The Online Court: Filling the Gaps of the Civil Justice System?

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Abstract

In his Civil Courts Structure Review Lord Justice Briggs argues that a user-friendly online court will be the best strategy to increase access to justice in England and Wales. The forthcoming online court will incorporate alternative dispute resolution (ADR) techniques to resolve small and medium value disputes. This article evaluates the EU regulatory initiatives to promote consumer ADR schemes and its implementation in the UK. It also examines the online court and it considers whether it could operate as a residual dispute resolution forum for those consumers who cannot benefit from ADR because of the traders’ refusal to participate. This article highlights the problems with the existing piecemeal approach to consumer redress and proposes pathways between the two different dispute resolution options to fill the gaps in the Civil Justice System.

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Introduction

There is a big gap in access to justice for individuals with medium to low-value disputes. This fact has recently been recognized by the by Lord Justice Briggs (Civil Courts Structure Review: Final Report) “the single most pervasive and indeed shocking weakness of our civil courts is that they fail to provide reasonable access to justice for the ordinary individuals”.\(^1\) Fortunately for many of these cases the courts is not the only avenue to obtain justice as many disputes are now being resolved through alternative dispute resolution (ADR) options, such as ombudsman schemes. Yet, major gaps still remain.\(^2\) Two recent regulatory initiatives have tried to fill these gaps: first, the key proposal from LJ Briggs’s Report was the creation of an online court that imbeds ADR techniques in its procedure and it accessible for litigants in person with disputes under £25,000;\(^3\) the other initiative comes from the European Union (EU) and it seeks to ensure the provision of ADR schemes accessible online for consumer disputes.\(^4\)

These regulatory changes reflect the efforts made in recent years to introduce technology in the dispute resolution process with the dual purpose of increasing trade and promoting access to justice. More generally we are witnessing the drafting of rules that encourage or require the use of ADR techniques and the availability of distance means of communication for resolving disputes. In other words, they are encouraging the use of online dispute resolution (ODR) techniques to settle and adjudicate civil disputes. In the international arena UNCTIRAL has agreed on rules for an ODR process for cross-border low-value disputes.\(^5\) Yet, the most concrete initiatives in this field have occurred at regional and national level. At regional level the EU has produced legislation that requires Member States to ensure the availability of certified ADR schemes (referred as ADR entities) that comply with procedural standards and it also requires traders to inform consumers about these certified ADR entities. Although trades must inform about these certified entities, they are not obliged to participate in the ADR processes (unless a national law so requires), which leads to confusion for consumers and huge gaps in the redress system.\(^6\)

After critically examining the European framework on consumer ADR and its implementation in the UK, this paper discusses some of the challenges in the design of the online court (OC) and whether it will be able to fill the existing gaps in the civil justice system. It notes that the piecemeal approach to consumer redress and an absence of joint

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\(^2\) Department for Business Innovation & Skills ‘Helping Consumers Get a Better Deal – Call for Evidence on Improving the Consumer Landscape and Quicker Switching’ (May 2016).

\(^3\) Briggs Final Report, n 1.

\(^4\) Directive 2013/11/EU on Alternative Dispute Resolution for Consumer Disputes O.J. (L 165) 63.


thinking will not tackle effectively the lack of access to justice; hence it proposes pathways to integrate the two new systems.

The EU framework: out-of-court online dispute resolution

The new European rules on ADR and ODR, in the form of a Directive on Alternative Dispute Resolution for Consumer Disputes and a Regulation on Online Dispute Resolution for Consumer Disputes, took effect in July 2015 and January 2016 respectively. The new regulatory framework aims of stimulating trade, especially in the online arena, by requiring EU Member States to ensure that consumer complaints can be resolved online by nationally certified ADR entities. Together, these two legislative instruments set up a ground-breaking framework for consumer ADR to tackle both national and cross-border disputes within the EU and create a network of accredited ADR entities. These ADR entities, which may be public or private bodies (even for profit), can offer a variety of ADR techniques, including mediation, arbitration, and ombudsman processes.

As a result, the EU framework has triggered an institutionalisation process that is moving ADR and ODR schemes from unregulated models of redress to an increasingly important part of the Civil Justice System in the United Kingdom and the rest of the EU. In doing so, it has ensured that businesses and consumers, regardless of their sectors, can agree to use quality ADR entities that have been publicly certified for complying with the EU and national procedural standards. Therefore, the ADR Directive does not make participation in ADR compulsory, but it requires, first and foremost, that all EU Member States ensure the availability of certified ADR entities that meet at least the procedural standards set in the Directive.

Amongst these requirements, certified ADR entities must be able to process complaints online, be free of charge (or of low cost) for the consumer, and comply with the principles of independence, effectiveness (e.g. resolving disputes within 90 days), transparency (e.g. publishing annual activity reports), fairness (e.g. giving consumers a cooling off period before they agree to settle a claim), legality (e.g. ensuring that mandatory consumer law is respected) and liberty (e.g. guaranteeing that consumers can only agree to arbitration, or any other procedure that precludes them from going to court, after the dispute arises—in other words, pre-dispute contractual agreements are only valid for consensual or non-

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7 Directive 2013/11/EU on Alternative Dispute Resolution for Consumer Disputes O.J. (L 165) 63.
8 Regulation (EU) 524/2013 on Online Dispute Resolution for Consumer Disputes O.J. (L 165) 1.
11 Moreover, this protection has been recently expanded by the CJEU which held that even when businesses choose a law different to that of the consumer jurisdiction, consumers cannot be led “into error” of thinking that only the business’ proposed governing law applies —i.e. implying that consumers do not have the protection afforded by the mandatory laws from their own jurisdictions. See Verein fur Konsumenteninformation v Amazon EU Sarl (C-191/15).
binding ADR processes). In addition, all businesses established in an EU Member States are obligated to inform a consumer resident in the EU about the availability of these certified ADR entities every time a trader has an unresolved dispute with that consumer or the consumer is not satisfied with the remedy offered by the trader.

