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„THE EU INCENTIVE FOR INFORMAL DISPUTE RESOLUTION: IS ADR THE SUPERIOR MECHANISM TO GIVE CONSUMERS ACCESS TO JUSTICE?“

verfasst von / submitted by

Martin Yanchev Sirakov, LLB

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List of Abbreviations

ADR – Alternative Dispute Resolution

B2B – Business to Business

B2C – Business to Consumer

CAA - Civil Aviation Authority

CBLSE - Council of Bars and Law Societies of Europe

CDR – Consumer Dispute Resolution

CEDR - Centre for Effective Dispute Resolution

ECJ – European Court of Justice

ECC – European Consumer Centres

ICT – Information and Communication Technology

MS – Member States

OFCOM - The Office of Communications

ODR – Online Dispute Resolution

OFGEM - Office of Gas and Electricity Markets

RICS - Royal Institution of Chartered Surveyors

TFEU - Treaty on the Functioning of the European Union

"Auf hoher See und vor Gericht ist man in Gottes Hand."

\- *German saying*

However, the core problem seems to lie elsewhere: claimants should first of all have the opportunity to access courts before they can place themselves in God's hands.

1. Introduction

The internet has become an unalienable part of our everyday life. In the European Union, over two thirds of internet users have purchased goods or services online during the past 2016.[1] Statistics show that the proportion of online shoppers has been growing steadily every year, with the biggest increase seen amongst young people. In addition, the percentage of people who have purchased goods or services from other EU Member States has also been rising progressively and in 2016 has reached 32% (as compared to only 25% in 2012) of all internet users within the European Union. Cross-border online purchases within the EU are a strong indicator of the smooth functioning of the internal market. The increasing opportunities to shopping online have given the ordinary EU consumer the possibility of having a wider choice of products and services and lower prices. The strong EU Consumer Protection rules have also fostered the e-commerce within the Union, as users feel safer when purchasing products from other Member States.

And while the accessibility and security of cross-border online transactions is seen as uprising with each subsequent year, there are still many occasions on which consumers are left unsatisfied with the process, the goods, the services, their quality, the speed of delivery, the costs or when they have faced some other obstacles. Almost one third of consumers who have purchased goods or services online were unhappy with the seller or

[1] Eurostat, 'E-Commerce Statistics For Individuals - Statistics Explained' (*Ec.europa.eu*, 2017) <http://ec.europa.eu/eurostat/statistics-explained/index.php/E-commerce_statistics_for_individuals> accessed 11 June 2017

its service.[2] Traditionally, those harmed individuals were unable or unwilling to seek redress due to the high costs of taking legal action against the traders. In recent years, however, the EU has undertaken the initiative of creating a concept similar to the one of the "Multi-Door Courthouse".

The idea of the "Multi-Door Courthouse" was first articulated by Frank Sander, an American professor of the Law School of the University of Harvard.[3] Professor Sander envisaged a dispute resolution mechanism of the future, whereby consumers and traders in B2C and B2B disagreements would be offered a range of options for the resolution of their disputes.[4] Court litigation would only be one of the options standing next to conciliation, mediation, arbitration, and ombudsman. Such a system was seen as offering more manageable way for accessing justice. Those who were unable or unwilling to go for traditional court proceedings would be given the opportunity to settle their issues via more welcoming alternative dispute resolution methods, such as mediation, arbitration, conciliation, etc. Consumers would consequently be encouraged to pursue their rights more often than not, as those options have the potential of giving them a more informal, comprehensible and inexpensive way of settling their disputes with sellers and traders and thus – more readily and easily accessible justice. On the other hand, this would mean that the burden of handling small claims would be taken off the shoulders of the civil courts and that those cases would be solved faster and more efficiently. At least in theory.

The aim of the current thesis is to identify how and to what extent this concept has become a reality within the European Union. Mechanisms for "informal" dispute resolution are now widely available within the EU with regard to B2C disputes. The ADR system implemented by Directive 2013/11/EU on Alternative Dispute Resolution for Consumer Disputes[5] (the "ADR Directive") and Regulation (EU) No 524/2013 on Online Dispute

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[2] Eurostat, 'Problems encountered by individuals when buying/ordering over the internet' (Appsso.eurostat.ec.europa.eu, 2017) <http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=isoc_ec_iprb&lang=en> accessed 11 June 2017

[3] KESSLER Gladys, FINKELSTEIN, Linda J, 'The Evolution of a Multi-Door Courthouse' (1988), 37 Cath. U. L. Rev. 577

[4] Address by Frank E.A. Sander at the National Conference on the Causes of Dissatisfaction with the Administration of Justice (1976), reprinted in Sander, Varieties of Dispute Processing, 70 F.R.D. 111

[5] Directive 2013/11/EU of the European Parliament and of the Council of 21 May

Resolution for Consumer Disputes[6] (the "ODR Regulation") has made the idea of settling cross-border disputes between traders and consumers, arising out of the sale of goods and services, through alternative means, more feasible than it has ever been.

However, a number of questions are still left unanswered. One of those concerns the impact of the consumer ADR system on the traditional state-court adjudication. The former's role could be a vital one, should it be implemented properly. But in the current EU system, which is still in a construction stage, the role of ADR is yet to be defined.

Turning back to Frank Sander's notion, his idea was recognized "as a functional instrument with a number of benefits for citizens and the court systems"[7]. It was believed, by scholars, judges and lawyers that such a "Multi-Door Courthouse" could lay the foundations of a new system to resolve disputes.[8] Nowadays, the EU has laid the foundations of such a system. The developments in the sphere of ADR are seen as means to induce compliance, as well as to foster and strengthen consumer law enforcement.

Still, as one of the main instruments in the picture - the ADR Directive - aims at minimum harmonization, Member States were given the vital task of revisiting national laws and modernizing their systems in order to make those compliant with the current EU ADR legislation. Many Member States have therefore faced great challenges in reforming their legal framework in order to implement the Directive, which has led to an uneven system of dispute resolution schemes within the EU.[9]

2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006 / 2004 and Directive 2009/22/EC [2013] OJ L165

[6] Regulation (EC) 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) [2013] OJ L165

[7] Michal Malacka, 'Multi-Door Courthouse Established Through The European Mediation Directive?' (2016) 16 International and Comparative Law Review <https://www.degruyter.com/downloadpdf/j/iclr.2016.16.issue-1/iclr-2016-0009/iclr-2016-0009.pdf> accessed 13 June 2017.

[8] Marietta Birner, *Das Multi-Door Courthouse: Ein Ansatz Zur Multi-Dimensionalen Konfliktbehandlung* (Otto Schmidt Verlag 2003).

[9] Christopher J. S Hodges, Iris Benöhr and Naomi Creutzfeldt-Banda, *Consumer ADR In Europe* (Hart Pub 2012).

The following chapters of this research paper will analyse the current legal framework of B2C ADR in the EU and how it has influenced the internal market. The focus will be on how the two systems giving access to justice – namely the civil courts and the alternative dispute resolutions mechanisms - coexist and how this cohabitate can be developed. While acknowledging the undisputed benefit of diverting small B2C disputes from traditional courts towards ADR bodies and its power to transform the existing dispute resolution landscape, the present paper will aim to determine the issues and drawbacks that need to be borne in mind when choosing the "right" method that could give consumers "access to justice". Emphasis will also be placed on the development of the EU legislation and its prospective course in the future. Recommendations will be given as to how the *status quo* can be improved in order to create a working system where law enforcement is safeguarded and consumers receive the crucial access to justice in the internal market.

2. The current system of ADR in the EU

The following chapter will analyse the *status quo* of B2C ADR in the European Union. Emphasis will be placed on the current legislation adopted. Moreover, the focus will be positioned on the procedure for settling disputes via alternative methods such as arbitration and mediation, the requirements of due process, issues that arise in that regard, as well as the (national) bodies that are responsible for ADR. The chapter will also discuss the knowledge of and access to ADR as a means for redress of consumers.

2.1. The Consumer ADR architecture in the EU

The term ADR has become quite popular in recent years throughout the European Union. It encompasses all the different ways of resolving complaints, which do not make a consumer go to a traditional court. Different types of Consumer Alternative Dispute Resolution include negotiation, arbitration, mediation, conciliation, ombudsman or complaint boards. Like traditional ADR, some Consumer ADR models may include multi-tiered clauses that encompass all or some of the above. If so, parties will be able to escalate through the different types of Consumer ADR models and attempt to settle their dispute through negotiation, mediation, conciliation and if it remains unresolved - finally resort to arbitration[10].

The main instruments regulating ADR within the EU are the ADR Directive, the ODR Regulation and the Mediation Directive[11]. While the latter instrument has been adopted in 2008, almost 9 years ago, the first two instruments are quite new (adopted in 2013). The ADR Directive was to be implemented by July 2015, while the ODR Regulation only came into force in 2016. According to the recitals of both the ADR Directive and the ODR Regulation, they are both based on Art. 114 TFEU[12], rather than on Article 81. This is so, due to the fact that basing the Directive and Regulation on Art. 81 would not have given the EU the competence to extend the ADR-Directive and the ODR-Regulation to domestic consumer contracts.[13] There is, however, still debate if the lawmaker was permitted to use Art. 114(1) as its legal basis.[14] In addition to the three instruments above, in 2007 the EU adopted a Regulation, which established the European Small Claims Procedure[15]. Although not an ADR mechanism as such, the Regulation also provided for an alternative to ordinary court procedures.

The architecture created through these community instruments has established an entirely separate legal framework for the settlement of consumer disputes. This is a reason why using the term ADR might give rise to confusion and a more appropriate term for this architecture, namely Consumer Dispute Resolution (through means alternative to court procedures) – CDR or Consumer ADR – has been embraced as more appropriate on the matter.[16] The legislation that has created this new CDR architecture will now be looked at.

[10] *Ibid.*, 29.
[11] Directive (EC) 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 [2008] OJ L136/3.
[12] Consolidated Version of the Treaty on European Union [2012] OJ C326.
[13] Hodges, *op.cit.*
[14] *Ibid.*
[15] *Ibid.*, 12.
[16] Naomi Creutzfeldt, 'Alternative Dispute Resolution For Consumers' in Michael Stürner, Fernando I Gascón, Remo Caponi (eds) *The Role of Consumer ADR in the Administration of Justice: New Trends in Access to Justice under EU Directive 2013/11* (sellier european law publishers 2015).

2.1.1. Legislation

As mentioned above, CDR has and is becoming increasingly important for the cross border e-commerce in the European Union. Apart from the aforementioned instruments, which will be considered in more detail below, a number of other instruments form the "body" of Consumer ADR. Among those are pieces of legislation that encourage the creation of ADR bodies in specific sectors. For instance, such measures are present in the MiFID[17], the Postal Services Directive[18] and the e-commerce[19] Directive. ADR reference is also to be included in Article 75 of the new MIFID II Directive which enters into force in 2018. More current instruments to include requirements for the establishment of suitable and efficient CDR mechanisms were introduced in the Payment Services Directive[20], the telecom sector[21], the Consumer Credit Directive[22] and the Services Directive[23]. All of the above instruments led to the legislative proposals in 2011, which consequently resulted in the adoption of the ADR Directive and the ODR Regulation.

The ADR Directive's goal is to warrant that consumers have access to CDR for settling their contractual disputes with sellers established anywhere in the EU, regardless of whether in the consumer's own or in another Member State. The only limits established concern disputes regarding health and public providers of further or higher education.

