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Editorial

Special Edition on Access to Justice and Consumer ADR

Setting the Scene

The contributions contained in this special edition originate in a workshop held at the University of Essex on July 9, 2015 (something of a landmark day, as becomes evident in the following paragraph). I and the contributors are very grateful to the editors of the Review for the opportunity to write for this special edition. In particular, I am grateful for the chance to introduce the contributions and provide some modest broader reflections.

It is obvious that access to justice is an essential pre-condition if private law rights are to be meaningful in practice. The question of access to justice is, of course, especially significant currently, given that Directive 2013/11/EU on alternative dispute resolution for consumer disputes (ADR Directive) was due to be implemented by Member States by July 9, 2015[1] and that Regulation (EU) No. 524/2013 on online dispute resolution for consumer disputes (ODR Regulation) applies as of January 9, 2016.[2] These provisions have already been analysed in this Review by Christopher Hodges,[3] who considered them along with the increasingly popular concept of 'regulatory' redress, which involves a regulatory body being able to require businesses to compensate consumers for losses suffered as a result of breaches of consumer protection law. Hodges focused, in particular, on the mass redress powers of the Danish Consumer Ombudsman and of various UK regulatory bodies including, in the consumer sphere, the Financial Conduct Authority, various utility regulators, and the various United Kingdom regulators responsible for general consumer protection. Core to Hodges' analysis is that the effectiveness of such schemes is dependent on effective system design, including adopting appropriate powers and enforcement policies and finding the best ways in which to combine individual ADR schemes with regulatory redress strategies.

In this special issue of the Review, most of the focus is on the ADR Directive and the extent to which it can be considered to lay the foundations for

1 Art. 25(1).

2 Art. 22(2), although note that it is also provided that certain provisions on ODR platforms and on ODR network contact points applied earlier than this. Note also Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters.

3 C. Hodges, 'Mass Collective Redress: Consumer ADR and Regulatory Techniques', 23. *ERPL* 2015, pp 829-873.

improved consumer redress. Of course, this properly provokes the further question as to whether improved redress through ADR mechanisms is actually the same thing as improved access to *justice*. This is an issue that is dealt with, e.g., by the contributions of Eva Storskrubb, Andrea Fejős, and Chris Willett. Further, and to connect, once again, with Hodges' recent contribution to the Review, 'system design' is a recurrent theme here: for example, on the effectiveness of the ADR Directive's quality requirements, see the contribution by Marco Loos, and on the extent to which the Directive has mandated systems that are sensitive to the behavioural biases of consumers and to different consumer sub-populations, see the respective contributions by Joasia Luzak and Eva Théocharidi.

However, the contributions here take the discussion of redress and access to justice, beyond the ADR Directive. So, for example, Youseph Farah and Leonardo V.P. de Oliveira consider the scope for arbitration to play a role in consumer ADR and the delivery of access to justice, while Peter Rott assesses the role of private market players in seeking redress on behalf of consumers – and what we might learn from this in designing better systems within which redress is sought for consumers by public and collective bodies.

The discussion here also extends beyond consumer law and policy. Indeed, this point provides an ideal bridge into a summary of each author's contribution – given that the first contribution to be described is the one that gives the broadest perspective on access to justice in civil law generally, within the EU legal order.

The Contributions

Eva Storskrubb ('Alternative Dispute Resolution (ADR) in the EU – Regulatory Challenges') discusses the recent consumer measures (particularly, the ADR Directive) in the context of the broader map of EU measures relating to access to justice in civil law: the fundamental rights and Treaty provisions on effective protection and remedies, the CJEU jurisprudence on equivalence and efficiency in relation to national procedural rules, the measures related to judicial cooperation in civil matters, and overarching and supporting measures (such as judicial networks, judicial training programmes, and e-justice portals). Among other things, the article considers the contribution that can be made by the recent consumer initiatives to the future development of the broader EU civil justice framework (particularly, in relation to cross-border access to justice), as well as what, in developing the consumer ADR agenda, might be learnt from this broader civil justice framework, e.g., in relation to the expertise of ADR bodies.

Andrea Fejős and Chris Willett ('Consumer Access to Justice: The Role of the ADR Directive and the Member States') argue that it is of fundamental importance to determine whether the Directive provides a version of access to justice that is nuanced to the needs of the consumer market. In failing to mandate participation in ADR processes by businesses, and in failing also to make the decisions binding on businesses, the Directive fails to insist on the sort of justice that is needed to recognize the vulnerabilities of individual consumers and to

discipline future business behaviour. Consideration is then given to the challenges that are faced at the national level if consumer-sensitive access to justice is to be delivered. It may well be that it is compatible with EU fundamental rights law to have processes that are mandatory and binding for businesses, but if Member States do not opt for this mandatory and binding combination, much will depend on the selection of incentives and sanctions that are best suited to the legal, regulatory, and socio-economic environment existing 'on the ground'.

