

# **A NEW REGULATORY FRAMEWORK FOR EXTRA-JUDICIAL CONSUMER REDRESS: WHERE WE ARE AND HOW TO MOVE FORWARD**

**Pablo Cortés\***

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This article examines the new legal framework on consumer Alternative Dispute Resolution (ADR) in the EU. Its primary contribution lies in identifying that, harmonizing the complaint submission in a pan European Online Dispute Resolution (ODR) platform, and directing parties to nationally approved ADR entities that comply with minimum standards, will not fulfil the potential of an extra-judicial consumer redress system. This paper proposes key functions that the ODR platform should incorporate if it is to provide effective redress. This paper also argues that a successful ODR platform should include built-in incentives that encourage parties to: (i) participate in approved ADR processes; (ii) settle complaints with little or no intervention from neutral third parties; and (iii) ensure voluntary compliance with final outcomes.

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# **A NEW REGULATORY FRAMEWORK FOR EXTRA-JUDICIAL CONSUMER REDRESS: WHERE WE ARE AND HOW TO MOVE FORWARD**

## **I. INTRODUCTION**

Today, the single most important priority of the EU is to stimulate the stagnant Internal Market. The EU believes that the provision of effective redress mechanisms is necessary to boost competition and growth in e-commerce, which is expected to play a key role in increasing economic growth in the Internal Market.<sup>1</sup> However, the institutional approach to consumer protection is currently shifting from putting an emphasis on judicial protection to building extrajudicial structures that provide consumers with effective redress. The promotion of Alternative Dispute Resolution (ADR) methods, when coupled with online communications, seem to be the most suitable approach for resolving consumer grievances arising from e-commerce.<sup>2</sup> These techniques (notably, automated and assisted negotiation, online mediation, online arbitration, as well as online ombudsmen schemes) offer a more efficient communication between disputants, and are collectively known as Online Dispute Resolution (ODR). Although, it is believed that ODR is generally the best (and frequently,

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<sup>1</sup> European Commission Staff Working Paper, Impact Assessment Accompanying the document of the Proposal for a Directive on Alternative Dispute Resolution for Consumer Disputes and the Proposal for a Regulation on Online Dispute Resolution for Consumer Disputes SEC(2011) 1408 final p. 5.

<sup>2</sup> R Bordone, 'Electronic Online Dispute Resolution: A System Approach -Potential, Problems, and a Proposal' (1998) 3 Harv. Negot. L. Rev. 175; E Katsh and J Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (Jossey-Bass, 2001); C Rule, *Online Dispute Resolution for Businesses* (Jossey-Bass, 2002); G Kaufmann-Kohler and T Schultz, *Online Dispute Resolution* (Kluwer Law International, 2004) p 7; L Ponte and T Cavenagh, *Cyberjustice, Online Dispute Resolution for E-Commerce* (Parson Prentice Hall, 2005); G-P Calliess, 'Online Dispute Resolution: Consumer Redress in a Global Market Place' (2006) 7(8) German LJ 647; M Conley Tyler and J Bornstein 'Accreditation of On-line Dispute Resolution Practitioners' (2006) 23(3) Conflict Resol. Q. 383; O Rabinovich-Einy, 'Technology's Impact: The Quest for a New Paradigm for Accountability in Mediation' (2006) 11 Harv. Negot. L. Rev. 253; D Larson 'Technology Mediated Dispute Resolution (TMDR): A New Paradigm for ADR' (2006) 21(3) Ohio St. J. on Disp. Resol. 629; R Morek, 'The Regulatory Framework for Online Dispute Resolution: A Critical View' (2006) 38 U. Tol. L. Rev. 163; J Hörnle, *Cross-border Internet Dispute Resolution* (CUP, 2009) p 75; P Cortés *Online Dispute Resolution for Consumers in the European Union* (Routledge, 2010) pp 52-54; A Lodder and J Zeleznikow, *Enhanced Dispute Resolution Through The Use Of Information Technology* (CUP, 2010) pp 75-85; C Hodges, I Benohr, N Creutzfeldt-Banda, *Consumer ADR in Europe (Civil Justice Systems)* (Beck/Hart, 2012) pp 367-453; L Del Duca, Rule and Z Loebl, 'Facilitating Expansion of Cross-Border E-Commerce-Developing a Global Online Dispute Resolution System' (Lessons Derived from Existing ODR Systems – Work of the United Nations Commission on International Trade Law) (2012) 1(1) Penn. St. J.L. & Int'l Aff. 59; M Wahab, E Katsh and D Rainey, *Online Dispute Resolution: Theory and Practice* (Eleven International Publishing, 2012); A E Vilalta Nicuesa, *Mediación y Arbitraje Electrónicos* (Aranzadi, 2013); P Cortés and F Esteban de la Rosa 'Building A Global Redress System For Low-Value Cross-Border Disputes' (2013) 62(2) ICLQ 407.

the only) option for increasing individual consumer redress,<sup>3</sup> the European Commission has concluded that its full potential has not yet been realised as its growth lags behind e-commerce.<sup>4</sup>

Against this backdrop, the European Union passed two innovative legislative initiatives on consumer dispute resolution.<sup>5</sup> The first legislative text is a directive on consumer ADR ('the ADR Directive'), which requires its transposition to national law within 24 months of its approval (i.e. 8 of July 2015). The ADR Directive aims to tackle three main deficiencies in the provision of extra-judicial redress in the EU:<sup>6</sup> (i) the absence of quality standards;<sup>7</sup> (ii) the low levels of consumer awareness on ADR schemes;<sup>8</sup> and (iii) the availability of ADR entities for the resolution of consumer complaints. The second legislative text is a regulation on consumer ODR ('the ODR Regulation'), which sets an online platform that will operate as a single entry point for resolving consumer complaints arising out of e-commerce. The ODR platform will link disputing parties with ADR registered entities, and is expected to be fully operational in the by the 8 of January 2016.

This paper has as its focus the legal processes and technological requirements necessary to establish an efficient European redress system for e-commerce disputes. Accordingly, it reviews the two pioneered legislative European initiatives (the ADR Directive and the ODR Regulation) and contrasts them with the rules being developed at the UN by the Commission for International Trade Law (UNCITRAL). It then proposes a number of

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<sup>3</sup> See OECD Conference on Empowering E-consumers Strengthening Consumer Protection in the Internet Economy, Background Report DSTI/CP(2009)20/FINAL, Washington DC, (8-10 December 2009) p. 29. European Commission, EU Consumer Policy Strategy 2007-2013, COM(2007) 99 final p.11.

<sup>4</sup> See Impact Statement, above n 1, p. 5.

<sup>5</sup> Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) 2006/2004 and Directive 2009/22/EC, [2013] O.J. L165/63 and Regulation (EU) 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) 2006/2004 and Directive 2009/22/EC, [2013] O.J. L165/1.

<sup>6</sup> Communication on Alternative Dispute Resolution for Consumer Disputes in the Single Market COM(2011) 791; Civic Consulting, European Parliament Study Cross-border Alternative Dispute Resolution in the EU (2011) pp. 9, 31 and 49; ECC-Net Cross-border Dispute Resolution Mechanisms in Europe-Practical Reflections on the Need and Availability (2009) p. 57.

<sup>7</sup> This situation has been criticized extensively noting that soft laws, such as the EU Recommendations on ADR, were insufficient to ensure minimum quality standards for ADR entities. See Commission Recommendation 98/257/EC of 30 March 1998 on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes (O.J. 1998, L 115); Commission Recommendation 2001/310/EC of 4 April 2001 on the Principles for the Out-of-Court Bodies Involved in the Consensual Resolution of Consumer Disputes (O.J. 2001, L109/56). See Impact Assessment, above n 1.

<sup>8</sup> ADR national schemes are more widely set up to resolve disputes in the fields of financial services, package travel and telecommunications. Identified gaps, where ADR is particularly inaccessible, include games of chance, food products, non-food consumer goods, construction and transport. See Civic Consulting Study for DG SANCO, 'Study on the Use of Alternative Dispute Resolution in the EU' (2009) Figure 14 p. 59.

functions for the European ODR platform –such as an online negotiation tool to encourage early settlements– that will sustain the pillars of consumer redress throughout the EU. Lastly, this paper submits that the literature and policy in the field of dispute resolution and dispute system design have neglected a key element that is crucial for the success of consumer redress mechanisms, that is, incentives that encourage participation in the process, early settlement and extrajudicial enforcement.

## **A NEW REGULATORY FRAMEWORK FOR CONSUMER REDRESS**

The expansion of e-commerce is limited by the traditional, court-based, channels for resolving disputes. These systems are unable to resolve high-volumes of low-value claims, let alone, for disputes where parties are far from each other. Both, the EU and UN, with the goal of enhancing cross-border trade, have recently recognised the need to promote extrajudicial consumer redress by promoting the use of ODR mechanisms. However, while the UN Commission for International Trade Law (UNCITRAL) is developing a model procedural law that can be contractually chosen by the parties, the EU has designed a legal framework aimed at improving the coordination and accessibility of quality ADR processes.<sup>9</sup> These ground-breaking regulatory initiatives, which are expected to shake the dispute resolution structure for consumer and low-value claims, are examined in turn below.

### ***A. New Legal Standards for Consumer Dispute Resolution Processes: The Directive on Consumer Alternative Dispute Resolution***

#### *Scope of Application and Coverage of the ADR Directive*

The ADR Directive requires Member States to ensure the provision of ADR entities for the resolution of domestic and cross-border consumer complaints, arising from the sale of goods and the provision of services.<sup>10</sup> The scope of the ADR Directive covers consumer (but not

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<sup>9</sup> UNCITRAL Working Group III (Online Dispute Resolution). See <[http://www.uncitral.org/uncitral/commission/working\\_groups/3Online\\_Dispute\\_Resolution.html](http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html)>. Hereinafter, last accessed 12 September 2013). Cortés and Esteban de la Rosa, above n 2.

