The report states further that incentives will be introduced for airlines’ participation in ADR. This sets the aviation sector apart from other consumer service sectors in the UK (for example financial services, energy, legal services and telecoms) where ADR is mandatory.

The CAA will take on the role as competent authority in which it assesses if ADR providers for the UK aviation sector qualify under the consumer ADR directive. This not only includes the requirement set by the directive but also additional criteria set by the CAA as competent authority. Furthermore, the CAA states in both the consultation document and the final policy

⁷⁷ Hodges, C. and Money-Kyrle, R. (2012) ‘Safeguards in Collective Actions’, 19.4 *Maastricht Journal of International and Comparative Law*, 477-504.

⁷⁸ Page 66 (27) consumer ADR directive.

⁷⁹ *Reforming consumer complaints handling - Consultation on the CAA's draft policy*, available at: http://www.caa.co.uk/docs/33/CAP1257_ADR_draft_policy_statement_for_consultation.pdf.

⁸⁰ CAA (2015) *Consumer complaints handling and ADR. CAA policy statement and notice of approval criteria for applicant ADR bodies*, available at: <http://www.caa.co.uk/application.aspx?catid=33&pagetype=65&appid=11&mode=detail&id=6712>.

statement that it will explore legislative opportunities to make industry participation in ADR mandatory if voluntary approaches do not succeed.⁸¹

Conclusions

The implementation of the consumer ADR directive initiates the development of a new complaint-handling standard throughout the EU. The development of ADR has occurred at different paces through the EU member states and this has resulted in a varied national ADR landscape. This paper has discussed ADR in relation to the aviation sector, especially in Germany and the UK. The example of the aviation sector shows the challenges that creating alternative means of settling conflicts can entail. As the German example has demonstrated, a successful transition from airlines refusal to participation in a private ADR can be made with a little help from legislative intervention. Current developments in the UK might also lead to a significant change in the ADR aviation complaint-handling.

In the UK, it will be interesting to see whether an avowedly customer-focused industry can deliver ADR (an acknowledged pro-consumer measure) off its own bat. The effect of the policy measures the CAA is introducing to encourage voluntary ADR uptake remains to be seen.

Since the aviation industry is truly international, the relevant stakeholders could consider creating a pan-EU ADR system for handling aviation complaints. Even if this might be a perspective on rather longer term, the exchange of best practice and a closer co-operation between new and existing ADR schemes are helpful already now.

⁸¹ Ibid See foreword.