The ODR Regulation complements the Directive by requiring the European Commission to run an ODR platform, which is in essence a website that acts as a hub to channel all consumer complaints (both, domestic and cross-border) arising from e-commerce to these certified ADR entities. The platform, which started operating in 15 February 2016, allows consumers (and traders, when the national law thus permits) to submit complaints related to online contracts in all the EU languages. All traders operating online as well as online market places established within the EU, such as Amazon, have the obligation to provide an easily accessible link to the ODR platform. At the same time, because the focus of the EU platform will inevitably be on cross-border issues, a number of EU countries, including Belgium, have built or are building national ODR platforms to complement the EU platform. It is still too early to assess how effective the new system is, but its implementation has faced a number of challenges. Despite strong support from most national governments, the transposition into the domestic law has been subject to delays. At the time of writing in November 2016 there were five Member States that have not yet implemented the ADR Directive which as due by July 2015 –namely, Spain, Poland, Luxemburg, Romania, and Croatia.

The transposition of the EU framework in the UK

The ADR Directive and the ODR Regulation have been transposed in the UK through the ADR Regulations 2015 which introduced standards for ADR entities that seek to be approved under these Regulations. The advantage of having this national accreditation is not only obtaining a certification that confirms meeting quality standards, but as discussed in greater detail below, all traders and businesses are required to signpost consumers to these certified ADR entities. Although the Regulations followed very closely the requirements set by the ADR Directive, there are a number of distinguishing features that are relevant to be addressed in this section.

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12 See arts. 5-11 ADR Directive.
15 Furthermore, it has been suggested that other Member States may have not done an adequate implementation. See J. Minor, ‘European Priorities for Consumer Protection’ Westminster Business Forum Keynote Seminar: The Future of Consumer Law and ADR in the UK’ (London, 14 September 2016) Conference Proceedings p. 57.
First, it is worthwhile to note that the national law has included within its scope not only the contractual consumer disputes required by the Directive, but also disputes with public providers of higher education as these fall in the UK within the scope of the Consumer Rights Act.17

In terms of the ADR procedures offered by the certified ADR entities, in the UK the Regulations do not allow, unlike in France, for the certification of ADR entities that operate as part of the traders’ in-house dispute resolution scheme. The exclusion of these in-house schemes was based on the concern that in the event of not reaching a settlement through the in-house mediation, the consumer will find difficult to find another certify ADR entity willing to consider that dispute. Furthermore, in-house ADR would not be perceived by the consumer as offering the same level of impartiality and independence to external ADR schemes, and it may confuse consumers, undermining their confidence in the whole ADR system. The Regulations however permit (and indeed regulators encourage) trade associations to provide their own ADR scheme rather than having traders using different ADR entities. An example of a private sectorial ADR scheme is that provided for the travel agents and tour operators that belong to the Association of British Travel Agents (aka ABTA).

However, unlike in Germany or Italy, the UK Regulations allow for the certification of arbitration schemes. Interestingly, the freedom of services may not impede for these certified arbitration entities to operate in countries where they do not meet the certification requirements, which may raise concerns of forum shopping.18 Nevertheless, as noted above, consumers are not bound by pre-dispute arbitration agreements. Hence, once a dispute arises consumers are free to choose whether to resolve their dispute in a national courts instead, though currently they would rarely do so as the latter option would typically require them to submit a claim in the county court and pay court fees to participate in a process is slower and more formal. Moreover, besides arbitration, under most ADR processes, such as an ombudsman, consumers can decide whether to accept a settlement or go to court to seek more compensation.

Another important feature is that there is not a single residual ADR entity –that is, one ADR entity that operates in all the economic sectors not already covered by a specialist ADR entity, such as the Financial Ombudsman Service or the Office of the Independent Adjudicator for complaints against public providers of higher education. Notably, while in some EU jurisdictions, such as Belgium and Sweden, there is a residual ADR entity that processes consumer complaints even when traders do not agree to participate in the ADR process, in the UK there is not such an entity; yet, like in most EU countries there is a number of sectors where the national law makes it compulsory for traders to be covered by a certified ADR entity, which in England are usually ombudsman schemes. The sectors underpinned by the regulatory obligation in England to participate in ADR are: energy,

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17 This is because students of higher education in England are required to self-finance their degrees. Although the government advances UK (and so far EU) students the cost of the university fees, these fees are expected to be return once students earn over £21,000 a year. Also, it must be emphasised that it only applies to contractual disputes, so for instance the water sector is not covered because there is no contract between consumer and supplier.

18 P. Cortés 'The Impact of EU Law in the ADR Landscape in Italy, Spain and the UK: Time for Change or Missed Opportunity?' (2015) 16(2) ERA Forum 125–147.
estate agents, financial services, higher education, gambling, legal services, pensions, postal services, property letting agents, and telecommunications. However, as already noted, important gaps remain in sectors such as traditional retail.

Currently, the best developed sectors are the ombudsman schemes operating in financial, legal, telecom and energy sectors. Frequently, well-established ADR entities operate in the regulated sector with a single statutory body operating as an ombudsman, such as the Financial Ombudsman Service or the Legal Ombudsman, where adherence by traders is compulsory. In some regulated sectors the trader is obliged to be covered by an ADR scheme but it may choose from several private ADR bodies, such as the case of the telecommunication sectors, where traders can choose from Ombudsman Services (OS) and the Communications and Internet Services Adjudication Scheme (CISAS). In other sectors ADR entities operate as a requirement of businesses to join a trade association, such as travel agents or double glazing.