<sup>10</sup> Art. 2 of the ADR Directive. It must be noted that initially Germany considered the inclusion of domestic disputes as a breach of the principle of subsidiarity. See Bundesrat's Chamber of European Affairs, Decision 772/11 adopting an opinion pursuant to Art. 12 (b) TEU (24 January 2012) para. 3 and 4. Cf. H Micklitz and G Sartor 'Assessing the Scope of the Online Dispute Resolution Platform' and H. Jacquemin 'Optimal Integration European Dispute Resolution Platform' (13 of April 2012) available at <<http://www.europarl.europa.eu/committees/en/imco/publications.html?id=IMCO00001>>. Although there are

trader) complaints arising from contracts of sales and services, both offline and online (including the provision of digital content for remuneration). Member States must thus guarantee the availability of quality ADR schemes where consumers (and no traders) are complainants.<sup>11</sup> This restriction is based not only on the likelihood that traders are in a better position to cope with the cost of lack of redress,<sup>12</sup> but also a desire on the part of the governments not to upset the present consumer ADR structure. Currently, a large number of ADR entities are publicly funded and designed to protect consumer rights by addressing the inequality of bargaining power between consumers and traders. While the Directive does not prevent Member States from creating ADR bodies with the competence to deal with complaints from traders against consumers, it does not mandate such provisions. Conversely, the ODR Regulation, which simply sets up the infrastructure to make ADR processes accessible online, includes within its scope ADR processes which allow traders to bring complaints against consumers insofar as the legislation of the Member State where the consumer is habitually resident allows for this possibility. A number of Member States, such as the UK and Spain, have already communicated that they will not accommodate this option.

The Directive applies to binding and non-binding ADR processes, and it describes ADR entities as adjudicative and consensual extrajudicial schemes created on a durable basis. It excludes complaints handling mechanisms established by the trader, direct negotiations between consumers and traders, and judicial settlement mechanisms.<sup>13</sup> It also excludes services from sectors generally provided by the State, such as health care and higher education.<sup>14</sup>

The Directive permits ADR entities to retain their own procedural rules. These entities will be able to dismiss complaints if they are frivolous, subject of court decisions, or if, prior to contacting the ADR entity, the consumer has not attempted to work out a solution (whether through contacting the business directly or participating in an in-house dispute resolution scheme). The Directive also authorises Member States to set financial thresholds below which the Directive will not apply, though the thresholds should not be set at a level,

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some existing ADR entities that already have this wide scope (e.g. the Spanish consumer arbitration system) the majority of the existing entities are sector specific (e.g. the Financial Ombudsman Service or the Legal Ombudsman in the UK).

<sup>11</sup> Art. 2(2)(e) of the ADR Directive.

<sup>12</sup> European Parliament, Committee on the Internal Market and Consumer Protection, Draft Report of 18 April 2012, 2011/0373(COD) Rapporteur L. Grech p. 65.

<sup>13</sup> Art. 2(2).

<sup>14</sup> Art. 2(2) (f) and (g).

where they could significantly impair the consumers' access to ADR processes.<sup>15</sup> This restriction aims to balance the need to guaranteeing consumer access to ADR procedures while avoiding disproportionate administrative costs for ADR bodies.

### *Raising Awareness about ADR Entities*

With the aim of increasing awareness, the Directive requires traders to inform consumers if they have voluntarily become affiliated with a particular ADR entity or if they are required to participate in ADR processes by the sectorial law or by the industry. A national competent authority will be assigned in each Member State to monitor traders' information obligations and the functioning of certified ADR entities.<sup>16</sup> Only those ADR entities that seek to be certified by their national competent authorities would be required to comply with the legal standards set in the Directive. However, non-accredited ADR entities may find themselves at a commercial disadvantage because they would not be included in the ODR platform.<sup>17</sup> In order to ensure compliance with the Directive, the competent authorities will have the power to issue proportionate penalties to traders and ADR entities that do not provide the required information.<sup>18</sup>

A criticism that may be levied against the new accreditation system is the inevitable risk that the standards of the ADR Directive will be applied inconsistently; this risk arises because 28 different national authorities will be required to assess that ADR entities comply with the national legislation that implements the Directive. A more levelled playing field could be achieved if the European Commission appoints a single pan-European authority that guarantees uniformity in the accreditation process.<sup>19</sup>

### *Due Process Standards*

According to the Directive all approved ADR entities must meet with the following six quality standards:<sup>20</sup>

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<sup>15</sup> Art. 5(4).

<sup>16</sup> Art. 18.

<sup>17</sup> See Department for Business and Innovation Skills (BIS) Government Response to the Call for Evidence, EU Proposals on Alternative Dispute Resolution (May 2012) p. 17.

<sup>18</sup> Art. 21.

<sup>19</sup> BIS Response, above n 17, p. 18.

<sup>20</sup> The blueprints of these standards were contained in the Recommendations 98/257/EC and 2001/310/EC.

- i. Expertise, Independence and Impartiality: Third neutral parties must be impartial and have no conflict of interest and collegial bodies must have equal stakeholder representation for consumers and traders.<sup>21</sup> ADR entities and neutrals may be hired exclusively by the traders once they have the approval by the national competent authorities and complied with a number of safeguards, such as ensuring that ADR entities have a separate budget and the remuneration of third neutrals is not linked to the outcome.
- ii. Transparency: It sets a number of information requirements that ADR entities must meet. Thus, they are required to publish annual reports stating both the number and type of cases received and the number of settlements. ADR entities are also required to inform parties through their websites about the type of ADR processes they offer.<sup>22</sup>
- iii. Effectiveness: Approved ADR entities must meet the following requirements: a) ease of access, regardless of location (i.e. they must have a website, receive online complaints and exchange information online), in other words, they should employ ODR techniques; b) legal representation should not be required; c) ADR processes must be free-of-charge or at moderate cost to consumers; and d) ADR entities will decide in three weeks from the submission of the complaint whether they are competent to deal with a dispute; in such case the complaint should be resolved within 90 days of submission –although in complex disputes ADR entities will be able to extend this period.<sup>23</sup>
- iv. Fairness: Member States must ensure that parties are aware of their rights and the consequences of participating in an ADR procedure. Outcomes must be reasoned and given in writing in a durable manner. The ADR Directive has included additional safeguards for consumers so that before they agree to a proposed settlement they must be informed about: (a) their choice of whether to agree to the settlement, that they could obtain a more favourable outcome in the courts; (b) their right to obtain independent legal advice; (c) the effect of the agreement; and (d) their opportunity to reflect before deciding whether to consent to amicable solutions.<sup>24</sup> In line with the

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<sup>21</sup> Art. 6.

<sup>22</sup> Art. 7.

<sup>23</sup> Art. 8.

<sup>24</sup> Art. 9.

Mediation Directive, the limitation period for seeking action before the courts is suspended while ADR is pending.<sup>25</sup>

- v. Liberty: According to this principle consumers cannot be required to agree on a legally binding process before the dispute has materialised.<sup>26</sup> It also requires consumers to be expressly informed about the binding nature of an ADR process before agreeing to participate.<sup>27</sup>
- vi. Legality: This principle states that processes that impose a solution cannot result in the consumer being offered a lower level of protection than the mandatory law of the territory where the ADR entity is established.<sup>28</sup>

ADR processes in the consumer sector, especially in the cross-border and e-commerce context, cannot be promoted without the relevant technological support. The role of technology in these online processes is so fundamental that it has been labelled it as the 'fourth party' because it displaces, and sometimes replaces, the role of the neutral third party.<sup>29</sup> The European Commission has realized that ADR processes for consumers should be complemented with technology. This conclusion led the European Commission to propose the ODR Regulation as a complement to the ADR Directive. The ODR Regulation ensures the accessibility of ADR processes through an ODR platform that offers a means of distance communication between the parties and ADR entities. It is to this regulation that we turn now in our analysis.

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<sup>25</sup> Grech, above n 12; see similar provisions in the Mediation Directive 2008/52/EC, Art. 8(1).

<sup>26</sup> Art. 10.

<sup>27</sup> Art. 11. In this way, the Directive is in line with previous legislation and developments by the Court of Justice of the European Union (CJEU) that restricted the validity of pre-dispute arbitration clauses. See *Asturcom Telecomunicaciones* (C-40/08) and *Mostaza Claro* (C-168/05). Cf. Micklitz and Sartor, above n 10, p. 16. See generally D Collins 'Compulsory Arbitration Agreements in Domestic and International Consumer Contracts' (2008) 19(2) King's LJ 335-356; M Piers, 'Consumer Arbitration in the EU: A Forced Marriage with Incompatible Expectations' (2011) 2(1) *Journal of International Dispute Settlement*, 209, 219-228.

<sup>28</sup> In cross-border disputes, in accordance with the Rome I Regulation, the applicable law will often be the law of the consumers' habitual residence particularly where the trader has actively targeted the consumer's jurisdiction by, for instance, offering goods in the language and currency of the consumer. See Art. 6(2) of the Rome I Regulation (O.J. 2008, L 177/6) and *Peter Pammer* (C-585/08). However, if the proposal for a Common European Sales Law Regulation is approved, then parties in cross-border contracts (for the sale of goods, digital content and related services) would be able to choose this common law instead of the consumer national laws. Editorial Comments (2012) 49 CML Rev. 1267-1278, 1278; S Whittaker, 'The Proposed 'Common European Sales Law': Legal Framework and the Agreement of the Parties' (2012) 75(4) MLR 578-605; F Esteban de la Rosa and O Olariu 'La Protección del Consumidor en la Propuesta de Normativa Común de Compraventa Europea: ¿Realidad o Quimera?' (2012) 13(1) *Indret* 1-32

<sup>29</sup> Katsh and Rifkin, above n 2, p 93.



## ***B. The Foundation for a Pan-European ODR Platform: The Regulation on Consumer ODR***

The ODR Regulation establishes a EU-wide ODR platform that aims to facilitate the resolution of consumer disputes arising from e-commerce.<sup>30</sup> The ODR platform, which will be accessible through Your Europe Portal,<sup>31</sup> will offer consumers a single point of entry to resolve domestic and cross-border complaints arising from e-commerce. Traders may also bring complaints against consumers as long as the national law where the consumer has its habitual residence allows for such disputes to be resolved through an approved ADR entity.<sup>32</sup> These cases may be related to feedback reviews (for example, where the consumer wants to avoid more costly defamation litigation) and money claims for unpaid goods or services.

The role of the platform is to increase awareness of ADR processes and to provide ODR technology with the aim of making individual redress more accessible to disputing parties. The European Commission will manage the platform, and for its implementation it has estimated a cost of two million Euros.<sup>33</sup> In essence, the platform interface will be a website that will act as a hub for receiving complaints. It will also offer an electronic case management tool to ADR entities enabling them to conduct the dispute resolution procedure online via the ODR platform, though its use will be optional for those ADR entities that already have their own technological infrastructure.<sup>34</sup> But, in any event, the dispute resolution process delivered by an accredited ADR entity cannot require the physical presence of the parties.

The Regulation mandates all online traders and intermediaries, including those who have no intention of using ADR, to provide a link to the ODR platform on their websites.<sup>35</sup> In addition, the platform will inform consumers on whether the trader is already affiliated with, or committed to, an ADR entity; and, if it is not, it will invite parties to search for and select an approved ADR entity.<sup>36</sup>

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<sup>30</sup> Art. 1 of the ODR Regulation.

