

B2C ODR IN THE EU

- **Consumer concept in the EU:**

Imperious need to define what is to be understood as consumer: It is possible to apply the already existing definitions provided for by the European Directives recognizing consumer rights according to which a consumer is basically a natural person acting for a purpose outside his trade or profession.

Two clarifications are in order:

- 1) If the buyer acts partly within and partly outside his trade or profession, it may not be deemed as a consumer “unless the trade or professional purpose is so limited as to be negligible in the overall context of the supply” (*Johan Gruber v. Bay Wa AG* C-464/01).
- 2) In the light of the principle of appearance, a "consumer" is any natural person who can be regarded as acting for a purpose outside their trade, business, craft or profession, meaning that if a trader acts for a purpose outside their trade, but he does not reveal such a circumstance to the seller, appearing to him like a trader, he will not be deemed as a consumer.

- **What happens with the broader concept of consumer existing in a Member State?**

Problems may appear if there is a wider consumer concept in a MS. (*e.g.* Spanish law includes both natural and legal persons in defining a consumer)

Solutions? Preferably not exclude legal persons from submitting their claims in a consumer ADR scheme in a country where they are considered as such.

EU PLATFORM OPERATIONAL ONLY WITHIN EUROPEAN BORDERS AND IN CROSS BORDER SITUATIONS

- ✓ European legislation is not exported beyond EU borders → nor should the principles and rules applicable to the functioning of the European ADR schemes.
- ✓ Only consumers having their habitual residence in the EU should benefit from using the EU ODR Platform and the exclusion of non residents can be fully justified.
- ✓ Habitual residence in a EU/EEA MS is essential to tag a situation as cross border, provided the trader's established in another MS.

- ✓ **Where is a trader established?**

Three criteria: $\left\{ \begin{array}{l} \text{the statutory seat} \\ \text{the central administration} \\ \text{the principal place of business.} \end{array} \right.$

NB! Problems appear if a trader has its statutory seat in one MS and its central administration or even the principal place of business in another MS. EU legislation must shed light into this matter...

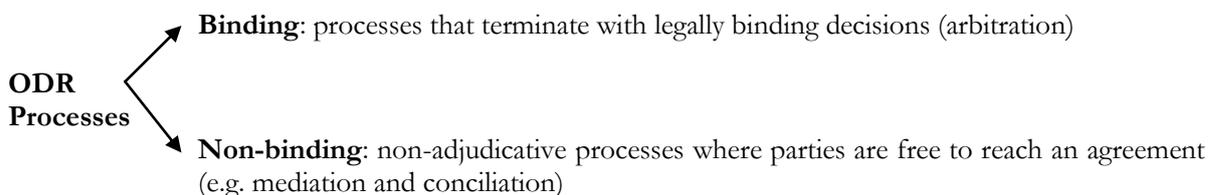
- ✓ **What happens with the transactions between consumers and foreign traders from outside the EU?**

Access to the European ODR Platform should be permitted if the foreign traders have a clear connection with the EU Market, even if the trader does not have its statutory seat, central administration or principal place of business in a MS, but the dispute arises out of operations of any branch, agency, or

other establishment situated in a MS. In such a case, the trader should be deemed to be established in that MS.

STANDARDS FOR ODR/ADR

The Commission Recommendations 2001/310/EC and 98/257/EC play an important role in setting the standards for ODR/ADR.



The principles provided for by the Recommendations must find a suitable reflection in the configuration of the ODR schemes in order to ensure an adequate consumer protection.

- ✓ The principles of independence and impartiality as well as the adversarial principle should be equally applied to binding and non binding processes.
 - ✓ The principle of transparency, a distinction must be made between binding and non-binding processes. While in binding processes the decision should be published, in non-binding processes the settlement and the negotiations should remain confidential.
 - ✓ The principle of legality is essential when the process has a binding outcome, as it should ensure that the consumer rights are fully respected.
 - ✓ Principle of liberty: consumers should not be contractually required to participate in a binding dispute resolution process (such as arbitration) before the dispute arises, unless they are covered by legal provisions.
- **Who does the control operate?**

The European initiative should set up a mechanism to guarantee that the ODR Providers comply with the rules establishing minimum standards.

Options to conduct the control:

- 1) New approach: award an European Trustmark to those ODR Providers fulfilling the criteria
- 2) Traditional approach: leave the control in the hands of the MS.