Reputational Feedback Systems and Consumer Rights

Improving the European Online Redress System

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Abstract

The European Union single market needs to tackle an outstanding issue to boost competitiveness and growth: a trust-based redress framework that ensures the effectiveness of consumers' rights. The current disparities among dispute resolution mechanisms, added to the fact that in practice many do not guarantee participation and enforceability, are serious obstacles to this goal. Trust and the integration of certain dispute avoidance tools added to the regulation of some common enforcement mechanisms are key issues in the field of consumer protection. The goal of this article is to offer some insights within the context of the European Union legislative proposals aimed at improving the current redress system.

Keywords: reputational feedback systems, consumer's protection, dispute resolution, ADR, ODR, enforceability, ecommerce, European redress system small claims.

1 Introduction

In the field of ecommerce conflict resolution, one outstanding challenge is to secure the satisfaction of consumer needs in an increasingly globalized market. Internationally, this pressing issue has been tackled by the market itself, through the idea of using reputation to build trust and, in so doing, directly influence consumers' purchasing decisions. The online market has recently experienced rapid growth in Europe, thanks to the emergence of highly innovative and highly sophisticated tools in the electronic environment, whose ultimate goal is to build trust among users. They incorporate very heterogeneous digital mechanisms of qualification, recommendation of goods or services, in addition to chargebacks and blocking of accounts in instances of noncompliance by a trader. Electronic feedback, reputation and private execution systems are complementary ancillary tools that provide significant added value to webs and digital intermediary plat-

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forms as they play an essential role in creating the necessary trust and credibility. In turn, they empower consumers and enable them to decisively influence trader's behaviour. They have become essential dispute avoidance tools.

The idea or belief that an individual person or legal entity will meet expectations in an economic transaction will depend, first, on previously obtained personal knowledge and experience, references from other users in similar circumstances and in their absence, on the possibility of having funds returned by the credit card company. Information on the professional rating of a supplier, good or service is a crucial aspect in today's market: it confers transparency, which in turn creates trust in the trader benefitting from it. This is why mechanisms based on referrals, ratings from members of a community or chargebacks have been so warmly welcomed by the market and are regarded as a collective measure of trustworthiness.

Even so, disputes can arise, and there is an inevitable clash of interests in a context in which trust has been affected. In such a scenario, conflict resolution schemes (ADR/ODR)[1] may play a crucial role since resorting to the courts to resolve consumer issues is not always an adequate forum for low-value transactions.[2] In addition to this, if the dispute resolution scheme chosen is non-adjudicative – namely, mediation, conciliation – some kind of mechanisms that guarantee the effectiveness of the outcomes are needed in case of noncompliance.

1 Which are Anglo-Saxon acronyms to identify modalities of out-of-court dispute resolution (ADR) and online dispute resolution (ODR). For more detailed information about origins and evolution of ODR, *see*: E. Katsh & J. Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, San Francisco, Jossey-Bass, 2001 ; C. Rule, *Online Dispute Resolution for Business*: *B2B, ECommerce, Consumer, Employment, Insurance, and other Commercial Conflicts*, San Francisco, Jossey Bass, 2002 ; P. Cortés, *The Law of Consumer Redress in an Evolving Digital Market: Upgrading from Alternative to Online Dispute Resolution*, Cambridge, Cambridge University Press, 2017. C. Rule & C. A. Schmitz, *The New Handshake: Online Dispute Resolution and the Future of Consumer Protection*, Chicago, ABA Book Publishing, 2017; M. Wahab, D. Rainey, & E. Katsh (Eds.), *Online Dispute Resolution: Theory and Practice*, 2012; P. Cortes, *Online Dispute Resolution for Consumers in the European Union*, 2010; E. Vilalta, *Mediación y arbitraje electronicos*, Cizur Menor, Thomson Aranzadi, enero 2013; P. Cortés, 'The Online Court: Filling the Gaps of the Civil Justice System?', *Civil Justice Quarterly*, Vol. 36, No. 1, 2017, 54-71; E. Katsh & M. Wahab, 'Technology and Dispute Resolution', *in* M. Piers & C. Aschauer (Eds.), *Arbitration in the Digital Age: The Brave New World of Arbitration*, Cambridge, Cambridge University Press, 2018, pp. 27-55; E. Katsh & O. Rabinovitch, 'A New Relationship between Public and Private Dispute Resolution', *Ohio State Journal of Dispute Resolution*, Vol. 32, 2017, p. 695; A. Schmitz, 'A Blueprint for Online Dispute Resolution System Design', *Journal of Internet Law*, Vol. 21, No. 7, 2018, pp. 3-11; L. Wing, 'Ethical Principles for Online Dispute Resolution: A GPS Device for the Field', *International Journal of Online Dispute Resolution*, Vol. 3, No. 1, 2016, pp. 12-29; F. Fowlie, D. Bilinsky, & C. Rule, 'Online Dispute Resolution: The Future of ADR', *Canadian Arbitration and Mediation Journal*, July 2013; P. Cortés & F. Esteban de la Rosa, 'Building a Global Redress System for Low-Value Cross-Border Disputes', *International Comparative Law Quarterly*, Vol. 62, No. 2, 2013, pp. 407-440; O. Rabinovich-Einy & E. Katsh, 'Technology and the Future of Dispute Systems Design', *Harvard Negotiation Law Review*, Vol. 17, Spring 2012, pp. 151-199; E. Katsh & L. Wing, 'Ten Years of Online Dispute Resolution (ODR): Looking at the Past and Constructing the Future', *University of Toledo Law Review*, Vol. 38, 2006, p. 101. More recently, E. Kaths & O. Rabinovich-Einy, *Digital Justice. Technology and the Internet of Disputes*, 1st ed., New York, Oxford University Press, 6 April 2017.

2 *See* P. Cortes, 'Conclusion', *The New Regulatory Framework for Consumer Dispute Resolution*, Oxford, Oxford University Press, 2016, p. 454.

This article will analyse some existing tools and mechanisms and will provide insights in order to overcome current concerns, aiming at improving the functioning and effectiveness of online consumer protection.

2 Reputation Feedback Systems as Dispute Avoidance Tools

A number of alternative ways to gain trust for traders and effective redress for consumers have emerged in the online market by means of innovative electronic tools, which allocate trust and improve voluntary compliance, avoiding the need for judicial enforcement mechanisms. Soft security mechanisms – namely reputation/feedback tools – use collaborative methods for assessing the behaviour of participants and making it possible to identify who cares about satisfaction of users, to sanction those who breach the norms and to recognize and reward those who adhere to the norms. The rationale behind this is that in the online and often cross-border environment these tools stimulate quality, provide incentives for good behaviour and integrity of sellers and purchasers, and avoid disputes because the consumer's expectations are better managed by their enhanced information on the sellers.[3] Transactions can seldom rely on judicial enforcement systems that are not suitable for resolving low-value disputes[4] because courts are not sufficiently user-friendly and cost-effective.[5] Instead, the digital market is increasingly developing tools that empower consumers with information about the reliability of traders.

2.1 Trust and Online Reputation

Trust is a term with a variety of meanings, and, as academic commentators note, two main interpretations are to view trust as the perceived reliability of something or somebody, called 'reliability trust,' and to view trust as a decision to enter into a situation of dependence, called 'decision trust.'[6] Gambetta adds that this is a particular belief predicated not on evidence but on the lack of conflicting evidence – a feature that makes it vulnerable to deliberate destruction. In contrast, distrust is very difficult to invalidate through experience. Once distrust has set in, it soon becomes impossible to know if it was ever in fact justified.[7]

The concept of reputation, closely linked to that of trust, is the overall quality or character as seen or judged by people in general.[8] The first reputation systems

3 *See* A. Jøsang, 'Trust and Reputation Systems', *in* A. Aldini & R. Gorrieri (Eds.), *Foundations of Security Analysis and Design IV, FOSAD 2006/2007*, Berlin, Springer, 2007, available at: http://home.ifi.uio.no/josang/papers/Jos2007-FOSAD.pdf.