<sup>31</sup> Art. 5(3). See link at <[http://europa.eu/youreurope/citizens/index\\_en.htm](http://europa.eu/youreurope/citizens/index_en.htm)>.

<sup>32</sup> Art. 2(2).

<sup>33</sup> To that figure we must add the annual running costs (300,000 Euros) plus upgrading the ECC-Net (500,000 Euros). See Impact Statement, above n 1, p. 58.

<sup>34</sup> Art. 10(d).

<sup>35</sup> Art. 14.

<sup>36</sup> There are three ways in which parties can agree to participate in an ADR process through the ODR platform. First, the consumer will be invited to participate in the ADR process when the trader contractually agrees, or has previously agreed, to an ADR process. Secondly, there are ADR entities (mainly ombudsmen schemes) that

The platform will provide standard complaint and response forms in all the languages of the EU. Although parties will be able to submit complaints free-of-charge and in their own language, there may be a reasonable fee for the subsequent ADR process and the ADR entity may only offer their services in a different language to that of the consumer. Each Member State will designate a contact point that will contain at least two ODR advisors, which will be most likely drawn from the national European Consumer Centres. The contact points will have the function of providing parties with information about the submission of the complaint and the available ADR processes.<sup>37</sup> They will also inform parties about other means of redress in cases where the dispute cannot be resolved via the platform.

The Regulation requires the ODR platform to be user-friendly and accessible to all, including vulnerable consumers.<sup>38</sup> The platform will provide an electronic translation function supported by human intervention that will assist parties and ADR entities to exchange information.<sup>39</sup>

Once the complaint is sent to an ADR entity, the platform will simply inform the consumer about the language in which the available ADR procedure will be conducted.

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receive consumer complaints without the traders' agreement to participate. This is for example the case of the Legal Ombudsman in the UK, which receives complaints about lawyers, or the Financial Ombudsman Services, which settle complaints related to financial services in the UK. Germany and the Netherlands also have other mandatory schemes. See Hodges et al, above n 2, pp. 73-116 and 129-166. Lastly, there are sector-specific laws in the EU that require the participation of traders in an ADR scheme. Examples of directives requiring that ADR schemes are put in place see the telecom and energy sectors (Directives 2009/136/EC and 2009/72/EC) as well as the consumer credit Directive 2008/48/EC and the payment services Directive 2007/60/EC. There are also legal provisions that require various sectors to provide internal complaint mechanisms. Examples are Directive 2002/65/EC on distance marketing of financial services: Recital 28, Art. 3(4)(a) and Art. 14; Directive 2008/122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts: Recital 21 and Art. 14; Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce): Recitals 51 and 52, and Art. 1(2) and 17.

<sup>37</sup> Art. 6.

<sup>38</sup> Art. 5(1). See also Report of the Committee on the Internal Market and Consumer Protection of the European Parliament on a 'Strategy for Strengthening the Rights of Vulnerable Consumers' (2011/2272(INI)) Rapporteur: I Pérez, para 33. Cf. F Esteban de la Rosa, 'Principios de Protección del Consumidor para una Iniciativa Europea en el Ámbito de la Resolución Electrónica de Diferencias (ODR) de Consumo Transfronterizas' (2011) 25 *Revista General de Derecho Europeo* 16. Arguably, parties without ICT skills may face barriers in accessing technology. The CJEU held this view in *Alassini* arguing that if online redress processes were imposed inappropriately on consumers it would impede their right of access to justice. See *Rosalba Alassini and Others v Telecom Italia* C-317/08–C-320/08 (18 March 2010) The CJEU in *Rosalba Alassini* allowed for the use of mandatory mediation provided it does not deny the parties access to the court after unsuccessful mediation and when 'the electronic means is not the only means by which the settlement procedure may be accessed'. See para. 67. Cf. J Davies and E Szyrach 'ADR: Effective Protection of Consumer Rights?' (2010) 35(5) *EL Rev.* 695. Nevertheless, access to technology and skills in its use are rapidly changing, particularly amongst younger generations and e-commerce participants. See D Larson, 'Technology Mediated Dispute Resolution (TMDR): A New Paradigm for ADR' (2006) 21 *Ohio St. J. on Disp. Resol.* 668-670.

<sup>39</sup> Art. 5 and 6.

Language is a key challenge for many cross-border cases, particularly those of low-value. Consumers expect to participate in a dispute resolution process conducted in their own language or in the language of the transaction.<sup>40</sup> It must be noted that, while consumers may manage in using a foreign language in an online transaction, their language level of many may not be sufficiently nuanced to take part in ADR process. Although, the Regulation designates ODR advisors as the intermediaries to assist parties' communications with the ADR entities,<sup>41</sup> their manpower will obviously be quite limited. A more useful role for ODR advisors would not be to act as language interpreters, but as managers of a platform that offers an effective negotiation tool that can efficiently assist parties in settling their disputes directly –without the intervention of third neutral parties. This view is envisaged by the draft rules that UNCITRAL is currently developing for promoting the use of ODR methods in the resolution of cross-border low-value disputes.<sup>42</sup> However, as set out in the section that follows, while the EU and UNCITRAL initiatives are meant to be complementary, the meaning of an ODR platform in UNCITRAL is different from that adopted in the EU.<sup>43</sup>

### ***C. The International Approach to Extra-Judicial Consumer Redress: the UNCITRAL Draft Rules on ODR***

Like the EU, the UN has also recognised the need to promote the use of ODR to enhance confidence in cross-border trade. In 2010 UNCITRAL established a mandate for Working Group III to develop rules for resolving 'cross-border low-value and high-volume' B2B (business to business) and B2C (business to consumer) disputes arising from e-commerce.<sup>44</sup> Currently, UNCITRAL rules are being negotiated and only partial consensus has been reached with regards to the procedural rules. Before we examine UNCITRAL rules it must be noted that the EU and UN initiatives intend to be complementary: while the EU initiatives provide minimum legal standards for the all types of ADR models and create a pan-European ODR platform, UNCITRAL is drafting a model set of procedural rules, which propose a tiered procedure that commences with negotiation, continues to facilitation, and ends in either

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<sup>40</sup> Flash Eurobarometer Report Cross-Border and Consumer Protection (March 2011).

<sup>41</sup> The lingua franca is normally English for the ECC. The ECC Protocol on Case Handling IT Tool states that the problem description should be written in English by the Consumer ECC unless another language is agreed between the ECCs sharing the claim. See Art. 7.

<sup>42</sup> See above n 9.

<sup>43</sup> Cortés and Esteban de la Rosa, above n 2.

<sup>44</sup> Official Records of the General Assembly, Sixty-fifth Session (New York, 21 June - 9 July 2010), Supplement No. 17 (A/65/17), para 257.

arbitration or in non-binding adjudication. Thus, an ADR entity accredited by a national competent authority (and therefore accessible through the EU ODR platform) can either offer disputants the UNCITRAL's tiered procedure or a different procedure altogether, e.g. an ombudsman scheme. The UNCITRAL draft rules will apply by means of the contractual agreement of the parties, and only to the extent that the rules are enforceable under the relevant national law; therefore, parties cannot rely on the UNCITRAL rules to overrule mandatory consumer protection law, which coincides with the principle of legality enshrined in the ADR Directive.<sup>45</sup> The main characteristics of UNCITRAL's rules are examined below and contrasted against the abovementioned European initiatives.

### *Two Different Levels of Consumer Protection and the Shared Goal of Increasing Cross-Border Trade*

The policy behind the EU legislation is to build consumers' confidence in the Internal Market by coordinating and making ADR approved entities more accessible through the ODR platform while providing consumers' assurance of traders' compliance with the law. Conversely, UNCITRAL is devising guidelines for the efficient resolution of low-value cross-border disputes without reliance on national or regional laws; instead, it is envisaged that the rules will rely on a narrow list of globally shared substantive legal principles, such as those developed by credit card chargeback mechanisms.<sup>46</sup> In this way, the UNCITRAL redress system will be contractually agreed between the parties and based on rules and that comply with an internationally recognized standard. Although UNCITRAL stated that it is mindful not to displace consumer protection legislation (and indeed its rules would not affect the EC rules about the non-displacement of mandatory consumer laws) its approach to redress may inevitably limit the application of national and regional consumer laws. This approach contrasts with that of the EU, where there is a substantial body of harmonised (or partly harmonised) consumer protection law,<sup>47</sup> and where the principle of legality is

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<sup>45</sup> UNCITRAL Report of Working Group III (Online Dispute Resolution) on the Work of its Twenty-Fifth Session (New York, 21-25 May 2012) A/CN.9/774 (7 June 2012) para 16.

<sup>46</sup> C. Rule, L. Del Duca, 'From Lex Mercatoria to Online Dispute Resolution: Lessons From History in Building Cross-Border Redress Systems' (2011) 43(3) UCC Law Journal 1-15, 13. See also A/CN.9/WG III/WP112 UNCITRAL Working Group III (Online Dispute Resolution) Note by the Secretariat 28 February 2012.

<sup>47</sup> See for instance the Directive on Consumer Rights 2011/83/EU and the proposal for a Regulation on a Common European Sales Law SEC(2011) 1165 final. See a critical analysis on the limitations of the consumer acquis at HW Micklitz and N Reich 'Crónica de una Muerte Anunciada: The Commission Proposal for a Directive on Consumer Rights' (2009) 46(2) CML Rev. 471; H Eidenmüller, F Faust, HC Grigoleit, N Jansen, G Wagner and R Zimmermann 'Towards a Revision of the Consumer Acquis' (2011) 48 CML Rev. 1077-1123;

enshrined in its regulatory framework. Furthermore, with the goal of making consumer rights more accessible in the EU, consumer law is going through a process of unification and clarification,<sup>48</sup> which is also permeating down to the national level.<sup>49</sup> These procedural and substantive reforms are complementary not only when the parties choose a rights-based dispute resolution method (i.e. arbitration or ombudsman schemes), but the harmonisation and clarification of consumer rights (and to some degree their expectations) also impact when parties negotiate in the shadow of the law.<sup>50</sup> Therefore, while the aim of the EU is to improve the application of the consumer protection *acquis*, UNCITRAL aims to provide efficient redress but without necessarily relying on the application of consumer national law.