Consumer support to identify and understand ADR has been assigned to Citizens Advice which acquired the role of a helpdesk to assist consumers to navigate through the complex ADR structure. This role of helpdesk is currently very underdeveloped due to lack of funds. At the time of writing Citizen Advice only provides a phone number in its website to assist in finding ADR entity. A preferable, but more costly, option would be to develop a national ODR platform.

The UK, like most EU Member States, have opted to set up a number of competent authorities, which are by in large sectorial regulators that have taken the role of certifying external ADR schemes that apply to operate in their sectors. Having many competent authorities produces the anomaly of ADR entities required to apply and pay for different sectorial certifications if they intend to work in one than more sectors. Furthermore, it has been suggested that the use of a single competent authority would allow for monitoring better the various ADR entities, it would help to bring greater consistency in standards, and it would facilitate the dispute resolution pathway for consumers.

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19 Department for Business Innovation & Skills, ‘Alternative Dispute Resolution for Consumers: Government Response to the Consultation on implementing the Alternative Dispute Resolution Directive and the Online Dispute Resolution Regulation’ (November 2014) p. 3.


21 The UK government has contracted the Chartered Trading Standards Institute (CTSI) to act as the UK’s competent authority covering ADR entities in non-regulated sectors, while the sector regulators remain as the competent authorities for their own sectors. The government has appointed the following competent authorities: the Civil Aviation Authority (for the aviation sector); Ofgem (for the energy sector); Powys Council (for estate agents); the Financial Conduct Authority (for financial services); the Gambling Commission (for the gambling sector); the Department for Work and Pensions (for pensions); Ofcom (for the telecoms and post); and the Legal Service Board (for regulated legal services in England and Wales).


The requirement of an additional certification may occur when an ADR entity wants to be signposted by a business established in another Member State. Arguably, this requirement may be in breach of the Service Directive, which sets the requirements as to when authorisation requirements can be acceptable under EU law. Indeed, if this restrictive interpretation requiring national and sectorial certifications were to be followed in all the Member States, then an online business or trader that operates across the European Economic Area would need to enter into contracts with ADR entities that have been certified by 30 different countries (the 28 EU Member States plus Norway and Iceland which have also implemented the ADR Directive), or to choose 30 different ADR entities. Although this reading does not sit well with the idea of a Single Market, it is in fact a moot point that may ultimately require the interpretation of the Court of Justice of the EU.

Since the ADR framework for consumer disputes is firmly anchored in EU legislation, an inevitably issue to ponder is whether Brexit would change the status quo. It is difficult predict now how the Brexit negotiations would progress, but what it seems clear is that unilateral changes in the field of consumer ADR would hinge on whether the UK government negotiations culminate with membership or access to the Internal Market. If so, then the UK will be expected to comply with all the regulation based on the Internal Market provision, including the EU framework on consumer ADR. However, at the time of writing it is not possible to know whether that would be the case.

What it is easier to envisage at this point is some level of expansion and consolidation in the field of consumer ADR in the UK. An indication of this intention was given by a recent government consultation which noted the benefits of ADR and the need to harmonise standards and expand mandatory ADR schemes for other regulated sectors, such as transport and water, in order to make them compliant with the ADR Directive. This is because the provision of consumer ADR in the UK has been growing organically over the last few decades. Traders’ membership is compulsory in a number of economic sectors, but voluntary in orders, so the coverage is presently very patchy and confusing for consumers. In order to increase awareness the EU legislation imposes information obligations on traders, but, as we will see in the next session, unless there is an effective residual dispute resolution forum, it can lead to more, rather than less, confusion.

The information requirement and the voluntary nature of most consumer ADR processes

It has already been noted that although the Directive does not make it mandatory for traders to participate in ADR, it requires them to inform consumers about certified ADR entities; and if the operate online, they must inform also about the EU ODR platform.

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25 Article 20 of the ADR Directive recognises that national law may request additional requirements, but the article also states that these have to be “in conformity with Union law” – and an unjustified restriction of services would not be in compliance with EU law. Moreover, in an event of an incompatibility between national and EU law, then EU law would prevail – though sometimes one may have to escalate the dispute to the Court of Justice of the EU to obtain such recognition.
26 Department of Business Innovation & Skills, Helping Consumers Get a Better Deal (May 2016).
27 Art. 13(3) ADR Directive and art. 14(1) ODR Regulation.
Accordingly, when traders have agreed to use a specific certified ADR entity (of if such agreement applies collectively to the traders’ sector), then they must inform consumers about the ADR entity in the T&C, and if they operate online, they must include a link to the ODR platform. Such link must be included when the trader makes an offer to the consumer via email.

Moreover, even if the traders have not signed up with an ADR entity, they must inform about a certified ADR entity to consumers with whom they are in an unresolved dispute (i.e. one that has brought to the attention of the trader and was not resolved in favour of the consumer), or one where the consumer has received a deadlock letter (normally after eight weeks of submitting the complaint) stating that the dispute could not be resolved. The notification must clearly specify whether the trader will be willing, or not, to use the ADR entity. In addition, all online sellers must include in their website an email address and a link to the EU ODR platform.

Naturally, the effectiveness of these notifications will depend on whether the trader is linked to an ADR entity (and how effective is that ADR entity). The national law can also play an important role in shaping the redress landscape. For instance, in France all businesses have an obligation to offer free of cost mediation services, which subject to a number of procedural guarantees, these may be offered in-house by the business. In Scandinavian countries and in Belgium traders may opt to participate in one of the certified ADR entities, but there is a residual ADR entity (a complaints board and an ombudsman respectively) which can process claims even when the traders refuse to participate in the process, though the outcomes of these processes are not binding for the trader.

