

# The Law of Consumer Redress in an Evolving Digital Market

## Upgrading from Alternative to Online Dispute Resolution

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### Abstract

*This article contains the Introduction of a book with the same title recently published by Cambridge University Press, which is reproduced here with its permission. The book offers an updated analysis of the various consumer dispute resolution processes, its laws and best practices, which are collectively referred as the Law of Consumer Redress. The book argues that many consumer redress systems, and in particular publicly certified Alternative Dispute Resolution (ADR) entities, are more than a mere dispute resolution mechanism as they provide a public service for consumers that complements, and often replaces, the role of the courts. In examining the current redress models (i.e., public enforcement, private enforcement and other market options), the book calls for greater integration amongst these various redress options. It also advocates, inter alia, for processes that encourage parties to participate in ADR processes, settle meritorious claims and ensure extrajudicial enforcement of final outcomes. Lastly, the book calls for a more efficient rationalization of certified ADR entities, which should be better coordinated and accessible through technological means.*

**Keywords:** e-Commerce, Online Dispute Resolution, Alternative Dispute Resolution, consumer redress.

### 1. The Law of Consumer Redress

In recent years, the digital world established itself as a convenient market for people, consumers and businesses, who come together and practice the essential actions of a functioning economy: selling and buying goods and services. Consumer expenditure represents the majority of the Gross Domestic Product (GDP). In the European Union (EU), consumer expenditure accounts for 56% of the total GDP,<sup>1</sup> while in the United Kingdom, the consumer GDP is 60%,<sup>2</sup> and in the Uni-

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1 Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, 'A European Consumer Agenda – Boosting Confidence and Growth', COM(2012) 225 final, p. 1.

2 Consumer Council of Northern Ireland, 'Back to Business: Are Businesses Getting Consumers' Rights Wrong?', December 2013, p. 3.

ted States, it is over 70%<sup>3</sup> (though different techniques are employed to arrive at these figures).

A growing level of regulation in the field of consumer protection is taking place in the EU – a body of law which is commonly known as *Consumer Acquis*. The rationale behind consumer regulation is supported by the view that a degree of consumer protection is required for a market to function more effectively.<sup>4</sup> Although it is possible to argue that the EU has adopted a paternalistic or interventionist approach with the expansion of consumer protection rights, in practice, however, these rights are as significant as the consumers' ability to enforce them, which is particularly challenging in the cross-border context. Consequently, legal certainty and consumer trust in the market can be achieved only when there are mechanisms that ensure compliance with the consumer protection legislation, and thus their legitimate expectations can be met.<sup>5</sup> The existing formal and informal processes (and their regulations) that consumers use to achieve compensation and justice are what this book refers to as the *Law of Consumer Redress*. Hence, this book deliberately merges concepts of justice and redress when examining different consumer redress systems.

When consumers and traders have unresolved disputes, they are understandably reluctant to consider formal judicial proceedings as a forum for finding redress, especially so when the loss is relatively small, as litigation is costly, slow and stressful.<sup>6</sup> Additional reasons include the perceived complexity of a court process and unclear legal advice – as legal representatives can rarely assure consumers on the outcome of a judgement, who then face the risk of having to pay legal costs without the guarantee of obtaining redress.<sup>7</sup> As a result, many organizations, including the EU and national governments, have decided to invest and promote out-of-court redress options. Extrajudicial redress is often the preferred option for most disputes as it can provide informal resolution in an independent, fast and effective manner. This is why many consumer disputes are increasingly being channelled directly through Alternative Dispute Resolution (ADR) schemes, which are replacing courts in many jurisdictions as the main redress providers in areas such as in financial matters and utilities.<sup>8</sup>

Consumer ADR systems differ significantly from traditional out-of-court processes employed between commercial parties – namely commercial arbitration and mediation processes. For that reason, leading academics have even referred

3 Federal Reserve Bank of St. Louis, 'Personal Consumption Expenditures (PCE)/Gross Domestic Product (GDP)', 2013. Available at <https://fred.stlouisfed.org/graph/?g=hh3>.

4 M. Armstrong, 'Interactions between Competition and Consumer Policy', *Competition Policy International*, Vol. 4, No. 1, 2008, pp. 97-147.

5 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 (hereinafter Impact Assessment), p. 5.

6 *Ibid.* See also S. Weatherill, *EU Consumer Law and Policy*, Edward Elgar, 2014, p. 283.