### *Scope of Application*

The mandate of UNCITRAL Working Group III applies to ‘disputes arising from the many low-value transactions, both B2B and B2C [and also C2C], which were occurring in very high volumes worldwide and required a dispute resolution response which was rapid, effective and low-cost [sic].’<sup>51</sup> Under UNCITRAL rules both consumers and traders can be claimants. By contrast, the ADR Directive only requires the establishment of ADR entities where consumers are the complainants, regardless of the value of the dispute, concerning contractual obligations stemming from sales contracts or service contracts.<sup>52</sup> The scope of the UNCITRAL rules is limited to low-value disputes; although it has not yet defined what is considered ‘low-value’, the Working Group intends to provide more guidance in a commentary.<sup>53</sup> Some delegations at UNCITRAL have suggested that the ODR system should be, at least initially, restricted to the following types of contractual claims: products that do not correspond with their description, non-delivery of goods or services, duplicate

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SR Weatherill ‘The Consumer Rights Directive: How and Why a Quest for “Coherence” Has (Largely) Failed’ (2012) 49 CML Rev. 1279-1318.

<sup>48</sup> I would like to thank the reviewers for raising this point.

<sup>49</sup> See for instance the UK that while implementing the Consumer Rights Directive 2011/83/EU is going through a process of harmonising and clarifying UK national consumer law. See the Department for Business and Innovation Skills (BIS) Report on ‘Consolidation and Simplification of UK Consumer Law’ (November 2010) and the Consumer Rights Bill 2013.

<sup>50</sup> Naturally, this expression has been borrowed from R Mnookin and L Korn Hauser, ‘Bargaining in the Shadow of the Law: The Case of Divorce’ (1979) 88 Yale L.J. 950.

<sup>51</sup> A/CN.9/716, January 17, 2011.

<sup>52</sup> Art. 2 of the ADR Directive.

<sup>53</sup> The European Small Claims Procedure threshold of €2,000 was discussed as possible benchmark. See Regulation (EC) 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, O.J. 2007 L 1999/1.

payments, charges after contract cancellation and duplicate processing. These categories are largely based on the credit card chargebacks and on eBay's dispute resolution scheme.<sup>54</sup>

### *Coordination of National ADR Schemes and the Development of Two Procedural Tracks*

While UNCITRAL is proposing a specific set of procedural rules, the EU is seeking to coordinate a multitude of different ADR processes through a new network, accessible through the EU ODR platform. UNCITRAL intends to complement the procedural rules with an ODR framework that would consist of the following four documents: (i) minimum standards for ODR providers; (ii) guidelines for neutral third parties; (iii) substantive legal principles for resolving disputes; and (iv) an enforcement protocol.<sup>55</sup>

UNCITRAL rules allow for the dispute resolution process to be contractually agreed before or after the disputes arise. UNCITRAL has proposed two discrete sets of procedures:<sup>56</sup> one ending in binding arbitration (tentatively referred as Track I), and another one (tentatively referred as Track II) with two possible final outcomes: (i) an outcome terminating in a facilitated settlement stage, where a final settlement cannot be guaranteed; or (ii) when a voluntary settlement has not been reached, a non-binding decision by a third neutral will be issued; this decision will only be enforceable via private mechanisms, such as a chargeback. A dispute resolution clause would specify whether disputes will be resolved under Track I or II. The Track specified in the dispute resolution clause would apply irrespectively of the nature of the purchaser (i.e. a business or a consumer).

The two tracks distinction clearly displays the different approaches held in various jurisdictions, where according to many national laws, particularly the USA, pre-dispute arbitration clauses are allowed (particularly to protect businesses from consumer class actions); while national laws in other jurisdictions, chiefly the EU Member States, Japan, Canada and number of Latin American and African States, invalidate these clauses in consumer contracts.<sup>57</sup> Also, the application of the national mandatory law in consumer

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<sup>54</sup> See eBay Resolution Centre at < <http://resolutioncenter.ebay.com/>> and MasterCard, Chargeback Guide (29 June 2012) <[http://www.mastercard.com/us/merchant/pdf/TB\\_CB\\_Manual.pdf](http://www.mastercard.com/us/merchant/pdf/TB_CB_Manual.pdf)>.

<sup>55</sup> See Draft Preamble of the twenty-fifth session (New York, 21-25 May 2012) A/CN.9/WG.III/WP.112 - Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules.

<sup>56</sup> See the 26th session (5-9 November 2012) and the 27th session (20-24 May 2013) of UNCITRAL Working Group III.

<sup>57</sup> In these jurisdictions an arbitral award against a consumer, which participated via a pre-dispute arbitration clause, would not be binding to the consumer. See Proposal by the European Union Observer Delegation of the

contracts would be a key element at the time of determining the application of the New York Convention in the enforcement of arbitral awards. According to article II(1) of the Convention pre-dispute arbitration agreements are valid and signatory States must give them legal validity; yet, article V contemplates the refusal of recognition and enforcement of arbitral award where such recognition or enforcement would be contrary to public policy of the country where the enforcement is sought, thus opening the question as to whether consumer protection legislation would be part of such public policy. The Court of Justice of the EU has indicated in *Asturcom Telecomunicaciones* and *Mostaza Claro* that consumer protection laws rank as public policy.<sup>58</sup> Furthermore, as noted above, the implementation of the ADR Directive by July 2015 will ban pre-dispute arbitration clauses in all consumer contracts.

#### *Different Views on the Functions of the ODR Platform*

The ODR Regulation establishes a single pan-European ODR platform that will link parties to all the ADR schemes that have been approved by the competent national authorities. In contrast, UNCITRAL does not foresee such a centralised ODR platform. Moreover, whereas the ODR Regulation states that complaints submitted to the platform will be forwarded to national ADR entities, UNCITRAL envisages a first stage of the ODR process (the negotiation) to be carried out within the ODR platform.

#### *Future Connection to a Judicial Process*

Going forward, the EU ODR platform might be connected to, or complemented by, a referral system to a court procedure, such as the European Small Claims Procedure, particularly once

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Twenty-Seventh session of UNCITRAL Working Group III (New York, May 2013) Online Dispute Resolution for Cross-Border Electronic Commerce Transactions: Draft Procedural Rules. A/CN.9/WG.III/WP.121.

<sup>58</sup> C-40/08 *Asturcom Telecomunicaciones* and C-168/05 *Mostaza Claro*. Although a number of EU Member States presently allow for pre-dispute consumer arbitration under very limited circumstances; other countries, chiefly the US, have largely upheld the validity of pre-dispute arbitration agreements unless they are 'unconscionable' for the consumer. The US Supreme Court has given a very restrictive interpretation to these exceptions and has also restricted the use of state law in limiting the application of the Federal Arbitration Act (FAA). See *Carnival Cruise Lines, Inc. v. Shute*, 499 S.Ct. 585 (1991) and *AT&T Mobility v. Concepcion* 131 S.Ct. 1740 (2011) giving force to the Federal Arbitration Act. US courts are however more likely to strike down mandatory arbitration clauses in online contracts when the consumer could not have found an alternative supplier. See *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593 (E. D. Penn. 2007). It must be also noted that the CJEU has distinguished pre-dispute mediation clauses from arbitration clauses. The former are valid provided that they meet the conditions set out by the Court. See C-317/08 *Rosalba Alassini* at 67.

e-justice technology is implemented in the national courts.<sup>59</sup> However, such an option will not be available in the near future at a global level. Although the (off-line) judicial enforcement of low-value decisions is not currently a feasible option for cross-border disputes (at the European or the international level),<sup>60</sup> the EU has enacted legislation to streamline this process within the Internal Market.<sup>61</sup> Conversely, judicial enforcement outside the EU would remain more cumbersome, with the possible exception of the enforcement of significant-value arbitral awards.

## **KEY FUNCTIONS FOR AN EFFECTIVE AND FAIR ODR PLATFORM**

The ODR Regulation requires the European Commission to build an ODR platform by January 2016. The platform will become the EU hub for receiving consumer complaints. However, many crucial aspects of the platform's design have yet to be worked out as they are being built in a piecemeal fashion. This part of the paper aims to fill this gap by providing a first-blush approximation of the functions that a successful platform should have. This paper argues that the ultimate goal of the ODR platform should not be simply to enable consumers to submit complaints in their own language, or to help the parties in finding an adequate ADR entity, but to increase consumer trust in e-commerce. Accordingly, it is submitted that, on their own, neither the standardisation of complaints nor recommending ADR entities, achieve this goal. This paper calls for a more holistic approach in fulfilling the principle of effectiveness contained in the ADR Directive. In so doing it proposes that the following four interrelated functions are incorporated into the ODR platform: (i) conflict prevention, (ii) online negotiation, (iii) case management for the approved ADR entities, and (iv) monitoring and enforcement.

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<sup>59</sup> See European Parliament Resolution of 25 October 2011 on Alternative Dispute Resolution in Civil, Commercial and Family Matters (2011/2117(INI)). The e-Justice portal is presently preparing an online filing system for the European Small Claims Procedure, which is expected to start running in 2013. See <<https://e-justice.europa.eu/home.do?plang=en&action=home>>. Cf. P Cortés 'Does the Proposed European Procedure Enhance the Resolution of Small Claims?' (2008) 27(1) CJK 83-97. See Recital 53 of the E-Commerce Directive 2000/31/EC encouraging access to justice by employing appropriate electronic means in the judicial process.

<sup>60</sup> Research in the EU has suggested that parties would not consider to go to court for less than €500. See J Stuyck, E Terryn, V Colaert, T Van Dyck, N Peretz, N Hoekx and P Tereszkievich, 'Study on Alternative Means of Consumer Redress other than Redress through Ordinary Judicial Proceedings' (Catholic University of Leuven, January 17, 2007). The economic threshold is even higher (€786) for cross-border claims. See Special Eurobarometer (2013) p. 8.

<sup>61</sup> E.g. Rome I Regulation (O.J. 2008, L 177/6); Brussels I Regulation (O.J. 2001, L 012); and the Mediation Directive (O.J. 2008, L 136/3).



