

# Online Mediation and e-commerce (B2B and B2C) Disputes

Mariam Skhulukhia\*

## Abstract

*Nowadays, electronic commerce plays a significant role in our society as internet transactions continue to grow in the business industry. Electronic commerce mainly refers to commercial transactions, such as business-to-business and business-to-consumer. Disputes are inevitable, part of our lives. Simultaneously by developing technology the need for an effective dispute resolution was obvious. Information communication technology and alternative dispute resolution together created online dispute resolution. Businesses and consumers are actively engaged in online dispute resolution. Therefore, the use of the internet makes business or consumer transactions easier. The online environment is much flexible when it comes to electronic commerce. This article focuses on online mediation, one of the most popular forms of online dispute resolution.*

**Keywords:** ODR, online Mediation, e-commerce, business-to business (B2B), business-to consumer (B2C).

## 1 Introduction

The growth of internet communication establishes new challenges to the access to justice and creates new opportunities for lowering barriers to justice. Some people using the internet believe that the online environment is magical. It overcomes numerous limitations related to time and space, while it entitles people to learn, create and operate in new and convenient ways.<sup>1</sup> In order to avoid lengthy and complicated procedures, parties usually prefer alternative dispute resolution (ADR) as the traditional court-based dispute resolution mechanisms may not be an effi-

\* Mariam Skhulukhia has a Bachelor's degree in law and a Master's degree in International Business law from the University of Georgia. She participated in the Consensual Dispute Resolution Competition (CDRC VIENNA) in 2018 and the John H. Jackson Moot Court Competition in 2019. Mariam was an intern at Tbilisi City Court in Civil Affairs Board. Also, she worked as a lawyer for residency and citizenship matters at a foreign company. She has successfully passed a Bar Exam (Civil Law Specialization) in 2021. Mariam wrote her Master's thesis: "Why do we need Online Mediation? Possible Challenges and Perspectives for Online Commercial Mediation in Georgia." She also submitted her Research Paper titled "Mediating Online: Among the Praises and Diatribes in MediateGuru's edited book titled "A Pathway to the Future of ADR: Comparative Perspectives around the World."

1 E. Katsh, & O.R Einy, *Digital Justice: Technology and the Internet of Disputes*, (Oxford University Press 2017) pp. 45-54.

Mariam Skhulukhia

cient way of resolving disputes. Specifically, litigation can be time-consuming and expensive. The need for an effective and creative dispute resolution method better appeared during the COVID-19 pandemic, which draws a picture of virtual reality. COVID-19 created many opportunities and challenges to deal with. – “As courts would not be able to respond Tsunami of disputes we need to build a creative system.”<sup>2</sup>

Online dispute resolution (ODR) is known as a fast, flexible and reliable method that assists parties to resolve disputes effectively, without any physical appearance. Therefore, living in different countries, or having a different time zone is not an issue for ODR. Parties save travelling expenses which best suits e-commerce and low-value disputes. Characteristics of ODR such as e-mail, chat conference rooms, instant messaging, or videoconferencing assist to compensate for the lack of face-to-face interactions.<sup>3</sup> In addition, it is not required to rent a neutral facility to administer the process, appropriate documents or materials are readily accessible and do not have to be transported for lengthy distances.<sup>4</sup> ODR significantly reduces the tensions apparent in traditional way of dispute resolution.

This article is organized in three sections. First, introduction of e-commerce and ODR is provided. The next section is an overview of business-to-business transactions (B2B), their characteristics and regulation. The third section discusses business-to-consumer (B2C) transactions and several European Union (EU) regulations. Finally, the conclusion is provided.

## 2 E-commerce and Online Dispute Resolution

“E-commerce refers to the use of electronic means and technologies to conduct commerce (sale, purchase, transfer, or exchange of products, services, and/or information), including within business, business-to-business, and business-to-consumer interactions.”<sup>5</sup> In a broad concept, e-commerce encompasses any economic activity held by electronic connections. Services not only within the finance, tourism, and insurance industries, but distribution and customer services also fall in this category.<sup>6</sup> “These types of business transactions are usually separated into two categories: business-to-business transactions and business-to-consumer transactions.”<sup>7</sup>

It is considered that “e-commerce is a largest and fastest growing market in the world.”<sup>8</sup> According to the Global Action Plan for Electronic Commerce the use of

2 Colin Rule, *Use of Videoconference and Technology for Mediators and Lawyers after Covid-19*, ADR Center Global MasterClass, 22 May, 2020.

