Online traders and marketplaces need to prepare for consumers using the new Online Dispute Resolution platform (ODR platform) by making changes to their terms and conditions. Here, our retail experts look at how the ODR platform will work, what it means for businesses and how to prepare.

**Background**

A key focus of the EU's Digital Single Market is to boost trust and confidence among consumers when buying from sellers in other European countries. The launch of the new European Online Dispute Resolution platform (ODR platform) should provide a practical tool for consumers who have bought online to resolve issues with sellers without expensive, lengthy court proceedings, and removing the barriers of language and location.

Under Regulation (EU) No 524/2013 (the ODR Regulation) the European Commission established a web-based platform to allow consumers and traders to submit a contractual dispute arising from buying goods or services online (whether cross-border or in-country), refer the dispute to Alternative Dispute Resolution (ADR) and then resolve the complaint using the ADR entity agreed by both parties (including paying the ADR entity's fee). There is a free case management tool which the parties can use if they choose. The ADR procedure may be conducted in any of the 23 official languages of the EU using an ADR body which complies with
the necessary quality requirements.

The intention is that the platform will allow consumers to enforce their rights and seek redress for low value claims. Staying out of court is also a more attractive option for traders who have reputational considerations and want to maintain good relations with their customer base. The ease of access and the language capabilities should encourage consumers to buy from abroad, safe in the knowledge that any issues can be resolved relatively easily.

How will it work?

The ODR platform will work in four simple steps:

1. the complainant party (consumer or trader) fills in an electronic complaint form;
2. the ODR platform will transmit the complaint to the respondent party and invite that party to propose an ADR entity;
3. Once the ADR entity is agreed upon by both the consumer and trader, the ODR platform shall automatically transmit the complaint to that entity;
4. The ADR entity which has agreed to deal with the dispute will handle the case entirely online and reach an outcome in 90 days.

An obvious barrier to successful resolution of disputes is the need to agree on an ADR entity. Where the parties fail to agree, or the ADR entity refuses to deal with the dispute, the complaint will not be processed further.

What does this mean for online businesses?

- The ODR Regulations apply to traders established within the EU who are engaging in 'online sales or service contracts'. This phrase is broadly defined under the ODR Regulation as:
  - any sales or service contract for goods or services,
  - offered by a trader (including online marketplaces where purchases can be completed), or the trader’s intermediary,
  - on a website or by other electronic means, which includes telephone sales or contracts concluded by email, and
  - the consumer has ordered such goods or services on that website or by other electronic means.
- Online traders have to:
  - provide an electronic link on their websites to the ODR platform,
  - state their email address on their website (most likely already given for various other
purposes) and
  • include a link to the ODR platform in their general terms and conditions.

Those traders who are already obliged to use ADR entities to resolve disputes with consumers (under the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015) must still inform consumers of the ODR platform and provide an electronic link to the ODR platform on their websites, in any email offers and in general terms and conditions.
  • Note though that traders do not have to actually use the ODR platform.
  • The ODR platform does not replace complaints procedures and the European Commission still encourages traders and consumers to try to resolve disputes amicably.
  • It also does not replace a consumer’s right to go to court but the reality is that very few consumers would even consider issuing court proceedings against a trader in another jurisdiction.

How to prepare

By 15 February 2016 online retailers, and online marketplace providers, need to be ready to comply with the ODR Regulation, so need to include the link to the ODR platform on their websites and in their terms and conditions.

When positioning this link, the ODR Regulation states that the link should be easily accessible for consumers. Traders are also encouraged to provide, where possible, the required information on the ODR platform together with any other information regarding consumer out-of-court redress procedures contained in other Union legal acts.

Consumer law fit for a 21st century digital world

The ODR Regulation is part of a wider project on consumer protection at the European level. The overall objective of EU consumer law is to achieve a high level of consumer protection while removing barriers for market integration across the EU to stimulate e-commerce. The ODR Regulation is a good example of both of these objectives; a practical change which heightens consumer trust through ease of access to quicker and hassle-free protection against traders, as well as furthering the harmonisation of consumer protection across the EU.

The European Commission is conducting a ‘Fitness check’ across consumer legislation as part of the Digital Single Market strategy. The Fitness check will evaluate the effectiveness, efficiency, coherence, relevance and added value of EU consumer law policy. The struggle with harmonisation and the simultaneous need for practical solutions was exposed by the demise of
the Common European Sales Law (CESL). This attempted to create an optional European contractual instrument for international online sales between businesses and consumers. This was rejected as fundamentally flawed due to being an optional system. Consumers will not enjoy greater protection unless there is a mandatory, harmonised system, critically in key areas such as remedies.

Following its abandonment of CESL, the Commission is proposing two draft directives that are maximum harmonisation measures. This means that, if they are passed, no member state could give consumers greater or lesser protection in the relevant areas. This will harmonise areas such as the hierarchy of remedies available to consumers and the minimum period for the reversal of the burden of proof of a defect on delivery. This is a long overdue measure; much of the complexity of the legal landscape has been the result of the European Commission issuing multiple, overlapping directives on various aspects of consumer now. Hopefully, as a starting point, consumers will be confident that their remedies (at least) will be the same regardless of where they buy goods and services from online.

The European Commission is increasingly aware of the need to be practical and pragmatic in its approach to pan-European consumer protection rather than just focusing on harmonising national laws. Legal change alone is not the panacea for online sales, although further harmonisation and simplification would be welcome. The practicalities of making websites available in multiple languages, cross-border VAT and sales tax, the cost of delivery and cultural differences are all as important as legal remedies when it comes to stimulating e-commerce across Europe.

The proposed directives and ODR platform are steps in the right direction but we should expect more changes in the years to come.