### ***A. Conflict Prevention Function***

An effectively designed ODR platform should play a key role in the prevention of future disputes.<sup>62</sup> Hodges *et al* observe that effective consumer redress mechanisms should not only increase consumer protection, but should also mandate behavioural consequences for markets and traders.<sup>63</sup> To this end, the ODR platform should classify complaints into a systematic taxonomy so that once the information is processed it could be shared with traders and regulators, who would have access to real time information on what is happening in the markets.<sup>64</sup> This information would allow regulators and traders to give a quick response to market problems that need to be addressed. While regulators would be able to monitor legal compliance, reducing the cost of public enforcement, traders would obtain valuable information on disputes,<sup>65</sup> allowing them to improve trading standards and avoid future disputes.<sup>66</sup>

eBay has appreciated the value of this information as it does not only handle over 80 per cent of disputes automatically, but it has also integrated measures to avoid new disputes.<sup>67</sup> Similar lessons have been learnt by more traditional service providers, such as Telecom Italia, which adapted its customer service system in 2010 to deal with many complaints that previously had gone to external ADR schemes.<sup>68</sup> Therefore, a tool that automatically breaks down and classifies the types of complaints received in the ODR platform can be a valuable asset for regulators and traders, particularly for those without sophisticated in-house systems. Appropriately processed data can be an effective mechanism

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<sup>62</sup> See generally, S Smith and J Martinez, 'An Analytical Framework for Dispute System Design' (2009) 14(4) Harv. Negot. L. Rev. 1401-1446. Hodges *et al*, above n 2, p. 1. R Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services* (OUP, 2008) 224.

<sup>63</sup> Hodges *et al*, above n 2, pp. 199, 200, 220.

<sup>64</sup> Ibid.

<sup>65</sup> It is likely that the ODR platform will receive many complaints that are simple requests for information. According to the ECC-Net, in 2011, 40 per cent of the contacts were consumer requests for information that arose from cases where traders had unattended the requests. European Consumer Centres 'Network, Annual Report 2011 Getting Help Advice on your Purchases Abroad (2012). Available at <[http://ec.europa.eu/consumers/ecc/ecc\\_annual\\_reports\\_en.htm](http://ec.europa.eu/consumers/ecc/ecc_annual_reports_en.htm)>.

<sup>66</sup> This important role was first envisioned by W Ury, J Brett and S Goldberg in *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflicts* (Jossey-Bass, 1988).

<sup>67</sup> C Rule 'Making Peace on eBay' ACResolution, (fall 2008). O Rabinovich-Einy and E Katsh, 'Lessons from Online Dispute Resolution for Dispute System Design' in M Wahab, E Katsh and D Rainey, *Online Dispute Resolution: Theory and Practice* (Eleven International Publishing, 2012) p. 42.

<sup>68</sup> The external ADR method previously used by Telecom Italia is 'paritetical negotiation', whereby a representative of the consumer met with a representative of the trader in order to settle a complaint.

for recognising patterns, which would enable traders and regulators to incorporate preventive measures. Hence, information on recurring complaints would aid traders to move ‘upstream’ from dispute resolution to dispute prevention.<sup>69</sup>

### ***B. Online Negotiation***

An essential function for an ODR platform omitted in the Regulation is an online negotiation tool.<sup>70</sup> Such a tool forms a fundamental procedural part of the model procedure contained in the draft UNCITRAL Rules.<sup>71</sup> This omission may be explained if we consider that the ODR platform was preconceived by the European Commission not to resolve disputes, but to harness the national ADR infrastructure to do so. Yet, a timely and effective negotiation tool can be very useful in recurring complaints. Indeed, that is how eBay resolves the majority of its over 60 million annual disputes.<sup>72</sup> It does not use the intervention of neutral third parties, but employs an automated negotiation tool to settle the majority of complaints between its buyers and sellers.<sup>73</sup> An effective ODR platform should include a negotiation tool that proposes computer-generated settlements that are tailored to the complaints falling within the scope of application. This role is what Katsh called the ‘fourth party’ –that is, when technology shares (and sometimes even takes) the role of the neutral third party in the dispute resolution process.<sup>74</sup>

It is possible to distinguish between two basic models of online negotiation: assisted negotiation and automated negotiation or blind-bidding.<sup>75</sup> The eBay and PayPal models employ assisted negotiation, categorising disputes and matching them with solutions adopted by parties in similar past disputes. For example, when a buyer is dissatisfied with the purchase of a gadget, the solutions offered will be limited to returning the gadget (with or

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<sup>69</sup> Smith and Martinez, above n 62, p. 1434.

<sup>70</sup> D Thompson ‘Online Dispute Resolution Expansion in the EU’ (2012) 22(6) *Computers & Law* 31, 32; P Cortés, ‘Improving the EU’s Proposals for Extra-judicial Consumer Redress’ (2012) 23(2) *Computers and Law* 27-28.

<sup>71</sup> United Nations Commission on International Trade Law (UNCITRAL) Working Group III (Online Dispute Resolution) Twenty-fifth session, ‘Online Dispute Resolution for Cross-Border Electronic Commerce Transactions: Draft Procedural Rules’ New York, 21-15 May 2012. Draft Art. 5.

<sup>72</sup> To put this figure into context, courts in England and Wales issue around one million civil (non-family) claims. See Judicial Court Statistics (annual) 2011 and Court Statistics (Quarterly) January – March 2013.

<sup>73</sup> T Schultz, ‘The Roles of Dispute Settlement and ODR’ in A Ingen-Housz, *ADR in Business: Practice and Issues Across Countries and Cultures* (Kluwer, 2011) p. 135.

<sup>74</sup> O Rabinovich-Einy, ‘Technology’s Impact: The Quest for a New Paradigm for Accountability in Mediation’ (2006) 11 Harv. Negot. L. Rev. 253. Cf. Katsh and Rifkin, above n 2, p. 36.

<sup>75</sup> Lodder and Zeleznikow, above n 2, pp. 75-85.

without paying the shipment), to obtaining a partial refund, or to being sent a new gadget by the seller. These three possibilities are automatically presented by eBay's ODR platform.<sup>76</sup> The other negotiation model is known as automated negotiation or blind-bidding. This technique may be used to reach settlements when liability is not challenged. In other words, in situations where both parties agree on the facts and liabilities, but disagree on the calculation of the loss or the type of remedy. Automated negotiation uses software that allows users to analyse their bargaining positions; it offers a space for evaluating and prioritising offers and counter offers. Such offers are kept hidden during the negotiation, and are only disclosed when these offers match or enter into a pre-established range - hence the name 'blind-bidding'.<sup>77</sup> The negotiation commences when one party invites the other to negotiate the amount of money in dispute. They can usually submit up to three offers, and if the bids of both parties come within a predetermined range or a given amount of money, the imbedded algorithm automatically settles the dispute in the mid-point of the two offers. Although it is a simple dispute resolution technique, it effectively encourages the parties to reveal their 'bottom line' offers and demands, splitting the difference when the amounts are close, that is, when they fall within a specified range which may be from 30 to five per cent.<sup>78</sup>

Conversely, if these ODR techniques are not employed, requiring each dispute to be resolved ad hoc by a neutral third party, then we are merely replication of traditional ADR processes. This type of redress system is inevitably more costly and less effective. Indeed, the cost of resolving a consumer dispute on average through existing ADR is currently too high.<sup>79</sup> These costs are unsustainable for the majority of consumer complaints, particularly for those arising from e-commerce.

For these reasons, it is essential that direct negotiations between the parties are encouraged in the European ODR platform. During such negotiation, consumers should have access to information on basic legal principles related to their complaints. This information

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<sup>76</sup> N Rogers, R Bordone, F Sander and C McEwen, *Designing Systems and Processes for Managing Disputes* (Kluwer, 2013) pp. 24-25, 250.

<sup>77</sup> See e.g. SmartSettle.com.

<sup>78</sup> See P Cortés 'A European Legal Perspective on Consumer ODR' (2009) 15(4) *Computer and Telecommunications Law Review* 92. See also Y Gabuthy, 'Online Dispute Resolution and Bargaining' (2004) 17(3) *European Journal of Law and Economics* 353-371.

<sup>79</sup> By way of examples on average costs, the Consumer Arbitration Scheme in Spain spends over 400 Euros in resolving each case, while the Financial Ombudsmen Services in the UK spends 555 GBP per case. See C Hodges, I Benohr, N Creutzfeldt-Banda, 'Consumer-to-Business Dispute Resolution: The Power of CADR' (2012) 13 *ERA Forum* pp. 199, 206 and 216. See also The Financial Ombudsman Service 'Annual Review 2010/11' Available at <<http://www.financial-ombudsman.org.uk/publications/ar11/foreword.html>>.

should be coupled with examples of prior dispute settlements, and it should be provided in a clear and targeted manner with the dual aims of filtering unmeritorious claims and promoting voluntary settlement. An effective negotiation tool could tailor the information into different types of complaints, acting as a diagnostic tool that discourages unmeritorious complaints. One benefit of dealing with a high-volume of e-commerce complaints is that they can easily be categorised and resolved as the applicable law on these disputes is often unequivocal.<sup>80</sup>

Therefore, in order to realise the potential of a negotiation tool, the ODR platform should offer parties a list of possible remedies, so encouraging the settlement of meritorious complaints. The more information the parties are able to obtain and exchange during the negotiation process, the more likely they will be in settling their dispute. Such negotiation will even be more effective when coupled with a subsequent ADR process that, if negotiations fail, is capable of progressing to a stage where, at least to some degree, a predictable decision would be proposed or imposed by a neutral third party.<sup>81</sup>

### ***C. The Case Management Function***

The Regulation establishes that the ODR platform will offer a case management tool, but it does not detail its functions.<sup>82</sup> Given the potentially high caseload, the ODR platform should carry out most of its case management functions in an automated manner, such as registering and date-stamping the complaint, sending an acknowledgment to the complainant and notifying the parties' chosen ADR entity. The ODR platform should remind ADR entities about deadlines and record outcomes. These management tools should include features designed to make the complaint process more intuitive and user friendly. It should also be capable of managing the communication flow between the parties by using effective translation tools. It must be noted that although ADR entities cannot be required to offer

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<sup>80</sup> Most disputes relating to the sale of goods usually concern the non-arrival or untimely delivery of the goods in question, or their non-correspondence with the description provided at the time of the transaction; while disputes about services will often relate to the quality of those provided, or whether they were provided at all, for example, in cases of flight cancellations. See E Katsh, J Rifkin and A Gaitenby, 'E-Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of "eBay Law"' (2000) 15(3) Ohio St. J. on Disp. Resol. 705, 709, and Hodges *et al*, above n 2, p.453.

<sup>81</sup> According to the European Consumer Centres' Network, the ECCs could only find an amicable solution in settlement with the trader in 41.6 per cent of all cases and 56.2 per cent of disputes arose from e-commerce transactions. In 75 per cent of cases where no solution was found this was due to lack of agreement with the trader. ECC Network Annual Report 2010, p. 1; K Henry, 'Med-Arb: An Alternative to Interest Arbitration in the Resolution of Contract Negotiation Disputes' (1988) 3(2) Ohio St. J. on Disp. Resol. 385.