The rationale behind the information obligation is that good businesses that are incentivised to engage with (and often pay for) ADR entities, would benefit from demonstrating higher trading standards by adhering to ADR as hallmark of their services. But this has simply not happened. Indeed, most traders who are not signed up do not inform customers about it. Those who do, bury it in the T&Cs, which rubs up against the law that requires them to provide this information in an easily accessible manner. Hence, to make the new rules work it is necessary proper enforcement. The Enterprise Act sets the penalties for noncompliance with the ADR Regulations, which is an unlimited fine and up to two years imprisonment. Naturally, this is a very blunt instrument that would only apply in very exceptional circumstances when traders had been asked to comply with the information requirements and had repeatedly refused to do so. A more effective strategy would be to launch awareness campaigns where regulators inform traders about the information obligations.

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29 See for instance the link to the ODR platform contained in paragraph 14 of the Amazon T&Cs available at <https://www.amazon.co.uk/gp/help/customer/display.html?ie=UTF8&nodeId=1040616&pop-up=1>.
30 Art. 14(1) ODR Regulation.
Of course, traders can always comply with the information requirements and simply ignore complaints sent by the ODR platform. Indeed, this is what has happened to the majority of complaints received in the EU platform. During the first seven months of operation around 55 per cent of cases received were automatically closed after 30 days because the trader did not respond (so the case was not sent to the ADR entity). After seven months of operation the EU ODR platform had received 14,000 claims, of which around 60 per cent of cases were domestic and 40 per cent were cross-border. This is hardly a high number for the over half a billion EU consumers. In practice the problem is that most businesses were not aware of the new legislation—something that has not changed dramatically since the implementation of the ADR Directive.

Arguably, the best way to incentivize traders to participate in ADR is to have a mandatory residual ADR body which can issue recommendations on how to resolve individual disputes. In order to encourage compliance with the recommendations, the ADR scheme might be run by a regulator or use name and shame techniques, which is defining feature of the Scandinavian ADR schemes, and it will soon be adopted by the Small Business Commissioner for late payments disputes between large corporations to SMEs. However this approach is unlikely to be extended to other sectors anytime soon in the UK. Instead, the substitute for consumer disputes in the UK might be the online court, but first, let us assess whether the EU ADR initiatives have achieved their aims and objectives.

Assessment of the ADR/ODR initiatives

The overall aim of the EU legislation was to promote the use of quality consumer ADR schemes, which in turn it would increase consumer trust and trade within the Internal Market, especially on its digital side. It also aimed to provide greater access to justice for consumers in so far consumers do not go to courts to resolve low value disputes, while leaving the possibility of accessing the courts open to consumers. Thus, it seeks to complement rather than replace the forum of the courts for resolving consumer disputes.

In the Communication that accompanied the legislative proposals for the ADR Directive and the ODR Regulation the European Commission identified the following three goals:

First, to ensure the coverage of ADR services, so that consumers and traders can find a certified ADR entity that operates in their economic sectors. Secondly, to ensure a minimum of quality standards in all certified ADR processes. And thirdly, to ensure that consumers and

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32 Minor, n 15, p. 57.
33 Minor, n 15.
36 Recital 7 and art. 1 ADR Directive.
traders are aware of the availability of ADR schemes. This section examines to which extent these three objectives are being met.

In the first place, the ADR Directive set goal of ensuring the availability of ADR entities for consumer disputes since there were many sectors where ADR was not used. However, it does not set a specific procedure, nor does it make it mandatory for traders to participate. In other words, the Directive ensures the availability of an ADR network (now accessible through the ODR platform), but it does not ensure that consumers will have access to ADR. That said, as mentioned above, a national law may require traders to join and participate in an ADR scheme, or a trade association may require members join an ADR scheme. Although the rest of the sectors can join an ADR scheme if they wish, they have not done so. Interestingly, as noted above, some Member States such as Sweden and Belgium have set up a residual ADR entity that processes the remaining of the claims regardless of whether the trader has opted into the ADR entity. While their decisions are not binding on the traders, they carry weight, and the Swedish ADR scheme blacklists traders who do not comply with their recommendations. This method has proven effective. The Swedish ADR reports that traders comply in 80 per cent cases, but it must be noted that case numbers are not very high as they are around 15,000 a year. Naturally an effective ADR system works towards ensuring high trading standards, which in turn reduce the number of complains. This contrast with the situation in Spain, which government bluntly opposed to support the approval of the ADR Directive in the committee of the European Council (COREPER) because of the high number of disputes that telecommunications operators have –reportedly around 25 million a year.

Residual schemes can also operate on a sectorial basis. A good model to follow in the UK is the Civil Aviation Authority (CAA), which in effect restricts the number of certified ADR entities by requiring high certification fees and it sets up a residual (non-certified) ADR scheme (called PACT) that charges airlines (somewhat over the market rate) per case it processes. This type of residual scheme would be effective in so far as it is sufficiently funded and has the necessary resources to encourage traders’ compliance –naturally being offered by a regulator that can issue enforcement procedures for legal infringements would represent on itself a powerful incentive. As already mentioned, outside the consumer realm in the UK there is the Small Business Commissioner. This scheme follows the Australian example and offers a complaint mechanism for small businesses that experience late

