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**Alternative Dispute Resolution and Online Dispute Resolution in the
EU: their linkages, legal status, and adoption challenges**

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ABSTRACT

The evolution of Online Dispute Resolution (ODR) as an augmentation from Alternative Dispute Resolution (ADR) has created a paradigm shift in the way disputes are handled beyond the traditional court systems. The incorporation of Information Technology Services as the main feature of this platform operates as a catalyst for economic growth and development. The root lies in the rapid growth of electronic commerce, which is inextricably linked to the growth of the Internet. Also, incorporating and regulating the mechanics of these tools into the law society. As an expansion of e-commerce is observed, conflict, dissatisfaction, mistrust, and lack of awareness are relatives that encompass itself within this field when consumers and traders converge. The ability of the platform to act as 'the fourth party' when conflict occurs amongst online litigants and also being able to bridge the gap between jurisdictions, exemplifies the advancement of the digital era. Consumers are often attracted to this forum in comparison to traditional means, which is usually an extensive and costly process to administer justice.

The fundamental problem is with the equivalent adoption of ADR and ODR across the EU Member States, where the ODR evolution has yet to apply sufficient clarity on incorporating ADR methodologies into the online process. The thesis will explore the adoption of ADR and ODR methodologies in the EU to identify the advancement and shortcomings that currently exist. Additionally, the paper also indicates the future directions that are expected to expand from the platform of ODR, the focus to which the text alludes to can be glimpsed through the way of Artificial Intelligence (AI). The document also proposes principled training models that negotiators can be applied in AI to advance the ADR and ODR process.

Keywords: Alternative Dispute Resolution (ADR), Conflict, Online Dispute Resolution (ODR), Consumer, Information Technology, Adoption, Artificial Intelligence (AI)

INTRODUCTION

The emergence of the digital sphere has generated a more suitable market for individuals, explicitly consumers and traders. They can easily collaborate to achieve their desires, which effectually contributes significantly to the Functioning and stability of the economy: through selling and buying goods and services.¹ The emergence and utilisation of the Internet have grown considerably within the past twenty years of its existence.² An aspect of this increase can be witnessed in the growth rate of e-commerce³ where businesses aim to sell their services to consumers, and consumers interact interchangeably.⁴ According to the European Commission, on a report⁵ dated September 25th, 2019 indicated consumer spending accounts for 56% of Europe's Gross Domestic Product (GDP) economic development. While there is evidence of the significance consumers play on the EU economic growth, there is an inextricable link to resolving conflicting issues that arise amongst consumers and traders within a reasonable time, to promote financial stability further while attaining consumer redress. The notion is particularly accurate for consumers whose nature of complaints is often of a low value, which is not reasonable to undertake the court fees and legal costs involved.

Additionally, the volume of disputes of cases is significantly high, which can place an intolerable burden on the court system. However, all is not lost as *dispute resolution* as an alternative to litigation has provided an avenue for resolving disputes amongst claimants efficiently and cost-

¹ Cortes, P. (2017). *The Law of Consumer Redress in an Evolving Digital Market: Upgrading from Alternative to Online Dispute Resolution*. (1st ed.) New York: Cambridge University Press. pg 1-8

² Naughton, J. (2016). The evolution of the Internet: from military experiment to General Purpose Technology. *Journal of Cyber Policy*, 1:1, pg 5-28

³ E-commerce in a restrictive way is doing business online that can be carried out via B2B transactions or B2C transactions. The thesis focouses on the latter and focuses on both the process and implications of e-commerce in the current Internet-based economy. See Zhao, Y. (2005). *Dispute Resolution in Electronic Commerce*. (Volume 9.) Leiden, Boston: Martinus Nijhoff Publishers. pg 13-23

⁴ Cortes (2017), *supra nota* 1, 1-8

⁵Report from the Commission to the European Parliament and the Council on the functioning of the European Online Dispute Resolution platform established under Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes, COM 2019. pg 1

effectively.⁶ ODR methods respond more speedily to the digital online environments, and the need to expedite access to justice as its use of online technology is “24 hours per day, [seven] days per week, 365 days per year access.”⁷ The practice of ADR methodologies has been effective in maintaining relations through its solving mechanisms as opposed to issuing a settlement as litigation often provides.⁸ In instances where close interactions become consistent, conflicts are inevitable to emerge, particularly online.⁹ As a result, the development of the Internet is responsible for both the conflict and solution via ways of Alternative Dispute Resolution (ADR) methods.¹⁰

While the first ODR scheme was established in 1995 by launching the Virtual Magistrate in Philadelphia, in the United States of America,¹¹ a few years passed afterwards before the active development of ODR took place and was observed within the borders of the EU. The incorporation of this was exemplified, where the European Commission implored an expert group to examine the economic development of consumer to business transactions. Moreover, identifying the pathway that will positively affect its Member States and sought measures to resolve the numerous consumer disputes that were being created through these interactions.¹² Consequently, as a result, ADR was incorporated as a toolkit by the Directive on Alternative Dispute Resolution for consumer disputes 2013/11.¹³ Additionally, ADR has fueled further innovation concerning the ODR platforms for internet disputes and further access to justice, which is denoted by regulation 524/2013 on Online Dispute Resolution for Consumer Disputes.¹⁴ Although these laws are

⁶ Ponte, L.M., Cavenagh, T.D. (2005). *CyberJustice: Online dispute resolution (ODR) for E-commerce*. Upper Saddle River, New Jersey: Pearson/Prentice Hall, 26

⁷ *Ibid.*, 27.

⁸ In the text ‘Getting to Yes: negotiating an agreement without giving in’ by Fisher, R., Ury, W., & Patton, B. denoted conflict should not be viewed as a problematic process but rather a way to maintain relations or not damaging a relationship. This concept falls within the meaning of ODR proceedings through alternative dispute resolution methods. Whereas litigation is often viewed as a zero-sum game procedure which suggests the best debaters wins, ODR focuses on resolving and maintaining such relations. The author views this as a more comprehensible way to resolve consumer to business disputes once conducted efficiently.

⁹ *Ibid.*, 7.

¹⁰ Coltri, L. S. (2004). *Conflict Diagnosis and Alternative Dispute Resolution*. (1st ed.) Upper Saddle River, New Jersey: Pearson Prentice Hall pg 498-509

¹¹ Cortes. P (2011) . *Online Dispute Resolution for Consumers in the EU*. (1st ed.) Madison Avenue, New York: Taylor & Francis Group pg 54

¹² Commission Report (2019) *supra nota* 5, 1

¹³ Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), OJ L 165, 18.6.2013, pg. 63

¹⁴ Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR), OJ L 165, 18.6.2013, pg. 1.

transposed into the national laws of the Member States, the adoption¹⁵ and awareness of ADR and the ODR platform benefits are not yet fully realised in some Member States.¹⁶ In the report as mentioned earlier on the application of Directive 2013/11 and Regulation 524/2013 on consumer disputes, it was discovered that 80% of disputes submitted to the ODR platform case were closed immediately after 30 days because the trader failed to respond on the platform to the notification of the consumer dispute.¹⁷ Also, it was reported that in only 2% of cases showed success where the parties were able to agree on an ADR entity and thus to allow the platform to initiate the next step, which is to transmit the dispute to the designated forum an ADR entity.¹⁸ The statistic leads to questioning the efficacy of the systems and motivates this research. Thus, the research question of this thesis is, ‘What are the deterrents, if any, that causes the shortcomings in the effective adoption of Online Dispute Resolution to resolve consumer to business disputes via the European pan platform? The thesis aims to deliver the following: to explore the adoption of ADR and ODR methodologies in the EU to identify the advancement and shortcomings that currently exist more precisely, in Estonia and the United Kingdom. Additionally, the paper also indicates the future directions that are expected to expand from the platform of ODR, the focus to which the text alludes to can be glimpsed through the way of Artificial Intelligence (AI). The document also proposes principled training models of negotiators that can be applied in AI to advance the ADR and ODR process.