<sup>82</sup> Art. 5(3) of the ODR Regulation.

their services in all the languages of the EU, they cannot refuse complaints on the ground that one of the parties is based in a different Member State.<sup>83</sup>

As the level of case management involvement would not be the same for all ADR entities, the ODR platform could provide optional ‘add-on’ tools that could be used as bespoke case management tools. A challenge for the designers of the platform will be to build a superstructure that integrates the various ADR processes and their existing case management systems. The case management function should offer a one-stop-shop for consumers and traders, so that they will not need to use a different web interface for each ADR process. It should also help to harmonise processes and standards, and, in the long term, could organically contribute towards the greater use of ADR processes, standardisation and interoperability.<sup>84</sup> Indeed, research at eBay and PayPal has shown that in the context of e-commerce, where the bulk of disputes are of low-value and where there is a high volume of similar disputes, the most effective approach to resolve them is to employ such a multi-tiered model.<sup>85</sup> An effective dispute resolution process which comprises various procedural steps should adopt the shape of a pyramid, where at the majority of disputes are settled voluntarily between the parties with the assistance of the relevant technology (the fourth party);<sup>86</sup> and only a small proportion of cases progress to the stage where a neutral third party resolves the dispute, using either a consensual or an adjudicative process.<sup>87</sup>

#### ***D. Monitoring and Enforcement Function***

The ADR Directive establishes a number of monitoring steps with the aim of assuring fairness and consistency in the application of the legal standards therein contained. First, every two years approved ADR entities will be required to submit a report to the national competent authorities, which in turn will submit another report to the European Commission.<sup>88</sup> In addition, the European Commission will report to the Parliament and the

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<sup>83</sup> Art. 5(2)(c) of the ADR Directive.

<sup>84</sup> J Hörnle ‘Encouraging Online Dispute Resolution in the EU and Beyond- Keeping Costs Low or Standards High?’ Queen Mary School of Law Legal Studies Research Paper No. 122/2012, section 4b.

<sup>85</sup> C Rule and L Del Duca, ‘From Lex Mercatoria to Online Dispute Resolution: Lessons From History in Building Cross-Border Redress Systems’ (2011) 43 (3) *UCC Law Journal* 1-15.

<sup>86</sup> Katsh and Rifkin, above n 2, p. 93; Hörnle, above n 2, p. 261.

<sup>87</sup> Cortés, above n 70, pp. 28-29.

<sup>88</sup> Art. 19(3) of the Directive on Consumer ADR.

Council on the compliance with the ADR Directive and the performance of the ODR platform.

The ADR Directive guarantees confidentiality and data protection. It also encourages ADR entities to join existing European networks and to cooperate with the competent national authorities entrusted with the enforcement of consumer protection laws.<sup>89</sup> However, the ODR Regulation does not provide for links with, and cooperation between, the ODR platform and regulators. As noted above when discussing the conflict prevention function, the information contained in the ODR platform, if appropriately shared, could improve the enforcement role of regulators. Consequently, it is paramount that while respecting data protection legislation, enforcement agencies have access to the information submitted in the platform for the early identification of rogue traders<sup>90</sup> and market failures.<sup>91</sup>

Such links with enforcement agencies are essential because consumers may not be aware when filing a complaint if the trader is acting in good faith or not. The ODR platform could employ technology to identify patterns of market failure and traders' bad practice; for example, a trader which never responds to complaints or where there are indications of fraud. Undeniably, such close cooperation between the ODR platform and enforcement agencies will be fundamental in ensuring a quick response to fraudulent cross-border activity. Out-of-court enforcement is also indispensable for a consumer redress system that is speedy and cost effective. The remaining of this paper addresses a key element that is missing from the European redress system but which is crucial to its success: the development of incentives. Effective incentives are essential to ensure parties' participation in an ADR process, the early settlement of complaints and compliance with final outcomes.

## **INCENTIVES: THE MAIN INGREDIENTS OF SUCCESSFUL REDRESS SYSTEMS**

The lack of awareness of ADR and ODR mechanisms and the lack of incentives for their use are considered the most important hindrances to their growth.<sup>92</sup> The ADR Directive attempts

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<sup>89</sup> Art. 16 and 17 of the Directive on Consumer ADR. See also Opinion of the European Data Protection Supervisor on the Legislative Proposals on Alternative and Online Dispute Resolution for Consumer Disputes 2012/C 136/01.

<sup>90</sup> Hörnle, above n 84 at section 6.

<sup>91</sup> Hodges *et al*, above n 79, p. 220.

<sup>92</sup> Communication on Alternative Dispute Resolution for Consumer Disputes in the Single Market COM(2011) 791.

to mitigate this by requiring traders to inform consumers about which ADR entities are competent to resolve consumers' complaints, and the ODR Regulation requires online traders to provide a link to the ODR platform. However, when a trader refuses to participate in an ADR process, the consumer-complainant will be left with two undesirable options, either to take the trader to court, or not to pursue the complaint any further.

This paper examines the legal effect of the information requirement and the penalties for its non-compliance. It is submitted that this requirement by itself will be insufficient to encourage traders, particularly those who are not required by their national laws to participate, settle meritorious complaints, and comply with final outcomes. Accordingly, it is essential to incorporate incentives in order to meet the stated policy aim of improving consumers' redress options resulting in greater competition and a more efficient Internal Market. This paper argues that the online forum offers the possibility to incorporate innovative incentives that can be used as leverage to persuade parties to engage in the redress process, reach early settlements, and voluntarily comply with final outcomes.

#### ***A. Incentives to Participate in an ADR Process***

##### *The Trader's Obligation to Inform Consumers about the ODR Platform and the Relevant ADR Entities*

According to the ODR Regulation all online traders will be required to inform consumers about the ODR Platform through the provision of a link in their websites.<sup>93</sup> This information requirement applies regardless of whether the trader is committed or not to participate in any nationally-approved ADR process. Since only a small proportion of these traders will be legally required to participate in an ADR process, this requirement could create 'false expectations' for consumers, misleading them into transactions with unreliable traders. Therefore, it is submitted that if online traders do not participate in any ADR process, the information obligation would run counter to the rationale of the new legislation.

Similarly, the ADR Directive requires only certain traders –those mandated by their national sectorial laws to be affiliated with an ADR entity and those who have voluntarily opted to do so– to inform consumers on their websites and in their general terms and

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<sup>93</sup> Art. 14(1) of the ODR Regulation.

conditions of sale about their links to specific ADR entities.<sup>94</sup> The consequences of not complying with an information requirement will be similar to those contained in other EU legislation,<sup>95</sup> allowing Member States to develop appropriate mechanisms to ensure compliance.<sup>96</sup>

It is also worth considering the contractual standing of the parties in the event that the trader states that it is committed to participate in an ADR process, but refuses to do so when a consumer institutes the process. The consequences in such an event would vary depending on the type of ADR process. In arbitration, the existence of the contractual agreement gives power to the arbitrator to resolve the case, even when the trader does not recognise such competence to the tribunal.<sup>97</sup> A similar scenario would occur when a trader falls within the scope of an institutional ombudsman. With regards to mediation normally only a court can enforce a contractual agreement to mediate.<sup>98</sup> However, it should be underscored that in most low-value claims consumers may not be able, or may not want, to pursue the claim through the courts. Overall, it can be expected that those traders that are subject to legal ADR obligations due to their sector or industry will participate in an ADR process, but it is argued that other traders will need added incentives for agreeing to participate in ADR processes.

### *Cost Analysis of Participating in ODR*

Costs will be a major challenge for the success of ADR processes that meet due process requirements, particularly since the ADR process must be free or at a low cost for consumers.

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<sup>94</sup> Art. 13(1) of the ADR Directive. In an effort to assist traders in reducing the legal costs in complying with the information requirements, the UK government is considering providing a template or a standard wording that traders could use. BIS Response, above n 17, p. 21.

<sup>95</sup> See e.g. Directive 2000/31/EC on Electronic Commerce O.J. 2000, L 178/1, and Directive 2011/83/EU on Consumer Rights O.J. 2011 L304/64. In the event that a trader adhered to an ADR scheme continuously refuses to participate it could be considered to be an unfair commercial practice (Directive 2005/29/EC O.J. 2005, L 149/22).

<sup>96</sup> In the UK the Enterprise Act 2002 confers enforcement powers to the Office of Fair Trading, the Local Authority Trading Standards Services and other enforcement bodies that have powers to consider complaints and seek court orders for compliance when there is a blatant breach of these information obligations.

<sup>97</sup> For instance, under the Spanish Arbitration System, in the cases where there exists a public offer of arbitration, the arbitral agreement will be valid once the consumer files the complaint and this is covered in the scope of application of the public offer. See Art. 24.2 Spanish Royal Decree 231/2008. Cf. E Vilalta, 'ODR and E-Commerce' in M Wahab, E Katsh and D Rainey, *Online Dispute Resolution: Theory and Practice* (Eleven International Publishing, 2012) p. 42.

<sup>98</sup> Art. 5(1) of the Mediation Directive empowers national courts to recommend the use of mediation (but not other ADR processes) when they consider appropriate to do so. Under English law this is possible according to *Cable and Wireless* [2002] 2 All ER (Comm) 1041. See generally K Hopt and F Steffek, *Mediation: Principles and Regulation in Comparative Perspective* (OUP, 2012).



Traders, who in all likelihood will be required to carry most of the costs, will only opt in voluntarily if they receive an economic profit.<sup>99</sup> In making this decision they will consider whether the cost of outsourcing the complaint handling system is economically justifiable. Naturally, the result of this cost-analysis will often depend on which type of redress system is used.

Empirical studies have shown that well-designed ODR platforms give parties a sense of justice and fairness in the market place, which, in turn, increases the loyalty and trust of those who benefit from the redress system.<sup>100</sup> eBay and PayPal have found that the users that encountered disputes and resolved them efficiently have subsequently increased their commercial activity through eBay more than those who have not encountered any disputes during the same period of time; this is because users' confidence in the fairness of the market place is enhanced.<sup>101</sup> This startling finding proves that ODR in e-commerce can successfully install confidence in trusted traders through the systematic use of effective redress systems.

Another cost incentive for traders is that their participation in an ODR process will limit their exposure to chargebacks. When a consumer initiates a chargeback process, the trader is required to pay a fee.<sup>102</sup> In addition, the credit score of that trader is affected; hence, the number of chargebacks issued against him can affect the interest rates that the trader pays per transaction.

Courts could also play a role in providing economic incentives for participating in a more cost-efficient dispute resolution process. For example, they could employ cost sanctions<sup>103</sup> when one party had unreasonably refused to participate in an ODR process. Although national courts are not currently adequate avenues for resolving low-value e-commerce disputes, as previously mentioned, recourse to collective redress and national

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<sup>99</sup> Hörnle, above n 84 at section 7.