[17] Directive (EC) 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC [2004] OJ L 145/1 33.

[18] Directive (EC) 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 [2008] OJ L 136 3.

[19] Directive (EC) 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') [2000] OJ L178 1.

[20] Directive (EC) 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 [2007] OJ L319 32

[21] Directive (EC) 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ L211 and Directive (EC) 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC [2009] OJ L211

[22] Directive (EC) 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 [2008] OJ L133/1 66

[23] Directive (EC) 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36

Those are excluded from the Directive's Scope. The ADR Directive covers both offline and online transactions, although as it is evident, e-commerce is its primary focus.
The Directive further requires a minimum standard of quality and professionalism for Consumer ADR bodies and obliges them to maintain up-to-date websites and to provide easy access to the information consumers are interested in regarding the settlement of complaints.

On the other hand, the ODR Regulation's main concern is the identified by the Digital Agenda for Europe[24] in 2010 problem of consumer protection in the abovementioned online transactions. As the internal market heavily relies on the growing number of e-commerce transactions between Member States, the main objective of the ODR Regulation is to create a redress tool for online commerce, which would ease the consumers in receiving the necessary access to justice. The ODR Platform, created through the Regulation, has been active since early 2016 and is available in all the 23 official languages of the European Union. It allows every consumer residing in an EU Member State, who has obtained goods or services online from a trader established in another Member State to seek out of court settlement of a dispute through the EU ODR platform. The method of ODR is developed and based on ADR, and in particular arbitration. Regardless of the above scope of application, it is confirmed that the Regulation covers both domestic and cross-border disputes. The leading elements of this second most important piece of legislation in the CDR framework of the EU mainly ensure: the access of all consumers within the Union to ADR procedures; the ability of the consumers to quickly identify which ADR entity would be competent to deal with their dispute; that every ADR body will be impartial, transparent, effective and fair, as consumers expect it to be (discussed in Chapter 4.2.); that Member States will oversee the work of those new "judicial organs".

[24] A digital agenda for Europe, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A Digital Agenda for Europe COM (2010) 245

At the time of writing of the present Thesis, more than 36000 complaints have been filed with the ODR platform, above 60% of which concern domestic disputes[25]. Most disputes have been submitted by UK and German consumers, each of those around 8500 - 9500. The sectors which consumers mainly complain about online are related to clothing (including tailor-made goods) and footwear, as well as airlines. This data shows that yet, neither consumers, nor traders are satisfactorily acquainted with the existence and potential of the ODR platform. Only 36000 complaints from the 511 Million-citizen European Union for a year and a half since the commencement of the activity of the ODR platform is not an impressive number. As mentioned, awareness is low, which necessitates the establishment of a campaign, which would increase the knowledge of the platform's existence.

Nevertheless, the efforts of the European legislator, as well as both instruments, are a step in the right direction. Those instruments, however, do not adequately protect the due process rights of consumers, as addressed in the following subchapter.

2.1.2. Procedure

Certain procedural safeguards ensuring a fair and just dispute are usually adopted in every civil process, as well as traditional ADR, especially in arbitration. While it is still quite unclear from CDR practice, these essential safeguards shall, in any case, also be applicable to CDR. They are typically referred to as due process.

2.1.2.1. Due Process

The general perception is that due process, regardless of whether in a traditional court or in ADR, shall comprise of two fundamental concepts – that no-one should be the judge of his own case, which also refers to the concept of the independence and impartiality of judges and adjudicators and the principle of fair hearing, pursuant to which each party shall have the opportunity to present and/or defend his or her own case[26]. Due process is

[25] 'Online Dispute Resolution Reports and Statistics' (Ec.europa.eu, 2017) <https://ec.europa.eu/consumers/odr/main/index.cfm?event=main.statistics.show> accessed 20 June 2017.

[26] Julia Hörnle, *Cross-Border Internet Dispute Resolution* (Cambridge University Press 2009) 13.

already quite common in ADR. In commercial arbitration, for instance, it is recognized by the UNCITRAL[27], as well as national laws on arbitration[28]. The latter ensure the application of the fundamental due process principles to arbitration.

2.1.2.1.1. Independence

Independence is mainly related to the non-bias of a decision maker towards any of the parties in a given dispute. As it is not a subjective concept, independence requires the absence of any relationship, regardless of whether past or present, between the adjudicator[29] and one of the parties. Otherwise, any such association is perceived as one that is likely to distort the decision-maker's freedom of clear judgment[30]. In arbitration, prior appointments do not usually constitute lack of independence in the arbitrator. In CDR, however, such an event may raise concerns, as a trader may take part in CDR proceedings before the same ADR body and the same adjudicator several times. This is also known as the "repeat player effect", whereby the consumer might be put in a worse position than the trader. The repeat player effect is considered in more detail in subchapter 3.2.7.3 of the present paper.

2.1.2.1.2. Impartiality

Unlike independence, impartiality concerns the state of mind of the decision maker. As such, it is much more difficult to find that an adjudicator is impartial. The notion refers to the perception that the decision maker shall not be prejudiced or predisposed towards either party.[31] In arbitration, however, rarely do challenges of decision makers on grounds of impartiality succeed. Nevertheless, in both arbitration and all types of CDR, some of the most prominent situations in which an adjudicator can be challenged for being impartial are related to nationality, the expression of opinions on the legal question of a

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[27] Julian D. M Lew, Loukas A Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 525
[28] See United Kingdom Arbitration Act, s. 33(1)(a), Belgium Judicial Code Article 1694(1), Germany, ZPO s. 1042.
[29] The decision makers in CDR proceedings may hereinafter be referred to as adjudicators.
[30] Hörnle, *op.cit.* 113
[31] M. L. Smith, 'Impartiality Of The Party-Appointed Arbitrator' (1990) 6 Arb Int 320, 323.

given dispute or where the decision maker has acted as a lawyer or counsel of one of the parties involved in that same dispute.[32]

2.1.2.1.3. Fair Hearing

Finally, fair hearing is a well-known procedural safeguard for due process. In ADR, however, it could be that parties give up some degree of their due process rights, in order to receive some other benefits, such as the faster resolution of a given dispute. Nevertheless, parties should always have the right to present, claim or defend their position. In CEDR[33] proceedings, for instance, the claimant has the right to make their claims, the respondent has the right to submit their defence and the claimant once again has the right to submit comments on the respondent's defence[34]. Where sometimes, as also true for CEDR proceedings, parties do not have the right to choose their decision making body or the adjudicator himself, under the ODR platform parties have thirty days to concur on an ADR provider and ninety days for the decision-maker to issue a resolution. As also parties may not choose the rules applicable to the given dispute, the evidence gathering procedure, etc., it is for the ADR body to ensure that the right of fair hearing is awarded to each of the parties.

2.1.2.2. Right of appeal

The right of appeal is a controversial question in CDR. Allowing for a decision to be appealed inevitably increases the costs of the proceedings, as well as the delays until parties can receive the final decision. In itself, this is contrary to the idea of Consumer ADR, which is to be a cost effective and speedy method for the resolution of disputes. While it is possible to opt for both an "imposed" or "proposed" solution of a given case, allowing for the possibility of appealing an ADR body decision is likely to cause substantial detriment to the consumer, given the inequity between the parties in terms of resources. Going to the state court gives parties the possibility of requesting a new

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[32] William Laurence Craig, William W Park and Jan Paulsson, *International Chamber Of Commerce Arbitration* (Ocena Publications 2000) 13.
[33] Centre for Effective Dispute Resolution, International Dispute Resolution Centre, 70 Fleet Street London EC4Y 1EU, United Kingdom.
[34] 'The Aviation Adjudication Scheme' (Cedr.com, 2017) <https://www.cedr.com/aviation/> accessed 1 July 2017.

decision, where a point of law has been improperly interpreted, despite the fact that the process itself cannot actually be classified as an "appeal". Nevertheless, in limited circumstances appeals shall be afforded to the parties in CDR proceedings, not only by a state court, but by the same ADR Body itself, especially when the question refers to a point of law, and not of fact.

2.2. ADR Bodies within Member States

While the European Union promotes the widening of ADR, some Member States still do not have proper ADR bodies able to resolve consumer disputes across a number of sectors. Other Member States, however, have established entire centres, which encompass dispute resolution panels in different areas, such as aviation, healthcare, postal services, communications, etc. Some of the most positive examples of such centres are for instance the Centre for Effective Dispute Resolution (CEDR) in the United Kingdom, the Consumer Conciliation Body of the Centre for Conciliation in Germany and the Foundation for Consumer Complaints Committees (SGC) in the Netherlands. Regardless of those positive examples of the usefulness of Consumer ADR, CDR coverage and availability throughout the EU is still quite limited, as it will be discussed in Chapter 3.2.2.

3. The challenges of Consumer ADR

The present chapter will turn to a more substantial part of the analysis and will cover the benefits and drawbacks related to CDR. As every other system, the one created by the EU legislator is not perfect, although its benefits such as the flexibility and speed cannot be underestimated. The goal has always been to settle disputes fast and without incurring arbitrary costs. As evident by Recital 9 of the ADR Directive, CDR is seen as a mechanism to boost economic growth and enhance the internal market.[35] To be more accurate, ADR is regarded as "one of the twelve levers to boost growth, strengthen confidence and make progress towards completing the Single Market".[36] It is therefore

[35] *supra* note 5.
[36] Commission Communication of 13 April 2011, 'Single Market Act – Twelve levers to boost growth and strengthen confidence – Working together to create new growth', COM (2011) 206.

evident that the EU has placed a lot of hopes in the establishment of the CDR architecture, as the legislator envisages what impact a working system of Consumer ADR might have on the internal market.

3.1. The perceived benefits of Consumer ADR

According to Recital 5 of the ADR Directive, "[a]lternative dispute resolution … offers a simple, fast and low-cost out-of-court solution to disputes between consumers and traders".[37] The mechanism for settling consumer-related disputes is also said to be an efficient and sustainable way of resolving consumer complaints[38] In what regard that is true, will be analysed below.

3.1.1. Flexibility

One can say that CDR is seen to be much more flexible than traditional adjudication. One reason behind that is because such Consumer ADR mechanisms for resolving disputes are often "more successful in creating legal peace between parties than courts".[39] In theory, this is true because parties have access to a much wider range of instruments, which they could agree on amongst themselves. CDR flexibility can be owed to the fact that ADR can, in general, be adapted swiftly to domestic MS conditions, the geographical requirements and the sector-specific regulations and instruments in force.[40] This adaptation means that CDR offers the possibility for the entire process to be fitted much more efficiently to the needs of both the consumer claimant and the trader. Besides, CDR is undoubtedly cheaper, offers much more expeditious resolution of the disputes at hand and is more informal and less compelling, which in theory makes Consumer ADR a much more inviting medium for seeking redress. The ease of filing is another advantage of the

[37] *supra* note 5.
[38] Giesela Rühl, 'Alternative And Online Dispute Resolution For Cross-Border Consumer Contracts: A Critical Evaluation Of The European Legislature's Recent Efforts To Boost Competitiveness And Growth In The Internal Market' (2015) 38 Journal of Consumer Policy and Wrbka, *European Consumer Access To Justice Revisited* (Cambridge University Press 2014) 83.
[39] Conference organized by the CMS Programme in Civil Justice Systems, '*The Hidden World of Consumer ADR: Redress and Behaviour*' (October 2011).
[40] Eurofinas, '*Response to the European Commission's consultation on the use of Alternative Dispute Resolution as a means to resolve disputes related to commercial transactions and practices in the European Union*' (March 2011).

flexible nature of ADR. For instance, in Germany one can file a complaint by using a printed form.[41]

What one has to be mindful of is that unlike court proceedings, ADR requires the consent of both parties. Moreover, CDR is more consumer-friendly, as most consumers would not necessarily be acquainted with the court procedures for filing complaints, describing their case, attaching evidence, etc. In that sense, an ombudsman may be of much help to the consumer, offering him/her instructions on how to improve their claim – a thing one can never expect from a civil court judge, for instance. In addition, it is to be noted that in ADR a solution may either be proposed or imposed. This is why sometimes companies tend to settle on an amount, which is likely to be much smaller than the one that would have been imposed on them by a civil court.