7 University of Lincoln, Lincoln Law School, 'Representative Actions and Restorative Justice', 2008. Available at: [www.bis.gov.uk/files/file51559.pdf](http://www.bis.gov.uk/files/file51559.pdf), last accessed 12 January 2017.

8 C. Hodges, 'Consumer Ombudsmen: Better Regulation and Dispute Resolution', *ERA Forum*, Vol. 16, 2015, p. 14.

to Consumer ADR (CADR) to distinguish it from traditional ADR models, or Consumer Dispute Resolution (CDR) to emphasize that for the great majority of consumer disputes judicial redress is not an option.<sup>9</sup> Thus, consumer ADR is very different from traditional ADR processes employed for resolving civil and commercial disputes. While traditional ADR is seen as an alternative to the court system, where parties may compare what they might get in court to what is being offered in a settlement,<sup>10</sup> consumer ADR often presents itself as the only resort for the consumer to find redress in a cost-effective and proportionate manner. Another defining feature of consumer ADR models is that given that most consumers did not obtain legal advice prior to contacting the ADR scheme, many procedures (especially ombudsman schemes) provide consumers with some level of advice and with processes that operate a triage or diagnosis stage that filters cases based on eligibility criteria. Lastly, while commercial ADR schemes are privately run and decisions are largely confidential, many consumer ADR schemes are either run by public regulators or closely controlled by them.

This book examines what I describe as the emerging Law of Consumer Redress, which encompasses the regulation affecting processes that enable consumers to resolve disputes and obtain compensation from traders, including dispute resolution procedures, best practices and the certification of providers. In so doing, this book discusses the regulatory transformation that this field is experiencing in the EU and elsewhere in the context of an evolving digital market. Dispute system design analysis takes place in order to identify best practices that can inform the regulation and design of consumer redress policies and processes.<sup>11</sup> It must be acknowledged that the terminology in this field can be confusing as it adopts different meanings for those who use it. The meaning of consumer redress adopted by this book includes ADR or out-of-court processes when used for consumer disputes (i.e., what has been termed as CADR or CDR) as well as regulatory and judicial processes in so far as these schemes have been designed for consumer cases in mind. Although the Law of Consumer Redress may be used as an umbrella term to describe the policy and the regulation affecting public and private enforcement options as well as judicial and ADR redress, the main purpose of this book is to contribute to the analysis of the transformation of consumer ADR techniques, increasingly underpinned by online dispute resolution (ODR) technology, as these schemes are expected to become the main redress option for the digital consumer.

- 9 See C. Hodges, I. Benohr, & N. Creutzfeldt-Banda, 'Consumer-to-Business Dispute Resolution: The Power of CADR', *ERA Forum*, Vol. 13, 2012, p. 199.
- 10 M. Moffitt 'Three Things to Be Against ("Settlement Not Included")', *Fordham Law Review*, Vol. 78, 2009, pp. 1203-1245, p. 1207.
- 11 Dispute System Design has been established as a field of its own. See Harvard Negotiation Law Review, 'Symposium on Dispute System Design', *Harvard Negotiation Law Review*, Vol. 14, 2009, pp. 1-343.

## 2. Technology as the Vehicle for Resolving Consumer Disputes in the Digital Era

Currently, around half of EU consumers shop online.<sup>12</sup> Conflicts arising from a typical purchase online (e.g., a tablet or a photographic camera that never arrives or that is damaged) are almost never resolved in the courts because the cost of bringing such claims outweighs the value of the dispute, especially when parties are located in different jurisdictions. Hence, the use of traditional face-to-face dispute resolution methods for settling disputes arising in this forum is nearly always impractical, time-consuming and expensive, particularly for settling low-value cross-border disputes.<sup>13</sup> Despite this, the practice of online purchasing is still growing, so is the number of disputes between online consumers and suppliers. The European Commission observed that the lack of available out-of-court redress mechanisms for resolving effectively low-value disputes triggers buyers' mistrust of sellers, which in turn constrains competition and limits the growth of the digital market.<sup>14</sup>

Consumer redress is not only a topic of theoretical significance, but it is also a topic of high practical relevance, especially for the digital consumer. According to Which?, an UK-based charity defending consumer rights, nearly half of UK consumers (46%) who bought goods online over the past 2 years had a problem with their purchase.<sup>15</sup> The three most common problems are deliveries arriving late (19%), goods arriving faulty or damaged (13%) and goods not arriving at all (12%).<sup>16</sup> It has been estimated that approximately 3% of all online transactions end up in a dispute, which is an impressive number if we consider that there are billions of online transactions a year.<sup>17</sup>