Although there is an evident relationship and procedural aspect between ADR and ODR, the research is based on the adoption and evolution of the pan European ODR platform to resolve disputes within the EU with particular focus to Estonia and the United Kingdom. It is pertinent to research this area of law as resolving consumer disputes outside of court through ODR mechanisms allows more confidence in the due process and the administration of justice to the parties involved. Also, enhancing customer service and productivity will enable the maintenance of economic development of national jurisdictions and, to a more significant extent, the Member States. Also, the text considers Future events that will be considered, given the focus on Artificial Intelligence (AI) that the EU has recently adopted. Artificial Intelligence is a priority field of study

¹⁵ The author defines adoption as the concept of embracing ideas and practises of ADR methodologies that will institutionalize a culture of mediation that will promote effective means of settling small claim disputes traditional litigation has proven insufficient to offer.

¹⁶ Solarte-Vasquez, M.C., (2014). The Institutionalisation process of Alternative Dispute Resolution mechanisms in the EU; The Estonian legal developments experience. *L'Europe Unie* , pg 97

¹⁷ Commission Report (2019) *supra nota* 5, 14

¹⁸ *Ibid.*, 14

and much needed regulatory development that concerns all disciplines where the law, society, information, and clearly the ones converging in technology and dispute resolution technologies.

The thesis relies on a theoretical framework that encompasses two theories, to substantiate the research conducted and justify why the research problem which structures the text exists. On the one hand, Rawls' theory on procedural justice refers to the fairness of a procedure by which a decision is determined is considered as a theoretical basis.¹⁹ The theory asserts in processes of dispute resolution; participants are more satisfied with the outcome because of the ability to have a voice in the proceedings, which is constituted as a form of fairness.²⁰ Thus, if results arrived between parties is considered as unfavourable to one party, satisfaction remains prevalent to that party due to the fairness of the procedure.²¹ On the other hand, the theory of proportionality, which was first established by in the codification of Prussian Law Article 10(2) of the Allgemeines Landrecht of 1794 and later adopted by other European courts is also considered.²² According to Paul Craig *et al.* the meaning of this is, “an action shall not go beyond what is necessary to achieve the desired end; whether it was necessary to achieve the desired end; and whether the measure imposed a burden on the individual that was excessive in relation to the objective sought to be achieved.”²³ Thus, the author will not suggest the traditional court system is unable to administer justice as it has been executing its duties, as seen in cases of public morality.²⁴ Instead, the text emphasises how ADR and ODR provides a better design to disputes that arise online and fill an adequate gap that judicial proceedings can not offer, which is more proportional.

The research understudy will apply the qualitative hermeneutic methodology. The hermeneutics methodology is suitable for this research as it involves interpreting texts to understand human cultural and historical life.²⁵ In order to discover the aims of the study, the paper will apply two precise research methods. The interpretive approach which examines “how people engage in processes of constructing and reconstructing meanings through daily interactions.”²⁶ Therefore, in

¹⁹ Rawls, J. (1999) *A Theory of Justice (Revised Edition)*. Cambridge, Massachusetts: Harvard University Press 3-7

²⁰ Vermunt, R., Törnblom, K. (1996) Introduction: Distributive and procedural justice. *Social Justice Research* 9. pg 305–310

²¹ *Ibid.*, 305-310

²² Joined Cases C-65/09 and C-78/09 *Gebr Weber GmbH v Jürgen Wittmer and Ingrid Putz v Medianess Electronics GmbH*, Judgment of the Court of Justice (First Chamber) of 16 June 2011.

²³ Craig, P., De Burca, G. (2015). *EU Law Text, Cases, and Materials*. (6th ed.) New York: Oxford University Press. pg 551

²⁴ Solarte-Vasquez, M.C., (2014), *supra nota* , 16.

²⁵ Leavy, P. (2014). *The Oxford Handbook of Qualitative Research*. (eds.) New York: Oxford University Press pg 20-21
²⁶ Craig, P., De Burca, G. (2015). *EU Law Text, Cases, and Materials*. (6th ed.) New York: Oxford University Press. pg 162

²⁶ Leavy, P. (2017). *Research Design: Quantitative, Qualitative, Mixed Methods, Arts-Based, and Community-based Participatory Research Approaches*. pg 129

pursuant of the thesis, the author will explore the literal interpretation of legislation by the EU to discover the meaning that was intended for the Member's States to adopt. Through this interpretative method, the author will consider the social, legal, political, and economic variations that possibly have construed from the basis of the legislation in the Member States. Secondly, the comparative-legal method is adopted. The study of comparative law elucidates the differences between the legal cultures in various jurisdictions and helps to understand the different techniques used to achieve a common goal.²⁷ The feature of this method examines legal materials, legal history, sociology of law, and legal philosophy in an objective manner.²⁸ Therefore, to understand the predilections currently in use, this involves analysing legal cases, legislation, academic writings such as scientific books and scientific articles to compare the Member States under study. The thesis incorporates the praesumptio similitudinis principle²⁹, which considers while revealing commonality and togetherness in the compared jurisdictions, it will also unveil its differences. The author proposes that consumers in the EU, namely in Estonia and the United Kingdom, have similar interests to have access to justice. As a result, the methodological approach utilised is the 'functional comparative method.' This method suggests focusing on common legal problems and legal solutions in the compared legal systems.³⁰ This method encapsulates the aim of the research by enabling the author to observe social, cultural practices amongst various jurisdictions, which will determine the shortcomings, if any, that exist.

Consequently, the analysis gathered from the primary and secondary sources will be utilised to compare against the country of study to explore areas of recommendations by which the thesis is guided. The paper is divided into three chapters to systemically navigate the reader through the pages with insight on the topic. The first chapter of the thesis is devoted to the historical background of ADR and ODR to appreciate its existence and development subsequently. The section also aims to observe the relationship between the two mechanisms and the legislations that directs both. Moreover, examining the theory of conflict and how the legislation aims to resolve and maintain relations. It is essential to outline this scope in this chapter and provide a blueprint for the remaining chapters that the thesis basis its research.

Consequently, section two examines the adoption challenges of Alternative Dispute Resolution and evaluates the results and process of Online Dispute Resolution that causes shortcomings in its

²⁷ Bussani, M., Mattei, U. (2012). *The Cambridge Companion to Comparative Law*. (eds.) New York: Cambridge University Press. pg 20

²⁸ *Ibid.*, 21

²⁹ *Ibid.*, 134

³⁰ Van Hoecke, M. (2015). Methodology of Comparative Legal Research. *Law and Method*. pg 8

'Accessed at [https://www.researchgate.net/publication/291373684 Methodology of Comparative Legal Research](https://www.researchgate.net/publication/291373684_Methodology_of_Comparative_Legal_Research) December 20th, 2019'

effectiveness. The final chapter aims to provide propositions to advance the ADR culture and shortcomings of the current state of affairs in the EU. Furthermore, the chapter presents limitations, recommendations, remarks on the development, and its adoption in the EU. A brief explanation is presented on the Future of ODR and the continuous changes that are conceivably destined to occur through means of Artificial Intelligence, which is the exclusion of human intervention and integration of automation. Additionally, it reviews the aims of UNCITRAL on the working paper III on an international standard of consumer legislation, which is ideal for the discussion of this thesis as it proposes development and efficiency towards the adoption of ODR.