3.1.2. Duration and Efficiency

Speed is seen as one of the greatest advantages of settling consumer disputes through alternative mechanisms. Pursuant to the ADR Directive, a decision on a given case shall be made available "within a period of 90 calendar days from the date on which the ADR entity has received the complete complaint file." In contrast, court cases are usually much slower, as the 2016 EU Justice Scoreboard shows[42]. On average, a civil or commercial case is settled within approximately 280 days. And that is only in the first instance. Appeals are not taken into account, where they usually double the timeline. For consumers, which most often settle small claims with traders, time is of the essence, which is why Consumer ADR is seen as much more attractive for "accessing justice" in disputes involving small amounts.

If seen from a different perspective, however, speed is not always a benefit. While business organizations also value the speedy resolution of disputes highly, consumer organizations tend to focus on the protection of consumer rights more than on speed, if a

[41] 'Schlichtungsstelle Energie' (Schlichtungsstelle-energie.de, 2017) <https://www.schlichtungsstelle-energie.de/schlichtungsantrag/formular.html> accessed 5 July 2017.
[42] 'EU Justice Scoreboard 2016 - European Commission' (Ec.europa.eu, 2017) <http://ec.europa.eu/justice/effective-justice/scoreboard/index_en.htm> accessed 5 July 2017.

swift determination by the decision-maker would mean that more errors would be made due to time pressure.[43]

3.1.3. Accessibility and Cost

Studies show that individuals are generally reluctant of going to court when consumer disputes are involved.[44] As consumer contracts most often involve small sums, it is likely that the expenses and efforts of going to court are to be outweighed by the potential advantages of civil litigation.[45] CDR, if made accessible through appropriate ADR bodies in a given Member State, tends to be much more attractive to consumers, since courts are, as seen above, often too slow, but also quite expensive when compared to the average amounts in dispute. CDR is therefore much more "user friendly" to regular individuals in their role as consumers, as time is not wasted in lodging formal complaints and documents and in attending time-consuming court hearings. CDR also removes the necessity of having to pay lawyers' fees and the risk of having to pay the opponents' costs[46].

In that sense, CDR is very low cost and almost risk-free. Claims made through ADR bodies are either free or tend to only charge the consumer, when and if the consumer's case is lost[47]. Nevertheless, despite the fact that there is still reluctance on the side of Member States to find funds[48] and provide coverage to ADR entities, it is evident that the costs related to consumer ADR, both pecuniary and non-economic, are much lower than those involved in settling a dispute before a civil court. There are also a number of other

[43] Gabrielle Kaufmann-Kohler and Thomas Schultz, *Online Dispute Resolution: Challenges for Contemporary Justice* (Kluwer Law International 2004).
[44] European Commission, 'Special Eurobarometer 342: Consumer empowerment' (Ec.europa.eu, 2011) <http://ec.europa.eu/consumers/consumer_empowerment/docs/report_eurobarometer_342_en.pdf> 183, 203, accessed 6 July 2017.
[45] European Commission, 'Consumer Redress In The European Union: Consumer Experiences, Perceptions And Choices' (Ec.europa.eu, 2011) <http://ec.europa.eu/consumers/archive/redress_cons/docs/cons_redress_EU_qual_study_report_en.pdf>, accessed 6 July 2017
[46] Christopher Hodges, Iris Benöhr and Naomi Creutzfeldt-Banda, 'Consumer-To-Business Dispute Resolution: The Power Of CADR' (2012) 13 ERA Forum.
[47] *supra* note 34; 'Über Uns - Ombudsmann.At - Schlichtungsstelle Für Den Onlinehandel' (Ombudsmann.at, 2017) <https://ombudsmann.at/schlichtung.php/cat/7/aid/20/title/UEber_uns> accessed 6 July 2017.
[48] *supra* note 5, Recital 46

complications associated with going to state courts when consumer disputes are at stake. Those will be looked into at a later stage of the current paper.

3.1.4. The possibility of settling consumer disputes online

Much has also been written about the ODR Regulation, offering consumers the possibility to resolve complaints through the new EU ODR platform, which has been in place since 2016. As already discussed, the ODR platform offers consumers the possibility to settle disputes with traders, regardless of where the trader is established (as long as both the consumer and the trader are residents in the EU), only by sitting at their computer. If working correctly, ODR is likely to be much cheaper than any other form of CDR, due to the fact that everything is processed through the web. The issue of jurisdiction is irrelevant, due to the extra-judicial nature of the mechanism.[49] The possibility of online dispute resolution carries with itself a number of benefits, which are directly related to the possibility of using Information and Communication Technology (ICT) in the settlement of disputes.

Resolving consumer disputes online is likely to be time saving, as parties may work and respond at any convenient time, rather than only on specifically designated court hours or during meetings scheduled with the other party. ODR is very convenient, due to the fact that parties may carefully “pick” their words and formulate their requests. In turn, it is believed that ODR facilitates parties to start working towards a mutually advantageous resolution of their dispute, using the help of a neutral third party[50]. This may also be compared to the function of the ombudsman and contrasted with the one of the court judge.

While not without its disadvantages, emphasis on which will not be put in the current chapter, ODR seems to be *prima facie* the most appropriate tool to address disputes arising out of cross-border online transactions within the EU, as already the online

[49] Eugene Clark, George Cho and Arthur Hoyle, 'Online Dispute Resolution: Present Realities, Pressing Problems And Future Prospects' (2003) 17 International Review of Law, Computers & Technology 9.
[50] Pablo Cortés, *Online Dispute Resolution For Consumers In The European Union* (Routledge-Cavendish Taylor & Francis Group 2010).

community has been “looking for conflict resolution options that mirror the speed and efficiency of the Web”[51]. Recommendations for the improvement of the *status quo* established by the ODR Regulation will nevertheless be made at a later stage of the present paper.

3.2. Specific problems of cross-border Consumer ADR

Having already seen what advantages ADR has by itself, in order to be able to make a parallel with civil litigation, it is important to likewise see what the former’s drawbacks are. While studies on the usage of Consumer ADR are quite outdated (2009-2011)[52], the latest report of the European Consumer Centres Network reiterates on the fact that CDR is still not as widespread as the legislator would like it to be. One third of all consumers thought that trying to resolve their complaints through CDR would be either too expensive or too complicated or did not even know such an alternative to civil courts existed.[53] It is therefore essential to ask the question of why consumers are still reluctant to use ADR in order to settle their small claims. The following subchapter will discuss some of the most critical reasons thereof.[54] One should take into account that some of those problems already exist in domestic CDR, but are aggravated due to the cross-border nature of Consumer ADR within the European Union.

3.2.1. Jurisdiction

One of the biggest issues with regard to cross-border Consumer ADR is the one with jurisdiction, or rather the lack or incompleteness of such. The problem lies with the fact that no established rules, allowing the party to check where an ADR procedure is to be conducted, exist. Creating a set of jurisdictional rules is impossible, as the powers of

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[51] Lucille M Ponte and Thomas D Cavenagh, *Cyberjustice*: Online Dispute Resolution (ODR) for e-commerce (Pearson/Prentice Hall 2005) 23.

[52] *Study on the use of Alternative Dispute Resolution in the European Union* (Civic Consulting 2009 and 2011) <http://www.civic-consulting.de/reports/adr_study.pdf> accessed 10 July 2017; *Cross-border Alternative Dispute Resolution in the European Union* (European Parliament 2009) <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/imco/dv/adr_study_/adr_study_en.pdf> accessed 10 July 2017

[53] The European Consumer Centres Network: 10 Years Serving Europe's Consumers - Anniversary Report 2005-2015 (Publications Office 2015).

[54] The Study Centre for Consumer Law – Centre for European Economic Law Katholieke Universiteit Leuven, Belgium, *‘An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings’* (2007).

states, in that sense, are not at stake.[55] The question is therefore which ADR entity, in which Member State, may consider itself competent to rule on a given dispute. Stay for a few exceptions[56], it is the *status quo* that ADR entities mostly solely deal with complaints against companies domiciled in their own EU Member State. The response to the question above is difficult, as there might be more than a single answer to it. It is problematic for consumers to find the ADR institution that would be competent to accept their claim and rule on their case. An additional obstacle lies in the fact that consumers, apart from having to find, also have to approach that body, which is very likely to be located abroad. Moreover, due to the fact that ADR bodies may decide on their scope of competence themselves, it is possible that multiple such institutions could consider themselves competent to rule on the same case, even if in different Member States. A solution could be found in the established network of consumer organizations, which assist individuals who want to find an out-of-court resolution to their issues. Regardless of that, proceedings still have to be conducted in the Member State where the competent ADR body is established. In that sense, as will be seen below, the coverage and availability of CDR is still disputable.

3.2.2. Coverage and Availability

Although, as required under Article 5(1) of the Directive, Member States have increasingly fostered the creation of and access to ADR entities, the lack of appropriate ADR schemes for consumer disputes is still an issue. For instance, Bulgaria offers a number of conciliation schemes[57], but only a single binding mechanism, the work of which is still questionable.[58] In practice, this means that receiving compensation for a delayed flight operated by a Bulgarian airline is very unlikely, if not impossible, should

[55] Fernando Gascón Inchaustiin 'Specific Problems of Cross-Border Consumer ADR: What Solutions? in Michael Stürner, Fernando I Gascón, Remo Caponi (eds) *The Role of Consumer ADR in the Administration of Justice: New Trends in Access to Justice under EU Directive 2013/11* (sellier european law publishers 2015).
[56] See i.e. Polish Insurance Ombudsman, British Financial Ombudsman System (FOS) and the German Conciliation Body for Public Transportation (Schlichtungsstelle für den öffentlichen Personenverkehr, SÖP)
[57] 'Online Dispute Resolution Bodies: Bulgaria' (Webgate.ec.europa.eu, 2017) <https://webgate.ec.europa.eu/odr/main/?event=main.adr.show> accessed 15 July 2017.
[58] 'National Association For Out-Of-Court Agreements' (Nais.bg, 2017) <https://nais.bg/> accessed 15 July 2017.

an individual decide to rely on CDR to settle this issue. One reason thereof is the common non-binding nature of the alternative dispute resolution schemes, whilst the lack of consent on the side of the airlines for ADR bodies to settle their issues with clients is another. Whereas the question of consent will be looked at in the following subchapters, it is evident that in a number of EU Member States there are still no, or very few, (appropriate) ADR schemes dealing with disputes arising from consumer contracts. And where they do exist, their competence or territorial jurisdiction is often quite limited. For instance, in Croatia, Romania and Spain, it is not even possible to settle consumer disputes via the ODR Platform. Sadly, therefore, although not being a substantive issue, the lack of such (appropriate) ADR bodies is still an obstacle for consumers to access justice regarding their consumer contracts through alternative means. As the concept of CDR is also quite novel to the ordinary European consumer, the subject of consumer ADR awareness will now be discussed.