4 *See* R. Koulu, 'Where Law, Technology, Theory and Practice Overlap – Enforcement Mechanisms and System Design', *in* C. Adamson (Ed.), *Online Dispute Resolution. An International Approach to Solving Consumer Complaints*, Bloomington, Net Neutrals, 2015, pp. 57-69.

5 J. Williams & C. Gill, 'A dispute System Design Perspective', *The New Regulatory Framework for Consumer Dispute Resolution*, Oxford, Oxford University Press, 2016, p. 377.

6 *See* Jøsang, 2007, p. 3.

7 *See* D. Gambetta, 'Can We Trust Trust?', *Trust: Making and Breaking Cooperative Relations*, Oxford, Department of Sociology, University of Oxford, 2000, p. 213.

8 Jøsang, 2007, p. 12.

to arise in the field of online B2C commerce were the trustmarks, alongside rating systems. The former are quality labels in the form of logos that companies display to demonstrate their compliance with certain quality standards in the carrying-on of their business. The latter provide the opinions of other users or consumers regarding their experience with the product or service sold over the Internet. The initial form in which they appeared – websites created by users themselves and open to anyone wishing to express their opinion – coexists alongside sophisticated rating tools included today on ecommerce intermediary platforms or on the traders' websites, to allow users to express their degree of satisfaction, experiences and to rate the product or service received. Designed with the aim to win user trust with regard to a product or service, these tools provide a powerful incentive for traders, as ecommerce service providers and sellers are keenly aware of the adverse impact that a negative review might label them a 'risky' vendor. The creation of online reputations has thus become an almost unavoidable activity accompanying the marketing and sale of products and services. Businesses have seen that finding out users' wishes and being sensitive to their behaviour patterns and needs, and meeting them, lead to success.[9] Ratings, recommendations, referrals and collaborative filtering systems help to devise and establish marketing strategies and improve sales margins.

Online traders are more concerned than their offline counterparts in securing the satisfaction of customers' expectations, and they often have to accept the adoption of generous redress measures to prevent negative reviews. The objective is to improve consumer trust and satisfaction levels and, consequently, their competitive position, which has an effect on the size of potential sales revenue in the future.

These reputation mechanisms operate as conventional incentives for better compliance that may work either separately or embedded into dispute resolution processes, thus preventing customers from seeking judicial intervention to resolve disputes between them and the seller/trader. They aim to ensure self-compliance with contractual and settlement agreements, which means that the parties will have no need to resort to the courts. Accordingly, the United Nations – through Working Group III of its Commission on International Trade Law – has done some work in collating and listing these tools into the so-called private enforcement mechanisms.[10]

2.2 Trustmarks

Also called trust seals, trustmarks are quality labels – namely stamps or logos – used by companies in their establishments and on their websites to demonstrate

9 *See* K. Lobaugh, J. Simpson, & L. Ohri, *Navigating the New Digital Divide: Capitalizing on Digital Influence in Retail*, Deloitte Consulting LLP, 2015, p. 17, available at: https://www2.deloitte.com/content/dam/Deloitte/us/Documents/consumer-business/us-cb-navigating-the-new-digital-divide-051315.pdf. Also, Bright Local, *Local Consumer Review Survey*, 2016, available at: https://www.brightlocal.com/learn/local-consumer-review-survey/.

10 *See* UNCITRAL, *Electronic Dispute Settlement in Cross-Border E-commerce Operations: An Overview of Private Enforcement Mechanisms*, Note by the Secretariat of 13 December 2013, available at: http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V13/863/47/PDF/V1386347.pdf?OpenElement.

compliance with certain quality standards in carrying on their business. Ecommerce is characterized by a high degree of informational asymmetry and a low level of personal interaction between consumers and traders. The seal issued by an independent, neutral third party certifies that the trader complies with certain conduct standards. Internet users who recognize the trustmark will identify the holder as a secure trader. Accordingly, a seal's value will depend on how recognizable it is to users.

One potential problem here is that there are several trustmarks operating in the market, each having different scope and focus parameters. While some are concerned with guaranteeing compliance with specific privacy policies, others focus on guaranteeing compliance with standards covering internal company processes, or securing that the technology used is safe. And it is quite common that users are oftentimes unaware of these parameters and the actual reputation of each seal.

Traders' commitment to participating in ODR procedures may be granted with a trustmark. Such trustmark is kept – or lost – depending on the degree of trader's compliance with agreements, resolutions or recommendations issued from the ODR procedures arising from a dispute. To give just some illustrative examples, Norton Secured,[11] BBB Accredited[12] or TRUSTe[13] are internationally recognized trustmarks for dispute management and resolution of disputes and show that the companies displaying them adhere to and comply with the codes of conduct and processes validated by such trustmarks. In Europe, the Ecommerce Europe Trustmark[14] incorporates a mediation process for disputes with companies operating in the European Union and a code of conduct by virtue of which companies have a duty to provide clear information on a number of subject matters.[15] In Spain, Confianza Online,[16] a not-for-profit association founded by Adigital, Autocontrol and Red.es, offers companies a trustmark linked to a code of conduct[17] and a resolution mechanism that is binding on both the buyer and seller and is offered free of cost to consumers in particular.

11 Available at: https://support.symantec.com/en_US/mysymantec.html.

12 *See* BBB website, available at: https://www.bbb.org/consumer-complaints/file-a-complaint/get-started.

13 Dispute Resolution Manager, available at: https://www.truste.com/business-products/dpm-platform/dispute-resolution-services/.

14 Available at: https://www.ecommercetrustmark.eu/.

15 Traders shall be transparent and provide clear information on identity, address, email, telephone number, description of the products and services offered, including photographs, final price, shipping costs if any, information on the existence of a legal warranty, and order confirmations. They also have to provide the ability to download contracts and secure means of payment.

16 More information available at: https://www.confianzaonline.es/consumidores/publicaciones/?publication_type=&description=&yr=Todos&mn=&buscar-btn=Buscar&page-num-results=*&pagina=1.

17 Ethical Code of Conduct that was recognized by the Spanish Data Protection Agency in a resolution dated 7 November 2002 (CT / 0004/2002) and granted the public trustmark by the National Consumer Institute on 15 July 2005, after analysing the content and verifying that the dispute resolution mechanism fulfilled the requirements established in Recommendation 98/257/EC, available at: www.autocontrol.es/pdfs/cod_confianzaonline.pdf.

Consumers consider less risky and more trustworthy those websites that display a recognizable quality seal.[18] It should nevertheless be noted that there are still no empirical studies that help us to identify the market impact of these seals. Another potential problem in this context is that a trader has to select and pay both the seal provider and the ODR service provider. In such cases, there is a strong possibility for conflict of interest to emerge because oftentimes an expert's neutrality could be indirectly affected to the extent that the service providers and said experts are at the service of one of the parties. These formal obstacles could be overcome if the grantor of the trustmark is independent from the ODR provider.

2.3 Rating Systems

These are tools allowing users to express opinions indicating the degree of their satisfaction with a specific product or service. They are a widely employed practice in ecommerce and are commonly used in the form of scores or grades. On the basis of scores for service providers, services and goods stemming gathered from user opinions and assessments, they provide specific information on concrete indicators. They use algorithms to dynamically calculate such reputation indicators on the basis of the opinions and ratings received.[19] Consumer review mechanisms may take the form of standalone sites that operate exclusively to collect user feedback or of online consumer feedback posting/collection tools embedded within trader's websites whose primary function is the sale of goods or services. The latter has a stronger presence in some sectors; for example, the hotel industry, where consumers look at reviews not only to filter their choice of hotels but also make booking decisions.[20]

A range of studies on ecommerce and user behaviour indicate that purchasers prefer websites that distribute products familiar to them and from well-known, reputed manufacturers. Online reputation has a positive association with trust and the idea that transactions with reputable participants are likely to result in more favourable outcomes than transactions with disreputable participants.[21]

Some findings confirm the fact that, as the number of ratings received by suppliers of goods or services increases, their reputation is also enhanced, because it dilutes the weight of negative ratings. This is why these operators are

18 The effectiveness of these seals will be highly dependent on the reputation of the scheme and on its becoming known by a critical mass of participants. *See* J. P. Cortes & F. Esteban, 'Building a Global Redress System for LowValue CrossBorder Disputes', *International and Comparative Law Quarterly*, Vol. 62, No. 2, 2013, p. 422.