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1. The Legal Framework and Landscape of ADR Methodologies

1.1. Conflict Resolution

Alternative Dispute Resolution seeks to focus on the best and suitable way for people to deal with their differences beyond a court procedure.³¹ Before unfolding the way, ADR preserves relationships by helping parties collaborate as a substitute of an adjudicative procedure, that promotes a competitive environment, an examination of the theory conflict is required.³² The meaning of the word conflict is obtained from the two Latin words *con* (together) and *fligere* (to strike).³³ Frequently, conflict represents “ a sharp disagreement, a negative collision of ideas, values, and interests.”³⁴ On the contrary, conflict, if managed properly, can lead to constructive change, preservation of relations, and innovation, if mismanaged can lead to destructive consequences, threatened relationships, systems, and institutions.³⁵ Therefore, it is crucial for societies that aim to maintain the rule of law within society to develop processes and institutions for the resolution of conflict.³⁶ Such processes generally revolve around negotiation, mediation, and arbitration.³⁷ However, for the objective of this paper, the main methods that will be discussed are mediation and negotiation because, in a restrictive way, mediation could indicate to any assisted negotiation.³⁸ The ideal method that the text refers to is the method of principled negotiation developed at the Harvard Negotiation Project. Principled negotiation fosters a process

³¹ Fiadjoe, A. (2004). *Alternative Dispute Resolution: a developing world perspective*. (1st ed.) London: Cavendish Publishing Limited pg 8

³² *Ibid.*, 8. See also, Coltri, L. S. (2004). *Conflict Diagnosis and Alternative Dispute Resolution*. (1st ed.) Upper Saddle River, New Jersey: Pearson Prentice Hall. pg 54

³³ Fiadjoe, A. (2004), *supra nota*, 31, 8

³⁴ *Ibid.*,8.

³⁵ *Ibid.*,9. See also Brown. J, H. (1999). *ADR Principles and Practise*. (2nd ed.) London: Sweet and Maxwell Limited. pg 1

³⁶ *Ibid.*, 10-12.

³⁷ *Ibid.*, 12.

³⁸ Cortes (2011) , *supra nota* 11, 66. See also, Solarte-Vasquez (2014), *supra nota* 16, 95.

where the parties that are involved in a dispute resolution process resolves the conflict, not in a bargaining format where the parties are focused on a positional perspective. First, an integrative negotiation as opposed to a distributive method.³⁹ The EU has recognised and incorporated ADR methodologies into the legal framework of its Member States by implementing the mediation directive⁴⁰, which promotes the use of resolving conflict⁴¹ in a voluntary approach. Traditional mediation is one of the oldest forms of alternative dispute resolution that has been utilised worldwide.⁴² Traditional mediation is a voluntary process that allows conflicting parties to a dispute to resolve the disagreement between each other by the support of a neutral third party, the mediator.⁴³ Mediation also offers various benefits to the litigants involved as it represents an alternative to the competitive ‘win-lose’ judicial process.⁴⁴ However, in the digital realm in which this text will also allude to, online mediation reflects offline mediation in its approach by strategies, styles, and services and standards drafted for offline mediation.⁴⁵ Through online mediation, the role of the mediator remains unchanged, and the procedural stages remain untouched, that is, the initial statement of the mediator describing the process, parties opening statements, and assistance by the mediator through active discussion.⁴⁶ Internet communication increases the mechanism of mediation since, within the Internet, there are no geographical restrictions that halts the process from occurring.⁴⁷ Moreover, the mediation processes prove to be more flexible and user-friendly that urges the parties to resolve disputes autonomously without resorting to lawyers; autonomy falls within the culture of the Internet that encapsulates the standard of mediation.⁴⁸ The Directive on mediation 2008/52/EC is solely concerned with civil and commercial cases.⁴⁹ Article 1 of the

³⁹ Integrative negotiation often involves “a more principled approach, even though the ultimate aim may also be to achieve the best outcome for each party.” On the other hand, distributive negotiation is where the parties involved view the process as “limited resources for distribution and the more one party receives, the less there will be for another.” Referenced in Brown, J.H. (1999). *ADR Principles and Practise*. (2nd ed.) London: Sweet and Maxwell Limited. pg 104

⁴⁰ Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters. OJ L 136, 24.5.2008, pg. 3–8

⁴¹ Conflict exists based on the perception of an individual whether internal or interpersonal; whereas a dispute is a conflict of which both parties are aware of the dissension amongst them. Referenced in Brown, J.H. (1999). *ADR Principles and Practise*. (2nd ed.) London: Sweet and Maxwell Limited. pg 7

⁴² Wall, J.A, Stark, J.B, Jr., Standifer, R. L. (2001). Mediation A Current Review and Theory Development. (Vol. 45), No. 3. *Journal of Conflict Resolution* pg370-391

⁴³ Lavi, D. (2016). Three is not a Crowd: Online Mediation – Arbitration in business to Consumer Internet Disputes *32 Penn Law: Legal Scholarship Repository*. pg 882

⁴⁴ Cortes (2011), *supra nota* 11, 144

⁴⁵ Kaufmann-Kohler, G., Schultz, T. (2004). *Online Dispute Resolution: Challenges for Contemporary Justice*. (1st ed.) The Hague, Netherlands : Kluwer Law International pg22

⁴⁶ Cortes (2011.) *supra nota* 11, 146

⁴⁷ *Ibid.*,150

⁴⁸ *Ibid.*,150

⁴⁹ “In civil and commercial disputes arriving at a settlement of the presenting issues is the primary goal.” Referenced in Brown, J.H. (1999). *ADR Principles and Practise*. (2nd ed.) London: Sweet and Maxwell Limited. pg 10-11

Directive promotes the use of mediation through soft law, which allows self-regulation, a “balanced relationship between mediation and judicial proceedings” but in some countries, mediation is still used in less than 1% of the cases.”⁵⁰ Although the absence of mandatory provisions should lead to an increase in adoption, the lack of its adoption is still being witnessed.⁵¹ Assisted negotiation is aimed at improving the parties' communication in disputes with the assistance of a third party or IT software.⁵² Automated negotiation, however, is conducted exclusively by an ODR platform without the mediation of a third party to resolve disputes by a blind bidding process.⁵³ A party to the negotiation invites the other party by making secret offers, which is disclosed when both offers match a standard to achieve a financial settlement.⁵⁴ Traditional arbitration as another form of dispute resolution is where parties involved present their arguments to a neutral arbitrator in an informal setting that cannot be unilaterally withdrawn once proceedings have begun.⁵⁵ The features of this process are based on confidentiality; the arbitrators are experts in consumer issues, awards are legally enforceable, restraints are placed on appeals, awards given do not create precedents for future cases, the process provides a quicker response to access to justice and cost-efficient than a court process.⁵⁶ However, e-arbitration is an electronic version of offline arbitration inclusive of an online arbitral award.⁵⁷ With online arbitration, the parties, arbitrators, and witnesses are expected to utilise the use of electronic devices in the form of software and hardware services.⁵⁸ The enforceable and binding decision and award feature of arbitration is governed by most countries who have adopted the Model Arbitration Law by UNCITRAL 1985 and the New York Convention 1958 in the Recognition and Enforcement of Foreign Arbitral Awards.⁵⁹

In conclusion, the European Commission has endeavoured to provide such protection through various legislation before the establishment of the ADR Directive and Regulation on ODR, which will be discussed in the next chapter. The legislative framework can be witnessed in the creation of the Mediation directive, as stated above, structured to promote access to dispute resolution.

⁵⁰ Joamets,K., Solarte Vásquez, M.C., (2019). Current challenges of family mediation in Estonia. *Journal of Contemporary European Studies*, 27(1), pg 109-120.

⁵¹ *Ibid*

⁵² Cortes (2011) *supra nota* 10, 66

⁵³ *Ibid.*, 64

⁵⁴ *Ibid.*,64

⁵⁵ van den Heuvel, E. (1997). *Online Dispute Resolution as a solution to Cross-Border E-Disputes*.s.n. 5

⁵⁶Cortes, P. (2017) *Supra Nota* 1, 27

⁵⁷ Betancourt, J.C, Zlatanska, E. (2014). *Online Dispute Resolution (ODR): What is it? and Is it the way Forward? ADR, Arbitration, and mediation: a collection of essays: an overview*: London pg 309-334

⁵⁸*Ibid.*,309-334

⁵⁹ Cortes, P. (2017), *supra nota* 1, 28

Also, the e-commerce directive⁶⁰ that mirrors the now ODR Regulation, where the purpose is to remove obstacles in cross border services, resolving disputes to provide legal certainty. Please see the table below on a brief variation of consumer protection in the EU. European consumer protection is solely based upon enforcement through soft law techniques to public bodies.⁶¹ The principle of subsidiarity states the EU should not regulate ‘unnecessarily’ instead leave room for innovation to foster governance by the Member States in the implementation of the law as minimal standards by the Commission will have as much scope of action as possible.⁶² Therefore, some European countries have effectively diffused soft laws to innovative ideas, which are illustrated in private bodies. A creative example of private enforcement is observed in the abmahnung procedure in Germany. This procedure allows private individuals such as lawyers to monitor traders' compliance with specific consumer laws, such as unfair practice and can demand compensation if there is a breach.⁶³

Table 1. Legal Landscape of Consumer Protection in the EU

Consumer Protection Legal Framework	Public Regulatory Compliance
Directive on Unfair Terms in Consumer Contracts	Consumer Protection Cooperation (CPC)
Directive on Misleading Advertising	European Consumer Centre (ECC-NET)
Directive on Unfair Terms in Consumer Contracts	Financial Dispute Resolution Network (FIN-NET)

Source: Cortes, P. (2017). *The Law of Consumer Redress in an Evolving Digital Market: Upgrading from Alternative to Online Dispute Resolution*.