3.2.3. Awareness and knowledge of ADR

In general, knowledge and acceptance of civil courts is universal[59]. And while ADR is already quite a popular term in the EU, especially among lawyers, scholars, judges and individuals who specialize in EU law, the degree of knowledge of CDR (in that sense the possibility of settling B2C disputes through an architecture, different than that of civil courts) by the ordinary consumer is yet quite weak.[60] The national and European consumer organizations mentioned above have played a great role in popularizing ADR. The same holds true for the obligation of online traders to "provide on their websites an electronic link to the ODR platform", imposed by the ODR Regulation.[61] Despite that, awareness of the relatively new architecture is still limited. The problem is clearly aggravated by the fact that we are speaking of cross-border disputes that are to be settled through CDR. Although the ODR platform also provides an exhaustive list of ADR entities in different Member States that deal with different sets of issues, access to those

[59] Hodges, *op.cit*. p. 391
[60] *supra* note 44.
[61] *supra* note 6, Art 14(1)

ADR entities for the purposes of making a claim is often still very difficult[62]. One reason thereof is the linguistic impediment, which will be examined below.

3.2.4. Language

One of the most obvious issues with cross-border CDR is the language barrier. Most ADR bodies and schemes operate in the official language of the Member State they are established in and allow consumers to file a complaint only in that official language (and often English), save for a few exceptions.[63] This consequently means that in most cases, consumers would have to file claims and expect proceedings to be conducted in a foreign language, which is often an obstacle in itself. Apart from the fact that language barriers increase costs (owing to the required translations), it is difficult to believe that a system, where proceedings are conducted in a language that a consumer does not (fully) understand, would give that individual access to justice. Although the ADR Directive provides for "[a]ssistance for consumers"[64], it seems that the effect of that assistance is quite limited. Consequently, even if an ADR entity widens its scope to accept claims from abroad, the language barrier creates a deterrent effect for consumers, as do the additional costs that would have to be borne by the individuals filing the claims. And while the EC European Consumer Centres Network might provide assistance with translations and the transferring of complaints, language still seems to be one of the most significant factors preventing consumers from pursuing their rights in ADR entities abroad.

3.2.5. Acceptance of ADR by traders

As with every form of ADR, the jurisdiction and competence of the tribunal or panel is dependent on the consent of both parties to submit a given dispute to alternative dispute resolution. In that sense, traders are not generally required to "subscribe" to an ADR entity, although the United Kingdom, for instance, is quite forward thinking in that regard.

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[62] *supra* note 57.

[63] The UK Financial Ombudsman Service, supports the complete processing of the case in several languages and provides information in 26 of them on its website; other systems, such as the Lisbon Arbitral Court in Portugal accept claims in other languages, but do not ensure that the procedure will develop in them.

[64] *supra* note 5, Article 14.

Regulators and authorities such as OFCOM, OFGEM, RICS and the CAA require traders in their respective sector to be members of an Alternative Dispute Resolution Scheme[65]. This means that each UK airline, for instance, is obliged to offer the possibility to settle travel-related consumer issues through ADR. In turn, this offers consumers the possibility to understand and acquaint themselves with CDR from the ECC, the airline (or trader), as well as from the relevant regulator.

Having said that, as mentioned previously, the ODR regulation requires traders to "provide on their websites an electronic link to the ODR platform", which would offer consumers the possibility to settle their disputes on the basis of the ODR Regulation and ADR Directive. And while on the one hand this is an obligation for all online traders established in the EU, it is clear that by agreeing to the "voluntary jurisdiction" of a particular ADR entity, traders send a much more positive message about their business standards and quality practices.

The ADR Directive stipulates that Member States shall ensure that "disputes […] which involve a trader established on their respective territories can be submitted to an ADR entity".[66] Hence, the Directive does not impose an obligation on Member States to establish ADR entities, which are to cover disputes involving traders not domiciled in their territories. This consequently means that rarely would CDR proceedings take place at the Member State of the consumer, as most likely no competent ADR entity would exist there. Where mandatory ADR procedures demand the adherence of a trader to a particular ADR scheme, traders tend to secure themselves a "home" ADR, whereas this is no longer possible in court litigation.[67] It is therefore useful to make a separation between "mandatory" and "non-mandatory" ADR procedures. From a trader's point of view it is not beneficial to accept "non-mandatory" ADR procedures for cross border disputes, as for them it is much easier to settle disputes before an entity in their home state. This, however does not preclude foreign consumers from filing complaints against

[65] 'Alternative Dispute Resolution | UK Civil Aviation Authority' (Caa.co.uk, 2017) <https://www.caa.co.uk/Passengers/Resolving-travel-problems/How-the-CAA-can-help/Alternative-dispute-resolution/> accessed 21 July 2017.
[66] *supra* note 5, Article 5.
[67] Jurisdiction clauses in consumer contracts are usually considered unfair. see *supra* note 55, 41.

those traders in their respective member states, but rather merely limits them. However, as evidenced in Chapter 3.2.4., language barriers may prove to be quite a challenge for such a filing.

3.2.6. Enforceability of awards

Another issue worth turning to is the effectiveness of the outcome of Consumer ADR in the EU. The problem is related to the difficulties that a consumer may face when trying to enforce the award of a foreign ADR entity. Even if the consumer has received a favourable outcome in another Member States, there are still a number of obstacles that the former might face. The ADR Directive neither provides any guidance, nor any solution to the questions of how a binding decision or an agreement between a consumer and a trader can be enforced or complied with or what should a consumer do in case a trader refuses to comply. Article 7 of the Directive, however, requires that ADR entities provide information on (i) the legal effect of the outcome of the ADR procedure, including the penalties for non-compliance in the case of a decision having binding effect on the parties[68], (ii) the enforceability of the ADR decision, if relevant[69] and the rate of compliance, with the outcomes of the ADR procedures, if available and known.[70] What really matters is actually whether the outcome of a given CDR proceeding results in a binding award, a proposal, a recommendation or another kind of outcome. Should the effect be non-binding, neither domestic, nor cross-border enforcement would be available, which is a huge drawback for non-binding CDR. Such a result, however, would be completely in line with the ADR Directive in the EU, as nowhere does the instrument actually stipulate that the decision of the ADR entity shall be equivalent to a judicial award. On the contrary, Article 7(1) n of the ADR Directive requires for the legal effects of a decision "in the case [that decision has] binding effect on the parties" to be made available in a "clear and easily understandable" manner, while Recital 32 only requires a "decision in a fair, impartial and independent manner". This would mean that regardless of whether the consumer is successful before an ADR entity, he/she might still be required

[68] *supra* note 5, Article 7(1)n.
[69] *supra* note 5, Article 7(1)o.
[70] *supra* note 5, Article 7(2)g.

to seek judicial relief, should a trader refuse to comply with a binding decision, "since this sort of relief can only be granted through the judiciary".[71]

It is therefore of crucial importance for consumers to acquaint themselves with the nature of the legal effect of the decisions of a given ADR entity or its procedure in cross-border cases, as well as whether, in the event of a binding award, that award could be enforced in another Member State. In itself, this represents quite a challenge and is very likely to deter consumers from resorting to CDR, because despite its numerous benefits, what is the point of an award that can never be enforced or can only be enforced after going through an entire civil court procedure? Having to seek judicial relief would incur costs one would have hoped to avoid, in order to hire lawyers who would have to look at other applicable legal instruments, such as the 1958 New York Convention[72], the 2008 Mediation Directive or the European Enforcement Order Regulation, in order to pursue the enforcement of the ADR award.

3.2.7. The stronger bargaining power of businesses

One last drawback I would like to emphasise on is the advantageous position in which traders may usually find themselves at in Consumer ADR proceedings. Mainly, this is simply due to the fact that businesses are likely to have the capital and manpower that an ordinary consumer does not possess.

3.2.7.1. Awareness and access to legal assistance

Due to the nature of their organizations, traders tend to have a wider spectrum of resources at their disposal. Combined with the fact that sellers are involved in proceedings much more often than the regular consumer, the former also have an advantage with regard to their experience and familiarity with the decision making processes. Moreover, taking into account that consumer ADR proceedings are confidential, the gap concerning the knowledge of the process between consumers and traders broadens considerably.

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[71] see *supra* note 55, 51.
[72] UNCITRAL, Con*vention on the Recognition and Enforcement of Foreign Arbitral Awards* (1958) 330 UNTS 3 / [1975] ATS 25 / 4 ILM 532 (1965) / UKTS 26 (1976).

As far as the legal knowledge and awareness are concerned, again traders are much more likely to have access to specialized e-commerce lawyers, either as their in-house counsels or as external partners. And despite the fact that one of the benefits of CDR, as discussed in Chapter 3.1, is the lack of necessity to hire a lawyer, as well as the fact that the EU ODR platform offers the possibility for parties to represent themselves[73], the help of legal advisors in dispute resolution is always handy. If going for Consumer ADR, it would therefore be financially irrational for an individual to hire a lawyer, while traders would rarely face that problem. It is therefore easy to believe that the 'equality of arms principle' might be in danger when Consumer ADR is concerned, as in effect, consumers will often have to argue their cases against experienced legal professionals, hired by the respondent trader.

3.2.7.2. Bias

Due to the considerations in the previous subchapters and the fact that businesses often settle their disputes with a limited number of ADR entities, the concern of bias in those ADR entities cannot be underestimated. Businesses are usually regularly involved in such B2C proceedings, where a consumer is most often a "one shot" player.[74] This is also famous as the 'repeat player' effect, as due to the fact that traders are involved in multiple analogous cases, they tend to have a number of benefits compared to the other party (the consumer). Systematic bias might be another issue, whereby an adjudicator or another decision maker may be inclined to favour a party in a dispute "by virtue of belonging to a particular interest or stakeholder group or from repeat appointments of such group." [75]

3.2.7.3. Repeat player effect

As already discussed in this chapter, traders often tend to secure a 'home' ADR entity, which is to rule on disputes filed by consumers. Traders are also much more likely to have been involved in similar cases before, by virtue of the fact that different customers might have had comparable claims. This is also true in relation to the ODR system of the EU, where both parties need to agree on an ADR provider, which is to rule on their case.

[73] *supra* note 6.
[74] Hörnle, *op.cit.* 75.
[75] Hörnle, *op.cit.* 126

Traders are likely to have an idea of what the procedures of different institutions are, which one would be most beneficial for them and where a given trader had the highest rate of success, for instance. Due to the not-quite-extensive awareness of ADR, on the other hand, consumers are much more likely to experience the entire procedure for the first time. This renders it impossible for consumers to have preference of a specific ADR body, which makes it more likely that traders could insist on a particular institution. Consequently, the continuous involvement of a trader in disputes, settled by a particular ADR body may create a relationship, similar to a client-provider one, since one also has to have in mind that ADR entities are private bodies, who compete on a free market among themselves. This logically leads to the desire to attract more businesses than the competition.