3 P. Cortés, *Online Dispute Resolution for Consumers in the European Union*, (1st edition, 2011) p. 57.

4 L. J Gibbons; R. M Kennedy; & J. M Gibbs, *Cyber-Mediation: Computer-Mediated Communications Medium Massaging the Message* 32 *New Mexico Law Review*, 2002 p. 27.

5 A. Manzoor, *E-commerce: An Introduction* (LAP LAMBERT Academic Publishing, 2010) p. 2.

6 K. C Liyanage, *The Regulation of Online Dispute Resolution: Effectiveness of Online Consumer Protection Guidelines*, 17 *Deakin Law Review*, 2012, p. 251.

7 K. Alboukrek, *Adapting to a New World of E-Commerce: The Need for Uniform Consumer Protection in the International Electronic Marketplace*, 35 *The George Washington International Law Review*, 2003, p. 425.

8 Cortés, 2011.

e-commerce can benefit economic and social impacts in numerous ways. E-commerce is an innovative approach and leads to the sustainable economic growth for the future, promotes B2B commercial relations, sales by companies to consumers, and exchanges between consumers.<sup>9</sup>

E-commerce and ODR have a strong interaction. If we look at litigation, it can be inconvenient, time-consuming and expensive for the disputes arising out of e-commerce.<sup>10</sup> “E-commerce transaction is a means of performing commercial activities using the global digital e-commerce infrastructure.”<sup>11</sup> In online contractual disputes parties acknowledge the operation of internet, have online financial relationship which makes ODR easier. However, ODR can resolve issues related to delivery of products, enforcement of warranties, and guarantees on products.<sup>12</sup> The character of cross-border disputants is changing over time like international dispute resolution and the growth of mediation in this field. It is considered that online mediation is most relevant or highly established with small commercial transactions, particularly to e-commerce as the software processes basic issues and figures.<sup>13</sup> The increased availability of internet and small business enterprises engaging in international commerce, significantly contributed to higher volume of international transactions.<sup>14</sup>

### 3 Business-to-Business (B2B) Transactions

#### 3.1 Characteristics

“Electronic commerce” which is transacted from business to business is known by the abbreviation -“B2B” – which is the initials of the words “Business to Business” in English.<sup>15</sup> In general, this e-commerce allows businesses to conduct procurement and sales activities through private or public computer networks.<sup>16</sup> In B2B relationship, both suppliers and customers are businesses. B2B e-commerce implies “sharing business information, maintaining business relationships and conducting business transactions by means of telecommunication networks.”<sup>17</sup> As the internet developed and technology also improved, new opportunities appeared in the field of international business e-commerce. The worldwide accessibility of the internet promoted businesses to participate in cross-border transactions.<sup>18</sup>

9 Alliance for Global Business, *A Global Action Plan for Electronic Commerce*, OECD Publishing (2nd edition, 1999).

10 *Ibid.*

11 S. Alfuraih, & R. Snow, *ODR and the E-commerce*, ACTA Press (2005).

12 A. Shah, *Using ADR to Resolve Online Disputes*, 10 *Richmond Journal of Law and Technology* 1, 2004.

13 S. Blake, J. Browne, & S. Sime, *A Practical Approach to Alternative Dispute Resolution* (3rd edition) Oxford University Press, 2014, p. 69.

14 N. Alexander, ‘Ten Trends in International Commercial Mediation’ 31 *Singapore Academy of Law Journal*, 2019, p. 406.

15 E. Sözer, M. E. Civelek, & M. Çemberci, *Strategic Excellence in Post-Digital Ecosystems: A B2C Perspective*; Zea E-books, 2018, p. 64.