A society that is increasingly interacting online<sup>18</sup> would prefer to take advantage of the online forum for resolving its grievances. Indeed, statistics in many

12 N. Mimica, EU Commissioner for Consumer Policy, 'EU Consumer Summit 2014: Ensuring that Consumers Reap the Benefits of the Digital Economy', Press Release IP/14/353 (1 April 2014). In the EU, the proportion of consumers engaging in e-commerce has grown significantly in recent years. According to Consumer Scoreboard, 20% of consumers participated in e-commerce in 2004, but this figure rose to 45% by 2012. See [http://ec.europa.eu/consumers/consumer\\_research/editions/docs/9th\\_edition\\_scoreboard\\_en.pdf](http://ec.europa.eu/consumers/consumer_research/editions/docs/9th_edition_scoreboard_en.pdf)

13 P. Cortés, *Online Dispute Resolution for Consumers in the EU*, Routledge, 2011 and R. Susskind, *Tomorrow's Lawyers: An Introduction to Your Future*, Oxford University Press, 2013, Chapter 10.

14 Impact Assessment, 2011.

15 E. Snow, 'Millions experience problems with online purchases', *Which?*, 7 March 2014. Available at: [www.which.co.uk/news/2014/03/millions-experience-problems-with-online-purchases-357861/](http://www.which.co.uk/news/2014/03/millions-experience-problems-with-online-purchases-357861/).

16 *Ibid.*

17 C. Rule, 'How the Internet Is Changing the Way Disputes Are Resolved', *Wire Innovation Insights*, 24 June 2014. Available at: [www.pewinternet.org/2013/09/25/whos-not-online-and-why/](http://www.pewinternet.org/2013/09/25/whos-not-online-and-why/).

18 According to Pew Research, 85% of Americans use the Internet. See K. Zickuhr, 'Who's Not Online and Why', 25 September 2013, available at: [www.pewresearch.org/fact-tank/2013/11/08/whos-not-online-5-factors-tied-to-the-digital-divide/](http://www.pewresearch.org/fact-tank/2013/11/08/whos-not-online-5-factors-tied-to-the-digital-divide/).

sectors show that the preferred vehicle of communication is the Internet.<sup>19</sup> This is even more predominant in those countries, such as in the United States, the United Kingdom and the Netherlands, where there is a high level of Internet penetration with over 90% and where the majority of the population uses Internet services, such as online banking. In the United Kingdom, this figure was already set in 2013 at 83% of households, where 73% of adults were accessing Internet every day and around half used online banking.<sup>20</sup> But even in those countries where the Internet penetration is relatively low, such as in Greece with just over 40%, the figure grows every year.<sup>21</sup> The growth rate is exponential with regard to online access via smartphones – while in 2015, the number of smartphones in the world was estimated to be over 2 billion, this figure is expected to double to 4 billion by 2020.<sup>22</sup>

Similarly, online retail is growing very fast, even when brick-and-mortar retail is going down in the wake of economic crises. According to the Centre for Retail Research in 2013, online retailing in Europe grew in one year by a weighted average of 21.1% to £111.2 billion, which was around 12 times faster than conventional outlets.<sup>23</sup> The British Retail Consortium found that around 20% of all non-food spending is through online shopping, and this figure is expected to increase.<sup>24</sup>

Digital consumers are interacting increasingly through online marketplaces, such as eBay or Amazon, that enable transactions between consumer and businesses, as well as what is known as the Shared Economy, services such as Airbnb and Uber, which essentially allow users to sell services to consumers. These new business models are affecting (and often threatening) traditional brick-and-mortar businesses, which are either transforming to the online sphere or disappearing. Traditional brick-and-mortar businesses such as DVD rentals, sale of CDs, travel agencies and broadsheet newspapers are gradually moving online.

At the same time, the Internet has empowered consumers with information about their rights that previously was available to them only via professionals.<sup>25</sup> Although the notion of empowering consumers is increasingly becoming central to the EU consumer policy strategy, not all consumers are the same, with some being more vulnerable than others. Vulnerable consumers are mostly those who are the oldest, the least educated and those who do not know or have access to

19 For tax claims in the property sector, see W. Sapp, 'Creating an Online Property Guide and Resolution Center', *Fair & Equitable*, April 2014, p. 3.