3.3. Conclusions

While, as mentioned in the beginning, the EU has placed a lot of hopes on the establishment of the CDR architecture, there are a number of flaws in the current system, which might preclude consumers from going to ADR or using the ODR platform. The legislature has not yet addressed all shortcomings which are seen as an impediment for furthering cross-border Consumer ADR. At the moment of writing this paper, both the ADR Directive and the ODR Regulation address cross-border online sales and service contracts. Neither of the instruments provides rules of confidentiality and the enforcement of awards or agreements reached through CDR. These are questions still left to national law. What is more, save for ODR, the failure to establish the competence of ADR bodies might still lead consumers to settle their disputes in a foreign Member State, very likely in a foreign language. Last but not least, the bewildered ODR platform only gives information to traders and consumers on the competent national ADR bodies available, while settling those disputes by itself seems would have been much more advantageous. As a result, it is likely that many would still prefer going to court, rather than "experimenting" with the new dispute resolution system which the EU has established. Where CDR in the EU is still an infant, Member States' courts have lasting experience in the settling of B2C disagreements. The following chapter will try to assess why would one prefer either system over the other and consider whether the two systems clash or coexist in harmony.

4. Consumer ADR and Adjudication by State Courts

In general, as already seen, there are two ways for consumers to settle their disputes with a trader in the EU. This is also true in a wider aspect, meaning that overall, two categories of dispute resolution may be identified – the settlement of a dispute by the State or the settlement of a dispute by a private party. As discussed in the previous chapter, many individuals tend to see the State as a monopolist in the settlement of disputes. However, as evident, parties may also be given what is due to them by using methods of alternative dispute resolution. The following subchapter will examine what the distinctive elements and characteristics of the two systems are, what their overall level of responsibility is and how those two methods compete with or complement each other.

4.1. The Differences

While both systems aim to speedily and efficiently settle disputes and enforce individual rights, in general, state adjudication serves a "higher" purpose. In many systems, especially common law ones, but also civil ones, state courts clarify and develop substantive law to create legal certainty. Thus, state courts "secure the peace and repose of society".[76] The role of the state adjudication is therefore an essential one for each country, as often governments are influenced by court decisions in the development of legal rules. As mentioned, in many jurisdictions, they also set legal precedents, which are then taken into account in future decision making. Especially in common law, the body of rules is being continuously established on the decisions settling individual cases.

[76] *Southern Pacific Railway Co v United States* [1897] US Supreme Court, 168 US1 (US Supreme Court) 39; *Nevada v United States* [1983] US Supreme Court, 103 SCt (US Supreme Court) 2917.

On the other hand, ADR is developing as a viable alternative for the settlement of such cases. While arbitration, mediation and even conciliation are, more than ever, used by corporations, Consumer ADR has emerged as a practical substitute to courts also for individuals in their disputes against such corporations and companies. The ADR Directive stipulates that "ADR procedures should not be designed to replace court procedures and should not deprive consumers or traders of their rights to seek redress before the courts. This Directive should not prevent parties from exercising their right of access to the judicial system."[77]

Nevertheless, it is a fact that the two systems are being used more and more in the internal market. The question that arises, however, is whether those systems actually compete with each other (like already seen that ADR entities compete with each other) or they rather complement their existence. Another question that is posed with the continuing advancement of ADR is whether Consumer ADR undermines and interferes with the abovementioned "developing" function of the state courts. It is probable that the more elements of the state adjudication system the EU CDR system contains, the more likely it is that this question can be asked in the affirmative. This is what the following subchapters are going to discuss and try to find out.

4.1.1. Complications of the State Court system in B2C disputes

Most civil courts deal with disputes in civil, commercial and/or criminal matters. In addition, administrative and constitutional courts usually supplement the work of the "ordinary" Member State courts. Needless to say, the decisions of courts, unlike many ADR bodies, are binding on the parties. But until those decisions are issued, parties spend vast amounts of time in preparing for hearings and before judges. And this is exactly the issue that CDR aims to tackle.

4.1.1.1. An architectural obstacle

An architectural obstacle, however, seems to deter individuals of going to state courts when business-to-consumer disputes are at stake. Many of us, in our consumer capacity,

[77] *supra* note 5, Recital 45

feel exactly the way this paper started – before courts and on the high seas – in God's hands. As already discussed above, consumers therefore feel reluctant of going to court for small amounts, which are the ones most often involved in ordinary B2C disputes. And many of us would not go to court, not because we are afraid we might lose the case, but simply because it is too much effort for a couple of hundred euros. There is therefore a psychological barrier that seems to be difficult to overcome, due to the complexity of the traditional court case. And subsequently, the courts' doors often remain closed.

4.1.1.2. Restrictions/Limitations

In general, in addition to the above, there are a number of factors which deter consumers from going to a traditional state court. Those are underpinned by a variety of reasons, which often lead to the decision of a consumer not to pursue their claim at all. First of all, in the traditional state court system, it is practically impossible to represent yourself, as knowledge of the national law of the seat of the court is essential. In turn, this means that most of the times, it is necessary for parties to hire an experienced lawyer, which drastically raises the costs of a small claim (as most of the consumer disputes are considered to be small claims under EUR 2000).[78] Furthermore, in addition to the lawyers' fees, claimants often have to pay state court fees beforehand. As legal support is rarely affordable to consumers who make claims for amounts under the abovementioned, buyers are thus reluctant to consider pursuing such small claims in court. A survey done in the EU in 2010 has evidenced that almost a half of all consumers in Europe would not go to court for a sum less than EUR 500,00.[79] Preparation for trials, as well as the need to attend the same is another deterrent, which should always be considered and compared to the amount at stake. Finally, the superiority of big companies and corporations in terms of legal support often scares consumers, which see themselves as the "weaker" party, and they consequently choose not to sue. Although the latter seems to be applicable also for CDR, as discussed in Chapter 3.7.1., the costs that a customer has to incur throughout state court proceedings are usually much higher than the ones in

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[78] European Consumer Centres Network, 'EU Consumers: Settling Small Cross-Border Disputes Without Any Hassle' (*Ec.europa.eu*, 2012) <http://ec.europa.eu/consumers/ecc/docs/small_claims_210992012_en.pdf> accessed 25 July 2017.

[79] 'Special Eurobarometer 342: Consumer Empowerment' (*Data.europa.eu*, 2010) <https://data.europa.eu/euodp/en/data/dataset/S944_73_3_EBS342__2_> accessed 25 July 2017.

a CDR one.[80] Many systems in Europe have tried to remedy this perceived "weakness" by adopting procedural national rules on the matter. The United Kingdom for instance has adopted the "Small Claims Track", pursuant to which claims below £10,000 are to be decided[81]. In Germany, the Code of Civil Procedure provides that "[t]he court may decide at its equitably exercised discretion on how to implement its proceedings if the value of the claim does not exceed the amount of 600 euros."[82] In France, for a small claim procedure to be applied, the claim must not exceed EUR 4,000 and must fall within the jurisdiction of the district or local court concerned.[83] In Bulgaria, however, no small claims procedure is provided for. Nevertheless, the citizens of all Member States may make use of the Small Claims Regulation, according to which consumers may make cross-border claims in the amount of up to EUR 2,000.[84]

As a result of the aforementioned observations, the door of the state courts might thus be closed for a substantial amount of hypothetical customer claimants. It is said that "effective access to justice can thus be seen as the most basic requirement" and even a human right.[85] Considering the above, there are many factors that can be seen as "taking away" this "human right". But whether ADR complements state courts and fills in the gaps is still to be determined.

4.1.2. Distinctive Elements of the Consumer ADR system

In general, Alternative Dispute Resolution is not novel. As mentioned in Chapter 3.2.2. it might be for the ordinary EU consumer, but the concept had started being discussed in Europe more than 35 years ago. ADR is mostly used as a tool for settling disputes in a more efficient manner. As going to courts is very time consuming and expensive, this tool has been seen as one which may be used for avoiding state adjudication. However,

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[80] Steven Shavell, 'Liability For Harm Versus Regulation Of Safety' (1984) 13 The Journal of Legal Studies 357.
[81] 'PART 27 - THE SMALL CLAIMS TRACK - Civil Procedure Rules' (Justice.gov.uk, 2017).
[82] Zivilprozessordnung 1950, 495a
[83] Code de procédure civile, 843-844
[84] Regulation (EC) 861 / 2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure [2007] OJ L191
[85] Mauro Cappelletti and Bryant G. Garth, 'Access To Justice: The Newest Wave In The Worldwide Movement To Make Rights Effective' (1978) 27 Buffalo Law Review 181, 1142.

of course, if that did not work and parties were unable to settle their dispute amicably, appearing before a state judge was inevitable. Parties therefore often agree on the so-called Multi-Tiered Dispute Resolution clauses, whereby initially parties attempt to settle their disagreement through alternative means, but if that proves impossible, other ways of dispute resolution are sought. In the world of CDR, however, this is often impossible. This is a result of some of the characteristics of ADR, which will be considered in the following Chapter.

4.1.2.1. Features and Specifics

ADR, and in that sense also CDR, has a unique characteristic which makes it completely different from state court adjudication. First and most important is the fact that ADR is voluntary. Parties may not be forced to settle their disputes through alternative means if they do not have the desire to do so. Arbitration, as well as all other forms of ADR require the consent of both parties to give jurisdiction to a certain body or person, who is to (help) settle their dispute. This gives the freedom to a consumer to decline the jurisdiction of a given body, tribunal or person. ADR clauses are often included in the Terms and Conditions of websites, mobile applications and other internet-based platforms. As they often also say that by using a given platform, a user consents to a specific way of dispute resolution, does this mean that a consumer may often be bound to settle a dispute according to the trader's preferences? In general, no. Article 10 (1) of the ADR Directive instructs that "an agreement between a consumer and a trader to submit complaints to an ADR entity is not binding on the consumer if it was concluded before the dispute has materialised and if it has the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the dispute". In other words, consumers cannot be compelled, before or at the time of purchase, to agree to dispute resolution through a specific method[86]. Such clauses therefore do not preclude a consumer from suing a trader before that trader's or the consumer's state court. Barring access to justice should therefore, under the wording of the ADR Directive, be impossible, although there

[86] Norbert Reich, 'A 'Trojan Horse' In The Access To Justice - Party Autonomy And Consumer Arbitration In Conflict In The ADR-Directive 2013/11/EU?' (2014) 10 ERCL.

are scholars that might be of the opposite opinion[87]. The simplest explanation why those academics should not be right refers to the fact that the Brussels I (Recast) Regulation[88] stipulates that a consumer may sue a trader not just before the court of the Member State in which that trader is domiciled, but also before the court of the consumer's own domicile.

Apart from requiring the consent of the parties, ADR is much more flexible. As seen in the previous chapters, state adjudication can be quite rigid. Hearings are often time consuming and inconvenient for consumers and most often they cannot even be negotiated with the court.

Consumer Alternative Dispute Resolution, however, does not always share all the characteristics of traditional ADR. Additionally, due to the fact that CDR proceedings can be conducted online, some aspects of the system remain entirely different. In that sense, the current framework in the EU offers consumers the possibility to make filings, neutral appointments, evidentiary processes, oral hearings, discussions, and even receive binding decisions entirely online. Yet, while sharing some of the main characteristics of ADR, CDR is also seen as something novel – an instrument which is "one of the twelve levers to boost growth, strengthen confidence and make progress towards completing the Single Market".