16 *Ibid.*

17 V. Zwass, *Electronic Commerce: Structures and Issues*, 1 *International Journal of Software Quality*, 1996, p. 3.

18 A. Nenstiel, *Online Dispute Resolution: A Canada-United States Initiative* 32, 2006, p. 313.

Mariam Skhulukhia

B2B electronic commerce includes a variety of different models in which trust is an essential element. ODR mechanisms establish the reliable atmosphere of trust necessary for the electronic trade. Alternatives to courts, like mediation and arbitration, are best suited for B2B disputes as they are “faster, more flexible and less costly than court proceedings.”<sup>19</sup> Therefore, a non-compulsory acceptance by business to submit disputes has a potential to remove obstacles and enhances business trust in electronic transactions.<sup>20</sup>

Disputes arising from B2B transactions usually involve higher value than B2C and may also apply to more sophisticated issues than uncomplicated consumer disputes. They are usually resolved through classical arbitration procedures, where information technology manages communications. However some B2B disputes (e.g. disputes between insurers) are settled exclusively online.<sup>21</sup> On the other hand, some of the European coalition groups have launched <http://gotomediation.eu>, a website to increase the awareness and mediation use in cross-border business disputes. The website offers reasonably priced cross-border mediation services. With the help of the website parties are able to decide whether mediation is the right choice and if so, the website then organizes the mediation process. The business mediator should be highly skilled: she or he needs to have an awareness of the legal background in the countries of both parties and the understanding of cultural differences.<sup>22</sup>

B2B transactions may include various online commercial transactions, “from the simple submission of electronic purchase orders to vendor, participation in the market exchange programs with suppliers, responding the proposals for the distribution of software and other products/services to business-customer via the internet.”<sup>23</sup> According, B2B transactions may be simple or complicated. If a business offers its goods and services by its corporation website, and another business accepts the offer, they create an agreement for the sale and delivery of good and services on the website. This can be a simple level of B2B transaction as the parties directly deal with each other, without the involvement of any intermediary. However, if the e-market place, acting as an intermediary, facilitates the purchase of products and services by multiple buyers from multiple suppliers, transaction is complicated.<sup>24</sup>

SquareTrade has extended its services to include disputes that arise in the offline world and today provides ODR services for B2B disputes.<sup>25</sup> OnlineConfidence, created by European Chambers of Commerce with the support of the European Commission also offers ODR procedures for B2B disputes concerning online pur-

19 K. Benyekhlef, & F. Gelinias, Online Dispute Resolution, *Lex electronica*, 10 (2005) p. 40.

20 *Ibid.*

21 M. Philippe, ODR Redress System For Consumer Disputes Clarifications, UNCITRAL Works & EU Regulation on ODR, *International Journal of Online Dispute Resolution*, (1) 2014, p. 60.

22 *Ibid.*

23 F. Badiel, Using Online Arbitration in E-Commerce Disputes: A Study on B2B, B2C and C2C Disputes. 2 *International Journal of Online Dispute Resolution*, 2015, p. 96.

24 *Ibid.*

25 A. Braeutigam, Fusses That Fit Online: Online Mediation in Non-Commercial Contexts, 5 *Appalachian Journal of Law*, 2006, p. 275.

chases. Although the services occur entirely online, local Chambers of Commerce have an important role in assisting the parties.<sup>26</sup>

The United Nations considered adoption of a system of regulations to promote the development of effective and inexpensive mechanisms to successfully settle small disputes between businesses and business-consumers. It has created a working group (UNCITRAL working group III) to propose specific rules and prepare legal standards.<sup>27</sup> In order to diminish paper-based difficulties in electronic transactions and to raise the legal certainty fundamental principles such as non-discrimination (including geographical), technological neutrality and party autonomy should apply in B2B transactions.<sup>28</sup> Although consumers consist of “the majority of the online population, most of the money spent in international commerce online is generated by B2B transactions.”<sup>29</sup> An online platform operator has to attract large number of businesses in order to be successful. At the same time, business suppliers are able to gain access to a much wider market than they could manage in case of independence.<sup>30</sup>