20 UK Office for National Statistics, 'Statistical bulletin: Internet Access – Households and Individuals, 2013,'.

21 Special Eurobarometer 381, 'E-Communication Household Survey', June 2012.

22 'The Truly Personal Computer', *The Economist*, 28 February 2015.

23 Centre for Retail Research, 'Online Retailing: Britain, Europe and the US 2014'. Available at: [www.retailresearch.org/onlineretailing.php](http://www.retailresearch.org/onlineretailing.php).

24 Online Retail Monitor, British Retail Consortium, 2016.

25 J. MacFarlane, 'ADR and the Courts: Renewing our Commitment to Innovation', *Marquette Law Review*, Vol. 95, No. 3, 2012, p. 927 and 930.

computers.<sup>26</sup> The definition of a vulnerable consumer in the EU led to a definition of an average consumer,<sup>27</sup> which became the benchmark for the majority of individuals. The Court of Justice defined an average consumer as someone who is reasonably well informed and reasonably observant and circumspect.<sup>28</sup> An added challenge is that the concept of consumer varies from country to country. Whereas some jurisdictions, notably within the EU, are adopting a more expansive consumer concept, for instance, including legal persons, other countries such as the United States have adopted a more restrictive approach.<sup>29</sup>

Consumer expectations about redress are also moving online. Currently, the vast majority of consumer redress mechanisms use some type of distance means of communication. These can be as basic as emails and telephone communications to deal with consumer queries and the various aspects of the complaint. Dispute resolution processes that allow for distance communications are frequently referred as ODR. ODR, originally an offshoot of ADR, offers online access to extrajudicial conflict settlement methods, such as negotiation, mediation, arbitration, complaint boards and ombudsmen schemes. ODR takes advantage of the speed and convenience of the Internet and online case management tools, making it the best (and often the only) option for providing redress to consumer grievances, strengthening their trust in a more reliable e-commerce.<sup>30</sup> ODR technology changes the paradigm of traditional redress procedures as it can support or replace the role of the third-party neutral – for example enabling direct party-to-party negotiations through software that encourage settlement. This role has

- 26 This is a heterogeneous group “comprised of persons who, on a permanent basis, are considered as such because of their mental, physical or psychological disability, age, credulity or gender.” See European Parliament Resolution of 22 May 2012 on a Strategy for Strengthening the Rights of Vulnerable Consumers (2011/2272(INI)).
- 27 J. Davies, ‘ADR/ODR: Too Much Optimism in the Promotion of Cross-Border Trade?’, in B. Hess, M. Bergstrom, & E. Storskrubb (Eds.), *EU Civil Justice: Current Issues and Future Outlook*, Hart, 2016, p. 43.
- 28 Green Swann C-299/12.
- 29 US federal courts have often restricted the application of consumer state law under the use of free services. For instance, while Facebook users were not considered consumers under Californian law, they were considered consumers by the French court of Cassation because Facebook users were considered an important source of funding due to the advertising schemes operating in the social media platform. *In Re Facebook Privacy Litigation*, 791 F.Supp.2d 705 (2011), (N.D. Cal. May 5, 2011). Available at: <http://leagle.com/decision/In%20FDCO%2020110516720>; D. Martić, ‘Redress for Free Internet Services Under the Scope of the EU and UNCITRAL’s ODR Regulations’, *Revista Democracia Digital e Governo Eletrônico*, Vol. 10, 2014, pp. 360-373; C. Hoofnagle & J. Whittington, ‘Free: Accounting for the Costs of the Internet’s Most Popular Price’, *UCLA Law Review*, Vol. 61, 2014, pp. 606-670; A. Cunningham, ‘Caveat Consumer? Consumer Protection and Cloud Computing – Part I’, Queen Mary School of Law Legal Studies Research Paper no. 130, January 2013, pp. 1-29.
- 30 Cortés, 2011; E. Katsh & J. Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, Jossey-Bass, 2001; G. Kaufmann-Kohler & T. Schultz, *Online Dispute Resolution*, Kluwer Law International, 2004; J. Hörnle, *Cross-border Internet Dispute Resolution*, CUP, 2009; M. Wahab, E. Katsh, & D. Rainey, *Online Dispute Resolution: Theory and Practice*, Eleven International Publishing, 2012.