4.1.2.2. What powers do courts have that B2C ADR bodies do not?

While some ADR bodies do offer the possibility to make use of the above-mentioned filings, appointments, hearings and presenting of evidence, due to the fact that the CDR system is aimed to award a speedier resolution of a given dispute, rarely if never, do CDR decision makers have the opportunity of gathering evidence. This is unlike civil court adjudication, where the judges have much more extensive possibilities to request and

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87 Horst Eidenmüller, Martin Engel, 'Die Schlichtungsfalle: Verbraucherrechtsdurchsetzung nach der ADR-Richtlinie und der ODR-Verordnung der EU' (2013) ZIP, 1704

88 Regulation (EC) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351

review evidence. The above consequently raises the possibility and likeliness that the outcome of the same case would be different before a state court and before a B2C ADR body. Adding to that may be the fact that especially in CDR arbitration, the aim is for a mutually beneficial resolution, which may also sometimes be equal to a compromise. And this is completely opposing the idea of state courts, where most often in the end, there is a winning and a losing party.[89]

As already mentioned, CDR involves the settlement of disputes on an individual basis, meaning that every case is decided for itself. Even if this sometimes means a decision on what is equitable. Civil courts, on the other hand, set precedents in case law, especially in some jurisdictions. Hence, the same develop the law and establish the system as it is. In that sense, the powers and responsibilities of state judges vastly differ from those of CDR decision makers. And this is the main difference between the two systems. Serving a higher purpose, civil courts should not be deeply involved in settling individual consumer small claims. "Receiving access to justice" for consumers, in that broad sense, need not be specifically related to lengthy processes, involving questionings, evidence gatherings and tons of court documentation. Rarely would consumers also be interested in precedents with similar cases like their own. Consumer expectations are therefore very interesting to look at in assessing what "receiving access to justice" in consumer-related cases means, which is why those be examined in the following subchapter.

4.2. Expectations by Consumers for Dispute Settlement Procedures

In order to assess whether ADR is actually the better and superior mechanism for settling consumer disputes, one has to look into what a consumer actually expects when speaking about "access to justice". In other words, the question should be what types of redress would be sufficient for the ordinary consumer, when entering into a dispute. Redress should be understood as the complaint-handling procedures through which consumers seek compensation or seek to rectify the problems that occur during B2C transactions[90]. Redress is thus received when some form of compensation is provided, if a product is

[89] Horst G. M. Eidenmueller and Martin Engel, 'Against False Settlement: Designing Efficient Consumer Rights Enforcement Systems In Europe' (2014) 29 Ohio State Journal on Dispute Resolution.
[90] *Ibid.*

returned, refunded or replaced. In turn, examining what consumers expect from a dispute resolution procedure would also serve as a central determinant of how the consumers' trust can be gained in the current system.

It has to be noted that e-commerce complaints, which are mostly the subject of the present paper, are regarded as more important and more difficult to pursue, due to the cross-border nature of many of them[91].

4.2.1. Redress in B2C e-commerce Transactions

The continuously increasing number of e-commerce transactions within the EU have led to their increased regulation. The instruments discussed earlier in this paper are evidence of this development. More and more are consumers inclined to buy over the internet, exactly due to the expansion of consumer protection laws, the lower transaction costs, the greater variety of products and shipment options and the "to-door" delivery.[92] Apart from fostering consumers to make the most out of the internal market and the opportunities that it offers, the current framework also intends to make the internet an accessible forum for disputes between consumers and businesses. Redress received after an easy, trustworthy and fair complaint handling procedures, which could also be conducted while the consumer is in front of his or her computer at home or at the office, would encourage consumers to further make use of the internal market.

Apart from benefiting the consumers and the internal market, effective redress is also likely to benefit traders themselves. Studies show that consumers have high expectations and higher opinion of traders and merchants who provide the opportunity to the former to voice their issues and complaints.[93] In turn, the confidence in a given trader, as well as the consumer satisfaction is likely to rise whenever a merchant listens to their clients and addresses the latter's complaints appropriately.

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[91] European Consumer Centres Network, The European Online Marketplace - Consumer complaints 2010-2011' (Ec.europa.eu, 2011)
[92] S. Umit Kucuk and Sandeep Krishnamurthy, 'An Analysis Of Consumer Power On The Internet' (2007) 27 Technovation.
[93] Nichola Robertson, Lisa McQuilken and Jay Kandampully, 'Consumer Complaints And Recovery Through Guaranteeing Self-Service Technology' (2011) 11 Journal of Consumer Behaviour.

Nevertheless, regardless of whether traders are open to assist consumers with their issues by implementing proper redress policies and by being responsive to consumer complaints, research shows that consumers rarely read the policies that traders put up on their websites.[94] As is the case with accepting the dispute resolution methods discussed in Chapter 4.1.2.1, the majority of consumers do not know that they enter into a legally binding contract when using a website, purchasing goods from it or using its services.[95] While this might be true, traders have certain online obligations to fulfil, which require them to put up those policies on their websites, mobile applications or other software. Online businesses, therefore, tend to fulfil those obligations, which are for instance imposed by the EU, regardless of whether consumers acquaint themselves with the contract they are entering to. And while the fact that consumers do not read the online contracts they enter into, this does not have to be seen as a sign that online businesses need not to provide consumers with those contractual and redress policies. While most Terms of Service, for instance, are lengthy, heavy and hard to read, a resolution to this issue would be for consumers to receive that contractual information in a much more clearer and structured manner, which is straightforward to read and easily accessible[96].

What the following subchapter tries to assess is how consumers would expect that information to be presented, as well as how and what the ideal redress procedures in consumer contracts would be.

4.2.2. How consumers can be eased in both civil litigation and ADR complaint procedures?

Recently, Chin Eang Onga and David Teh conducted methodical interviews in assessing consumer experiences when dealing with problems the latter have had with online traders. [97] The research showed that consumers expected four main elements to exist in the dispute

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[94] Chin Eang Ong and David Teh, 'Redress Procedures Expected By Consumers During A Business-To-Consumer E-Commerce Dispute' (2016) 17 Electronic Commerce Research and Applications, 156
[95] S.E. Gindin, 'Nobody Reads Your Privacy Policy Or Online Contract: Lessons Learned And Questions Raised By The Ftcs Action Against Sears' (2009) 8 Northwestern J. Technol. Intellectual Property.
[96] D. Svantesson, R. Clarke, *Trade Practices Act: a hard act to follow – online consumers and the new Australian consumer law landscape*, James Cook University Law Rev., 20 (2013), pp. 85-117
[97] *supra* note 94

settlement with traders. Most consumers indicated that complaint handling must be accessible, effective, convenient and transparent. The same could be said about the users' expectations with regard to the policies provided by online businesses. Consumers tend to think that "well-established and clearly spelled out policies" give them assurance and security, as they help users easily understand what an online business will do if a consumer is not satisfied with a product or service. In turn, this is also likely to mean that such traders are trustworthy and have a simple and comprehensible dispute settlement procedure in order "to deliver a satisfactory online complaint-handling experience".[98]

Consumers are further of the opinion that traders that address their complaints in the abovementioned effective, convenient and transparent manner and provide adequate compensation would always be preferred. As human and computer faults do occur, tackling those with a clear redress policy and procedure would mean that customers will always be willing to repeat purchases from that same trader, regardless of the issues they had with them. Hence, the fact that one receives a faulty item would not necessarily mean that that a customer would never purchase from this buyer again. Most consumers tend to think that the way such a problem is addressed and the responsive customer service is more important and above anything else.[99]

The personal research that I have done as an author of the present thesis showed that consumers are more and more of the opinion that online users should be able to lodge a complaint in the most convenient manner for them. In order to gain access to an effective redress procedure, this might be done through ADR, through state courts, through an internal complaint system of an online business (i.e. Amazon), etc. The main element is that a consumer shall be eased and offered as many effective redress procedures as possible for him or her to choose.

But what does actually an effective redress procedure mean? Coming back to the main topic of this paper, would going to court or employing ADR be the more suitable option

[98] *Ibid.*
[99] *Ibid*

in case a disagreement between a trader and a customer cannot be settled amicably, despite both sides' desire to do so. For the ordinary consumer, both methods are likely to be quite difficult and frightening. Traditional litigation seems more unsuitable, due to the fact that often, as discussed above, the competent court might have to be determined, the costs are likely to be too high, due to the fact that a consumer would need a lawyer, etc. This is also due to the fact that consumers anticipate a timely and effortless resolution of their complaints, mainly because the latter usually involve relatively low monetary amounts. As addressed in Chapter 4.1.1.3., small claims procedures are still not in place in all EU Member States. In order for traditional litigation to be an effective dispute resolution mechanism for B2C e-commerce transactions, disputes need to be resolved in a much more timely and non-demanding manner. If such accessible and responsive procedures are adopted community-wide, consumers that remain unaware of ADR and are, at the moment, reluctant to go to court, would be much more likely to pursue their legal claims through the traditional system, rather than to just accept the monetary losses incurred due to an e-commerce transaction. While unlike in court litigation, applicable law might not be one of the biggest issues in ADR, there is still room for improvement in the Rome I Regulation[100] and the harmonization of that topic within the EU. Whereas ADR is still emerging as a complaint handling alternative, the awareness of that system needs to be raised in order for it to reach its full potential of effectiveness. All in all, taking into account the enormous volume of e-commerce B2C transaction that happen cross-border within the EU daily and the same as being one of the biggest drivers of the internal market, both traditional courts and ADR should work towards establishing a system that avoids long, puzzling and complex complaint procedures. As will be seen in the following subchapter, the relationship between ADR and state courts has become the subject of an increasing debate.

[100] Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177

4.3. Consultation Paper on the Relationship between Formal and Informal Justice

In the beginning of 2017, the European Law Institute and the European Network of Councils for the Judiciary released a consultation paper entitled "The Relationship between Formal and Informal Justice: the Courts and Alternative Dispute Resolution".[101] The consultation paper addresses the boundary between traditional courts and ADR processes in the EU and seeks how these two interrelate. By identifying the common existence of "vulnerable parties, whether consumers, ordinary citizens, small businesses, or family litigants", which feel compelled to consent to ADR or to accept other resolution methods without having a suitable understanding of their legal rights, the paper seeks opinions if those issues may be settled by developing "statements of best practice" or similar models, which could consequently be used by traditional courts or ADR panels and providers in evaluating the type of resolution mechanism which is most appropriate in a given dispute. The paper further indicates issues that have already been identified in the present paper, such as the risk that consumers may be denied an independent judicial determination, the risk that decision-makers or those conducting ADR processes are poorly qualified, the risks of decision-making being made by an anonymous online decision-maker, the risk that individual parties have an inadequate understanding of the available methods of dispute resolution, etc.

Not many views and replies to the consultation paper have yet been issued. One of the few, but very interesting ones comprises the comments of the Council of Bars and Law Societies of Europe[102]. Contrary to the prevalent opinion that ADR processes may very well exist without the necessity of lawyers, the CBLSE is of the opinion that lawyers, who are by default supposed to be independent and subject to strict ethical rules, are also

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[101] European Network of Councils for the Judiciary, The Relationship between Formal and Informal Justice: the Courts and Alternative Dispute Resolution (*Europeanlawinstitute.eu, 2017*) <http://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Projects/ADR/ELI_ENCJ_ConsultationPaper.pdf> accessed 30 July 2017.