### 3.2 Regulation of B2B Transactions

#### 3.2.1 Overview of the EU 2019/1150 Regulation

Compared to the B2C internet transaction disputes, B2B e-commerce necessitates more formal dispute resolution mechanisms, because of the large monetary amounts.<sup>31</sup> “There is no specific legislation addressing platform-to-business relationships at EU level. EU consumer protection law is limited to B2C transactions, and existing measures targeting harmful trading practices are applicable only to the offline world – not to B2B relations in the online world.”<sup>32</sup> Concerns have led the EU to develop a proposal for transparency and fairness in the relationship between online platforms and the businesses acting as suppliers of products. B2B relationship aspects on online platforms have been on the European Commission’s agenda since 2016.<sup>33</sup> Particularly there were concerns for medium-sized enterprises (SMEs) and micro-enterprises, regarding some trading practices of certain online platforms. European Commission requested a study to examine unfair B2B

26 T. Puurunen, ‘International Online Dispute Resolution - Caveats to Privatizing Justice’ *Finnish Yearbook International law*, 2003, p. 242.

27 A. Vilalta, & R.P Martell, ‘Overview of the New Normative on Mediation in Spain’ 6 *American Journal of Mediation*, 2012, p. 10.

28 Online Dispute Resolution 42 *United Nations Commission on International Trade Law*, YB 2011, p. 1211.

29 K. Stewart, & J. Matthews, Online Arbitration of Cross-Border, Business to Consumer Dispute, 56 *University of Miami Law Review* (2002) p. 1111.

30 T Flesner, The EU’s Proposals for Regulating B2B Relationships on Online Platforms – Transparency, Fairness and Beyond, 7 *Journal of European Consumer and Markets Law*, 2018 [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3253115](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3253115).

31 H. A. Haloush, Online Alternative Dispute Resolution as a Solution for Cross-Border Electronic Commercial Disputes (Doctoral Research, The University of Leeds, 2003).

32 European Parliament Briefing, EU Regulation in Progress, Fairness and Transparency for Business Users of Online Services (2019).

33 T. Flesner, 2018.

Mariam Skhulukhia

trading practices in online platforms environment and made two publications in 2017 and in 2018.<sup>34</sup>

The European Parliament and the European Council agreed to implement the proposal for a Regulation on Promoting Fairness and Transparency for Business Users of Online Intermediation Services<sup>35</sup> in February 2019. It is considered to be the first regulatory attempt in the world for establishing fair and innovative ecosystem in the online platform economy.<sup>36</sup> The regulation set many standards of transparency and fairness. To fully utilize the advantages of the online platform economy, it is essential that undertakings can trust online intermediation services. Article 2 of the regulation defines the term “an online intermediation service,” and sets three requirements: At first it must be an information society service as defined in Article 1 (1)(b) of directive (EU) 2015/1535 of the European Parliament and of the Council; second, the service has to entitle business users to suggest goods or services to buyers through initiating direct transactions between them, despite the place of arrangement; and third, the service has to be available on a contractual basis between the providers and business users which offer goods or services to consumers and engage into commercial relationships.

While the growth of intermediation transactions leads to increased dependence of business users, especially SMEs, and micro and small enterprises. Of course, a competitive, fair, and transparent online ecosystem of responsible companies is also essential for consumer welfare. Ensuring the transparency of the online platform economy in B2B relations could indirectly help to raise consumer trust in such platforms. Online intermediation services can be online e-commerce market places, involving collaborative ones on which business users are active, online software application services, such as application stores, and online social media services, notwithstanding the technology.

“This Regulation should not apply where business users or corporate websites users are not established in the Union or where they are established in the Union but where they use online intermediation services or online search engines to offer goods or services exclusively to consumers located outside the Union or to persons who are not consumers. Furthermore, this Regulation should apply irrespective of the law otherwise applicable to a contract.”<sup>37</sup> The online intermediation service providers (OISP) shall guarantee that the terms and conditions are drafted and available in a clear and understandable language. If the provider terminates its service to a particular business user, explanations to its legitimacy should be made with the accordancy of notice periods.