<sup>100</sup> Rogers et al, above n 76, pp 24 - 25.

<sup>101</sup> C Rule, CEO at MODRIA (and former ODR Director for eBay and PayPal), Presentation on eBay ODR Experience at the 10th International ODR Forum, Chennai, India. 9 February 2011.

<sup>102</sup> D E Sorkin, 'Payment Methods for Consumer-to-Consumer Online Transactions' (2001) 35(1) Akron L. Rev. 9-10.

<sup>103</sup> This incentive would go hand in hand with the Art. 5.1 of the Mediation Directive that allows national courts to recommend the use of mediation. Established case law in the UK states that cost penalties for unreasonably refusing to participate in ADR comply with Art. 6 ECHR and Art. 47 of the CFREU. See *Halsey v Milton* EWCA Civ 576 (2005), and Pt 36 of the Civil Procedure Rules 1998 (England and Wales).

small claims courts may become more accessible with the improvement of e-justice technology.<sup>104</sup>

### *Pan-European Trustmark or Online Label*

The goal of a trustmark is to assist consumers in recognising reliable traders and ADR entities.<sup>105</sup> A pan-European trustmark can operate as an online label for ADR entities, as well as being included in the traders' website, linking traders to the ADR entity and the ODR platform. However the European Commission and the Council have been reluctant in sponsoring the creation of a pan-European trustmark due to, mainly, the aversion of the Member States in being held liable for the performance of private ADR entities and traders. Although the European Economic Social Committee and the European Parliament recommended the creation of a trustmark for those ADR entities that comply with the quality criteria set out in the ADR Directive, regrettably the final text did not include it.<sup>106</sup>

A reputable trustmark can be displayed by the ADR entities that guarantee compliance with procedural standards and on the website of those traders adhered to approved ADR entities. Such a system would require monitoring and include procedures to withdraw the trustmark where necessary. The withdrawal of the trustmark should occur in relation to ADR entities that do not comply with the standards set in the Directive, while traders should lose it if they either refuse to participate in the ADR proceedings or to comply with final outcomes. The competent authorities of the Member States and the two national ODR advisors will be well placed to award and withdraw the trustmark.

The threat of withdrawal of a trustmark would be an effective incentive if consumers are aware of the trustmark and make purchasing decisions based on it. It should be acknowledged that currently there is insufficient evidence to show how effective trustmarks are. In fact, trustmarks have been used for well over a decade but there has been largely a

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<sup>104</sup> See European Parliament Resolution of 2 February 2012, 'Towards a Coherent European Approach to Collective Redress' (2011/2089(INI)).

<sup>105</sup> A trustmark is an electronic label displayed in the traders' website signifying that they pledge to comply with a code of conduct, the relevant law, and that disputes will be addressed by an independent third neutral party. Cf. P Balboni, *Trustmarks in E-Commerce* (CUP, 2009) 35-37.

<sup>106</sup> EESC, Alternative Dispute Resolution for Consumer Disputes, Rapporteur: J Pegado Liz (CESE 803/2012 - INT/609) para. 3.3. Grech, above n 12, p 65. It is unclear to this author the reason for deciding its exclusion, but a plausible motivation might be the interest of the Commission in making a general consumer trustmark.

lack of success.<sup>107</sup> This is arguably due to the existing high number of trustmarks that confuse consumers, who in turn may not pay attention to them.<sup>108</sup> Accordingly, if the key factor for the success of trustmarks is awareness –which can only be achieved by reaching a critical mass and credibility– the ODR platform would be a suitable instrument to sponsor an effective trustmark that is monitored by the European Commission or a designated public institution, such as the ECC-Net. The idea of a public trustmark is not new and it has been successfully employed at national level.<sup>109</sup>

A trustmark should not be awarded to traders for the mere participation in consensual ADR processes, especially if they have a high rate of unresolved complaints. Traders should only be allowed to display a trustmark when they have a high rate of resolved complaints, and when they are linked to ADR entities that operate in the language of the transaction where the trader displays the trustmark. In turn, as it will be further explained below, compliance with final decisions could also contractually allow traders to require the removal of negative reviews posted by consumers, or at least to add a note in a review website stating that a complaint has been independently considered and subsequently resolved.

## ***B. Incentives to Settle Complaints***

### *An Effective Automated Negotiation Tool*

Cost-effective ADR processes are those that successfully manage communication flows and provide incentives that encourage parties to settle before a dispute escalates to more costly processes. In the context of ODR, the most successful models are those where the majority of disputes are settled without the intervention of neutral third parties. A filtering process occurs in most consumer ADR schemes, such as in ombudsman models,<sup>110</sup> which provide an

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<sup>107</sup> Hörnle, above n 84 at section 6. See also P Cortés ‘Developing Online Dispute Resolution for Consumers in the EU: A Proposal for the Regulation of Accredited Providers’ (2011) 19(1) *International Journal of Law and Information Technology* 1-28.

<sup>108</sup> Cortés, above n 2, pp. 62-64.

<sup>109</sup> For example, the Spanish government has created a trustmark (Confianza en Línea) that is controlled by the national consumer association and which provides assurance that its traders will participate in the institutional consumer arbitration scheme. See *Real Decreto* (Regulation) 292/2004 20 February 2004 which establishes a public trustmark for the services of the information society and the electronic commerce. See also Hörnle, above n 2, pp. 262-263.

<sup>110</sup> Hodges, above n 2, pp. 90-94, 121, 289-290, 358.

initial diagnosis of the merit of complaints while inform complainants about their rights.<sup>111</sup> As noted above with the UNCITRAL rules and the eBay dispute resolution mechanism, effective consumer redress schemes often adopt a pyramid shape, where most disputes are resolved in its base, after parties have exchanged all the necessary information, and only a small proportion of complaints progress to the next stage where a neutral third party intervenes to facilitate settlements.<sup>112</sup> An even smaller number of disputes should reach the adjudicative stage where a decision is imposed on the parties by a neutral third party.<sup>113</sup>

It is submitted that a key element for a successful consumer redress system dealing with a high number of consumer complaints would be to automate the diagnosis stage. In so doing, the ODR platform should incorporate an effective automated negotiation tool, which would manage the communication between the parties from the information submitted in the complaint and response forms.<sup>114</sup> The negotiation stage will be most effective when parties are aware of what is the likely outcome if the case goes on to adjudication. Therefore, clear guidance – for example, on who has the burden of proof if a complaint progresses to an adjudicative process– are essential in persuading parties to settle. Furthermore, in low value disputes traders often prefer an expeditious resolution than an accurate one. Interestingly, research at eBay and PayPal has found that traders often prefer to lose a case in a few days than to spend weeks in a complaint that they eventually win.<sup>115</sup>

### *Filing Fees*

Reduction of case fees can be a means of rewarding parties who settle complaints early. A number of ADR entities waive the traders' case fee for the first few cases and they do not charge (or charge less) before the appointment of the neutral third party. The reason for this is to encourage traders to settle meritorious complaints before they progress to procedures where a third party is appointed and case fees are requested.<sup>116</sup> Other ADR schemes stay the

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<sup>111</sup> Ibid; S. Roberts and M. Palmer, *Dispute Processes: ADR and the Primary Forms of Decision Making*, 2nd ed (CUP, 2005) 346-357.

<sup>112</sup> Hörnle, above n 84, at section 4a.

<sup>113</sup> Hodges *et al*, above n 79, p. 214.

<sup>114</sup> D Doktori, E Karlik, and L Perkins, 'Stakeholder Analysis and Design Recommendations for an EU-Wide Online Dispute Resolution System' Harvard Negotiation & Mediation Clinical Program (2 May 2012).

<sup>115</sup> Rule, above n 101.

<sup>116</sup> Hodges *et al*, above n 79, p. 212.

fees until parties have exchanged all the information or just before the documents are sent to the adjudicator.<sup>117</sup>

### *Costs Penalties*

Cost sanctions may be used for encouraging parties to settle their disputes when appropriate, instead of employing more costly adjudicative models. It may be worth examining whether parties who do not achieve a more favourable outcome in adjudication than what was offered in the negotiation should be required to carry the additional cost of the adjudicative process.<sup>118</sup> An example of how ADR entities can incentivise parties to settle early is the CEDR Solve Consumer Arbitration Scheme. This scheme incorporates economic incentives in relation to consumer complaints against members of the Association for British Travel Agents (ABTA). The procedural rules state that when the consumer-complainant is awarded less than what was previously offered by the trader, the consumer would be ordered to pay an amount that is equal to the registration fee.<sup>119</sup>

### *Multi-Tiered Dispute Resolution Processes*

There is a trend in consumer dispute resolution to employ processes that deal with disputes in various stages. The first stage is a consensual process, and, only if this fails, can parties move to an adjudicative process where a neutral third party recommends or imposes the solution. While it is clear that not everything is negotiable, and there are circumstances in which ADR is not suitable,<sup>120</sup> a multi-tiered ODR process can be used for the majority of consumer disputes. In fact, not only is this already the model employed by many ombudsmen in Europe but, as discussed above, it is also the approach being proposed by UNICTRAL for the resolution of e-commerce disputes. The effectiveness of settlement in a tiered process depends on the parties' being realistic about their claims, particularly for consumers who may be inexperienced in reaching settlements. As a result, facilitating consumers' access to information on their rights may contribute towards speedy and amicable agreements. Although disputes settled through negotiation are not required to follow national substantive laws, it is evident that negotiation generally takes place against the backdrop of

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<sup>117</sup> Ibid.

<sup>118</sup> P Cortés, 'A Comparative Review of Offers to Settle – Would an Emerging Settlement Culture Pave the Way for their Adoption in Continental Europe?' (2013) 32(1) CJC 42-67.

<sup>119</sup> See <[http://www.abta.com/consumer-services/travel\\_problems/arbitration](http://www.abta.com/consumer-services/travel_problems/arbitration)>.

<sup>120</sup> O Fiss, 'Against Settlement' (1984) 93 Yale LJ 1073.

the parties' rights, as defined by the relevant legal structures.<sup>121</sup> An effective redress system should therefore contain a binding stage whereby a dispute can be resolved regardless of how reasonable the parties are.