[102] 'CCBE Comments On The ELI/ENCJ Consultation Paper On 'The Relationship Between Formal And Informal Justice: The Court And Alternative Dispute Resolution'' (*Ccbe.eu, 2017*) <http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/ACCESS_TO_JUSTICE/ATJ_Position_papers/EN_ATJ_20170331_CCBE-comments-on-the-ELI-ENCJ-Consultation-Paper-on-The-Relationship-between-Formal-and-Informal-Justice-the-Court-and-Alternative-Dispute-Resolution.pdf> accessed 30 July 2017.

people who are well familiarized with the resolution of legal disputes, regardless of whether the disputes are before a traditional court or an ADR entity. As such, the CBLSE believe that "the participation and involvement of lawyers is […] essential for the proper deployment of ADR schemes." Furthermore, the possibility that consumers resolve their claims without having received any legal advice is seen as an issue jeopardizing the ADR system, which may consequently deny an independent judicial determination. Therefore, most of the respondents to the above-mentioned consultation paper emphasize on the importance of legal aid in out-of-court dispute settlement procedures.

The consultation paper of the ELI also raises thoughts on a number of other issues in ADR and how it can be improved as a system for effective judicial determination in the EU in B2C disputes. Those concerns, nevertheless, give food for thought on how the two systems of ADR and state courts co-exist and how both can be developed in order to create a harmonized judicial system, where consumers can receive access to effective justice. The following subchapter will address the issue on whether the two systems complement or compete with each other and how their coexistence may be perfected in a two-tier integrative judicial system for B2C disputes.

4.4. Complementing or Competing?

While considering the above, one cannot conclude that consumers are offered a system of effective justice, the already-established system of ADR might very well prove to be a move in the right direction. Alternative Dispute Resolution and mainly arbitration has proven itself as extremely effective in certain areas[103]. However, it remains unclear whether the same could be said about CDR. More than everything, CDR is used as a political tool for enhancing and building trust in the internal market. It might not be the only reason why consumers have increased their confidence in traders established in other Member States, but it has undoubtedly facilitated cross-border e-commerce.

Although the European Consumer ADR system cannot replace the formal judicial one, it may be seen as an instrument to complement the judiciary and to foster judicial reforms.

[103] i.e. Insurance, Agriculture and Energy Sectors

In supplementing the state judges, ADR may reduce caseloads and deal with small-claims cases, leaving state courts to deal with the "serious matters". As such, if small cross-border e-commerce cases are adjudicated through the EU ODR Platform and larger consumer-related cases are decided by state courts, this could be considered as an effective consumer-redress system.[104] The most prominent example of what ADR is capable of doing is evident in the case of AT&T Mobility LLC v. Concepcion[105]. This case also shows what the main idea and rationale behind promoting Consumer ADR should be. CDR should be seen as a supplement to state courts, in assisting them and relieving them of the less-important cases, while leaving state judges to establish legal precedents, implement changes in the legal and social norms and develop the law. While it is not for the consumer to decide what type of CDR to use – binding or non-binding, the main difference between the state courts and CDR is the fact that CDR, and especially non-binding Consumer ADR, is an instrument for the application of equity, rather than the rule of law, which may nevertheless be the "right" way of dispute resolution in many consumer cases.

Where the above can be seen as the "logical" role of Consumer ADR, as one that contributes to the enforcement of EU consumer law and the consumer rights, it may also be the case that CDR can obstruct their development and compete with the national justice systems. Pursuant to Article 11 of the ADR Directive, ADR entities, which apply EU consumer law are often faced with the uncertain answer to the question of which law applies to a given dispute. This consequently raises the issue of whether the succeeding interpretation of that law would be correct. What is also problematic in that regard is the fact that ADR entities cannot submit questions to the ECJ for interpretation, as state courts can. Thus, this is likely to lead to different interpretations of the law by different ADR entities, which then creates a precondition for the vast reduction of legal certainty. If Consumer ADR is to prove itself, then parties would need to have an idea which body decides how. And this would be impossible without the setting of precedents – a characteristic, typical for the state courts, which is, however, absent from ADR. It is true

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[104] Gerhard Wagner, 'Private law enforcement through ADR: Wonder drug or snake oil?' (2014) 51 Common Market Law Review, Issue 1, pp. 165–194

[105] *AT&T Mobility LLC v Concepcion* [2011] 563 U.S. 333 (USA).

that the ODR Regulation attempts to deal with that issue, nevertheless in a disappointing way. The database that is created for storing processed information pursuant to Article 11 of the same Regulation is not available to and accessible by the public.[106] What is more, the possibility of judicial review for ADR decisions is lacking in the current framework, which is likely to secure justice in small claims cases. At the moment, the only option for a consumer would be to file a completely new case before his or her own national courts. Finally, one of the most important issues which seem to undermine the "justice" awarded by ADR entities is the fact that the decisions of the latter are almost never published. Thus, it is rarely possible for the EU, the Member State or the parties to assess whether even recognized ADR bodies provide the basic quality of decisions that the ADR Directive necessitates[107]. Under the same Directive, ADR entities are required to "make publicly available on their websites, on a durable medium upon request, and by any other means they consider appropriate, annual activity reports". These, nevertheless, are unable to make any structural and substantive shortcomings of the cases decided come to light.

As evident, one cannot resolve that the current system is actually capable to sufficiently "boost growth, strengthen confidence and make progress towards completing the Single Market", as envisaged in the ADR Directive. Whereas the Recital of the Directive stipulates that "the dissemination of ADR can also prove to be important in those Member States in which there is a substantial backlog of cases pending before the courts, preventing Union citizens from exercising their right to a fair trial within a reasonable time", the same can be read as to say to the Member States that they should pay more attention in the forming and promoting of ADR, rather than in reforming their own court systems. And as already mentioned, ADR will probably never be able to replace the justice, awarded by the state courts. The paramount path of Consumer ADR would be to be further developed in a way in which it can complement the court system, rather than

[106] *Supra* note 6, Article 11
[107] M.B.M. Loos 'Enforcing Consumer Rights Through ADR At The Detriment Of Consumer Law' (2017) 24 European Review of Private Law.

compete with traditional adjudication for the attention of the state. After all, such a route would be unacceptable for an area of freedom, security and justice.[108]

All of this shows that while under development, the creation of a multi-doored courthouse is still inchoate. The following and final chapter will, therefore, turn the attention of the reader to the possible solutions for rectification of the current legislative framework for Consumer ADR on the matters outlined. As perceived above, consumers are still far away from receiving appropriate "access to justice".

5. So how can the current system be improved?

As seen in the present paper, the incentive of the European Union, the ADR Directive and the ODR Regulation can all be seen as a move on the right path, as they have provided for a basic framework of the consumer dispute resolution of the future. Nevertheless, this framework does not entirely solve the current problems of the system for the settlement of consumer disputes, which motivated the EU to create that infrastructure in the first place. In order to improve the current system and to create a working one in which Consumer ADR and state courts supplement each other and where consumers can actually receive access to justice, there are a number of issues that need to be tackled. This chapter focuses on the recommendations, which can lead the EU Consumer ADR system towards its final goal: to give consumers effective access to justice.

5.1. A conflict-of-entity and conflict-of-laws approach

The fact that CDR proceedings will most often not take place in the Member State of the consumer, as outlined in Chapter 3, is a great issue, which deserves specific attention. The ADR Directive does not impose an obligation on Member States to establish ADR entities, which are to cover disputes involving traders that are not domiciled in that same Member State. This hitch consequently leads to the doubt of whether in cross-border cases

[108] Michael Stürner, *'ADR and Adjudication by State Courts: Competitors or Complements?'* in Michael Stürner, Fernando I Gascón, Remo Caponi (eds) *The Role of Consumer ADR in the Administration of Justice: New Trends in Access to Justice under EU Directive 2013/11* (sellier european law publishers 2015).

and in their current form, ADR entities are able to abide by EU consumer protection law. Presently, the ADR Directive creates a clash between its regime and that of the Brussels I Regulation (Recast)[109]. The latter is being undermined by the fact that cases under the ADR Directive are mostly decided by an ADR entity established in the Member State of the trader, instead of where the consumer is resident under the Brussels regime. What is more, even if consumer protection is awarded by that entity, it seems unlikely for the same to be acquainted with the mandatory consumer protection legal rules of the consumer's Member State, which may not be derogated from under Article 11(1)(a) of the ADR Regulation and under the Rome I Regulation.

An alignment between the conflict of law, competent court and ADR rules therefore needs to be made. ADR, in general, is based on the mutual consent of the parties involved in a dispute to submit the same to a neutral third party for decision. Unlike the jurisdiction of state courts, ADR is not mandatory and this might be the reasons why it is so attractive. And subsequently, CDR needs to stay attractive in order to be successful. An incentive for traders to participate in ADR proceedings in a Member State different from their own needs to be created. A prerequisite could, for instance, be that traders who specifically target, based on their relationships or activities in a given Member State, customers from that same Member State, are compelled to attend ADR proceedings in that Member State.[110] Likewise, it is rational to require consumers, who have purchased goods or services from traders, which do not usually do business in other Member States, but their own, to pursue their claim in the trader's Member State.[111] Furthermore, establishing a conflict-of-laws framework for the ADR Directive does not seem problematic as, in general, consumer ADR cases are not as complex as other cases. On the contrary, such a framework may benefit consumers, traders and ADR entities. Consumers will be sure that regardless of where their claims are addressed, fundamental (consumer protection) rules will be adhered to in every ADR process. And while for traders, going into a consumer

[109] *supra* note 88
[110] Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 2011, 98, 105 points out that three out of four European traders do not direct their activities towards other Member States, due to the likely occurrence of legal problems.
[111] Jonas Kotzur, '*A Confl ict-of-Laws Approach for Cross-Border ADR?*' in Michael Stürner, Fernando I Gascón, Remo Caponi (eds) The Role of Consumer ADR in the Administration of Justice: New Trends in Access to Justice under EU Directive 2013/11 (sellier european law publishers 2015).

dispute in another Member State may, at first glance, seem frightening, rules applicable to ADR are essentially identical in terms of content throughout the EU28[112]. Finally, ADR bodies are likely to be comforted from the burden of whether a given case falls within their jurisdiction or not, while maintaining both the required and desired degree of flexibility in following their Member State's substantive rules.[113]

5.2. To "propose" or to "impose" a solution - a question for enforcement

Solutions and awards under the ADR Directive may either be "proposed" or "imposed". In other words, awards may either be binding or non-binding on the parties to a dispute. And that raises an issue. When the decision-maker delivers his or her decision, if the solution is proposed, parties would reflect on the outcome and either accept or reject the decision. So what follows if one of the parties reject it? Simply, the decision can (not) and will not be enforced. In essence, parties would have gone through an entire CDR procedure of an ADR body, just to affirm that they do not stand on common ground.

Consequently, this would not seem as a useful system for the resolution of disputes. In turn, this undermines the role of the decision-maker, as not actually being a "decision maker" as such, but rather just a person who suggests a recommendation to the parties. What is worse is that consumers could just "try their luck" with an ADR procedure, due to the fact that many of those procedures are relatively cheap, if not free. Efficiency is therefore greatly reduced by the possibility to "offer solutions" to the parties, similar to conciliation. A definitive binding decision of the decision-maker is likely to be much more advantageous, as the system would be cleared of parties who "try their luck" and would help both consumers and traders realize that the best alternative to binding CDR would be to get involved in a prolonged, expensive and demanding litigation. Which in

[112] Directive (EC) 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance [2011] OJ L304

[113] Kotzur, *op. cit.*

turn is expected to get more consumer-related cases into the CDR world, rather than that of the state courts.