The regulation includes specific terms on mediation, especially in case of the redress. Mediation offers OISP and their business users the means to resolve the issue in a sufficient way, without judicial proceedings, which can be time-consuming.

34 *Ibid.*

35 Council Regulation (EU) 2019/1150 of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services OJ L 186/57.

36 European Parliament Briefing, EU Regulation in Progress, Fairness and Transparency for Business Users of Online Services (2019).

37 Council Regulation (EU) 2019/1150 of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services OJ L 186/57.

ing and expensive. Providers and business users should participate in mediation with good faith objective. The OISP have to find out one or several mediators in their terms and conditions, and suggest fast out-of-court dispute resolution methods including a proposal to pay at least half of the total costs of mediation.<sup>38</sup> In addition, the Commission encouraged appointing special mediators because of the cross-border nature of online intermediation services in particular. However, submitting to the result of mediation proceedings would be still non-mandatory for platforms and business users to have the chance to launch judicial proceedings at any time during or after the mediation process.<sup>39</sup> According to the regulation business users are entitled to receive all the information about the functioning and effectiveness of mediation related to its activities. Therefore the OISP shall make the information accessible if the business user requests.<sup>40</sup>

The regulation sets requirements for mediators: They should be impartial and independent, should know the language of the terms and conditions that guide the contractual relationship between the business users and providers, should be easily accessible either physically in the place of residence of the business user, or remotely using communications technology. They should also have a sufficient understanding of general B2B commercial relations to effectively settle the dispute.<sup>41</sup>

## 4 Business-to Consumer (B2C)

### 4.1 Characteristics

“Electronic commerce from business to consumer is known in the literature as “B2C”, which is the abbreviation of “Business to customer” in English.”<sup>42</sup> In this electronic commerce organizations perform their sales, distribution and marketing activities to buyers via computer networks.<sup>43</sup> B2C e-commerce transaction represents the value of products or services, individuals buying online and supposed for ‘personal, family or household use’.<sup>44</sup> These transactions are usually carried out for the global purposes primary over the internet.<sup>45</sup> A consumer (hereinafter the buyer) can be anyone who acts “for personal purposes and in non-commercial capacity.”<sup>46</sup> At this time “from a legal perspective a consumer is an individual that needs legal protection when dealing with a business owing to his perceived lack of knowledge and weak position in the course of entering into a transaction.”<sup>47</sup>

Consumers are considered to be in a weak position compared to traders, as they are not professionals and have neither the bargaining capacity nor the com-

38 Art. 12 of (EU) 2019/1150 Regulation.

39 *Ibid.*

40 *Ibid.*

41 *Ibid.*

42 Sözer et al. 2018, p. 67.

43 *Ibid.*

44 American Bar Association’s Task Force on Electronic Commerce and Alternative Dispute Resolution 2002, p. 425.

45 *Ibid.*

46 Cortés, 2011.

47 *Ibid.*, p. 10.

Mariam Skhulukhia

prehension to negotiate fairly in terms of the contract. That is why consumers are protected under specific rules and regulations when coming into contractual relationships with businesses.<sup>48</sup>

While the B2B transaction is driven by global forces, B2C – is driven by local phenomena which are promoted by government protection, strong Information Communication Technology (ICT) infrastructure and consumer purchasing power.<sup>49</sup> We should not treat B2B and B2C disputes on the same level - as consumers are persons acting for their personal needs and businesses are individuals acting for commercial purposes.<sup>50</sup>

“B2C is a rapidly growing sector of traditional retail shopping that is facilitated by online technology. It is necessary to add to this definition that online B2C transactions have revolutionized aspects of traditional retail shopping. As a result of the unique borderless nature of cyberspace, B2C transactions are no longer constrained by national borders, and B2C transactions now take place internationally more frequently and in greater numbers than ever before.”<sup>51</sup>