19 Collaborative filtering systems (CF) have similarities with reputation systems, however the assumptions behind CF systems is that different people have different tastes, and rate things differently according to subjective taste. *See* Jøsang, 2007, p. 13.

20 World Tourism Organization (UNWTO), *Online Guest Reviews and Hotel Classification Systems. An Integrated Approach*, 2014, available at: https://www.starratings.com.au/docs/default-source/media-releases/unwto-rating-report.pdf?status=Temp&sfvrsn=0.9296408442314714. *See* P. Carroll, *Digging Deeper into Hotel Reviews: Exactly How and Why Travelers Use Them (Online)*, 2014, available at: http://ehotelier.com/news/2014/07/02/digging-deeper-into-hotel-reviews-exactly-how-and-why-travelers-use-them/.

21 *See* Jøsang, 2007, p. 20.

concerned with embedding such tools into their webs and securing broad-based user participation.

Online comments and ratings are the Internet's 'word of mouth' (WOM) and affect consumers' purchasing decisions.[22] Recent studies also suggest that the impact of consumers' comments on online sales depends on factors beyond the product and its characteristics. The impact is greater when the means of acquiring information are relatively scarce. It is also known that a negative reputation has a much greater impact on consumers and users than a positive one and the consumers' perception of improper behaviour on the part of the trader is associated with the risk of potential rise in the number of consumer disputes in the future.[23] Given that companies are becoming increasingly aware of the importance of word-of-mouth, they try to facilitate users' access to said information.

The greatest difficulty for users is to judge the quality, robustness and the reliability or vulnerability of reputation systems. Some studies have suggested certain criteria for evaluating them.[24] To wit, systems should be capable of the following: (i) distinguishing between a new entity of unknown quality and a known one, (ii) indicating recent trends in the entity's performance, (iii) resisting cyberattacks and attempts by entities to manipulate reputation indicators[25] and (iv) preventing the simple addition of any indicator from, in itself, significantly influencing the score as a whole.

The European Union is considering regulating this sector. The Results of the Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries, Data and Cloud Computing and The Collaborative Economy ran between 24 September 2015 and 6 January 2016 reveal that most business and citizens consider that platforms should be more transparent. Many stakeholders refer to the following potential improvements to rating systems: (i) ensure reviews are based on actual customer experience and avoid fake reviews, (ii) establish a charter of good practice for reviews and reputational systems, (iii) ensure the accuracy and reliability of statistical information resulting from reviews when it may influence buyer behaviour, (iv) for branded products find ways to ensure that reviews do not relate to counterfeits and (v) ensure comparison tools are impartial and transparent about their methodology. Respondents realize the risk of manipulation of consumer opinion via fake reviews or misrepresented statistics. The majority of citizen and online platforms respondents considered that the above-mentioned problems consumers or suppliers perceive

22 Customer Complaining Behavior (CCB) has received much attention among scholars since 1981. *See*, M. Marquis & P. Filiatraut, 'Understanding Complaining Responses through Consumer's Self-consciousness Disposition', *Psychology & Marketing*, Vol. 19, No. 3, 2002, p. 267. Also, J. Y. Hong & W. N. Lee, 'Online Technology as a Complaint Communication Channel', *in* Y. Gao (Ed.), *Web Systems Design and Online Consumer Behavior*, New Jersey, Idea Group Inc., 2005, p. 97.

23 Resnick *et al.*, 'The Value of Reputation on eBay: A Controlled Experiment', *Experimental Economics*, Vol. 9, 2006, p. 79.

24 A. Jøsang, R. Ismail, & C. Boyd, 'A Survey of Trust and Reputation Systems for Online Service Provision', *Decision Support Systems*, Vol. 43, No. 2, 2007, p. 36.

25 For example, 'sybil' attacks, consisting in the fraudulent practice of creating false identities (with pseudonyms, for example) to harm a user/trader by damaging its reputation.

could be best addressed by a combination of regulatory solutions, self-regulatory mechanisms and the market dynamics. Nevertheless, there is consensus that rating systems and trust mechanisms are beneficial because they allow consumers to read other consumers' opinions.[26]

In the arena of digital intermediary platforms, the European Union has become aware of the importance of effective private enforcement mechanisms, and, given the cross-border nature of many transactions and the fact that the final destination is often a consumer, such implementation requires not only harmonization but also the articulation of means for cooperation between competent authorities. This implies, on one hand, a need for macro-data analysis tools allowing one to obtain detailed information on the ecosystems of online platforms and, on the other, a need for instruments of private and public compulsion of obligations. With this new approach, the first challenge for the European Union is to assess whether the existing regulatory framework is still appropriate, as standards designed for a traditional service delivery model may not be effective in a virtual environment. At this stage, self-regulation and co-regulation based on principles, codes of conduct and other tools may also be useful to ensure the application of legal provisions and the adoption of the most appropriate control mechanisms. Such measures can ensure a fair balance between predictability, flexibility and efficiency.

As the European Commission acknowledges, reputational tools can contribute to improving the quality of services and potentially reducing the need for certain regulatory provisions as long as the quality of reviews and ratings are reliable and free from any bias or manipulation.[27] Enhancing confidence in these tools – the vast majority of them created by collaborative platforms or specialized third parties – helps and empowers consumers. The Communication from the Commission to the European Parliament and the Council on Online Platforms and the Digital Single Market expresses the need for these tools to be transparent so that users can understand how the information is filtered, configured or customized. The correct information provided about the nature of the products they see or consume online contributes to the efficient functioning of markets. That is why existing EU consumer and marketing regulations require online platforms to be transparent and not to mislead users. A number of academics claim the need to harmonize the legal framework of reputational feedback tools currently provided by online intermediary platforms.[28] Where a platform embeds a reputational feedback system, it shall provide information on the modalities for collecting, processing and publishing ratings and reviews. Furthermore, the reputational feedback system should comply with a number of standards: (i) The online plat-

26 *See* v. gr. Synopsis Report on the *Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries and the Collaborative Economy*, p. 8, available at: https://ec.europa.eu/digital-single-market/en/news/results-public-consultation-regulatory-environment-platforms-online-intermediaries-data-and.

27 Conversely, false reviews and comments cause a loss of confidence that can undermine the business model of the platform itself and generate generalized mistrust.

28 Vid. Comment and analysis of such Draft at Busch *et al.*, 'Discussion Draft of a Directive on Online Intermediary Platforms', *EuCML*, Vol. 4, 2016, p. 165.

form shall take reasonable and proportionate steps to verify that the reviews are based on a confirmed transaction. (ii) If a review has been requested in exchange for a benefit, it must be indicated. (iii) The reviews must be published without undue delay, and, if a review is rejected, the reviewer must be informed without undue delay of the rejection and the reasons for such rejection. (iv) The order in which the reviews are presented by default should not be misleading. Platform users should be able to see reviews in chronological order. (v) If the reputation feedback system excludes previous revisions, this should be indicated to the users of the platform. The exclusion period should be reasonable and not less than 12 months. (vi) Finally, If reviews are consolidated into a global rating, the total number of reviews on which the rating is based should be indicated.

Another issue that should be refined at this point is how to ensure that platforms integrate free and reliable complaint mechanisms for both traders and users, if there is any concern about the authenticity of a review. Furthermore, in order to preserve those reviews as reputational capital of the supplier, platforms should facilitate means to transfer those reviews to other platforms in a structured, commonly used and readable format.

There is little doubt that reviews are a primary pillar for the prevention of disputes fully integrated in the commerce because, on one hand, users consult and nurture them systematically and spontaneously before, during and after a transaction is completed and, on the other, companies have embraced these tools and will continue to empower them to the extent that such tools give them a competitive advantage in the market. Therefore, it is of paramount significance to advocate for a regulation that responds to the needs of both traders and consumers.

2.4 Blacklists

Blacklisting is a name-and-shame approach consisting in publishing a list of people or groups regarded as unacceptable or untrustworthy and often marked down for punishment or exclusion.[29] This is another enforcement mechanism by means of which a noncompliant trader becomes part of the listing of, and statistics for, traders who are risky to users.