been termed as the fourth party in the dispute resolution process, given its key role as facilitator in managing and framing the information exchange.<sup>31</sup>

The design of consumer redress mechanisms has two interlinked goals. Firstly, it increases access to justice by providing consumers, even vulnerable ones, with an easier pathway, than, for instance, the courts in small claims procedures, to meet their legal needs.<sup>32</sup> Secondly, effective redress mechanisms enhance consumer trust and contribute towards building a more competitive market. The success of large online market places that provide effective ODR technology has been exemplified by the eBay dispute resolution paradigm, which acts as the third- (and fourth)-party neutral, and has claimed to resolve over 60 million disputes a year between its buyers and sellers.<sup>33</sup> This is a significant number, particularly if we take into account that English courts receive around 1.5 million civil claims every year. Effective ODR tools have the potential to impact on the willingness of consumers to raise complaints reflecting substandard transactions, thus leading to higher trading standards.

Yet, there are still too many unresolved consumer disputes for which a redress option is needed. The European Commission believes that in the EU the usage of ADR is well below its potential. In 2015, the European Commission reported that only around half of the retailers (54%) knew about ADR schemes for consumers, either in their sector or in another sector – the breakdown of this percentage was as follows: 30% of traders were willing or legally required to use it, 16% said there was no ADR in their sectors and the remaining 8% declared their unwillingness to use it.<sup>34</sup> Moreover, empirical data shows a very low consumer ADR use.<sup>35</sup> The European Commission estimated that consumer disputes amount to financial losses estimated at 0.4% of the EU's GDP and that a well-functioning and transparent ADR for their disputes could save around €22.5 billion a year, corresponding to 0.19% of EU GDP.<sup>36</sup> Consequently, the EU passed legislation that aimed to promote consumer ADR: the directive on consumer ADR and the regulation on consumer ODR, which have transformed the foundations of con-

31 Katsh & Rifkin, 2001, pp. 93-116.

32 H.W. Micklitz, 'The Future of Consumer Law – Plea for a Movable System', *Journal of European Consumer and Market Law*, Vol. 2, No. 1, 2013, pp. 5-11 and C. Hodges, I. Benohr, & N. Creutzfeldt-Banda, *Consumer ADR in Europe (Civil Justice Systems)*, Beck/Hart, 2012, pp 367-453.

33 N. Rogers, R. Bordone, F Sander, & C McEwen, *Designing Systems and Processes for Managing Disputes*, Kluwer, 2013, pp. 24-25; S Smith & J Martinez, 'An Analytical Framework for Dispute System Design', *Harvard Negotiation Law Review*, Vol. 14, No. 4, 2009, pp. 1401-1446; L. Del Duca, C. Rule, & Z Loeb, 'Facilitating Expansion of Cross-Border E-Commerce-Developing a Global Online Dispute Resolution System', *Penn State Journal of Law & International Affairs*, Vol. 1, No. 1, 2012, p. 59.

34 DG Justice and Consumers, European Commission, Consumer Conditions Scoreboard, 2015, p. 47. Available at: <http://tinyurl.com/hrbltnl>.

35 DJS Report, 'Understanding Consumer Experiences of Complaint and Handling', Citizens Advice, June 2016. Available at: <http://tinyurl.com/gljmkv6>.

36 Impact Statement, 2011.

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sumer redress in the EU.<sup>37</sup> The ADR Directive requires member states to ensure the availability for consumers of quality ADR entities that observe procedural standards,<sup>38</sup> while the ODR Regulation that establishes a pan-European website, called the ODR platform, redirects consumer complaints arising from online contracts to nationally approved ADR entities. These two innovative regulatory initiatives have initiated a process of institutionalizing and professionalizing consumer ADR, which is becoming the main pillar of the Law of Consumer Redress.

### 3. Contribution of This Book to the Academic Debate and Methods

This book examines the emerging legal framework for consumer redress in the digital era. In so doing, it examines how this field is evolving while it tries to identify best practices and regulatory recommendations that help to achieve the policy aim of designing and promoting the use of ADR and ODR methods that assist in invigorating e-commerce. Accordingly, the main theme that acts as a thread to this book is a shift in consumer redress, which is changing the priorities of policymakers; their focus is no longer on guaranteeing the protection of consumers by their national judicial processes and public enforcement bodies, but there is an emerging layer of ADR and ODR structures that provide a public service helping consumers to obtain accessible and tangible redress. Yet, this book seeks to identify best practices for redress schemes that offer consumers both, effective individual redress and better compliance with the consumer protection law, thus raising industry standards.