Cross-border B2C transactions are best suited for ODR. One of the reasons why consumers prefer ODR instead of court procedures is the cost. The EU required that ODR methods have to be less costly for consumers. Neither the Regulation on consumer ODR nor the Directive on consumer ADR determines the precise fee that buyers have to pay in such a procedure. An ADR procedure should be free of charge or available at a nominal rate for consumers.<sup>52</sup> Random checking of ADR entities on the ODR platform has shown that consumers need to pay low prices (approx. EUR 10 to 20) and sometimes even nothing. From the point of view of economic accessibility, this uniform EU regulation of ODR strategies has therefore definitely achieved its goal.<sup>53</sup>

## 4.2 Regulation of B2C Transactions

### 4.2.1 OECD Guidelines for Consumer Protection in the Context of E-commerce

“Naturally as consumers engage in the virtual world, disputes of all sorts arise, and e-commerce is no exception.”<sup>54</sup> In 2010 eBay/PayPal resolved 16,000 million disputes between businesses and consumers and up 20 million from 2008.<sup>55</sup> The continued growth of international online B2C commerce is unable to reach its full potential with the absence of fair and effective means of dispute resolution.<sup>56</sup>

48 *Ibid.*

49 M. Almousa, Barriers to E-commerce Adaption: Consumers Perspectives from a Developing Country, 5 *IBusiness* (2013) p. 66..

50 M. Philippe, 2014

51 Badiei, 2015, p. 103.

52 N. P. Vogrinc, ‘The Effects of Regulation (EU) No 524/2013’ (2016-2018) Economic and Social Development, 22nd International Scientific Conference on Economic and Social Development: The Legal Challenges of Modern World (Zeljko Radic, et al., eds) p. 330.

53 *Ibid.*

54 V. Rogers, ‘Managing Disputes in the Online Global Marketplace: Reviewing the Progress of UNCITRAL’s Working Group III on ODR, *Dispute Resolution Magazine*, 19 April 2013, p. 20.

55 *Ibid.*

56 K. Stewart, Jo. Matthews, 2002.



The OECD Council had consultations with member countries, business and consumer organizations and promulgated the OECD Guidelines<sup>57</sup> in 1999. The reason to develop this guideline is to protect consumers while engaging in business internet transactions. The OECD Guidelines contain many objectives with a framework and set of principles assisting governments and, businesses and consumers to effectively participate in e-commerce transactions.<sup>58</sup> The OECD Guideline for Consumer Protection in the context of e-commerce aims to provide meaningful access to fair and timely ADR for consumers.<sup>59</sup> The Guideline promotes self-regulatory approach with its apparent self-regulatory procedures including ADR mechanisms. Business and consumer representatives should set up co-operative self-regulatory projects for consumer complaints. Consumers should have access to the ADR mechanisms which ensures effective resolution of dispute “in a fair and timely manner and without undue cost or burden to the consumer.”<sup>60</sup>

#### 4.2.2 *Mediation Directive 2008/52/EC*

The EU provides numerous laws on mediation as well as issues related to B2C mediation, namely civil procedures and consumer protection laws. The EU aims to harmonize the laws of the member states in the area of dispute resolution and improve competition within the internal market.<sup>61</sup> Accordingly, consumer’s protection policies in the EU are comprehensive. Indeed consumers in the EU have more privileges by distance purchasing procedures, rather than going to the local shop.<sup>62</sup>

Directives are one of the most general types of legislative acts in the EU.<sup>63</sup> The Mediation Directive<sup>64</sup> addresses civil and commercial mediations, where disputants are domiciled in different member states. The directive set principles for consumer mediation out in the EC Recommendation<sup>65</sup> for consensual resolution of consumer disputes. The directive applies to cross-border agreements where online mediation is not excluded: “This Directive should not in any way prevent the use of modern communication technologies in the mediation process” (Recital 9 of the directive). Accordingly, the directive encourages the use of ICT in the case of consumer cross-border mediation. Online agreements should have the same treatment, at least if they are acquired from bodies approved by the member states.

57 OECD Guidelines for Consumer Protection in the Context of Electronic Commerce (1999).

58 Liyanage, 2012, p. 258.

59 Puurunen, 2003, p. 241.

60 OECD Guidelines 1999.

61 P. Cortés, 'Can I Afford Not to Mediate - Mandatory Online Mediation for European Consumers: Legal Constraints and Policy Issues, 35 Rutgers Computer & Tech LJ 1, 2008.