Recently, they have been successfully adopted by certain public electronic platforms associated with consumer dispute resolution. Worthy of particular note is British Columbia's initiative Consumer Protection BC,[30] which consists in providing consumers with web-based access to a computerized search system of opened, ongoing and closed cases against companies that have received complaints, indicating the number of complaints accepted and the full decisions taken.

Within the sphere of the European Union, there are a number of noteworthy initiatives: (i) The Sweden's Allmänna reklamationsnämnden (National Consumer Complaints Office, ARN), which publishes a weekly listing of companies

29 *See* Oxford dictionary definition, available at: https://en.oxforddictionaries.com/definition/blacklist.

30 Available at: https://www.consumerprotectionbc.ca/.

that do not comply with the obligations arising from the outcomes of the ADR procedures it has managed and which conclude in a nonbinding recommendation or judgement based on law.[31] (ii) Italy's consumer financial sector, the Arbitro Bancario Finanziario (the Banking and Finance Arbiter, ABF) – reporting to Banca de Italia,[32] the country's national banking authority – owns a system for publishing the legally based but nonbinding decisions it issues and news and updates on noncompliant companies on the ABF website.[33] (iii) The Czech Republic has the Office of the Financial Arbitrator (FA)[34] that arbitrates disputes and takes binding decisions that are later published to inform consumers. (iv) The Austria Internet Ombudsman provides a watch list with information of fraudulent sites, scams and noncompliant traders.[35]

At a global level also, trustmark organizations and other nongovernmental entities turn to the usage of blacklists for the general public to assess the trustworthiness of a trader.[36] Yet the lack of transparency in the policies applicable to some blacklists, the misleading decisions, and even pressure on companies to adhere to and pay a fee may question their usefulness.

2.5 Account Suspension or Blocking

Another mechanism that has become popular on the Internet – in the case of traders providing goods or services through ecommerce intermediary platforms – is the suspension or blocking of their accounts to prevent them from operating in the future in said virtual markets, either provisionally or even definitively. In this regard, digital intermediary platforms frequently reserve in their terms and conditions of the company's policies, certain rights associated with remaining on their platform. Generally, these terms include some waiver releasing the intermediary platform from any content-related liability, stating that they have no obligation to monitor the information or communications carried out by traders.[37]

31 *See* 'Rad & Ron' magazine owned by the Swedish consumer organization, available at: www.radron.se/. *See also* P. Cortes & F. Esteban de la Rosa, 'La normativa europea de resolución de conflictos de consumo y su transposición en España: una oportunidad para mejorar los derechos de los consumidores aprovechando las experiencias positivas en el derecho comparado', *ADICAE*, 2016 (in press).

32 Art. 128 bis of Legislative Decree 385/1993 and Legislative Decree 130/2015 transposing EU Directive 2013/11.

33 ABF website: https://www.arbitrobancariofinanziario.it/intermediariInadempienti.

34 V.FA website: www.finarbitr.cz/cs/reseni-sporu/sbirka-rozhodnuti.html.

35 *See* Austria Internet Ombudsman website, available at: https://www.watchlist-internet.at/.

36 *See* ECC-Net, *Trust Marks Report 2013: Can I Trust the Trust Mark?*, October 2013, p. 9, available at: http://ec.europa.eu/dgs/health_food-safety/information_sources/docs/trust_mark_report_2013_en.pdf.

37 With regard to limits to install a system for filtering, *see* Case *CVBA (SABAM) v. Netlog NV*, C-360/10, ECLI:EU:C:2012:85, Para. 53, on which grounds, the European Union Court of Justice rules that EU Directives 2000/31/EC, 2001/29/EC and 2004/48/EC must be interpreted as precluding injunctions against a hosting service provider which requires it to install a system for filtering information which is stored on its servers by its service users, which applies indiscriminately to all of those users as a preventative measure and exclusively at its expense for an unlimited period, which is capable of identifying electronic files with a view to preventing breach of rights.

They also stipulate that under no circumstances do they guarantee or make any undertaking that all the content published or uploaded by providers on their services and/or goods will be definitively published, as publication will not occur in the case that the provider in question has acted in bad faith or to prejudice a consumer. The terms contemplate that, should any illegal, fraudulent or prejudicial act be detected, the intermediary platform may be entitled to take the following actions: (i) delete, suspend, edit or modify the content at its sole discretion, including, among others, user publications, at any time, without prior notice and for whatever cause or to delete, suspend or block any service user publication; (ii) access and disclose any information that they deem reasonably necessary to comply with any law, regulation, legal process or request from a legal authority; (iii) prevent and manage fraud-related, technical or security issues; and (iv) respond to consumers requests for assistance. The most severe measure for a trader is, undoubtedly, blocking the access, either provisionally or definitively.

2.6 Contact Information, Personalized Attention and Feedback

Another strategy used to improved trust levels is to provide users with telephone or email contact details on the website. It is known that one of the most frequent complaints of users/consumers is the lack of information of this type, or the fact that it is difficult to find, thereby preventing them, in practice, from contacting the trader. A second complaint is with regard to the lack of response when contact has been established. Not providing a proper or timely (within 24 hours) response to contact can entail, in many online markets, a negative rating that will impact a site's reputation.

Feedback between user and trader is another technique for enhancing one's reputation. This can be achieved by means of, among other methods, brief surveys inviting users to evaluate the service, the trader's response capacity, the product, delivery and so on. In this way, not only positive comments can be gathered but also, perhaps more importantly, concerns expressed can be addressed to allow for the correction and prevention of errors in the future.

Nevertheless, at times, disputes cannot be avoided. In such cases, the said platforms provide advice on how to tackle them to ensure the least impact possible on the trader: by satisfying the consumer. Instead of entering into an open dispute leading to negative public feedback, the best remedy is to offer private feedback with the customer, negotiating and speaking with them over the phone to resolve disputes professionally. It has been shown that, although emails can be useful, a less impersonal tool, such as providing a telephone number and having a conversation, can be very effective.

2.7 Chargebacks and Escrow Accounts

Alongside reputation systems, other mechanisms have emerged to guarantee the effectiveness of Internet users' rights in online transactions, linked in this case to forms of payment. We are referring here to the reimbursement systems or chargebacks and escrow accounts offered by some payment intermediaries.

A chargeback is the technical term used by international card schemes to name the refunding process for a transaction carried out by card, following the

violation of a rule. This process takes place between two members of the card scheme – the issuer of the card and the acquirer. The final customers of these two schemes – the cardholder for the issuer and the merchant for the acquirer – do not have any direct relationship in the chargeback process. Chargebacks allow users to recover amounts from traders when their expectations of a transaction are not met. They can be put into practice when the financial transaction has been carried out with certain payment methods (Visa, MasterCard, PayPal etc.) or by depositing the price into a third-party account. The intermediary in these payment systems can exercise very effective de facto control.[38]

In a chargeback, a complainant may request the reimbursement of an amount paid to a trader via an intermediary when certain conditions are met. By way of example, these include: services not provided or goods not received, a recurring transaction cancelled, goods not conforming to the product specifications or are defective, fraudulent multiple transactions, falsification, authorization rejected, no authorization, card expired, late submission, unrecognized transaction, account number not matching, incorrect transaction amount or account number, and duplicated processing or payment by other means. The process triggered in case of nonconformity on the part of the trader is first one of pre-arbitration followed, as the case may be, by arbitration administered by the payment intermediary itself. This measure's scope will depend on the rules applied by the companies in the country in question. For this, EU some States require determining that the purchaser has indeed been defrauded. In others, it is enough for there to have been absence of compliance or compliance has only been partial.[39] In addition, the financial intermediary has its own decision-making process, which is not always transparent: it asks the purchaser to support the chargeback request before making a decision. It should be borne in mind that reimbursements are in any case limited in scope, given that they are only applied in cases of credit card payments and outcomes do not affect the validity of the contract that could still be challenged in court.[40]

Escrow accounts[41] have a broader scope of application than reimbursements, as they do not depend on the issuing of a credit card: the purchaser deposits the

38 *See*, European Union, SWD, *The Consumer Conditions Scoreboard – Consumers at Home in the Single Market*, 9th ed., July 2013, p. 291, available at: http://ec.europa.eu/consumers/archive/consumer_research/editions/docs/9th_edition_scoreboard_en.pdf.