### *The Publication of Adjudicated Decisions*

The ADR Directive does not require the publication of adjudicated decisions, which, as opposed to consensual agreements, it could be argued should not remain confidential in order to enhance transparency. However, it must be noted that decisions will not contain detailed reasoning in the majority of typical consumer low-value cases. For these cases alone, the Directive has been correct in requiring the publication of aggregated information on outcomes (including the percentage of cases decided in favour of the consumer).<sup>122</sup> An adequate level of transparency is essential in asymmetric relationships where traders decide on the terms and conditions and often require payments in advance of providing goods or services. Therefore, it is submitted that the publication of decisions would have at least three important roles: firstly, bringing transparency to a process where parties do not contest on an equal footing and where traders are repeat players while consumers are inexperienced users;<sup>123</sup> secondly, helping to establish a body of model cases, facilitating legal certainty and the predictability of outcomes;<sup>124</sup> and thirdly, acting as an incentive for respondents to settle reasonable complaints. Conversely, it can be argued that the publication of outcomes may act as a detriment for traders to opt in to an ADR scheme, but establishing a certain degree of anonymity in the publication of outcomes might lessen this concern.

### *C. Incentives for Out-of-Court Compliance of Outcomes*

#### *Feedbacks in Review Websites*

The publication of feedback is becoming increasingly common in e-commerce. These involve websites, often held by intermediaries, which record users' experience. Sometimes they operate through an opt-in system (for example, eBay or Booking.com); sometimes they

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<sup>121</sup> M. Eisenberg, 'Private Ordering Through Negotiation' (1976) 89 Harv. L. Rev. 637; Mnookin and Korn Hauser, above n 50, p. 950.

<sup>122</sup> Art. 7(2).

<sup>123</sup> Cf. C. Menkel-Meadow, 'Do the "Haves" Come out Ahead in Alternative Judicial Systems? Repeat Players in ADR' (1999) 15 Ohio St. J. on Disp. Resol., 19-61.

<sup>124</sup> Micklitz and Sartor, above n 10, p. 12 arguing for the publication of decisions in binding and non-binding processes, but maintaining the anonymity of the parties when they so request.

allow consumers to leave reviews for any type of business (for example, Trust Pilot and Review Centre)<sup>125</sup> while others relate to a specific sector (for example, Trip Advisor for travel reviews). Remarkably, feedback within eBay has become a very useful mechanism for incentivising parties to participate in the dispute resolution process. If eBay sellers would like to request the removal of negative comments, which will affect their competitive position in the online market, they will have to either reach a settlement or agree to have them adjudicated by a neutral third party.

Similar incentives could in time be incorporated in the European redress model if the ODR platform cooperates with consumer review sites, so that when settlements are reached, traders can request their incorporation in the review sites. This notification could automatically remove the negative post, or be included as a note to the consumer's review, that is, stating that the complaint was considered in an independent ADR process, and when applicable, scrutinised by a neutral third party. The removal of the post should be done when a settlement or a decision is reached (regardless of whether it is or not in favour of the consumer). In order to avoid the consumer blackmailing traders, it will be necessary to include some tools, such as cease-and-desist letters, to ensure the filtering vexatious reviews.<sup>126</sup> Moreover, a trader should be able to invite the consumer to initiate a claim in the ODR platform. If the consumer refuses to do so within an adequate period of time, then the negative posting should be automatically deleted or followed by a post that records the consumer's refusal to participate in the dispute resolution process.

### *Cooperation with Search Engines*

The Internet opens up new possibilities to use technology as leverage to reward good traders and to penalise those who unjustifiably dismiss consumer complaints. Currently, when Google Shopping displays online sellers in its browser it includes third party reviews.<sup>127</sup> Google's algorithms aggregate the reviews (as well as extracts from such reviews) found from a search of the sellers' domain name. Similarly, the ODR platform and review sites could also cooperate with the search engines to rank down traders who have a high number of

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<sup>125</sup> See <<http://www.trustpilot.com/>> and <<http://www.reviewcentre.com/>>.

<sup>126</sup> It should be noted that Art. 14 of the E-Commerce Directive 2000/31/EC establishes a safe haven regime for hosting providers as long as they are not informed of its illegal character, and that they act promptly when informed of it. By contrast in the US, s. 230 of the Communications Decency Act 1996 provides greater protection for website publishers. See *Zeran v. AOL*, 129 F.3d 327 (4th Cir. 1997).

<sup>127</sup> See <<http://www.google.com/ads/shopping/>> and <<http://www.google.com/wallet/>>.

unresolved complaints or that have not complied with final outcomes. Although search engines are committed to neutrality, and so they would be reluctant to change their own settings, search engines could incorporate filters with this option, allowing users to decide whether to refine their browses.

### *'Name and Shame' Techniques and Blacklists*

The 'name and shame' techniques could also be linked to the ODR platform. A blacklist could be used to include recalcitrant traders with many complaints and refusals for participating in ADR schemes. However, if the information contained in the blacklist is false, the publication could give rise to civil liability for defamation, and even to criminal prosecution in jurisdictions where defamation is a crime. This possibility is more likely to happen in those Member States where they have data protection laws that allow traders who are 'shamed' to issue a claim on such a basis. Nevertheless, even in these jurisdictions the processing of this data may be justified when there is a public interest and it could be subject to special immunity to publishers. Indeed, a number of ADR and ODR schemes already use 'naming and shaming' as an incentive for compliance and to warn consumers.<sup>128</sup>

Outside the EU, an important scheme is carried out by the Better Business Bureau (BBB), which rates traders in Canada and the USA.<sup>129</sup> The BBB lists traders operating in the US, including those that have been accredited by them as well as those who are not accredited by the BBB, though having the BBB accreditation improves the traders' rating. Consumers can search online for businesses and submit complaints, even when the trader does not participate in the ADR scheme.<sup>130</sup> The participation and compliance of the trader is taken into consideration, and if the trader does not participate or comply with outcomes, then a new rating will affect them negatively. The BBB scheme is the largest scheme of its kind in the US, and while consumers perceive it as a useful mechanism, some traders do not like it because they cannot opt out. For that reason, it is submitted that a mid-way approach would

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<sup>128</sup> E.g. Trusted Shops lists the websites which have had their accreditation withdrawn for non-compliance <<http://isisaccreditation.imrg.org/User/Pages/WithdrawnWebsites.aspx?pageID=16&pageTemplate=1>>; the Internet Ombudsman in Austria publishes a Watchlist of traders that have generated multiple consumer complaints <<http://www.ombudsmann.at/schlichtung.php/cat/5/aid/17/title/Watchlist>>; and the Swedish National Board for Consumer Disputes also makes available to the public its decisions for 'naming and shaming' traders for non-compliance. See European Parliament Study Cross-border Alternative Dispute Resolution in the EU (2011) p. 40

<sup>129</sup> See <<http://www.bbb.org/>>.

<sup>130</sup> L Webb 'International BBB Ratings a la eBay: A Proposal for an Improved Online Better Business Bureau to Facilitate International Business Transactions' (2004) 35 Cal. W. Int'l L.J. 127.



be preferred: traders should not be penalised for not being accredited, but when traders refuse to participate in ADR processes after many requests (or to comply with outcomes) then this conduct should be reflected in a blacklist. In other words, the ODR platform should have two lists: a white list that will contain all the ‘reliable traders’ that have agreed to have all their complaints resolved by an approved ADR entity and comply with outcomes; and a black list, which will contain the ‘unreliable traders’ that have received many complaints but have unjustifiably declined to participate in ADR processes or to comply with final outcomes.

### *Online Intermediaries*

Lastly, intermediaries may be effective in encouraging compliance.<sup>131</sup> Such intermediaries can be those who hold the money related of the transaction, such as escrow services that determine who keeps the transaction money when there is a dispute between the buyer and seller.<sup>132</sup> Also payment providers, such as credit card companies (i.e. Visa, Mastercard and American Express) and other online payment intermediaries (i.e. PayPal) can reverse payments in compliance with outcomes, moving sums in dispute from the seller’s account to the buyer’s. Furthermore, in extreme cases, online regulators such as ICANN could potentially play a key role in blocking traders that engage in criminal activities through the cancelation of domain names when required by public enforcement bodies. These intermediaries can therefore play useful roles in ensuring quick enforcement without the need for judicial intervention.

## **CONCLUSION**

The European Commission has found that the lack of effective consumer redress is hampering the development of the Single Market. The resolution of the typically low-value consumer disputes that arise from e-commerce is nearly always more suited to extrajudicial redress mechanisms than it is to the courts. Accordingly, with the goal of stimulating the Internal Market, the EU has adopted legislation that aims to overcome the obstacles that have impeded the use of ADR and ODR: namely, gaps in coverage, the absence of legal standards,

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<sup>131</sup> Hodges *et al*, above n 79, p. 216.

<sup>132</sup> See for example <[www.escrow.com](http://www.escrow.com)>. The Payment Services Directive 2007/64/EC (O.J. 2007, L 319) allowed the introduction of low-cost escrows in the EU that are properly licensed and regulated by the public authorities.

and a lack of awareness. While, the ADR Directive will increase the availability of quality ADR for consumer disputes, the ODR Regulation will create an ODR platform that will act as a signposting service, directing contractual disputes from online sales to ADR entities that meet the quality criteria set in the Directive.

The goal of ODR techniques is to improve communication flows between parties in disputes, which are often rooted in misunderstandings and miscommunications. The principal aim of this paper has been to call for a more holistic approach to achieving an effective consumer redress system. It has suggested that, as envisaged by UNCITRAL, direct negotiation, particularly when followed by effective adjudication, is the most important dispute resolution method that parties can use in settling their disputes. This paper has therefore suggested that setting up an ODR platform that only acts as a referral website will be a missed opportunity to enhance consumer redress in the EU. It has submitted that the ODR platform should have four functions: (i) conflict prevention, (ii) online negotiation, (iii) case management, and (iv) monitoring and enforcement functions.

This paper notes that the study of incentives has been neglected by policymakers and the literature in this field. It has thus submitted that an effective consumer redress system that meets the policy aims of the legislation (i.e. improving competition and invigorating the internal market) will only be met if incentives are incorporated into the ODR platform to encourage the participation of respondents; to settle complaints as early as possible; and to ensure out-of-court enforcement of final outcomes. Accordingly, it has been argued that the traders' information obligations set in the Directive will be more effective when coupled with the following incentives: evidence of clear cost savings for traders; a trustmark system that reaches critical mass; an effective negotiation tool; final outcomes that impact on consumer review sites, search engines, and blacklists; as well as obtaining the cooperation from online intermediaries.

The level of confidence of the half billion European consumers will be affected by the success of this redress system. If greater consumer trust is achieved, it will contribute to make the European Market more competitive, putting us closer to the aim of achieving the full potential of the Internal Market.