62 P. Cortés, 'Developing Online Dispute Resolution for Consumers in the EU: A Proposal for the Regulation of Accredited Providers' 19 Int'l JL & Info Tech 1, 2011.

63 J. N. Haley, 'Is Europe Headed down the Primrose Path with Mandatory Mediation' 37 NCJ Int'l L & Com Reg, 2012, p. 981.

64 Council Directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters OJ L 136/3.

65 Cortés, 2011, p. 159.

Mariam Skhulukhia

#### 4.2.3. Regulation (EU) No 524/2013

Consumer e-mediation for cross-border disputes has increased dramatically over the recent years, especially with frameworks such as the EU ODR.<sup>66</sup> To promote individuals to participate in cross-border online commerce, and indirectly support economic growth, the European Union adopted Regulation (EU) No 524/2013<sup>67</sup> of the European Parliament and of the Council of 21 May 2013 on ODR for consumer disputes, which also establishes the ODR platform.<sup>68</sup> This regulation applies to the out-of court resolution of disputes initiated by EU consumers against EU traders, or by EU traders against EU consumers, that are covered by Directive 2013/11 / EU.<sup>69</sup> Regulation (EU) No 524/2013 establishes an ODR platform which offers consumers and businesses a single point of entry for the out-of-court resolution of online disputes, via ADR entities connected to the platform. The existence of quality ADR entities across the Union is thus a precondition for the proper functioning of the ODR platform.<sup>70</sup> “The EU ODR is only a case management tool, not supranational EU – wide dispute resolution entity. In another words, EU traders and consumers are still facing need to agree on and to address their dispute to a national ADR entity.”<sup>71</sup>

According to regulation 524/2013, ODR offers a simple, fast and efficient resolution of disputes arising from online transactions. Before submitting the complaint through the ODR platform consumers and traders are encouraged to resolve the dispute amicably. The directive also implies the existence of ODR contact points that provide assistance to the resolution of disputes related to complaints submitted through the ODR platform.<sup>72</sup> After the ODR platform transfers the complaints to ADR entity, the latter informs disputants whether it accepts a dispute in accordance with Article 5(4) of Directive 2013/11/EU. “The procedure can be conducted through the platform or in any other manner (i.e. video conference, phone), but the physical presence of the parties or their representatives must not be required, unless its procedural rules provide for that possibility and the parties agree.”<sup>73</sup> All the personal data information and confidentiality are strictly controlled. According to the surveys “Among all sectors, the largest portion of complaints on ODR platform are filed with regard to the clothing and footwear sector (11.35% of all filed complaints), followed by airlines (9.03%), and information and communication technology (7.85%)”.<sup>74</sup>

66 N. Alexander, 2019, p. 407.

67 Council Regulation (EU) 524/2013 of 21 May 2013 on dispute resolution for consumers disputes and amending Regulation 2006/2004/EC and Directive 2009/22/EC (Regulation on consumer ODR) OJ L 165/1.

68 Vogrinc, 2016-2018, p. 326.

69 Council 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, OJ L 165/63

70 *Ibid.*

71 K. Poljaneec, ‘Party Autonomy and the EU Online Consumer Dispute Resolution’, 3 *InterEULawEast: J Int’l & Eur L, Econ & Market Integrations*, 2016, p. 45.

72 Art. 7 of Regulation (EU) No 524/2013.

73 Vogrinc, 2016-2018, p. 328.

74 *Ibid.*

#### 4.2.4 *Mandatory Mediation*

Mediation is a voluntary process where parties mutually agree to participate. However mandatory mediation takes place if the parties introduce an ODR clause in their contract or if courts order. The mediation directive demands Member States to allow parties to initiate judicial proceedings regarding their dispute by the termination of limitation periods during the mediation process. In addition the directive also states that the court may suggest the parties to use mediation or to attend an information session about mediation. However, in this case the session should be free of charge for consumers otherwise they should not be obliged to participate.<sup>75</sup> A mediation clause should not be imposed where mediation could be a burden to consumer access to justice. Specifically, the ODR clauses must not diminish the capacity for consumers to access justice by creating new barriers, including: “unreasonable costs, geographic barriers and linguistic limitations.”<sup>76</sup>