The legislation, as mentioned in the table above, seeks to enhance better compliance for consumers as the main goal is to obtain regulatory compliance. However, the framework of ADR and ODR aims to provide individual redress where disputes emerge.⁶⁴ The author suggests that due to the numerous compliance legislation in place, and the two mention mechanisms to resolve individual

⁶⁰ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, electronic commerce, in the Internal Market (OJ L 178/1, 1707.2000)

⁶¹ Craig, P., De Burca, G. (2015). *EU Law Text, Cases and Materials*. (6th ed.) New York: Oxford University Press. 162-176

⁶² *Ibid*, 172-173

⁶³ Cortes, P. (2017), *supra nota* 1, 19

⁶⁴ *Ibid.*, 38

consumer complaints, there is not a significant need for more regulations but rather self-regulation.⁶⁵ The issue is not solely rested upon the Commission shoulders as exemplified in the subsidiarity principle but rather the diffusion of soft laws to effectively transpose ADR and ODR culture for the Member States to realise the full potential these mechanisms have to offer. ⁶⁶

1.1.1. Legal Framework of ADR and ODR

The EU's dedication to consumer protection has always been eminent throughout the years. Therefore, it is with no surprise the enactment of ADR and ODR to provide a faster, economic and more informal process to resolve disputes. According to a memo by the European Commission in the year 2013, it was reported “in 2010, one in five consumers in the EU encountered problems when buying goods or services [...] leading to financial losses estimate at 0.4% of the EU’s GDP.”⁶⁷ Moreover, the consumers who attempted to receive justice was only a small amount amongst the many complaints. The necessity to create these mechanisms was further realised by acknowledging, if consumers can rely on legitimate ADR schemes to hear disputes, a savings of around 22.5 billion euros a year will be made, corresponding to 0.19% of the EU’s GDP.

Towards understanding the Regulation on ODR, it is significant to briefly discuss the scope and application of the ADR directive as both are interconnected. The scope of the ADR directive revolves around domestic and cross border disputes between a trader and a consumer in the EU. ⁶⁸ The Directive allows for an intervention of an ADR entity to facilitate hearing disputes amongst both parties to arrive at an amicable solution.⁶⁹ Consequently, the Directive applies only to disputes brought by a consumer against a trader. The limitation can be viewed as more beneficial towards the consumer as traders are often the stronger party in such a case. To execute the mandate of the Directive Member States must ensure the following precepts in accordance to article 5 are met:1) an updated website must be maintained to enable consumers to submit a complaint and supporting

⁶⁵ Craig Paul et al defines this as the possibility for economic operators, the social partners, non-governmental organizations or associations to adopt amongst themselves and for themselves common guidelines at the European level.

⁶⁶ See contrasting view on this concept by author Weatherill, S. (2014) *EU Consumer Law and Policy*. (2nd ed.) Massachusetts, USA: Edwards Elgar Publishing Limited. 12. The proposed view is that the principle of subsidiarity is not consumer based and is solely created for market and economic integration.

⁶⁷ A step forward for EU consumers: Questions & answers on Alternative Dispute Resolution and Online Dispute Resolution. (2013). Brussels. pg 3

Accessed at https://ec.europa.eu/commission/presscorner/detail/en/MEMO_13_193 February 1st, 2020.

⁶⁸ Directive 2013/11, *supra nota*, 13 Art 2.

⁶⁹ *Ibid*

documents online, 2) provides the parties with information on ADR entities as per their request, 3) allows the consumer to file a claim offline where applicable, 4) enable the discussion of information between the parties through electronic means or via post if necessary, 5) accept both domestic and cross border disputes, and 6) ensure while carrying out acts within this Directive, personal data should adhere to the directive 95/46 EC on data protection. Throughout, articles 6-11, the Directive emphasises on providing high-quality standards through expertise, independence, impartiality, transparency, effectiveness, fairness, liberty, and legality. Promotion of cooperation amongst traders, article 13 denotes a trader shall inform the consumer about ADR entities to which the traders are covered by to resolve disputes. Article 18 emphasises that a Member State should designate a competent authority to oversee ADR schemes to carry out its functions effectively. Articles 19 and 20 provide information that ADR schemes should provide to become competent, ADR entities. Additionally, maintaining compliance, section 21 lay down rules on penalties that should be proportionate if the Member States causes infringements.

The Virtual Magistrate Project (VMP) was the birth of the Online Dispute Resolution platform that was founded by a working group known as the National Center for Automated Information Research and the Cyberspace Law Institute in 1995.⁷⁰ The VMP was created to utilise an arbitration panel to resolve disputes brought against Internet Service Providers or against other users who had committed offences of sharing harmful or illegal messages or postings online.⁷¹ An individual who has been affected in one of the mentioned areas, and wish to make a complaint would email the VMP, describe the misconduct and the parties involved in the act.⁷² Subsequently, this attempt of the ODR mechanism, other mechanisms were inspired to create similar extra-judicial proceedings, Online Ombudsman Office (1996), this mediation offered services for all internet disputes and Cyber Tribunal (1996) handled cases by applying both mediation and arbitration.⁷³ According to Pablo Cortes, the development of ODR mechanisms can be divided into four phases:⁷⁴

⁷⁰ Gellman, R. (1996) . A brief History of the Virtual Magistrate Project: The Early Months, NCAIR Dispute Resolution Conference. 'Accessed at <http://www.umass.edu/dispute/ncair/gellman.htm>

⁷¹ Solovay, N., Reed, C., K. (2003) *The Internet and Dispute Resolution Untangling the Web*. Law Journal Press. (1st ed): New York: Law Journal Press pg 5-35

⁷² Hang, L.Q. (2001). Online Dispute Resolution Systems: The Future of Cyberspace Law. 41 Revision.837 *Santa Clara Law Review*.

'Accessed at <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1337&context=lawreview>' . pg 845-848

⁷³ *Ibid*

⁷⁴ *Ibid*

1. Hobbyist phase: this period was from the creation of the Internet until 1995 when ODR did not exist. Disputes that occurred online were handled in an informal setting such as ADR; however, ideas on how this can be handled more efficiently were considered.
2. Experimental phase: this phase ranged from 1995 to 1998, as a result of the growth of the Internet, more disputes started to appear, and initiatives by non-profit organisations to resolve this issue emerged. The phase can be exemplified with the Virtual Magistrate project, Online Ombuds Office.
3. Entrepreneurial phase: from 1998 to 2002, when the ODR industry started to develop and commercial businesses had successful projects, for example, SquareTrade and Cybersettle.
4. Institutional phase: this phase generated from 2002 to present, due to the adoption of ODR by public authorities. The institutionalisation of ODR into public bodies can be seen in the process of the European Commission to create the Directive on consumer disputes 2013/11 and Regulation 524/2013 on online disputes.