The book critically discusses the sociolegal developments in this field and argues, *inter alia*, that consumer redress is more effective when complemented with incentives that encourage parties to participate in these out-of-court processes, settle meritorious claims early and ensure extrajudicial enforcement of final outcomes. This book calls for a more holistic approach to consumer redress that integrates through technology consumer ADR techniques and other redress options, including the courts, regulators and public enforcement bodies, moving upstream from dispute resolution to dispute prevention, and providing consumers with greater protection.

While there are already some important sociolegal studies on best practices for consumer ADR schemes in Europe,<sup>39</sup> most of these studies have not examined the impact of the ADR Directive and the use of technology in the field of con-

37 Directive 2013/11/EU on Alternative Dispute Resolution for Consumer Disputes OJ L165/63 (hereinafter the ADR Directive) and Regulation 524/2013 on Online Dispute Resolution for Consumer Disputes OJ L165/1 (hereinafter the ODR Regulation). *See also* P. Cortés (Ed.), *The New Regulatory Framework for Consumer Dispute Resolution*, Oxford University Press, 2016.

38 Arts. 6-11 ADR Directive.

39 *See, e.g.*, J. Stuyck, E. Terryn, V. Colaert, T. Van Dyck, N. Peretz, N. Hoekx, & P. Tereszkiwicz, *Study on Alternative Means of Consumer Redress Other Than Redress Through the Ordinary Judicial Proceedings*, Catholic University of Leuven, 14 January 2007; and Hodges *et al.*, 2012.



sumer ADR, which remain a fairly unarticulated subject.<sup>40</sup> Furthermore, there is no empirical work on how technology and economic incentives can be pivotal in ensuring the success of voluntary extrajudicial schemes.<sup>41</sup> Hence, this book hopes to fill this gap by contributing to our understanding on the impact that recent legal developments and best practices in ODR techniques could have in transforming traditional ADR redress schemes into more accessible and efficient online redress mechanisms.

This book summarizes some of the key findings of a research project funded by the Nuffield Foundation to identify how consumer redress schemes are being transformed. The research project focused on the regulatory and technological changes affecting consumer redress in the EU. It examined a range of reports, opinions and insights that can help to inform about best practices and strategic developments in the field of consumer ODR. The research has identified a number of challenges (such as their lack of awareness and the voluntary nature) and opportunities (to improve consumer redress of non-complainants) facing these emerging redress systems and the need for policymakers, competent administrative authorities, regulators and individual redress bodies to develop their strategic aims in response. It is hoped that this book can provide a helpful reference point in that context.

This book evaluates the main consumer redress schemes in the EU with a particular focus of those operating in Italy, Spain and the United Kingdom. These schemes are currently adapting their processes to the European legislation and to a society progressively interacting in the digital sphere. The book notes that the consumer redress landscape is diverse and often incoherent; consequently, identifying issues that will be equally relevant to all types of schemes is not always possible as national traditions and narrow sectorial pressures heavily influence the need for a 'menu of process pluralism'<sup>42</sup> in consumer redress. Thus, recommendations are often made on *ad hoc* basis rather than for the whole field of consumer redress.

This book seeks answers to the following research questions: firstly, how are traditional redress schemes adopting ODR technology into their processes (Chapters 1 and 3); secondly, what is the impact of the new regulation on consumer redress on ADR schemes (Chapters 4 to 6) and thirdly, how redress processes, and in particular ADR schemes, are designed to, inter alia, increase access to redress while discouraging unmeritorious claims, facilitate voluntary compliance of final decisions and encourage traders to tackle causes of complaints as well as consequences (Chapters 7 and 8).

40 Cortés, 2011 and M. Stürner, F. Gascón Inchausti, & R. Caponi, *The Role of Consumer ADR in the Administration of Justice – New Trends in Access to Justice under EU Directive 2013/11*, Selp, 2015. In the Spanish language see, e.g., F. Esteban de la Rosa, *La protección del consumidor en dos espacios de integración: Europa y América*, Tirant lo Blanch, 2015.