To avoid several legal uncertainties it is preferred to enter into a contract, prior to the procedure establishing the competent court and laws for enforcement decisions. Therefore, the parties and the mediator need to choose a jurisdiction more suitable for the mediation process.<sup>77</sup> “The directive does not provide an enforcement procedure, leaving the Member States to decide on procedural matters. The Green Paper suggested that courts, public notaries or even Chambers of Commerce, can undertake this role.”<sup>78</sup> When analysing online mediation as a mandatory step, there should be policies suggesting balance between self-determination and persuasion for attending mediation. ODR providers should also comply with legal minimum standards. “Irrespective of whether the mediation is carried out online or offline the mediator’s code of ethics must expressly forbid not only duress but also more informal pressures.”<sup>79</sup>

On 15 January 2008, a consumer filed a complaint against an Italian telecommunications operator seeking compensation of thousands euros for the failure of providing telecommunications services, including an internet connection to her property. The complaint was filed before the Justice of Peace in Ischia (Naples, Italy). On the other hand, the defendant company complained that the claim should be submitted to a mediation process at first. “The judge suspended the proceeding to ask the court if the Italian legislation violates the principle of the right to a legal proceeding expressed in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms and the communitarian law. In referring the matter to the court, the judge took the position that the mandatory nature of the dispute resolution procedure represents an illegal barrier to access to the courts.”<sup>80</sup>

75 Mediation Directive 2008/52/EC Art. 5.1.

76 Kohler, Schultz, *Online dispute resolution: Challenges for contemporary justice*, 2004 (n 11) 114; ADR Guidelines – Agreement reached between CI and GBDe (2003) p. 100.

77 Cortés, 2011, p. 163.

78 *Ibid.*

79 Cortés, 2008.

80 D. Cutolo, M. A. Shalaby, ‘Mandatory Mediation and the Right to Court Proceedings’, 4 *Dispute Resolution International*, 2010, p. 131.

Mariam Skhulukhia

## 5 Conclusion

This article analysed e-commerce and e-commerce transactions (B2B, B2C) in the context of dispute resolution. Business-to-business transaction refers more to the business world or to the business interests – managed by large enterprises, whereas the second, business-to-consumer is more consumers oriented – small value claims and specifically regulated by the EU. E-commerce is the fastest growing market in the world, and therefore commercial disputes between businesses or business to consumer is inevitable. In order to find a solution parties need a fair and effective dispute resolution mechanism.

This article gave an explanation why online mediation can be best suited for B2B and B2C e-commerce transactions. Online mediation is the best candidate for the disputes where parties are unable to meet each other, that is e-commerce disputes. If consumers and businesses are geographically distant and the value of the controversy is high enough, online mediation obviously is a good choice. In case of B2C disputes there is a power balance between consumers and SMEs that makes online mediation more relevant. B2B traders are entitled to find an amicable solution in case of disputes through the online platform offering mediation service. Here mediation can also be the best solution assisting businesses to continue the relationship for the future.

This article concentrated on several EU regulations that encourage parties to benefit from online mediation. As discussed, the EU introduced directives that include mediation clauses. Especially these regulations focus on B2C e-commerce as consumers are considered to be in a weaker position than traders because of the lack of knowledge of certain rules and regulations while entering into a transaction. Accordingly, the EU significantly promotes the use of online mediation. However, the EU is a case management tool and not a dispute resolution body.

Parties are also entitled to choose mandatory mediation but it should not be against the consumers. Mandatory online mediation could be successful with e-commerce disputes, where a face-to-face meeting or court attendance is not acceptable for the parties. It is important to note that mandatory online mediation does not itself limit the right of access to the court. International organizations (such as UNCITRAL and OECD) also play a big role in regulating the ODR and create a trustful atmosphere for businesses and consumers in order to engage in cross-border internet transactions.