The intent of creating an Online Dispute Resolution was not to displace, compete, or disrupt an existing legal regime or ADR processes.⁷⁵ The intention is to fill the vacuum surrounding disputes online where there is an absence by the law authority and to provide “new and better and ways to resolve disputes online.”⁷⁶ The Commission launched in February 2016 an online dispute resolution platform (website) that allows consumers and traders to select an appropriate ADR body to resolve e-commerce conflict.⁷⁷ The platform is made accessible through ‘Your Europe Portal’ that provides access to the pan-European platform. The platform’s processes are conducted in four main steps: 1) the consumer fills in an online complaint form and submits it through the ODR website; 2) the complaint is then sent to the trader in question who proposes an ADR entity to resolve the complaint ; 3) once the trader and consumer mutually agree on an entity, the ODR platform automatically transfers the claim to that entity; and 4) the accepted body will handle the case online within a timeframe of 90 days. The figure of the process of the ODR platform is indicated below. It is essential to note that within the framework of Article 7 of the Regulation of ODR, each Member State shall designate an ODR contact point with at least two designated ODR advisors. The ODR advisors act a bridge between consumers and the competent ADR entity if

⁷⁵ Katsh, E., Rabinovich-Einy, O. (2017). *Digital Justice: Technology and the Internet of Disputes*. (1st ed.) New York: Oxford University Press 33

⁷⁶ *Ibid.*,33

⁷⁷ Page, J, Bonnyman, L. (2016) ADR and ODR- achieving better dispute resolution for consumers in the EU. *ERA Forum* pg145-160

questions arise or providing information on procedural rules of solving disputes. However, the author considers this process to be counterproductive as it adds another layer of bureaucracy intending to resolve disputes. The scope of this process is highlighted in the next chapter, and a proposed mechanism is given that ought to reflect changes of the ODR efficacy.

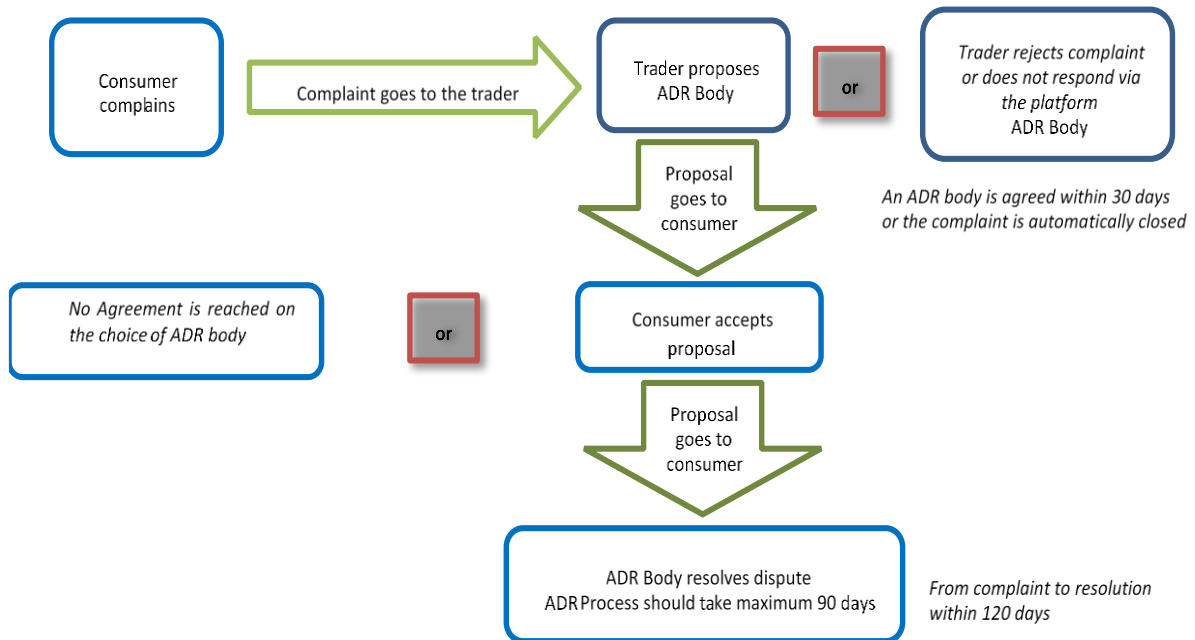


Figure 1. The current process of the European Online Dispute Resolution Platform

Source: European Commission Report on the Functioning of the European ODR Platform Statistics 2nd year

The incorporation of ODR with ADR offers the most suitable approach to resolve e-commerce disputes and regain the confidence and trust of affected consumers. However, the EU has deemed that the system has not yet seen the full potential being transposed in some Member States, which will be discussed in chapter two.

1.1.2. Overview of the Relationship between ADR and ODR

To ascertain the relationship between Alternative Dispute and Online Dispute Resolution is to understand the definition of Online Dispute Resolution. The description of ODR can fall into two main categories: *sui generis* form of dispute resolution and online alternative dispute resolution

(online ADR).⁷⁸ The meaning of *sui generis* focuses on the tools offered by the Internet and computers such as automation; this definition ignores the origins of ADR such as mediation and arbitration as an expansion to ODR and reckons this mechanism can stand alone with no human interaction through mediation as an example.⁷⁹ On the contrary, online alternative dispute resolution refers to the legal instruments that have been developed in Alternative Dispute Resolution; online mechanisms must be designed in such a way that it meets the requirements of offline ADR.⁸⁰ The core of this thesis will be based on the definition of online alternative dispute resolution because to attain procedural justice and to maintain the due process in such proceedings; there should be guidelines to adhere to, which will remove any mistrust. Moreover, as noted in the book 'Mobile Technologies for Conflict Management, "[t]echnology does not transform conflict per se: humans do, and the question is which, when, and how technologies may facilitate their quest." Thus, while the author maintains the framework of the latter definition, a 'process pluralist'⁸¹ approach is also considered as the thesis will also explore future directions of Online Dispute Resolution. The intent is exemplified in the regulation 524/13 article 14, whereby it is mandated a link must be provided on the ODR platform to an ADR entity to resolve disputes.⁸² Therefore, a working definition for this discussion will be extracted from the UNCITRAL Working Group III, who defines ODR as an "online dispute resolution, which is a mechanism for resolving disputes [facilitated] through the use of electronic communications and other information and communication technology."⁸³

The use of technology by way of any electronic communication can be construed as ODR; the key is, the process should be mediated to be considered as such.⁸⁴ Colin Rule, director of Online Dispute Resolution of eBay, Paypal, and founder of Modria.com, states, 'to separate ODR and

⁷⁸ Kaufmann-Kohler, G., Schultz, T. (2004), *supra nota* 45, 6

⁷⁹ Leigh, D., Fowle, F. (2014). Online Dispute Resolution (ODR) within Developing Nations: A Qualitative Evaluation of Transfer and Impact. *Laws* 3, 106-116
Accessed; https://www.researchgate.net/publication/269401391_Models_of_Alternative_Dispute_Resolution_ODR
November 3rd, 2019

⁸⁰ Solarte-Vasquez, M.C., (2014), *supra nota* 16

⁸¹ Menkel- Meadow, C. (2016). *Dispute processing and conflict resolution: theory, practice, and policy*. (2nd ed.) New York: Routledge 12-30

⁸² Regulation (EU) No 524/2013 of the European Parliament and 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)

⁸³ UNCITRAL Technical Notes on Online Dispute Resolution. (2017) United Nations Commission on International Trade Law.