41 See a first approximation of this topic at P. Cortés, 'A New Regulatory Framework for Extra-Judicial Consumer Redress: Where We Are and How to Move Forward', *Legal Studies*, Vol. 35, No. 1, 2015, pp. 114-141.

42 C. Menkel-Meadow, L. Love, A. Schneider, & J. Sternlight, *Dispute Resolution: Beyond the Adversarial Model*, 2nd ed., Aspen, 2011.

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The field of consumer redress is multidisciplinary as it draws concepts *inter alia* from law, sociology, political science, economics and psychology. Accordingly, the main methods used throughout this book have been doctrinal, normative, comparative and sociolegal approaches. The doctrinal method, sometimes referred as the 'black-letter approach',<sup>43</sup> has been described by Richard Posner as "not a field with a distinct methodology, but an amalgam of applied logic, rhetoric, economics and familiarity with a specialized vocabulary and a particular body of texts, practices, and institutions".<sup>44</sup> This method is employed to examine legislation and policy rules. The analysis often adopts a normative approach critically examining how the legislation ought to be in order to provide an effective and holistic redress structure for consumers. The comparative method is employed when national rules and traditions are contrasted. Although this book has a distinctive EU approach, the analysis often draws comparisons with practices in the United States, and it compares the national approaches adopted in various EU jurisdictions (though the most in-depth analysis within the EU limits to Italy, Spain and the United Kingdom).

Last, but not least, the sociolegal approach is employed to examine consumer redress models in their social context and in seeking to influence government policy in the provision of consumer redress. Thus, to inform and contrast the views expressed in this book, I have conducted qualitative research through interviews with stakeholders representing the academia, ADR schemes, ODR providers, consumers, businesses and policymakers, in order to extract best practices that inform consumer redress. Accordingly, a total of 40 qualitative interviews were carried out to establish a detailed understanding of the transformation in this sector. Most of the qualitative fieldwork was conducted between February and December 2015.<sup>45</sup> The interviews lasted around 1 hour and were carried out on the phone and face-to-face to enable participants to express their views on these changes. This generated valuable insights into the challenges and opportunities facing consumer redress. However, the views expressed here are those of the author; and while they have been informed by those interviewed, unless otherwise stated, it does not necessarily express their own views.

#### 4. Structure of the Book

This book examines best practices on consumer redress schemes, with a particular focus on ADR processes as the primary route of consumer redress and on the impact of technology in the dispute resolution process. The book is divided into eight chapters.

Chapter 1 contrasts the role of public enforcement bodies and pan-European networks in seeking traders' compliance with consumer law with the role of pro-

43 M. Doherty & P. Leighton, 'Research in Law: Who Funds it and What is Funded? A Preliminary Investigation', *Law Teacher*, Vol. 38, No. 2, 2004, p. 182.

44 R. Posner, 'Conventionalism: The Key to Law as an Autonomous Discipline', *University of Toronto Law Journal*, Vol. 38, 1988, p. 333, p. 345.

45 See the list of interviewees at the beginning of this book.

cesses ADR schemes typically offer consumers with individual redress. This chapter calls for greater collaboration between public enforcement bodies and ADR schemes in order to ensure that more consumers (and not only complainants) have access to redress. It argues that effective data exchange will lead to more effective redress as well as dispute prevention strategies and higher industry standards, thus meeting the goal of increasing consumer trust in the market.

Chapter 2 considers the state of play of technology in CDR and the challenges that those technologies face in their growth. It analyses how ADR has been adapted to meet the needs of consumer disputes, the concept of ODR and its main processes. It notes that the new online paradigm changes the dynamics of traditional face-to-face ADR procedures, and it evaluates the main obstacles slowing down the expansion of ODR.

Chapter 3 discusses developments in the field of civil procedure to resolve consumer disputes. In so doing, it examines the interplay and potential synergy that the European Small Claims Procedure and collective redress mechanisms have (or could have) with extrajudicial redress options. These two types of court procedures lend themselves to be complemented with technology and ADR. This chapter proposes new strategies to better integrate court processes with ADR/ODR techniques and explores specific pathways of collaboration. It calls for the provision of procedural pathways that promote settlements and for an online uniform process that facilitates the enforcement of judgements.