39 In the European Union chargebacks are regulated by Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC. OJ L 319, 5 December 2007, pp. 1-36 and Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008, on credit agreements for consumers and repealing Council Directive 87/102/EEC. OJ L 133/66, 22 May 2008. EU-law only covers credit card chargeback, purchases where debit cards are not covered by EU-law but can be covered by national law such as in Denmark and Portugal. *See* ECC-Net, *Chargeback in the EU/EEA. A Solution to Get Your Money Back When a Trader Does Not Respect Your Consumer Rights*, 2015, pp. 8-9, available at: http://ec.europa.eu/consumers/ecc/docs/chargeback_report_en.pdf.

40 S. Drake & M. Smith, *New Directions in the Effective Enforcement of EU Law and Policy*, Cheltenham, Edward Elgar Publishing, 2016, p. 218.

41 The first company in the field authorized to operate was Escrow.com.

payment in a third-party account, and, after a certain period of time has passed and if there have been no complaints or if it has been verified that the goods were received as expected, the money is released to the trader. Just as with the traditional escrow, the Internet escrow account works by consigning a financial sum to the control of a third party that safeguards consumer and vendor rights in a transaction. When both parties have confirmed that the transaction has been concluded in accordance with the agreed terms, the third party disburses the money to the vendor. If, on the other hand, a conflict arises, the intermediary offers a resolution mechanism that will decide on and enforce the outcome.

Problems may arise if a fraudulent trader creates a false escrow account. To prevent improper use of these forms of payment, the European Union passed its Directive 2007/64/EC of the European Parliament and the Council on 13 November 2007 for payment services in the internal market[42] that governs and authorizes the use of these kinds of services, which are today mostly administered by banks. As the directive notes, low-value payment instruments should be a cheap and easy-to-use alternative in the case of low-priced goods and services and should not be overburdened by excessive requirements. Even so, it should be borne in mind that, in order to reduce the risks and consequences of unauthorized or incorrectly executed payment transactions, the parties should inform the payment service provider as soon as possible and by a deadline about any complaints they may have. Once a user has informed a payment service provider that its payment instrument may have been fraudulently used, the former should not be held liable for any subsequent losses that may be caused by unauthorized use of the instrument. In order to assess possible negligence by one of the parties, all of the circumstances should be taken into account and the degree of alleged negligence should be evaluated according to national law. Contractual terms and conditions relating to the provision and use of a payment instrument, the effect of which would be to increase the burden of proof on the consumer, should be considered null and void. Furthermore, these systems are designed so that trader users should be able to rely on the proper execution of a complete and valid payment order if the payment service provider has no contractual or statutory ground for refusal. Nevertheless, according to the directive, legal disputes arising within the relationship underlying the payment order should be settled only between the payer and the payee. In this regard, it also provides that, to guarantee the fully integrated straight-through processing of payments and for legal certainty with respect to the fulfilment of any underlying obligation between payment service users, the full amount transferred by the payer should be credited to the account of the payee. Accordingly, it does not authorize the making of any deductions from the amount transferred in the execution of payment transactions, beyond the deduction of any agreed payment service provider charges.

42 Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC. OJ L 319, 5 December 2007, pp. 1-36

3 Existing Consumers ADR/ODR

Once a conflict has arisen, conflict resolution mechanisms take on a key role, given that studies have in recent years repeatedly made it clear that resorting to the jurisdiction of the courts is not the best option, particularly when there are cross-border transactions and consumers are increasingly reluctant to exercise their rights as a result of a lack of confidence in the effectiveness of the diverse redress mechanisms made available to them.[43] The barriers to obtaining effective redress constitute a significant source of vulnerability for consumers.[44]

In its Communication of 13 April 2001 on the Single Market Act, the European Union included legislating on ADR as one of its 12 priorities, and its different Resolutions[45] have stressed that any global focus must prioritize simple, affordable, quick and accessible resources. Nevertheless, emphasis has still not been placed on one aspect that is crucial for ensuring that the necessary trust is placed in the system: its effectiveness, in terms of the enforcement and satisfaction of consumer rights, above and beyond the contents of the principle of effectiveness included in Article 8 of Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013, on alternative dispute resolution for consumer disputes ('the Consumer ADR Directive').

Under the terms of said directive, the principle of effectiveness requires Member States to ensure that the procedure is available, easily accessible and free of charge or at a symbolic fee for consumers; the consumer is aware of and receives the documentation; and the outcome is made available within a reasonable period of time (90 days). However, this does not guarantee the effective exercise of their rights if traders do not participate or the outcomes of the procedures are not respected and consumers are not provided with information of, or are not aware of, proper channels for the enforcement of their rights. This is because effectiveness arises from the real application of a right by its beneficiaries and depends on two factors: (i) beneficiaries voluntarily or spontaneously accept the conduct provided for by the regulation and (ii) regulation is enforced by judges and other competent bodies. This has to do with behaviour and requires conformity with, or non-opposition to, regulations.[46] With good reason, Article 47 of the Charter of Fundamental Rights of the European Union[47] states: "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal." This principle of effective remedy

43 P. Cortés & F. Esteban de la Rosa, 2016, p. 6. *See* to the same effect, *Flash Eurobarometer 300: Retailers, Attitudes Towards Cross Border Trade and Consumer Protection*, Conducted by The Gallup Organization upon the request of Directorate-General Health and Consumers, 2011, available at: http://ec.europa.eu/public_opinion/flash/fl_300_en.pdf.

44 *See* P. Cartwright, 'Understanding and Protecting Vulnerable Financial Consumers', *Journal of Consumer Policy*, Vol. 38, No. 2, June 2015, pp. 119-138.

45 Resolution of 25 October 2011 on alternative dispute resolution in civil, commercial and family matters (2011/2117(INI)) and Resolution of 20 May 2010 on delivering a single market to consumers and citizens (2010/2011(INI)).

46 L. Díez-Picazo, S. A Ariel (Ed.), *Experiencias jurídicas y teoría del derecho*, 3rd ed., 1999, p. 206.

47 Proclaimed on 7 December 2000 in Nice, as amended on 12 December 2007 in Strasbourg, OJ C 303, p. 1, entitled 'Right to an effective remedy and to a fair trial'.

before a tribunal is a general principle of EU law, which arises from the constitutional traditions common to Member States and has been enshrined in Articles 6 and 13 of the charter.[48] Community Law could govern this specific matter to harmonize or unify criteria, but, given that it fails to do so, it falls to the domestic legal systems of each Member State to designate the bodies and arrange the resources designed to ensure that this right is safeguarded, and it is their responsibility to guarantee, in each given case, effective protection of these rights.[49]

Focusing once again on non-adjudicative methods, negotiation, mediation and conciliation have reached the greatest implementation in EU Member States for reasons that go beyond the scope of this study. Closely linked to the principle of freedom that ensures that consumers are not deprived of their right to resort to the judicial system,[50] the effectiveness of their outcomes is key to conflict resolution procedures. Analysis of specific mechanisms to obtain effectiveness requires, first, that we distinguish between: (i) the effects of commencing a negotiation, mediation or conciliation procedure and (ii) the effects of any settlement that may be reached by the parties.

With regard to the former point, one should first note the positive socioeconomic effects that are caused by the mere fact of attempting an ADR/ODR procedure because ADR/ODR helps avoid escalating the dispute and also, in part and in many cases, reduce courts' workload by reducing the amount of litigation they have to deal with.[51] It has been seen how the simple fact of commencing a dispute resolution procedure results, in a significant number of cases, in the avoidance of escalating this dispute. However, it is true that, on occasion, agreements cannot be reached for a number of reasons: differences between the two parties are irreconcilable; one or both of the parties exercise their entitlement to deem the procedure concluded in advance; the maximum agreed or legally established deadline for the duration of proceedings has passed; or a cause for termination of the proceedings has arisen.