Accessed at http://www.uncitral.org/pdf/english/texts/odr/V1700382_English_Technical_Notes_on_ODR.pdf

⁸⁴ Solarte-Vasquez, M.C (2014). *Regulating eTechnologies in the European Union*. New York: Springer Cham pg 272

ADR is to perpetuate a false dichotomy because ADR and ODR is fundamentally the same thing.⁸⁵ Based on the principles of ODR impartiality, transparency, effectiveness, fairness, and access to justice are parallel to the laws of ADR, which proves further this relationship. The main distinction between these two mechanisms is the incorporation of ICT services in ODR, which can be viewed in the table below. Additionally, the scope of both differs in the execution process as traditional ADR is done in a physical space, also known as synchronous. At the same time, ODR is carried out solely online, known as asynchronous.⁸⁶

Table 2. ADR and ODR tools and techniques, based on different modes of communication

	ADR Face-to-face communication (F2FC)	ODR Computer-mediated communication (CMC)
Synchronous communication	Negotiation/mediation session in a physical place	Instant messaging Chat Video conference Voice IP
Asynchronous communication	Shuttle mediation Caucusing	Email Posting Online caucusing

Source: Poblet, M. Casanovas, P. (2007). Emotions in ODR: International Review of Law, Computers, and Technology. Vol. 21, No. 1. England: Routledge

The author views that ODR is fundamentally associated with ADR through the principles and goals of both. Moreover, recognising the significance of ODR is to have a culture of ADR awareness and efficiency, which can transcend to the works of ODR. The author proposes the act of this should be inclusive of synchronous type communication as this is one of the primary goals of ADR

⁸⁵ Rule, C. (2016). Is ODR ADR? A response to Carrie-Menkel-Meadow. *International Journal on Online Dispute Resolution* (3) 1. 8-11. Accessed at <http://www.colinrule.com/writing/ijodr.pdf>

⁸⁶ Rule, C. (2002). *Online Dispute Resolution For Business: B2B, E-Commerce, Consumer, Employment, Insurance, and other Commercial Conflicts*. (1st ed.) United States: Jossey-Bass

methodologies that allow for efficient means to navigate and negotiate through the process effectively. The tradition of utilising ADR methods varies across the Member States of Europe as schemes are being used more in some areas than others.⁸⁷

1.2. The Importance of Online Dispute Resolution

In France during the year 1996, it was reported that the average time from the commencement of legal proceedings initiated before a court of appeal to the date a decision is enacted, was more than fifteen months.⁸⁸ The same source also reported in that year “[t]he European Court of Human Rights regularly condemns [France] under article 6.1 of the European Human Rights Convention due to long delays.”⁸⁹ Access to justice is not restricted to the European member state France, but rather other European countries share the same difficulties in this area.⁹⁰ As the issue of justice was prominent in the year 1996, for instance, the topicality of this rising was yet reflected 14 years later. A study conducted by the European Commission in 2010 found a gap in the time it takes to resolve civil, commercial, and administrative law in courts around the EU.⁹¹ The time quoted for Italy was 928 days, Portugal timeframe allocated to 925 days, and 408 days in Bulgaria, while the price range for a lawyer in the EU is between 100 euros to 300 euros per hour.⁹² The report also found, as a result of the delay and expense, consumers and traders are reluctant to seek judicial redress and would instead utilise dispute resolution methods.⁹³ Conflict arising amongst parties is inevitable and can result in productivity and creativity.⁹⁴ The purpose lies in managing conflict to ensure progress is not hindered, or worse, destroy the ability to achieve goals.⁹⁵ Therefore, exploring a new avenue such as technology to assist these impending issues is paramount. ODR,

⁸⁷ *A Study on alternative dispute resolution and cross – border complaints in Europe*. (2002). (1st ed.) Copenhagen: Nordic Council of Ministries pg18

⁸⁸ Kessedjian, C., Cahn, S. (1998). Dispute Resolution On-Line. *The International Lawyer*, 32(4), 977-990.

⁸⁹ Accessed at https://www.jstor.org/stable/40707455?read-now=1&seq=1#page_scan_tab_contents January 2nd, 2020

⁹⁰ *Ibid.*, 977

⁹¹ *Ibid.*, 977

⁹² Page, J, Bonnyman, L. (2016), *supra nota* 77, 145-160

⁹³ *Ibid.*, 146

⁹⁴ *Ibid.*, 146

⁹⁵ Rule, C. (2002) *Online Dispute Resolution for Business: B2B, e-commerce, consumer, employment, insurance, and other commercial conflicts*. San Francisco: Jossey-Bass pg 1-13

⁹⁶ *Ibid.*, 1

through the use of technology, is an indistinguishable way people around the world will employ to resolve disputes.⁹⁶ ODR, in some cases, is the only access to justice, as any other method would generate a high cost.⁹⁷ Additionally, ODR is not tied to a geographical location as it is with courts. Thus, disputants can resolve conflict while in different continents, which saves cost, time, and enhance the speed in the process.⁹⁸

2. Analysis of the ADR Methodologies

2.1. The Adoption challenges of ADR in the EU

The previous chapters recognised that Alternative Dispute Resolution, coupled with online communications, has proven to be the most suitable form for resolving consumer disputes arising from e-commerce. While the scope of consumer disputes should guarantee consumer redress via this forum, the progress of the EU has confirmed that after three and half years of the launch of the ODR platform, the ADR and ODR framework is “underused and has yet to reach its full potential.”⁹⁹ The ADR culture varies significantly in the EU, with numerous nations lingering behind with adoption, awareness, and duty to commit to self-regulation.¹⁰⁰ On account of the Mediation Directive, the execution conventions are satisfied, having directly affected structural and regulatory aspects, however substantially less effect on dispute resolution culture.¹⁰¹ A few states went further than the provisions of the Directive when passing their mediation laws that increased or developed effective institutionalisation of ADR. The development and adoption of consumer protection can be classified into varying legal traditions and cultures. The distinction amongst EU Members based on two indicators: the opportunities for group actions and the

⁹⁶ *Ibid.*, 9

⁹⁷ Kaufmann-Kohler, G., Schultz, T. (2004). *supra nota* 45, 68

⁹⁸ Kessedjian, C., & Cahn, S. (1998), *supra nota* 88, 978

⁹⁹ Ponte, L.M., Cavenagh, T.D. (2005) *supra nota* 6, pg 18

¹⁰⁰ Solarte-Vasquez (2014). *Supra Nota* 16, 5

¹⁰¹ *Ibid.*, 5

institutional approach of adopting such actions.¹⁰² The main differences found between Scandinavian and East European countries where influential public authorities characterise the former group, and the latter categorised by weak public authorities and weak consumer associations.¹⁰³ Estonia, geographically suited as an eastern European country, falls under that categorisation of insufficient quality ADR.¹⁰⁴ The table on Consumers' trust across the EU Member States, located in appendix four, represents the disparity. The fundamental problem, as mentioned earlier on the lack of efficiency reflected by the ODR platform, derives from the clarification of incorporating ADR methods into the process. The lack of clarification is arising from the slow progress of adopting an ADR culture before the implementation of supranational legislation and the interest to go beyond the minimum requirements to advance the sector. In the book, *Litigation and Dispute Resolution* co-authored by Pirkka-Marja Poldvere stated, “ although there are many alternatives to traditional litigation and court proceedings now available, civil disputes in Estonia are still mainly settled by the courts.”¹⁰⁵

The co-author further emphasises that negotiation and arbitration rarely utilised in Estonia, and one of the primary factors is due to the extended period; there was no law regulating mediation.¹⁰⁶ The regulation of mediation occurred many years after other Member States proactively encouraged a culture of mediation. The first sign of ADR regulation came into force in January 2010 with the Estonian Conciliation Act based on supranational legislation, Directive 2008/52/EC¹⁰⁷. The act intended to regulate mediation processes but captioned as ‘conciliation’ which is a separate meaning of the execution of mediation; such terminological deficiencies causes additional adoption challenges of ADR.¹⁰⁸ A lack of awareness on the meaning of mediation or how to execute the process in countries with a weak ADR culture propels the poor results reflected in the ODR platform. In the same year of enforcement of Directive 2008/52/EC, the UK went beyond the scope of the legislation. Also, the state introduced a paper for solving disputes in the country courts: Creating a simpler, quicker, and more proportionate system: A consultation on

¹⁰² Nessel, S. (2019). Consumer Policy in 28 Member States: An empirical assessment in four dimensions. *Journal of Consumer Policy*. 42 (1) pg 455-482. Referenced in Cafaggi, F., & Micklitz, H.-W. (2009). *Administrative and judicial enforcement in consumer protection: The way forward*.

¹⁰³ *Ibid*

¹⁰⁴ Tertiary education courses on ADR were not in existence in the curriculum of socialist systems in the nineties until the year 2002 where the first course on ADR was introduced for instance in the former International Concordia University, Estonia. See Solarte-Vasquez (2014). *Supra Nota* 16, 6.