But the question that still remains vital and unanswered is, even if such binding, "imposed" decisions are issued, how would those be enforced? A fundamental change that needs to be considered by the European legislators is therefore the creation of a framework for the enforcement of CDR awards throughout the European Union. So far, this issue is left without a workable solution. Depending on the type of outcome in a cross-border case, at the moment, the European consumer can make use of the enforcement tools under Brussels I Regulation (recast)[114], the European Enforcement Order Regulation[115] or the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards[116], should a trader refuse to comply with an ADR entity decision. Judicial relief or enforcement might also be necessary, which then leaves the entire purpose of CDR questionable.

5.3. Recommendations for further developments of Consumer ADR in the EU

Some structural problems, such as the fact that ADR institutions need to have the desire to apply to be listed as an ADR entity, pursuant to the ADR Directive, are negligible defects which may simply be corrected through an amendment of the abovementioned instrument. These, however, raise issues such as the fact that ADR bodies, which have not applied for recognition under the Directive, would not be covered by the Directive and its minimum quality standards would not apply to them. Consequently, this raises the concern that the scope of the Directive is too limited. A solution to the problem would be to make the obligations and standards contained in the ADR directive mandatory for every ADR provider within the EU. This would ensure a harmonized level of quality requirements for all Consumer ADR bodies and their decision-makers throughout Europe.

[114] *supra* note 88
[115] Regulation (EC) 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims [2004] OJ L143
[116] *supra* note 72

Another issue is that whilst as previously mentioned, ADR depends on the voluntary nature of the entire process, “rouge” traders may still often evade consumer dispute resolution proceedings and never address consumer complaints. Where and if a jurisdictional system concerning conflicts-of-laws is created, the mandatory participation of a trader in ADR, regardless of whether in their own or the consumer’s Member State, could also be considered. It is evident that the mandatory ODR Regulation notice does not satisfactorily address the issues regarding participation in CDR, so it would be interesting to see how traders, who are obliged to subscribe to an ADR entity, depending on the above jurisdictional rules, would behave in terms of consumer protection. And while this may not seem like a “balanced” solution as far as the interests of both sides are concerned, would this actually raise the consumers’ trust in the CDR system?

And in order for the success of the established ADR system to continue rising, the trust of consumers therein is essential. A chief explanation of why consumers are still reluctant of using the ADR Directive and the ODR Regulation as instruments for settling consumer-related disputes is that the outcomes from the processes provided are still believed to be unpredictable, as shown in the methodical interviews made by Chin Eang Onga and David Teh, addressed earlier in the present paper. As mentioned, the database created for storing processed information pursuant to Article 11 of the ODR Regulation is not available to and accessible by the public and is not enough to create the necessary level of legal certainty. A transparent process where ADR entities are compelled to publish their decisions is likely to create a natural constraint fighting impartial, ill-founded and unsupported decisions, as those will then be accessible for everybody to read and analyse. Furthermore, transparency in the decision making will shrink the gap between the “one-shot” consumers and “repeat-player” traders.

Moreover, as discussed in Chapter 4 of the present paper, a main issue which is posed due to the confidentiality and even “secrecy” of the ADR entities’ activities and decision is the fact that one can never be sure of whether the interpretation of the law made by the decision makers therein is correct. A resolution would be to allow ADR entities to refer questions concerning the interpretation of the law to their national courts, which could in turn refer those questions to the European Court of Justice for a preliminary ruling pursuant to Article 267 TFEU. Unless such a step is made, the system is left without an effective mechanism for overseeing the “correctness” of the legal interpretation in CDR decisions and it would be impossible to assess whether a given ADR entity provides the quality as required under the ADR Directive. Another possibility can consist in the creation of a type of “judicial review” mechanism for points of law. Such an “appeals mechanism” could serve as a second instance, confirming whether the law has been correctly interpreted and applied, without accepting new evidence or looking into questions relating to facts or the merits of the case.

In summary, there are still numerous questions that remain unanswered and multiple failings that need to be revised by the European legislator. These reconsiderations should be done cautiously, while keeping the balance of interests between the consumers and the traders. And while consumer protection might be the most important goal of the ADR Directive and the ODR Regulation, in order for the internal market to continue developing without borders, traders’ interests should not be undermined in any case. Although access to justice through the Consumer ADR system in the EU is still distant, the abovementioned steps may bring the framework closer to the legislator’s ultimate goal, which motivated the EU to create that infrastructure in the first place. The report on the application, implementation and success of the ADR Directive, which should be submitted by July 2019, could be the document addressing some or more of those issues and could pave the way for those developments.

6. Conclusion

Having examined the objective of the European Commission, the EU incentive for B2C dispute resolution and the current status quo of the Consumer Alternative Dispute Resolution infrastructure in the European Union, it is still difficult to give a definitive answer to the main question of the present paper. It is true the moving power behind the creation of the CDR framework is actually the inability of state courts to adequately address small consumer-related claims. Hence, the lack of effective redress in B2C disputes is seen as an obstacle hindering the further development of the internal market.

The ADR Directive and the ODR Regulation were adopted as a response to this setback and are aimed at filling gaps relating to coverage, legal standards and awareness. But have they been successful in doing so? As already seen, there are a number of drawbacks in the ADR Directive, which prevent it from effectively fulfilling its aim and purpose. Regardless of those, it has nevertheless addressed vital shortcomings, which have been preventing consumers from pursuing their claims at all, regardless of whether in state adjudication or through alternative means. While this is true for the ADR Directive, the ODR Regulation, however, seems to have missed its aim. As B2C disputes mostly involve small amounts or certain miscommunication or misunderstandings between traders and consumers, the functions of the ODR platform should have been more far-reaching than just those of a coordination hub referring claimants to appropriate decision-makers. Access to justice would (have) be(en) fostered by adopting a more direct form of online resolution of disputes. Negotiation, for instance. As already seen by a number of scholars[117], online dispute resolution is more usable when it is “pyramid”, rather than “flat” shaped in the sense that the majority of B2C disputes can be settled online directly, without outside involvement, while only a fraction of those cases would need third-party intervention to resolve their dispute. In contrast, the current “flat” system directly sends parties to a decision-maker, who proposes or imposes a solution on the parties. Giving the ODR platform negotiation, conflict prevention, case administration, oversight and enforcement functions is guaranteed to improve consumer redress and thus access to justice.[118]

What can therefore be concluded is that the current framework for out-of-court access to justice somehow lacks incentive. It is, however, very likely that speedy resolution with guaranteed enforcement of the outcome throughout the EU could be the perfect recipe for consumer access to justice. On the other hand, the respondent’s motivation to participate

[117] Darin Thompson, 'Online Dispute Resolution Expansion In The EU' (2012) 22 Computers & Law and Pablo Cortés, 'Improving The EU's Proposals For Extra-Judicial Consumer Redress' (2017) 23 Computers & Law.
[118] Pablo Cortés, 'A New Regulatory Framework For Extra-Judicial Consumer Redress: Where We Are And How To Move Forward' (2014) 35 Legal Studies.

may be elevated through evidence of CDR cost savings for traders. And, in turn, if traders are motivated in using CDR, awareness will undoubtedly rise.

In the coming years, CDR will surely become the most important instrument for safeguarding the rights of EU citizens in consumer matters. Whereas the role of courts will never be overturned and whereas courts have the potential of developing into a supervisory mechanism of CDR, access to justice will predominantly be provided by Consumer ADR, rather than state adjudication. While the current CDR infrastructure could be viewed as chaotic and puzzling[119], with a number of design tweaks, which would amend it, knowing what already works and what does not in the current system, a refined model that would give access to justice to half a billion EU consumers is expected to rise up.

And with a system of complementary justice between consumer alternative dispute resolution and state adjudication, each dealing with the cases they are best and most effective at, the system will become the guardian of public interest[120] in the area of freedom, security and justice and will contribute to the creation of a more competitive European Union, which brings each and every one of us closer to the objective of realizing the full potential of the internal market, where everybody can have access to justice.

[119] Chris Gill and others, 'Designing Consumer Redress: A Dispute System Design (DSD) Model For Consumer-To-Business Disputes' (2016) 36 Legal Studies.
[120] *op. cit. 118*

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Abstract

German

Das Ziel dieser Master-Thesis ist es zu ermitteln, ob das vom Gesetzgeber der Europäischen Union erstellte System der alternativen Beilegung verbraucherrechtlicher Streitigkeiten die am meist geeignete Methode zur Beilegung sowohl der innerstaatlichen als auch der grenzüberschreitenden B2C-Streitigkeiten zwischen den Händlern und den Verbrauchern ist. Da die Schnittstelle zwischen der alternativen Beilegung verbraucherrechtlicher Streitigkeiten und den Gerichtsprozessen ein zentrales Thema ist, untersucht die Diplomarbeit den bestehenden Prozess des Verfahrensschutzes, der den Verbrauchern im Rahmen der derzeitigen Gesetzgebungsinfrastruktur gewährt wird, und beschließt, was die Fehler jedes einzelnen Systems sind, warum die Verbraucher zögern, die Eine oder die Andere zu verwenden, welche Streitbeilegungsmethode in einem bestimmten Streit verabschiedet werden sollte und wie das derzeitige System verbessert werden kann, damit die beiden Systeme sich gegenseitig harmonisch ergänzen und nicht miteinander konkurrieren können. Durch die Untersuchung der Probleme und einiger positiver Beispiele für die Richtlinie der alternativen Streitbeilegung in Verbraucherangelegenheiten, die Verordnung über Online-Streitbeilegung in Verbraucherangelegenheiten und die Nachteile des derzeitigen Systems zieht die Diplomarbeit Schlussfolgerungen darüber, welche Elemente fehlen und was die Erwartungen der Parteien über eine wirksame Konsumentenregelung sind. Auf der Grundlage der Erkenntnisse der Analyse des Status quo bestimmt die Diplomarbeit die Probleme und Nachteile, die bei der Wahl der "richtigen" Methode, die "Zugang zur Gerechtigkeit" gibt, berücksichtigt werden müssen und gibt Empfehlungen darüber, wie das derzeitige alternative Justizsystem verbessert werden kann, sodass ein funktionierendes System erschaffen wird, bei dem die Strafverfolgung gesichert ist und die Verbraucher den entscheidenden Zugang zu Gerechtigkeit im Binnenmarkt erhalten.

Abstract

English

The goal of this paper is to determine whether the Consumer Alternative Dispute Resolution system created by the European Union legislator is the more appropriate method for settling both domestic and cross-border B2C disputes between traders and consumers. As the interface between Consumer ADR and court processes is a key issue, the Thesis examines the existing state of procedural protection afforded to consumers under the current legislative infrastructure and resolves what the flaws of each of the systems are, why consumers are reluctant to use one or the other, what dispute resolution method should be adopted in a particular dispute and how the current system can be improved so that the two systems can harmonically complement one another rather than compete with each other. By investigating the problems and some positive examples of the ADR Directive and the ODR Regulation and the drawbacks of current system, the Thesis draws conclusions as to what elements are lacking and what are the parties' expectations regarding effective consumer redress. Based on the findings of the analysis of the status quo, the Thesis determines the issues and drawbacks that need to be borne in mind when choosing the "right" method giving "access to justice" and provides recommendations as to how the current alternative judicial system can be improved in order to create a working system where law enforcement is safeguarded and consumers receive the crucial access to justice in the internal market.