Marco Loos ('Consumer ADR in the EU: Enforcing Consumer Rights at the Detriment of Consumer Law?') argues that the ADR Directive 'has shortcomings precisely where it is thought to provide solutions to existing problems with ADR'. Here, the focus is on various shortcomings in the Directive's requirements as to how ADR systems should operate. So, for example, the article highlights the limitation of the regime to disputes initiated by consumers, the failure of the information requirements to ensure that consumers can make a more fully informed assessment as to their prospects of success, and failings in core quality issues (e.g., going to whether non-recognized bodies can continue to operate and doubts as to expertise, in particular where foreign law is concerned). Crucially also, this article points out that ADR bodies cannot make primary references to the CJEU for a correct interpretation of the law and that this should perhaps be rectified if the development of EU consumer law is not to be hindered.

Joasia Luzak ('The New ADR Directive: Designed to Fail? A Short but Hole-Ridden Stairway to Consumer Justice') also reviews a number of ways in which the ADR Directive may fall short in terms of offering a smooth path or 'stairway' to justice for consumers. What is distinctive in this contribution is that it focuses, in particular, on the challenges posed by consumer biases and the extent to which the Directive succeeds (or often fails) to set requirements that take account of these biases. So, for example, it is argued that the Directive's provisions take insufficient account of consumer uncertainties as to such issues as costs, the chances of winning a case, the fairness of the process, the expertise of the decision makers, whether the outcome will be adhered to by the business, and the impact of the outcome on their fellow consumers.

Eva Théocharidi ('The Effectiveness of the ADR Directive: The Standard of Average Consumer and Possible Exceptions') provides a very useful perspective, an explanation perhaps, for the various shortcomings in the ADR Directive that have already been mentioned as being discussed in other papers. It highlights the need to see ADR in the light of broader spoken and unspoken debates and tensions as to the way consumers are viewed – the sort of strengths and weaknesses that are attributed to them. In particular, it is argued that the ADR Directive is implicitly grounded in the standard of the so-called 'average consumer'. It then considers whether this implicit use of the average consumer concept (characterizing consumers as being reasonably well informed and reasonably circumspect) helps to explain why the level of protection granted is limited. It then examines whether, and to what extent, Member States might

provide for exceptions, to take account of the capabilities and interests of sub-populations of consumers, e.g., those that are especially vulnerable in cognitive terms.

The article by Youseph Farah and Leonardo V.P. de Oliveira ('The Ambivalence of Consumer Arbitration: A Missed Opportunity in the ADR Directive to Impose an EU-Centric Approach to Consumer Arbitration') highlights the tension between the public and the private nature of arbitration and considers how this tension prevents consumer arbitration from fulfilling important public functions. It is concluded that the EU should strive to introduce a system that facilitates justice for consumers, i.e., a system of dispute resolution that is committed to procedural and substantive public policy. This focus on public policy is preferable to a system that is primarily concerned with the resolution of disputes between businesses and consumers, however efficient and fair that system may be, and this remains an important challenge for Member States as they work on developing ADR models in the coming years.

Finally, the article by Peter Rott ('Claims Management Services – An Alternative to ADR?') once again moves the discussion away from the ADR Directive and from the focus on adjudication *institutions*, how to access them, and how they function and focuses, rather, on the role of those who seek redress on behalf of consumers. It analyses the business models of *flightright* and the other private service providers and why the services they offer are so remarkably successful in attracting customers as well as in obtaining compensation for them. It shows what other types of claims this business model could extend to and what types of claims will remain for classical enforcement by law firms, consumer organizations, or through ADR. Crucially, it demonstrates that the private *flightright* model fills a redress gap, but it goes on to propose reforms to public and collective enforcement that would also allow consumers to get easy access to compensation but save them the large share of this that (under the private model) goes to the claims management companies.

Final Reflections

We can see that EU law on consumer ADR is part of a larger body of EU 'access to justice' law. The consumer element of this body of law is relatively new, and the coming years will see it being unpacked and developed at national, local, and cross-border levels, as the ADR Directive and the ODR Regulation begin to be given effect to in law and practice. Presumably, this will stimulate further debate within, and well beyond, the consumer law sphere, as to the nature of access to justice, how it is supported within the EU legal order by general principles and institutional structures, how it is operationalized at local and national levels, and how to maintain coherence in all of this.

This brings us to a further important point. Hard questions must be asked about (i) the appropriate division of labour between different forms of individualized, out-of-court means of achieving access to justice (e.g., mediation,

ombudsmen, arbitration), and (ii) the appropriate division of labour between these individualized out of court approaches and other approaches, i.e., redress that is facilitated by regulatory or consumer bodies, and redress that is facilitated by private claims management companies.

In relation to consumer ADR, or indeed any other form of civil justice, it is also important that detailed system design and operation should be disciplined and directed by EU general principles and fundamental rights. At the same time, it is important for these general principles and fundamental rights to be sensitive to the particular context within which the detailed system design and operation takes place, sensitive, that is, to the dynamics of the particular type of private law relationships involved and to the national, local, and sectoral contexts.

Finally, and closely linked to the point just made, designing systems for improved access to justice must be based on the well-known and developing research and scholarship about the particular relationships in relation to which justice must be accessed. For example, as several contributions here point out, consumer access to justice cannot be achieved if we do not understand consumers and their wants, preferences, biases, weaknesses, and vulnerabilities.

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