With reference to the latter – the effects of any agreement that may be reached by the parties – there are no econometric studies allowing us to establish the percentage of successfully administered cases that are subsequently escalated

48 According to settled case-law, the principle of effective judicial protection is a general principle of Community law. *See* Case *Unibet (London) Ltd and Unibet (International) Ltd v. Justitiekanslern*, C-432/05, ECLI:EU:C:2007:163, 37; Joined Cases *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* C-402/05 and C-415/05, ECLI:EU: C:2008:461, p. 335; Case *Mono Car Styling v. Dervis Odemis and Others* C-12/08, ECLI:EU:C:2009:466, p. 47.

49 Case *Impact* C-268/06, ECLI:EU:C:2008:223, pp. 44-45.

50 Arts. 10 and 12 of 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) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR). OJ L 165, 18 June 2013, pp. 63-79.

51 Namely, the empirical study on the benefits of Green Paper the Commission of the European Communities, *Green Paper on Alternative Dispute Resolution in Civil and Commercial Law*, 19 April 2002, COM (2002) 196 final. Also, regarding the evaluation of cost and time benefits, *see* ADR Center, *The Cost of Non ADR – Surveying and Showing the Actual Costs of Intra-community Commercial Litigation*, June 2010.

and whose enforcement is requested because the agreements reached have not been respected. What we do know, however, is that the costs of judicial proceedings greatly exceed those of any out-of-court settlements, something that in itself explains the adoption of measures to encourage the latter.

3.1 The Mediation Attempt

The *Study on Citizens' Rights and Constitutional Affairs* for the Directorate-General for Internal Policies (PE 493.042)[52] shows that mediation is still underused (in less than 1 per cent of disputes). Even though the study fails to identify the specific reasons for such a low uptake, it does list some specific measures that seem to have been effective in implementing it,[53] for example, establishing compulsory mediation in certain types of cases, holding compulsory mediation information sessions, referring by the courts, granting tax incentives for parties opting for mediation,[54] and sanctioning parties that do not attend compulsory mediation. Following a comparative analysis of the legal frameworks existing in the 28 Member States, it has been noted that only a degree of compulsion in the use of mediation leads to a significant increase in the number of mediations. Indeed, the introduction of a compulsory mediation attempt in some spheres has given rise to positive effects, even in voluntary mediation. One example of this is been provided by Italy, where mediation attempts were obligatory between March 2011 and October 2012, and, during this period, the number of voluntary mediations increased significantly. The Italian paradigm shows that certain legislative policies can lead, as a whole, to positive outcomes. In addition, the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters[55] establishes an obligation aimed at Member States so that, by means of policies focused at encouraging mediation, they effectively ensure that the use of such mechanisms achieves a balanced relationship with judicial proceedings, which entails making greater endeavours to this end.

Yet it should be stressed that the right of access to courts must be always preserved, and, thus, limitations on access must not be excessive. Noteworthy is the case of *Alassini v. Telecom Italia SpA*,[56] which asked whether a provision that

52 European Parliament, *Rebooting the mediation Directive: Assessing the Limited Impact of Its Implementation and Proposing Measures to Increase the Number of Mediations in the EU*, Brussels, January 2014, available at: www.europarl.europa.eu/studies

53 It is interesting to note that other measures to promote mediation, such as reinforcing the protection of confidentiality, increasing the number of invitations to mediation by judges and courts, or a more demanding system of accreditation of experts have not generated, by themselves, the expected results.

54 *See* Report of the General Directorate or Internal Policies, *Rebooting the Mediation Directive, Assessing the Limited Impact of Its Implementation and Proposing Measures to Increase the Number of the Mediations in the EU*, 2014.

55 Official Journal of the European Union L 136/3, dated 24 May 2008.

56 *See, Alassini v. Telecom Italia SpA* (C-317/08), [2010] 3 CMLR 17, available at: http://swarb.co.uk/alassini-v-telecom-italia-spa-environment-and-consumers-c-31708-ecj-19-nov-2009/. For more detailed explanation, S. Prince 'Access to Court?', *in* P. Cortés (Ed.), *The New Regulatory Framework for Consumer Dispute Resolution*, Oxford, Oxford University Press, 2016, p. 83.

required consumers to use an out-of-court process before having access to a court can be deemed as a breach of Article 6 of the European Court of Human Rights (ECHR). The European Court of Justice found that this provision was compatible with the requirements of the EU legal framework provided that the mandatory process should not only be available on the Internet but should also not cause excessive delay.[57]

3.2 Fighting against Fraudulent Practices

The European Union, committed to bolstering the internal market and promoting cross-border transactions, has adopted some measures to boost consumer confidence and prevent fraudulent practices. In this regard, it has recently presented a proposal for review of the Consumer Protection Regulation, in the aim of granting greater powers to national authorities to immediately shut down websites committing frauds and to request information from domain registrars and banks to find out the identity of the trader responsible, all to boost consumer confidence in ecommerce. Article 21a of Regulation 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws ('the CPC Regulation')[58] established that the Commission shall assess the effectiveness and operational mechanisms of this regulation and thoroughly examine the possible inclusion in the annex to the regulation of additional laws that protect consumer interests. Accordingly, this regulation provides a legal basis for extending national procedural regulations such that they can be applied to cross-border situations when trader malpractice occurs: unfair trading practices, use of unfair contract terms, infringement of consumer *ius cogens* or of compulsory warranties; violation of laws governing ecommerce, ADR and e-privacy; and violation of sector-specific legislations on passenger rights or consumer credit.

According to the proposal's preamble, there continues to be a high degree of noncompliance with consumer regulations. The top five grounds for complaints noted are, in the order of their importance, as follows: (i) non-delivery, (ii) defective products, (iii) problems with contracts, (iv) goods or services not in conformity with the order and (v) unfair trading practices.

Between October 2013 and February 2014, the Commission held a public consultation. Stakeholders were invited to give their views on how to improve the functioning and effectiveness of the CPC Regulation. In total, 222 responses were received that were sufficiently representative of all stakeholders directly involved in consumer ecommerce (public authorities, consumer associations, ECCs, businesses and individual consumers). More than 50 per cent expressed support for

57 Currently the Court of Justice of the European Union is studying a preliminary question from The Tribunal Ordinario di Verona (Italy) in Case [C.75/16] *Livio Menini and Maria Antonia Rampanelli v. Banco Popolare—Società Cooperativa*, asking whether the requirement of mandatory mediation with legal representation in consumer matters is compatible with the ADR Directive.

58 Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on Cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation) Text with EEA relevance, OJ L 364, 9 December 2004, pp. 1-11.

giving explicit powers against infringing traders, as well as the power to request penalty payments to cover illicitly obtained gains and to require interim measures. As much as 88 per cent of respondents supported the possibility of introducing common procedural criteria and introducing standards authorizing the publication of enforcement decisions, access to documents, the collection of evidence and the investigation of websites. Furthermore, almost all enforcement authorities supported the idea of developing and improving surveillance mechanisms, and the majority of European Consumer Centres (83 per cent), consumer associations (75 per cent) and businesses (62 per cent) called for more mechanisms to signal infringements via alert systems or tools.

Last, the European Union has established a general regulatory framework for ADR/ODR[59] systems and has promoted the creation of a EU-level consumer ODR platform to handle domestic as well as cross-border complaints arising from online transactions to provide the necessary, more detailed regulatory cover for resolution procedures. In this regard, also worthy of note is the work begun in 2010 by UNCITRAL's Working Group III, whose efforts to secure an international instrument to facilitate the online resolution of disputes that involve small claims arising in the context of cross-border online B2B and B2C transactions have given rise to some technical notes or guidelines (the *Technical Notes on Online Dispute Resolution*) and an upcoming descriptive and nonbinding document that contemplates the principles and elements that should be included in ODR procedures. It proposes an open formulation of the description of ODR, to provide future coverage for other technologies that may be developed for the same purposes.

Nevertheless, little has been achieved to date with regard to the effectiveness of consumer rights and less still in terms of what should be their ultimate goal: the satisfaction of their interests. Unlike the case of service providers, in online transactions, consumers do not generally know who they are dealing with, nor do they know what they will receive in the end, as they are unable to see and check the product before acquiring it; this means they cannot judge the quality of the product or service, important factors when making a purchasing decision. This asymmetry of information in online commercial relations affects and damages trust and is an added factor in consumer disputes.