38 As noted above in the UK, this includes the following sectors: financial services, energy, telecoms, legal services, green deal, estate agents, gambling, and higher education (and to some degree in the transport services).
39 The list is available in the consumer magazine Råd & Rön and online at <http://www.radron.se/svartalistan/>.
40 See the Swedish Complaints Boards (ARN) at <http://www.arn.se/>.
41 That, coupled with the fact that the main ADR scheme in Spain is a publicly funded arbitration system that processes consumer complaints free of costs for businesses and consumers (and that one of the major telecoms was previously government-owned) shifted the Spanish vote. See ‘Statement by Spain on the Directive on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC’ (17 April 2013) 2011/0373 COD. The position of Spain is available at <http://tinyurl.com/zlulx9z>.
payments from corporations that are unsatisfied with a transaction. Although the Commissioner cannot legally force corporations to pay, they will use a blacklist to name and shame those corporations that do not comply with their recommendations. To sum up, the goal of ensuring the availability of ADR is pointless if traders refuse to use it because they are not required or do not have incentives to participate. Therefore, there should be at least an effective residual ADR scheme that is able to process consumer complaints (and it has incentives to ensure compliance) when traders are unwilling to opt in voluntary. As it is argued below, this role might be taken by the online court, but only if this is a truly accessible form for litigants in person and for low-value disputes.

The second goal outlined by the Commission Communication was to ensure minimum procedural standards for ADR entities, thus ensuring the provision of quality ADR. The ADR Directive provides minimum standards and requires Member States to certify ADR entities that comply with these. Most Member States have delegated this role to sectorial regulators, especially in those Member States where there is a sectorial approach to ADR, such as the case in the UK. This has seen as an opportunity for many to enter into the market through the provision of ADR and, as noted above, it added a level of bureaucracy for ADR entities, especially those that seek the certification in various sectors. Furthermore, the entrance of private ADR schemes has increased the availability of ADR providers, but the traders’ ability to forum shopping has also given rise to concerns about the independence of ADR entities. This is because ADR entities, in particular those that are for profit, have economic incentives to attract clients, which are traders, offering lower prices and arguably processes that favour the interest of traders. It is the role of the national competent authorities to ensure that certified ADR entities comply with the minimum criteria set in the law, including the standards of independence and impartiality.

The supervision of certified ADR entities will be more effectively carried out when there is one or a limited number of certified ADR entities per sector. In addition, a limited number of ADR entities benefits economies of scale and the gathering of data that could in turn feedback the industry and the regulators so that they can set up dispute avoidance strategies – let that be requirements for the improvement of traders’ in-house complaint systems or issuing enforcement action, or even clarifying the regulation when needed. However, in the UK this has only happened in those regulated sectors where it is mandatory for traders to join a certified ADR entity, and in the example provided above by the CAA. Only in these regulated sectors there is a limited number of providers and a reasonable level of control and monitoring from the competent authorities. Conversely, in the non-regulated sector it is less clear whether appropriate control is being carried out. Despite that, it must be acknowledged that the ADR Directive has introduced transparency requirements for certified ADR entities. Accordingly, certified ADR entities must publish annual activity and produce a bi-annual report. Hence, whereas the new accreditation system has brought some inevitable bureaucratic process and a risk of forum shopping, it also raised procedural standards and brought greater transparency. Therefore, higher standards are very much welcome, but the risks would be minimised if the Member States reduce the number of certifying bodies setting up a coordinating competent authority as well as the number of

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42 For the background information see <https://www.gov.uk/government/consultations/small-business-commissioner-role>.

43 Cortés, n 18.
ADR entities certified in each sector through a renewable tender process as it already happens in some regulated sectors.

The third goal of the EU legislation was to increase awareness about ADR amongst consumers and traders. That is the information obligations that mandate traders to inform consumers with unresolved complaints about certified ADR entities, and to online traders to carry the link to the ODR platform. However, as already noted, the level of compliance with these obligations is very low. Evidence of that is that the above mentioned low level of claims submitted to the EU ODR platform. Moreover, as it happened to this author, in the majority of cases consumers will submit complaints and they will only hear back 30 days later, when an automated email from the platform states that the case is closed because the trader did not reply. An added challenge is that it is difficult to police certain information requirements –namely, the traders’ obligation to notify about ADR once a complaint has completed the traders’ in-house complaint process. Proper monitoring by enforcement bodies, changing the ODR Regulation to require traders to reply to complaints, and (mandatory) residual ADR entity, or in its defect a truly accessible online court for low value disputes, would help to address the issue of low compliance.

The European legal framework for consumer ADR/ODR incorporates recognized best practices, and in doing so, it has started a process of professionalizing a traditionally unregulated sector. The rationale behind this regulatory effort is the promotion of ADR/ODR as the primary form of dispute resolution for consumer disputes. This institutionalization process is moving ADR from the unregulated models of redress to an increasingly important part of the civil justice system in the United Kingdom and the rest of Europe. From a EU and UK view point, consumer ADR, like courts, is more than a mere tool of dispute resolution; it is an essential mechanism to ensure better compliance with consumer protections laws. Consumer ADR entities, which are now publicly certified, provide a public service. Accordingly, ADR entities should incorporate proper corporate governance strategies, which remit goes beyond the provision of individual redress, and thus cooperate with the industry and enforcement bodies in improving standards and compliance with consumer law. Furthermore, a fundamental element of a successful consumer redress system should be effective pathways to the courts in order to ensure that regulatory compliance and clarifying when necessary the interpretation of the law. This interconnection would encourage traders to tackle the causes and consequences of their disputes with consumers, and in doing so, they would improve industry standards benefiting the society at large. The online court is the most obvious fit to accommodate the collaboration between ADR entities and the courts in the UK.

