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The Role of the EU in Online Dispute Resolution

(10 theses of a presentation at the Vienna Conference of March 29-30)¹.

1. The EU - having only a limited competence in procedural matters - has been very active in encouraging and lately requiring Member states – to a limited extent also businesses - to set up effective redress systems (ADR/ODR/mediation) for consumers (in a broad sense of the definition) in its measures relating to the functioning of the internal market (Art. 95 EC, now Art. 114 TFEU). This policy has found support lately with the formal enactment of the EU-Charter of Fundamental Rights, being part of EU law from 1.12.2009 according to Art. 6 (1) EU Lisbon. Its Art. 47 reads:

‘Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.’

2. EU measures relating to ADR and lately ODR have a “horizontal” and a “vertical” dimension. The *horizontal* dimension wants to guarantee consumers certain basic principles of procedural fairness (“due process” in US-terminology) if they put their complaints before an ADR system. The *vertical* dimension is concerned with the specific area of EU policy where ADR/ODR systems have to be set up (or are at least encouraged) by Member states.
3. The “horizontal dimension” has been defined in *Recommendation 98/257/EC* of the Commission of 30 March 1998 regarding principles applicable to bodies responsible for out-of-court consumer dispute settlements (OJ 1998 L 115, 31). It aims at encouraging respect for certain essential principles by bodies responsible for alternative consumer dispute resolution systems that already exist, or that are to be created within the European Union. The adoption of these principles (the independence and transparency of ADR mechanisms; adversarial system; efficiency principle; principle of legality; freedom of access; and the principle of representation) tends to assure the protection of consumer rights and to increase confidence in ADR systems.

¹ Based on Micklitz/Reich/Rott, *Understanding EU Consumer Law*, Intersentia 2009; see also the „Leuven study“ on ADR mechanisms, directed by Prof. Jules Stuyck, done for the EC Commission, Jan. 2007,

4. *The European complaint form* attached to the Recommendation of 30 March 1998 has been designed as an instrument of dialogue between the consumer and the professional, in the event of litigation. Should an out-of-court settlement be arrived at, this form constitutes a means of facilitating and rationalizing the introduction of a procedure before extra-judicial authorities for the settlement of consumer disputes. This European complaint form is available on the internet in all the official languages of the EU. It is not known whether and how it has been used by European consumers.
5. The resolution of 25 May 2000 established the *European Extra Judicial Network, the EEJ-NET* (OJ 2000 C 155/1). This initiative is strongly related to the adoption of the E-commerce Directive 2000/31/EC (OJ 2000 L 178/12) and the then euphoria over the prospects of the internet and more particularly on the new economy. Member States are invited to set up central contact points which are to function as a clearing house. In the national context this clearing house shall provide the consumer with assistance in finding a competent national ADR system for the respective conflict. In the international context the clearing house shall inform the consumer who is involved in a cross-border conflict on ADR systems in the respective Member States. The mechanism encouraged Member States to gain a full picture of the diverse national ADR systems and exchange the information via the contact points. National clearing houses are to support the consumer in filing his complaints. The success (or failure?) of this initiative is not known to me.
6. “Vertical measures” have been included in the so-called “Universal Service Directive” 2002/22/EC of 7 March 2002 concerning telecommunication services in the EU (OJ 2002 L 108, 51, slightly modified by the new Dir. 2009/136/EC of 25.11.2009, OJ 2009 L 337/11). Recital 47 of the Directive refers to Rec. 98/257. Its Art. 34 reads:

‘1. Member States shall ensure that transparent, simple and inexpensive out-of-court procedures are available for dealing with unresolved disputes, involving consumers, relating to issues covered by this Directive. Member States shall adopt measures to ensure that such procedures enable disputes to be settled fairly and promptly and may, where warranted, adopt a system of reimbursement and/or compensation. Member States may extend these obligations to cover disputes involving other end-users. 2. Member States shall ensure that their legislation does not hamper the establishment of complaints offices and the provision of on-line services at the appropriate territorial level to facilitate access to dispute resolution by consumers and end-users. 3. Where such disputes involve parties in different Member States, Member States shall coordinate their efforts with a view to bringing about a resolution of the dispute. 4. This Article is without prejudice to national court procedures.’
7. The legal importance of Art. 34 of Dir. 2002/22 was before the European Court of Justice (ECJ) in joined cases C-317-320/08 *Rosalba Alassini et al. v. Telecom Italia*. The judgment of 18 March 2010 concerned the requirement of consumers/private users of telecommunication services to first use the ADR/ODR mechanisms to be

installed by the Italian providers before taking their complaints to court. The ECJ with strong words supported the importance of a (*mandatory*) ADR/ODR mechanism for effective complaint handling with the following words:

‘In that connection, it must be stated that Article 34(1) of the Universal Service Directive assigns Member States the objective of establishing out-of-court procedures for dealing with unresolved disputes involving consumers and relating to issues covered by that directive. Accordingly, the fact that national legislation such as that at issue in the main proceedings has not only put in place an out-of-court settlement procedure, but has also made it mandatory to have recourse to that procedure before bringing an action before a judicial body, is not such as to jeopardise the attainment of that objective. On the contrary, such legislation, in so far as it ensures that out-of-court procedures are systematically used for settling disputes, is designed to strengthen the effectiveness of the Universal Service Directive’ (para 45).

8. At the same time, the Court put some *important conditions* on these requirements:
 - The ADR/ODR must be so as to guarantee effective judicial protection, in particular by keeping up to the principles of Rec. 98/227 which thereby takes a quasi-binding nature;
 - consumers not having access to the internet must be able to bring their complaint in writing or any other form;
 - consumers may not be prevented from going to court if they are not satisfied with the result of the ADR/ODR procedure;
 - the procedure should not cause a “substantial delay” or cost on the claims of the consumer.

9. This judgment is an important precedent for other ADR/ODR mechanisms to be imposed or at least encouraged by Member States on providers of services, eg
 - Investment services to so-called “retail clients” according to the MiFID (Markets in Financial Instruments Directive) 2004/39 (OJ 2004 L 145/1);
 - Services in the Internal Market by Dir. 2006/123 (OJ 2006 L 376/36);
 - Consumer Credit according to Dir. 2008/48 (OJ 2008 L 122/66)

10. It is still an open question in how far these principles also relate to *voluntary ADR/ODR mechanisms* installed by traders/trade associations, particularly in the transnational context. In my opinion, insofar as these mechanisms put a mandatory use requirement on (EU-) consumers, they must conform to the conditions set up by the ECJ before precluding consumers to go to court (in an EU jurisdiction under the Brussels Regulation 44/2001 [OJ 2001 L 12/1])