3.3 Harmonizing the European Union's Redress System

By virtue of Article 169 of the Treaty on the Functioning of the European Union, the current consumer ADR directive has proposed the establishment of a general regulatory framework for out-of-court mechanisms, both traditional and online, aimed at consumers, whose goals include, first, the establishment of minimum EU-wide quality values and standards and, second, but no less important, to harmonize and coordinate national laws to do away with disparities in terms of the coverage, quality and understanding of ADR.

59 Regulation (EU) no 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) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0001:0012:EN:PDF.

In this regard, on the one hand it gives its seal of approval to certain principles already included in the preceding recommendations of 1998[60] and 2001,[61] making them binding in nature. On the other, it opts for a minimum level of harmonization of dispute resolution schemes and leaves up to Member States numerous issues in order to embed the already existing schemes and the different legal traditions within the European Union. In addition to this, the directive authorizes Member States to increase the level of protection afforded to their consumers. To this latter end, the consumer ADR directive itself provides that, to ensure a greater level of consumer protection, Member States may maintain or introduce rules that go beyond those laid down by the directive.

Therefore, a legal instrument that was initially conceived as a means to prevent disparities has become a new obstacle to harmonization, because, as noted in the Explanatory Memorandum itself, these differences – and inconsistencies – constitute obstacles to the internal market and refrain from purchasing. Currently, we can find a myriad of diverse mechanisms offered among EU Member States: (i) Adjudicative schemes of dispute resolution, while the vast majority have favoured the implementation of non-adjudicative models. Each type follows diverse procedural tracks, which results in great difficulties for consumers. (ii) It has also been left up to each Member State to establish a system of compulsory or voluntary participation or adhesion by businesses.[62] (iii) In addition, penalties applicable to certain infringements by businesses depend mainly on each Member States' internal regulation. (iv) Many different ways of funding ADR/ODR entities, some of them clearly controversial since they allow funding of private dispute resolution schemes by business entities.[63] (v) The thresholds for accessing ADR/ODR schemes also vary significantly from country to country, and Member States may add new grounds of non-eligibility. In addition, while some schemes are free of charge for the consumer, others charge the costs of the pro-

60 98/257/EC Commission Recommendation of 30 March 1998 on the Principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, OJ L 115, 17 April 1998, pp. 31-34. R. 98/257/CE available at: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31998H0257&from=EN.

61 Commission Recommendation of 4 April 2001 on the Principles for out-of-court bodies involved in the consensual resolution of consumer dispute, OJ L 109, 19 April 2001, pp. 56-61, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32001H0310&from=EN.

62 Although voluntary participation is the mainstream criteria -and companies refuse to participate- some Member States have standardized the attempt to mediate as a requirement before filling a court proceeding (Italian model). In some Member States membership to certain associations or chambers obliges them to be affiliated to a resolution system, which increases the participation rate of companies (v. gr. UK): others, like France, require business to participate in a mediation process when asked by a consumer; others, like Norway use complaint boards that process consumer complaints even when traders have not agreed to participate. *See* C. J. S. Hodges, I. Benöhr, N. Creutzfeldt-Banda, *Consumer ADR in Europe*, Oxford, Hart Publishing, 2012, pp. 25-354. *See also*, J. P. Cortés, *The New Regulatory Framework for Consumer Dispute Resolution*, Oxford, Oxford University Press, 2016.

63 A number of countries authorize private entities financed by companies or its associations to administer ADR/ODR processes, as is the case of Germany, Belgium, the Netherlands, France, Ireland, or the United Kingdom. *See* Hodges, 2012, pp. 25-354.

ceeding and there is no a common criteria on this aspect among Member States.[64] (viii) Accredited and non-accredited dispute resolution entities may coexist under the same umbrella. (ix) Finally, binding, enforceable outcomes are clearly the exception among Member States.

A number of Member States have legislated to equip themselves with specific resolution bodies in strategic or regulated sectors (energy, telecommunications, transport, insurance, finance and banking, travel agents etc.). Such is the case of Germany, Belgium, France, Holland and the United Kingdom, which have mostly adopted an ombudsman scheme to resolve disputes. Nevertheless, not all of them have established a system of compulsory adherence for businesses operating in the said sectors, such that, in some Member States – namely Italy, Belgium, the United Kingdom, Holland, Romania, Austria and Portugal – businesses are legally compelled to participate, while in others adherence is voluntary, resulting in very low business participation levels. Moreover, only in few cases are the outcomes of these ADR/ODR binding on businesses,[65] such that, if the system is not bolstered by the incorporation of certain reputation tools like name-and-shame schemes,[66] the level of noncompliance is extremely high.[67]

While some Member States have created platforms that serve as 'online helpdesks' to guide consumers towards existing accredited entities arranged by sector – as is the case of Portugal, the United Kingdom and Sweden – others have created an integrated e-platform to handle online complaints;[68] in the vast majority of Member States, it is the consumer himself or herself who must decide in each given case as to which entity should solve the claim.

Finally, some countries have set up certain reputation mechanisms to ensure that businesses voluntarily adhere to and participate in ADR schemes – namely,

64 For example, in Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Latvia, Lithuania, Luxemburg, Portugal, Spain and Sweden, at the Air Passenger Rights sector the procedure is free of charge for consumers, who will only bear their own costs. Conversely, in Belgium and Denmark consumers have to pay a submission fee which will be recovered if the consumer wins the case or the case is dismissed. And in Cyprus the consumer must pay a submission fee depending on the claim and if the case is lost a supplementary fee depending on the value of the complaint. *See* ECC-NET Joint Project, 'Alternative Dispute Resolution in the Air Passenger Rights sector', 2012, p. 14.

65 Namely, Italy (ABF), France (The Médiateur de RATP for public transportation), United Kingdom (The Communications & Internet Services Adjudication Scheme, CISAS; the Ombudsman Services, OS), Czech Republic, Denmark (Civil Aviation Authority, NEB), Latvia (Civil Aviation Authority, NEB CRPC) or The Netherlands (SGC, Geschillencommissie).

66 As is the case of Denmark, Finland, Sweden or Latvia. *See* ECC-NET Joint Project, 2012, pp. 18-19.

67 This is the case for example of Spain, at the banking and financial sector. The Ombudsman's Resolution of 17 July 2014 described this fact and stated that in order to strike a balance between the two sides of the relationship, bank and client, where there is conflict, it is essential the effectiveness of the results and the effectiveness of the control mechanisms offered to users of financial services. Citizens, who make a claim and obtain a favorable decisions from the Claims Services fail to see their rights protected effectively because banks are not formally obligated to comply with such results.

68 Namely, Belmed platform in Belgium. *See* S. Voet, 'The New FPS Economy and its Mediation Task', *Consumer ADR in Europe*, Oxford, Hart Publishing, 2012, pp. 25-36.

by means of public quality trademarks, or voluntarily comply with proceedings' outcomes – public blacklists of noncompliant traders – although the vast majority have not yet included rules establishing mandatory participation of traders and enforceability of outcomes, giving rise to a significant uncertainty in terms of effectiveness.

4 Compliance of Agreements and Enforceability of Settlement Outcomes

On a legal level, once an agreement between a consumer and a trader is reached, the law enforcement effects attached to the outcome becomes a new concern. Indeed, in consumer conflict resolution the vast majority of ADR/ODR schemes are consensual – namely, mediation or conciliation – and, thus, parties settle their conflict all by themselves by entering into a new agreement. This outcome produces the novation of the previous existing contract, takes on binding effects and, when applicable, also enforceability.