44 There is no official data on the level of compliance, but it is plain that most online businesses do not carry the link in their website. A Swedish consumer magazine article stated that only around 1% of online traders have the link to the EU ODR platform. See ‘Regelmissen: Nästan inga svenska e-handlare följer lagen’ Ehandel.se (23 June 2016). Available at <http://www.ehandel.se/Nastan-ingen-svensk-e-handlare-foljer-lagen,8138.html>.
45 Cortés, n 10.
46 Hodges n 23.
Background and design of the online court

The idea behind the online court (OC) is not a completely novel idea and it is one that is gaining traction in a number of jurisdictions outside the UK.47 There is also a number of tribunals48 in the UK that are incorporating ODR technology in their processes, allowing parties to submit and decide claims online. For instance, in England and Wales the Traffic Penalty Tribunal is a statutory body that considers appeals against parking fines.49 The OC, as currently envisaged in the Civil Courts Structure Review, has the same goal as an online tribunal, which in essence seeks to deliver an improved small claims procedure (with a narrower scope), which is user-friendly and accessible online. Similarly, the Tribunal of the Social Entitlement Chamber has recently announced the launch of an ODR platform.50

The incorporation of technology in judicial processes, and notably in the OC, are increasingly characterised by being processes that, in addition to judicial adjudication, incorporate other consensual dispute resolution methods that can be used by individuals without legal representation engaging with the third party neutral through online and telephone communications. These initiatives follow the paradigm of the multi-door courthouse posed by Professor Sander in the 1970s at the Pound Conference in the US.51 The rationale behind the multi-door system is to assist litigants to find the most appropriate dispute resolution method for their disputes. Similarly, the system design of the OC is rooted in the lessons and techniques used by modern consumer ODR and ADR processes, especially in those ombudsman processes characterised for: (i) filtering unmeritorious claims through a triage stage; (ii) resolving the bulk of claims through assisted settlement discussions; and, (iii) resolving the remaining claims through an adjudicated decision. Although these decisions are often recommendations in the UK, they become binding when accepted by the consumer-claimant. A paradigmatic example of a process that inspires the OC is the Financial Ombudsman, which resolves ‘huge numbers of relatively low value or low stakes cases ... simply, quickly and cheaply by avoiding hearings all together’.52

The OC follows the proposals made by the Civil Justice Council53 and by JUSTICE.54 Both reports noted the urgent need to make an overhaul in the court process, to invest in technology and to incorporate ADR and ODR techniques into the procedure in order to ensure that access to justice is met for citizens (who are by in large not entitled to legal aid)

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48 In common law jurisdictions in addition to courts there are tribunals. These are normally administrative adjudicative bodies akin to courts set by statute to deal with claims from citizens against decisions made by public bodies, though there are also employment tribunals. Typically these tribunals are more informal and thus in principle accessible for litigants in person, and they are chaired by a judge accompanied by two lay members with expertise in the field (e.g. a trade union member and a representative of employers).
49 See <https://www.parking-appeals.gov.uk/olappeals>.
50 N. Rose, ‘Tribunals Set to Pilot Online Dispute Resolution as a Priority’ Legal Futures (25 February 2016).
53 Civil Justice Council Online Dispute Resolution Advisory Group, ‘Online Dispute Resolution for Low Value Claims’ (February 2015).
with civil and commercial disputes of low and medium value. Inevitably, many consumer disputes will fall within this category. The proposal for the OC became doable when the Lord Chancellor’s Autumn Statement in November 2015 committed over £700 million to digitalise the court system making the launch of the OC a reality. The proposed procedure for the OC follows closely the Canadian online Civil Resolution Tribunal, and it has been fleshed out by LJ Briggs in his Interim and Final Reports.

The OC seeks to resolve the majority of monetary disputes under £25,000 where currently full legal representation is normally disproportionate, nevertheless LJ Briggs recommended an initial soft launch for disputes under £10,000. The OC will exclude cases that are complex or follow a separate procedure or digital platform, such as repossession cases and personal injury matters. In addition, the OC will be able to transfer cases to the county court, which process will also be digitalised in the next few years, but will continue using the Civil Procedure Rules as well as regular court hearings.

A distinguishing feature of the OC will be that it will have its own simplified procedural rules that will depart from the traditional adversarial process, operating instead an online tiered procedure with three main stages which imbed ADR and ODR techniques. The stage 1 will be a fully automated triage process in which parties will be required to fill in an online claim form and offered simple commoditized online advice. In stage 2 the case will be passed to a case officer, who will have legal training and offer a mix of conciliation services and case management, both online and via the telephone – and ideally settle the majority of cases. LJ Briggs recommended that parties should have “an unfettered right” to have any decision made by a case officer reconsidered by a judge. Case officers will recommend parties use ADR/ODR or invite them to participate in an early neutral evaluation (ENE) provided by a specialist judge, who would briefly review the claim and issue a non-binding recommendation. While ADR will not be compulsory, it is expected to be culturally normal, as it will be imbedded into the procedure. Those cases that cannot settle will undergo case management with the assistance of the case officer to be prepared for the final stage. Stage 3 will therefore deal with unresolved claims where a judge will make a final determination on the documents (and occasionally, when necessary, after a telephone, video, or face-to-face hearings).

Susskind has suggested the implementation of stages 2 and 3 first, as the design of stage 1 would be the most difficult since it would require the building of ‘diagnostic rule-based expert systems’. But LJ Briggs recommended launching the three stages together, and the Ministry of Justice is working towards achieving this by 2020.