Chapter 4 analyses the core regulation of the Law of Consumer Redress, which is the new EU legal framework for consumer out-of-court redress: the ADR Directive and ODR Regulation. This chapter critically examines the two pioneered legislative European initiatives and proposes a number of functions in the design and revision of the European ODR platform, such as an online negotiation tool to encourage early settlements. However, this chapter notes that the present legal framework will not meet its policy-stated aims of improving redress and increasing cross-border e-commerce in so far as it does not meet the objectives of closing the gaps in consumer ADR, ensuring the quality of ADR processes and raising awareness about their availability. This chapter argues that these objectives will be met only if national governments ensure that traders inform and participate in ADR/ODR and if these entities are properly monitored to ensure that they comply with the quality requirements set in the regulatory framework.

Chapter 5 discusses consumer redress in three completely different jurisdictions: Italy, Spain and the United Kingdom. Accordingly, it examines the implementation of the ADR Directive and the impact it had on the main nationally approved ADR entities in these three jurisdictions. This chapter offers a picture of three radically different dispute resolution traditions that reflect three diverse redress cultures in the EU. Currently, the main redress models in Italy are mediation and 'representative negotiations or joint conciliations' (where representatives of consumers and businesses resolve disputes on their behalf), while Spain has a public arbitration system, and the United Kingdom relies mainly on sectorial ombudsman schemes. This chapter recommends making business adherence mandatory in the regulated sectors, facilitating access through a national ODR platform and ensuring that national competent authorities provide adequate

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supervision in order to ensure that traders comply with the information obligations and that certified ADR entities remain independent and impartial.

Chapter 6 evaluates the Technical Notes developed by UNCITRAL Working Group III (ODR) for e-commerce disputes which are characterized for being cross-border and of low value. The notes envisage a three-stage online procedure that starts with automated negotiation between the parties without a human neutral, and it is followed by a conciliation and finally by either an arbitration process or a recommendation, which may be complemented by self-enforcement mechanisms. The main thrust behind the UNCITRAL initiative was to establish an internationally accepted and trusted, normative framework for ODR. This chapter argues that although this initiative was the most important international legal effort in the field of consumer redress, it failed short to establish new legal framework due to incompatible views that the United States and the EU had on pre-dispute arbitration. This chapter contrasts the discussions carried out in UNCITRAL Working Group III with the EU initiatives in consumer ODR, and it submits that the legally binding nature of arbitral awards will not guarantee their out-of-court enforcement, and the confidentiality of the awards may let market abuses go undetected. Hence, in order to ensure transparency, this chapter calls for adequate monitoring by accreditation agencies and for the publication of binding awards.

Chapter 7 examines when and why traders participate in consumer redress. In some regulated sectors, traders have a statutory obligation, in the remaining of the sectors, they decide to opt in either voluntarily or as a part of belonging to a trade association. This chapter argues that the new information obligation set in the ADR Directive should be complemented with a residual mandatory ADR scheme (or a truly accessible online court or tribunal that incorporates ADR techniques) that encourages traders to opt in specialized ADR entity. The chapter also examines how ADR entities can ensure an adequate coverage in the provision of consumer redress by fleshing out the procedural grounds upon which ADR entities can refuse complaints. This chapter argues that even though the directive assures the availability and awareness of quality ADR entities, it does not ensure that traders participate in these processes, which poses the risk of undermining consumer trust in the whole redress system. This risk will be augmented if traders, who can often choose and pay for these ADR entities, engage in forum shopping, especially if procedural restrictions contained in the directive are not adequately monitored by the competent authorities.

Chapter 8 looks at the dispute system design used in consumer redress; in particular, this chapter discusses two essential elements for a successful consumer redress scheme: a high level of settlements and out-of-court compliance with final outcomes. It argues that the online forum offers the possibility to design multi-tiered procedures that promote early settlements and facilitate out-of-court compliance with outcomes. It submits that since consumer ADR models are providing a public service, they must incorporate appropriate governance structures that favour dispute avoidance strategies. This is indeed a feature of some statutory ADR schemes that collaborate with regulators (such as certain ombudsman schemes underpinned by sectorial legislation), which, in addition to offering dispute resolution services, provide consumers with advice, and the

industry and the regulator with intelligence data that help to prevent future disputes.

The book concludes summarizing the findings and arguing that if these dispute system design features spread into other consumer redress processes, they will deliver greater benefits for the society at large, thus realizing the often overstated policy aims of consumer ADR; that is, providing consumer protection, increasing access to justice and boosting consumer trust in e-commerce.