¹⁰⁵ Madden, M. (2012). *Litigation and Dispute Resolution*. (1st ed.) London: Global Legal Group. pg 100

¹⁰⁶ *Ibid.*, 108

¹⁰⁷ Accessed at <https://www.riigiteataja.ee/akt/13240243> March 12th, 2020.

¹⁰⁸ Joamets, K., Solarte Vásquez, M.C., (2019). *supra nota* 50, 6

reforming civil justice.¹⁰⁹ The paper endorses automatic referrals towards mediation in small claims matters. The UK, as a common law jurisdiction has developed an influential culture of mediation where Traders' membership is compulsory in several economic sectors characterised by a maximum level of regulation and consumer disputes, namely: energy, financial services, and higher education.¹¹⁰ Furthermore, in 2009 the Financial Ombudsman service of the United Kingdom administered 160,000 cases; this indicates an influential ADR culture and a state that commits to the adoption of dispute resolution.¹¹¹ In England and Wales, in particular, have witnessed cases where courts have required mediation procedures as a more proportionate measure to resolve disputes. The encouragement of this method transpired in the case *Egan vs Motor Services (Bath) Ltd*, in this case, the Court of Appeal dealt with a plaintiff that was unsatisfied with a purchase of a new car and the defendant car dealer refused to reimburse the full price of the car.¹¹² The claimants fought via litigation and paid a disproportionate sum in legal costs. The judge presiding over the case presented the following observations:

What I have found profoundly unsatisfactory, and made my reviews clear in the course of argument, is the fact that the parties have between them spent in the region of £100,000 arguing over a claim which is worth about £6000. In the florid language of the argument, I regarded them, one or the other, if not both, of them, as 'completely cuckoo' to have engaged in such expensive litigation with so little at stake [...] This case cries out for mediation.¹¹³

Countries that did not develop an ADR culture did not gain in the least from the legislation on mediation, conciliation and the new legal framework of ADR and ODR.¹¹⁴ However, countries that were familiar with ADR methods before the EU initiatives were issued were already available and highly acknowledged. The figure depicted in appendix six will illustrate the readiness of the ODR platform by the amount of registered competent ADR authorities to handle consumer disputes. Moreover, appendix six demonstrates the growth and adoption of countries such as the UK and France that have developed further in consumer redress. In contrast, countries such as Estonia, Romania, Lithuania, Latvia, Slovenia and Slovakia were found repeatedly in the lower end of the spectrum.

¹⁰⁹ Madden, M. (2012). *Supra Nota* 105, 97

¹¹⁰ Cortes, P. (2017), *supra nota* 1, 163

¹¹¹ Solarte-Vasquez (2014). *Supra Nota* 16, 5

¹¹² Cortes, P. (2009). An Analysis of Offers to Settle in Common Law Courts: Are They Relevant in the Civil Law Context? *Electronic Journal of Comparative Law*, vol. 13.3 pg 5

¹¹³ *Ibid.*, 5.

¹¹⁴ Solarte-Vasquez, M.C (2014), *supra nota*, pg 276.

In conclusion, the concepts that appear to be detached, such as internet governance, the networked information society¹¹⁵; then the skillsets that are optimal for collaborative and alternative conflict management are closely connected in practicality to achieve consumer redress.¹¹⁶ The current regulation of the ODR platform is dependent on the expertise of mediators and the principles of ADR methodologies. Therefore, if clarification on the way dispute resolution methods should be conducted for effective redress equivalently across Member States is lacking, then the possibilities of the diverged results will reflect on the platform of ODR.

2.2. The results and process of Online Dispute Resolution in the EU

The information produced in this chapter is based upon the Commission's obligation to present data on the implementation of ADR and ODR in different Member States under Article 21 of the ODR Regulation. The introduction of technology into dispute resolution methodologies has changed the shape of the ADR landscape, the core of the disputes being handled by human interaction to the pre-resolution of software design on the one hand and the post-resolution stage of data evaluation and dispute prevention on the other hand.¹¹⁷ Katsh and Rabinovich-Einy alludes to the optimism of ODR through digitalisation, where a large number of disputes can be processed with the use of developing and refining algorithms.¹¹⁸ The scope of technology acting as the 'fourth party' that employs algorithms and exploits the intelligence of machines that removes the need for synchronous communication and the need for a mediator.¹¹⁹ However, the author views the results and mechanics of the European ODR platform has only managed to produce 'increased access' and not 'increased justice.' During the first year of implementation, 1.9 million people visited the platform, and around 24,000 complaints were submitted.¹²⁰ During the second year of

¹¹⁵ Network society is a society that basis its construct on a social restructure made up of networks powered by microelectronics-base ICTs. Solarte-Vasquez, M.C (2014). *Supra Nota*, 113, 261. Referenced in Castells, M. (2004). *Informationalism, networks, and the network society: a theoretical blueprint. The Network Society*, 3, 3–45

¹¹⁶ Solarte-Vasquez, M.C (2014). *Regulating eTechnologies in the European Union*. New York: Springer Cham.pg 251

¹¹⁷ Katsh, E, Rabinovich-Einy, O. (2017), *supra nota*, pg 47

¹¹⁸ *Ibid.*,47

¹¹⁹ *Ibid*

¹²⁰ Report from the Commission to the European Parliament and the Council on the functioning of the European Online Dispute Resolution platform established under Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes (2017).

Accessed at https://ec.europa.eu/info/sites/info/files/first_report_on_the_functioning_of_the_odr_platform.pdf December 12th,2020.

implementation, February 2017 to 2018, there was an increase of visitors on the platform, with five million people visiting the platform.¹²¹ Also, an increase per month indicated, 360,000 visitors in the second year as oppose to 160,000 in the first year.¹²² Moreover, there was an indication of 50% in complaints, as consumers submitted 36,000 complaints within this year.¹²³ The chart below on the increase of consumer e-commerce complaints via the platform will confirm the increase. Concerning geographic distribution in the first year of ODR operation, the majority of complaints were generated by consumers in Germany with approximately 6500 complaints and the UK with 6000 complaints.¹²⁴ Moreover, one-third of the complaints submitted concerned a cross border dispute. Within the second year, records showed once again that the highest complaints by consumers were from Germany and the UK followed by France, Spain, and Italy that were previously mentioned as countries with a strong ADR culture.¹²⁵ Moreover, the reply rate by traders to facilitate the ADR process has proven to be insufficient and indicates a reflection of the perception towards the use of ADR.¹²⁶ The first year of implementation of the ODR platform showed an exorbitant amount of 85% of complaints by consumers closed automatically before being solved by an ADR body.¹²⁷ A survey conducted with consumers whose cases were closed automatically, 40% of these reported cases were settled directly with the traders. Furthermore, only 1% of disputes were settled through an ADR body.¹²⁸ “A dispute resolution process that fails 60 per cent of the time is far worse than a tool of communication that is beneficial to the parties in only 40 per cent of the cases.”¹²⁹ It is essential to note that this research of settlement does not constitute the definition of an ADR process as no records can stipulate that the due process was adhered to and proof the consumer was given justice. The statistics of the second report on ODR reflected the same concern on disputes being handled¹³⁰. Once again, only 2% of complaints submitted reached an ADR body, and 81% of cases were automatically closed after 30 days.¹³¹ Additionally, data also indicates that 13% of traders stated they prefer to settle the cases bilaterally without the intervention of an ADR body.¹³²

¹²¹ Functioning of the European ODR Platform Statistics 2nd year (2018).