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55 Civil Justice Council, n 53.
56 Briggs Final Reports, n 1.
57 LJ Briggs recommended the OC for specified (i.e. debt) rather than unspecified (i.e. damages) claims, and proposed to exclude inter alia, the possession of homes, professional negligence, intellectual property claims, and personal injury claims that fall within the Fast Track or Multitrack, unless agreed by the parties to fall within the Small Claims Track. See Briggs Final Report, n 1, para. 6.54, 6.93, 6.95 - 6.100.
58 Briggs Final Report, n 1 para. 7.35-7.38.
59 R. Susskind, ODR Group Response, Civil Justice Council (31 March 2016) para 5-6.
60 Briggs Final Report, n 1, para 6.68.
An important factor in the design of the OC is that it must be accessible for users without IT skills. The government has noted that there is a high proportion of individuals who do not feel themselves comfortable using public digital services, specifically noting that only 30 per cent of the population have “the skills, access and motivation to use digital services unaided,” while another 52 per cent are able to engage with government public services if they receive some assistance allowing them to fall within the first group over time; the remaining 18 per cent are digitally excluded. Yet, the size of these groups with IT challenges is constantly reducing as digital services become more common in the lives of ordinary citizens, and technology becomes more intuitive.

The design of the OC must take into account all these groups, incorporating adequate mechanisms for people without IT skills. The Ministry of Justice intends to provide telephone and chat support, as well as access to paper channels for those that require it. Furthermore, it expects to provide for face-to-face assistance, for instance helping in filling forms. This type of support may be provided in house by the HMCTS or by external bodies, such as Citizens Advice Centres. Accordingly, these centres will need additional resources to train their staff and provide clinics where one-to-one support can be obtained in order to avoid the exclusion of these citizens from the OC.

The need for to design a process that uses costs penalties to encourage settlements and the use of ADR

LJ Briggs noted in his Interim Report that ‘the true distinguishing feature [of the OC]... is that it would be the first court ever to be designed in this country, from start to finish, for use by litigants without lawyers’. However, this would be very difficult to realize, since tribunals (in the common law sense) as well as the small claims procedures were also originally designed to operate without lawyers in response to consumer demand in the early 1970s. Indeed, the LJ Briggs Final Report conceded that some legal assistance may be necessary, allowing the recovery of some legal costs, including initial legal advice pre-issue of the claim. Thus, while consumer ADR and the OC will overlap in terms of targeting low value disputes, in practice the OC is expected to be self-financed, so it will automatically exclude the vast majority of low-value consumer disputes. Hence, the main risk of the new OC would be similar to the shortcomings of the existing tribunals and small claims procedures – that it

62 Ibid.
63 Ibid para. 7.1.5.
65 JUSTICE ‘What is a Court’ (May 2016). Available at <https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2016/05/JUSTICE-What-is-a-Court-Report-2016.pdf>. In order to assure greater access to the OC the government announced that it is testing an online application system to help those with low incomes to pay for the court fees. Ministry of Justice, n 61, para. 7.1.6.
66 Ibid, para 6.5.
is a court procedure after all, which may remain only accessible to highly educated litigants in person with medium-value disputes. In order to overcome this risk, the OC must be truly accessible to litigants in person, and, which is the most relevant for the purpose of this paper, it should imbued incentives that encourage parties to consider the most appropriate dispute resolution technique to resolve their disputes. Although in consumer matters, the best option will often be to participate in a certified ADR scheme, it is still unclear how the existing consumer ADR architecture will interact with the OC.

Pre-action protocols have the function of exploring settlement before escalating a claim in court. LJ Briggs argues that pre-action protocols⁶⁹ are not suitable for litigants in person, who at most should be required to exchange written correspondence in advance of lodging a claim in court. Instead, the pre-action protocols are expected to be replaced by stage 1 of the procedure.⁷⁰ But when reliable ADR is available, as it is in the consumer sector, parties, especially traders, should be incentivised to consider pre-issue ADR.⁷¹ This is what LJ Briggs refers as stage 0, where would-be-litigants should be informed about ADR (as well as about sources of legal advice).⁷² This stage would be followed by what LJ Briggs calls stage 0.5 which will help parties to ascertain whether they have an undisputed claim that simply needs to be enforced.⁷³ In effect, these two preliminary stages would filter cases that do not require going through the full stage 1. Accordingly, prospective claimants should be required to notify, in writing, prospective defendants of their intention to lodge a claim in court. This pre-issue obligation could be streamlined by a function offered by the OC website, which should include a template for this notification and the ability to register when it was accessed by the defendant.

Yet, the most effective tool that the English court system has to channel claims through the most adequate dispute resolution technique is the allocation of costs. The costs shifting rules can have an important impact on the parties’ behaviour towards settlement, encouraging pre-action ADR and the online mediation stage.⁷⁴ Consequently, there should be cost consequences when a judge considers that one litigant has behaved unreasonably in refusing to participate in settlement discussions or in accepting a reasonable offer to settle.⁷⁵ Cost sanctions, however, should be proportionate, affecting mostly the shifting court fees, and imposed only in exceptional cases on consumers acting as litigants in person when facing repeat players, which are usually businesses with legal representation. In order to encourage early settlements the fee structure should be a ‘pay as you go’ system, requiring court fees to be paid for each of the three procedural stages.

⁶⁹ Pre-action protocols are the steps that parties are expected to take before lodging a civil claim in court. These steps are annexed to the procedural rules and include notifying in writing to the other party and consider the use of ADR.
⁷⁰ Briggs Final Report, n 1, para. 3.69 and 6.74.
⁷¹ Ibid, para. 6.108.
LJ Briggs recommended that the cost allocation should follow the small claims track regime allowing a limited fixed recoverable costs, including pre-action legal advice on the merits of a claim or a defence using unbundled legal services from solicitors and direct access to barristers. The recovery of these costs seeks to encourage the settlement of meritorious claims while leaving the courts as the last resort option. An additional incentive would be to allow the imposition of a cost penalty when traders had been unreasonably in refusing to participate in a certified consumer ADR entity prior to the submission of the claim, or after an invitation has been received during stages 1 and 2 of the procedure.