Taking into consideration the second effect, enforceability, the vast majority of Member States are granting the outcomes the same authority as a judicial decision does when the agreement complies with certain legal requirements or 'filters.' To summarize briefly, two traditional sets of filters can be identified: (i) recognition of the agreement reached after a referral by a court, which is most common in Spain, Portugal, Austria, Slovakia, Norway, the Czech Republic, Cyprus, Italy and Romania, and (ii) involvement of a public notary, consisting in the conversion of the agreement into a public deed that embeds enforceability – namely, Spain, Poland, Germany, Austria, Slovakia, the Czech Republic, Croatia and Romania.[69] However, these 'filters,' once again, make the outcome dependent on the intervention of the judiciary, which has a negative impact on achieving the initial goal – the effectiveness of the rights in a reasonable time and at a cost proportionate to the amount claimed. Looking at the case of Spain, for example, enforcement of agreements arising from mediation must be converted into a pub-

69 European Parliament, January 2014, pp. 77-118.

lic deed pursuant to the terms of the Law on Mediation and processed afterwards in accordance with the Law on Civil Proceedings.[70]

Other flexible and expeditious tracks to make a mediation outcome enforceable have been implemented by countries from the European economic sphere: (i) mediation outcomes signed by the parties and their lawyers who certify that it complies with and respects the law and public policy (v. gr. Italy);[71] (ii) mediation outcomes from certified mediators (Belgium); and (iii) mediation outcomes containing a declaration of parties authorizing enforceability – 'enforceability clause' (Croatia).

An additional concern regarding mediation outcomes may be the myriad of possible defences to the enforcement of settlement agreements. Even when the terms of a mediation outcome meet the formal requirements for its enforcement, potential grounds for opposition may prevent the agreement from eventually being enforced because each country has its own regulations in this regard. Differing laws governing the filters that have to be passed to become enforceable has led the international community to start work on correcting, in part at least, legislative inconsistencies. By way of example, at the international level, the UNCITRAL Model Law on International Commercial Arbitration[72] provides legal grounds for opposition to awards that may contain settlements. Furthermore, the last initiative of this body consisting on a draft Model Law for enforcing trade-

70 The regulatory framework in Spain is established by Law 5/2012, of 6 July 2012, of mediation in civil and commercial matters and also by Law 1/2000, dated 7 January 2000, of Civil Procedure. Both legal texts require that the mediation agreement comply, in addition to natural formal requirements. Namely, (i) in writing; (ii) stating the identity and address of the parties and mediator. (iii) As well as the place and date on which it is subscribed. (iv) Relating the set of obligations assumed by each party. (v) Indicating that the mediation procedure has been followed in accordance with the provisions of the Law. (vi) And finally, signed by the parties or their representatives. Specific procedural formalities: both parties must submit it before a notary for it to be converted into a public document, accompanied by copies of the proceeding's opening and concluding sessions. The notary then checks compliance with the requirements set by the Law on Mediation and that its content is not contrary to the law. Execution must be carried out before the court competent therefore, which shall be the Court of the First Instance of the place in which the mediation agreement was signed. When the mediation agreement must be enforced in another Member State, the requirements included in any international conventions to which Spain is a party and the rules of the European Union must also be added. Finally, if the mediation process is the result of judicial referral, for it to be regarded as an enforceable title, it must be judicially approved, and the court competent for the execution shall be that which approved the agreement.

71 Report from the European Association of Chambers of Commerce and Industry (Eurochambres) 'Pan-European Mediation Practices', Survey on the Use and the Practice of B2B Mediation, year 2012 and 2013. Co-financed by the European Union. JUST/2011-2012/JCIV/AG/3373, p. 23. Available at: www.eurochambres.eu/custom/Volume_Pan_European_practises_in_EU-2014-00891-01.pdf.

72 With the amendments adopted in 2006 by the United Nations, UNCITRAL, New York, available at: https://www.uncitral.org/pdf/spanish/texts/arbitration/ml-arb/07-87001_Ebook.pdf.

related settlement agreements[73] has been that it has provisions for direct execution and possible defences or grounds for refusing enforcement.[74] At the EU level, Regulation 1215/2012 of the European Parliament and of the Council of 12 December 2012 on the jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Brussels Regulation)[75] provides the grounds for the non-recognition of a decision.

5 Concluding Insights

This article has identified some of the existing efficient tools to secure the effectiveness of consumers' rights and the satisfaction of their needs, which is a pending issue in conflict resolution as is prevalent in the European Union. The attractiveness of this approach is that it provides a comprehensive view of this particular topic not falling into the trap of focusing on one piece of the jigsaw, only to disregard other important and interconnected issues.

Highly innovative and sophisticated mechanisms that monitor and regulate the reputation of traders engaged in ecommerce to build trust among users have emerged spontaneously and opened new venues to empower consumers and ensure compliance of traders: trustmarks, ratings, blacklists and escrow accounts have become essential dispute avoidance tools.

Consumers place their trust in products, services and businesses that are familiar to them or about which they have accurate information gathered from other consumers' degree of satisfaction in relation to their past purchases of similar products or services. Beyond the protection offered by regulations, consumers place more trust in businesses that have been scored by other consumers, appear capable of meeting their needs and resolve problems quickly and efficiently. These mechanisms allow potential purchasers to familiarize themselves with traders, products or services and learn to trust them.

The former were the first to emerge at businesses' own initiative, although their value depends to a great extent on the level of user recognizability of their logo and the perception of independence they manage to create. Rating systems have been incorporated into the market very successfully on a massive scale since they meet users' needs for accurate information. Nevertheless, they are vulnerable to certain fraudulent practices and require uniform policies that avoid misleading practices and guarantee that the information is accurate. Blacklists allow to obtain a high degree of compliance from businesses due to fear of appearing in

73 It includes any commercial operation of supply or exchange of goods or services, distribution agreement, representation or commercial mandate, transfer of credits for factoring, leasing of equipment with leasing, construction works, consulting, Engineering, licensing, investment, financing, banking and insurance. It has been preferred to exclude from its scope transaction agreements involving consumers.

74 (A/CN.9/861, paragraph 93).

75 To replace Council Regulation 44/2001 of 22 December 2000 on the same subject (Brussels I Regulation), Section 3, 'Refusal of recognition and enforcement', Sub-section 1 'Refusal of recognition', Art. 45. Official Journal of the European Union, L 351/1, 12 December 2012, available at: https://www.boe.es/doue/2012/351/L00001-00032.pdf.

a list of risky or noncompliant traders. Connecting with some public ADR schemes provides very satisfactory results. The visibility of the lists is a key issue for their efficiency. These reputational feedback tools alongside private enforcement measures – namely, chargeback mechanisms and escrow accounts – are becoming the driving forces behind the new digital economy. It is therefore worthwhile advocating that Member States regulate and promote their implementation in certain sectors – notably strategic or regulated ones – and become interconnected to accredited conflict resolution entities (ADR/ODR).

Furthermore, Europe's experience to date has made clear three primary results: (i) existence of reputational tools in the market, which play an essential role in creating the necessary trust and credibility, reduces the number of consumers claims; (ii) although consumers have access to courts, litigation is a last resort; and (iii) only a certain degree of business participation leads to positive outcomes.

There is thus little doubt as to the need to rethink consumer protection to accomplish the following goals: (i) incorporating a minimum standardized legal framework for dispute avoidance tools that defines principles and legal requirements to ensure transparency and transferability of data alongside interoperability of such tools with any consumer public authority or other public bodies, and (ii) incorporating compulsory participation of businesses from strategic or regulated sectors[76] in conflict resolution schemes that incorporate such dispute avoidance tools that have been a success in those Member States that have implemented them to provide protection to consumers in need of quick, low-cost and effective solutions. This entails as well removing obstacles such as difficulties in making contact and communicating with the businesses and avoiding unnecessary formalities when making complaints.

This article has also shown the value, in the long run, of being more decisive in making consumer affairs agreements enforceable. One possible strategy might be to introduce quick and expeditious mechanisms for the direct judicial approval of agreements reached. This is a process that can be carried out by conflict resolution entities themselves (ADR/ODR), speeding up enforcement where necessary and preventing 'resisting' attempts to avoid enforceability by one of the parties involved in a conflict.

In light of the fact that that making outcomes enforceable by simply standardized processes entails the adoption of more in-depth EU legislative policies, dispute avoidance tools may play an essential role in the short and medium term, encouraging self-compliance with agreements and outcomes and, thus, reducing very significantly the number of disputes.

76 *See also* Cortés, *op. cit.* at 458.