However, Brigg’s proposed design of the OC does not seem to account properly for the existing out-of-court ADR infrastructure, bar the possibility of a case officer recommending parties to attempt ADR or ODR. This is partly because the OC and the consumer ADR infrastructure are emerging in an organic way from different governmental departments to meet specific sectorial needs. For instance, while the Financial Ombudsman was created to address lack of redress in the UK banking system, the rationale behind the launch of the OC was inter alia to tackle the collapse of legal aid and an expensive court system. Thus, there is an urgent need to build “appropriate dispute resolution” pathways that align these systems.

The dispute system design of the OC, and in particular using the parties’ incentives to settle, is very important for its success and the quality of outcomes. The design of stage 1 of the procedure should draw lessons from ADR/ODR schemes, including those operating by online market places, such as the eBay Resolution Centre. eBay has claimed to resolve around 60 million disputes a year—a number that has already been dwarfed by Alibaba—using an effective ODR software, which algorithms generate settlement proposals that are often accepted by the parties. This is possible because all disputes in eBay (and in other marketplaces such as Amazon) can be categorised into a few groups (i.e. non-delivery, delays, non-payment, or goods not matching description), so the solutions are also limited (e.g. refund, partial refund, return of goods, etc.), and, importantly, parties have strong incentives to settle because while buyer wants compensation and the seller needs positive

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76 Rule 27.14 Civil Procedure Rules and Briggs Final Report, n 1, para 6.104 and 6.22 - 6.39. Briggs also noted that the OC should allow for the recovery of costs for advocacy at trial when really necessary. Briggs Final Report, n 1, para. 6.104.
77 Hodges, n 23.
78 Ibid.
81 These websites are available at <http://www.financial-ombudsman.org.uk> and <http://resolutioncentre.ebay.co.uk>.
feedback to keep selling goods at competitive market rates.\textsuperscript{83} Similarly, the telephone mediation provided by the Small Claims Mediation Service for litigants in the small claims track incorporates incentives that may not be easily replicated in the OC. This is because when parties opt into the telephone mediation, they are aware that if they do not settle over the telephone they will have to attend an oral hearing at the county court (and take time off work to do so). Therefore, reasoned explanations and costs penalties should operate instead as incentives in the OC procedure.

When claimants issue the particulars of the claim in the stage 1, the registration process should again require parties to justify whether they have considered their participation in a certified ADR before resorting to the OC, and be warned that unreasonable refusal, such as not answering to an invitation to consider mediation or ADR,\textsuperscript{84} would have costs consequences. In certain circumstances it may even be justified to impose indemnity costs in the event of misconduct.\textsuperscript{85} Although parties with legal representation may be allowed to bypass most of stage 1 of the procedure,\textsuperscript{86} they should still be required to provide the particulars of the claim and a justification for not using ADR.

Furthermore, once litigants move to stage 2 of the procedure and a case officer is allocated to the case, then this conciliatory stage should be sufficiently flexible to allow not only for referrals to the Small Claims Mediation Service, but, as envisaged by LJ Briggs, also “other kind of conciliation process, such as ODR, judicial ENE or private mediation”.\textsuperscript{87} Hence, case officers together with the parties should consider whether to out-source cases to sector-specific ADR entities. If parties settle in ADR, then, unless otherwise agreed, the defendant should cover the court fees of the claimant.

Lastly, a proportionate but higher fee should be required for the trial in the stage 3 of the procedure, which should culminate with judgements that are publicly accessible to anyone. The publication should include the name of businesses and only the initials of the name of the individuals in order to protect their personal data.\textsuperscript{88} The publication of judgments will be in itself a powerful incentive to encourage businesses to consider ADR options in appropriate cases.

Conclusion

This article has analysed the developments of the consumer ADR framework in the EU and its implementation in the UK. It has noted that these regulatory changes are institutionalising and professionalising the field of consumer ADR by turning best practices into minimum standards for certified ADR entities. It criticised the low level of information compliance of traders and observed that the coverage of redress options remains patchy –in

\textsuperscript{83} Cf. P. Cortés, \textit{Online Dispute Resolution for Consumers in the European Union} (Routledge, 2010).

\textsuperscript{84} \textit{PGF II SA v OMFS Company 1 Limited} [2013] EWCA Civ 1288. See also S. Blake, J. Browne, S. Sime, \textit{The Jackson ADR Handbook} (Oxford University Press, 2013) para. 11.56.

\textsuperscript{85} Briggs Final Report, n 1, para. 6.104.

\textsuperscript{86} Ibid, para. 6.111.

\textsuperscript{87} Ibid, para. 6.112.

practice ADR is only effective in those sectors where the sectorial law or a trade association requires traders to join an ADR scheme. Accordingly, this paper argued that regulators should ensure that traders comply with the information requirements and provide an effective and accessible redress forum, such as a residual ADR body, to cover the gaps of redress.

Furthermore, this paper noted that this role of a residual dispute resolution forum could be taken by the OC in England and Wales, but its design should account for parties with poor IT skills and incorporate cost incentives (especially for traders) to ensure that they consider ADR options prior to court litigation. In order to achieve this goal prospective claimants should be required to inform defendants of their intention to escalate their dispute to court, and parties should be required to consider available ADR processes before they proceed from the stage 1 of the OC procedure. Once in the OC procedure moves to stage 2, case officers should also seek to move parties towards early resolution through the ADR options. Stage 3 should culminate in a public decision, accessible online in order to be an incentive for traders to settle meritorious claims. Yet the most powerful incentive are likely to be cost incentives encouraging parties to settle their disputes rather than having them determined by a judge through a more adversarial and expensive dispute resolution process. Therefore, if the right incentives to consider ADR are imbedded in the OC procedure, then litigants will be able to resolve more effectively their disputes, putting us closer to filling the gaps in the English Civil Justice System.