‘Accessed at https://ec.europa.eu/info/sites/info/files/2nd_report_on_the_functioning_of_the_odr_platform_3.pdf December, 12th 2020’

¹²² *Ibid.*, 1-2

¹²³ *Ibid.*,1-2

¹²⁴ Commission Report (2019) *supra nota* 5

¹²⁵ Commission Report (2019) *supra nota* 5

¹²⁶ Commission Report (2019) *supra nota* 5

¹²⁷ Commission Report (2017) *supra nota* 120

¹²⁸ Commission Report (2019) *supra nota* 5

¹²⁹ Kaufmann-Kohler, G., Schultz, T. (2004) *supra nota* 45, 20

¹³⁰ Commission Report (2019) *supra nota* 5

¹³¹ Commission Report (2019) *supra nota* 5

¹³² Commission Report (2019) *supra nota* 5

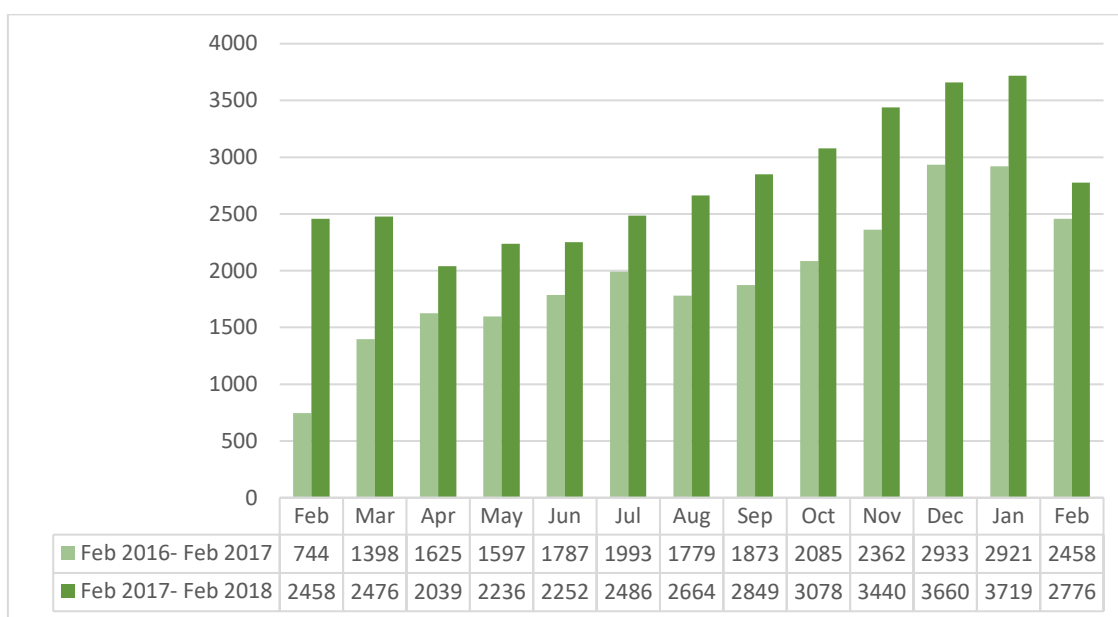


Figure 2. Comparison of Consumer Complaints between the year 2016 and 2018

Source: European Commission Report on the Functioning of the European ODR Platform Statistics 2nd year

The author suggests for attributes of synchronous type communication to be incorporated to the complaint and dispute handling process by the use of the mediator. The current procedure of the platform is reliant on the nature of asynchronous communication that should allow for a timeframe for disputants to manage emotions before the ADR authority is chosen to solve the dispute. On the contrary, mediators that involves online communication (online chat) had a higher successful win-win results opposed to delayed communication. Consequently, online negotiation simulation that integrated 'small talk' were four times likely to settle than cases where no 'small talk' was utilised.¹³³ In principle, the author suggests that a mediator should engage with the consumer and trader once the conflict is made public via individual and, or cooperate caucusing. The rearranged step in the ODR platform allows for procedural principles to be engaged as the parties will have a voice to explain the disputes as opposed to the current 30 days wait of asynchronous communication after a complaint is made which leads to limited redress as stated above. The increase of consumer complaints yearly that is observed is; as a result of the ODR platform through the use of ADR is the best form and the only method, in some cases to resolve a dispute that is low

¹³³ Poblet, M. Casanovas, P. (2007). Emotions in ODR: International Review of Law, Computers, and Technology. Vol. 21, No. 1. England: Routledge pg50-51

in value and would be disproportionate to settle via litigation. Synchronous communication requires instantaneous responses during a dispute resolution process which is usually achieved face to face; however, the same effect can be produced online through digitalisation with the use of instant messaging through chat boxes, forums and video conferencing that facilitate communication. The proposed process is illustrated below that should incorporate a better form of redress.

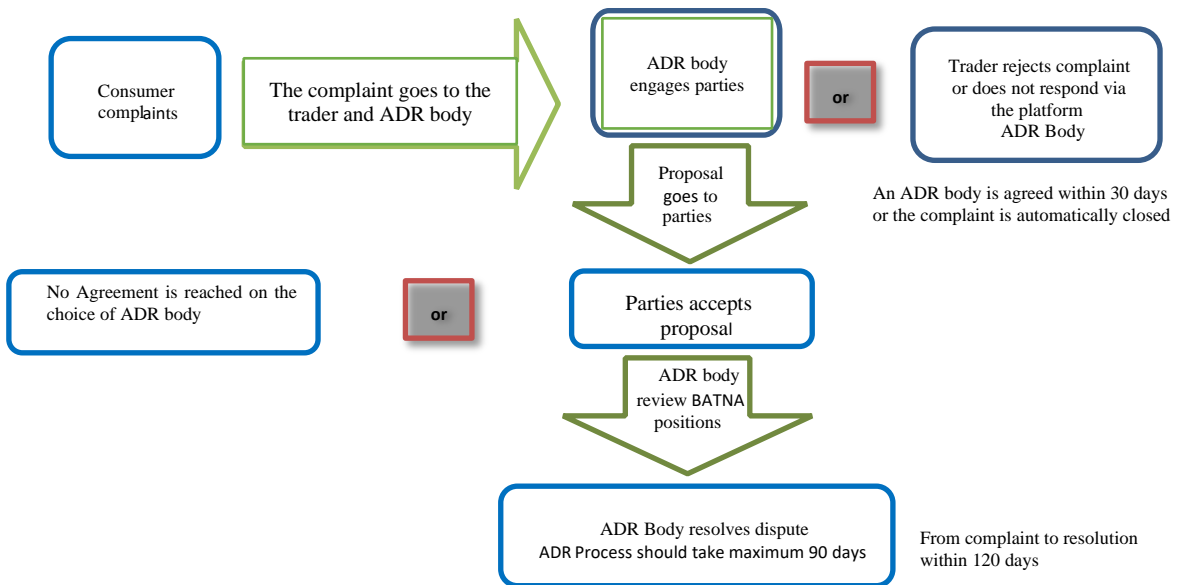


Fig 3. The proposed process of the European Online Dispute Resolution Platform

Source: European Commission Report on the Functioning of the European ODR Platform Statistics 2nd year and Author's Contribution

The complaints of high magnitude were made in countries that have a strong ADR culture. However, the current bureaucratic system further propels a shortcoming for individuals to receive access to justice, particularly in countries of low ADR culture. It goes beyond providing a contact point between the consumer but first utilising tools readily available in technology to increase effectiveness in redress. ODR schemes often fall into first-generation or second-generation where the former incorporates the tools of technology, and the latter merges Artificial Intelligence into the landscape; unfortunately, the current scheme in the EU has not maximised the capacity of these forms.

In conclusion, coupling of ADR methodologies into the ODR platform innovatively and proactively will enhance the procedural principles of the process and ensures misinterpretation,

lack of redress and traders' participation will become more symbiotic and yield better results. The tools of technology can combat the inconsistencies of handling disputes that arise, but building on human capacity is paramount in order to reform the landscape of ODR effectively.

3. Propositions to advance the effective adoption of ADR and ODR

The core of the dispute resolution process relies on the mediated technique that is implored to allow disputant to arrive at a settlement agreement. The effectiveness of the process calls for a developed substantive method that fosters efficient communication that will facilitate and advise the parties to exchange information, improve their perception of the dispute resolution, recognise their Best Alternative to a negotiated agreement (BATNA) and a systematic guide to agree on an acceptable outcome. The previous chapters indicated the importance of Online Dispute Resolution and the support that can be derived from the maximum use of technological tools to facilitate the process of achieving redress. The aim of the chapter, therefore, is to promote human capacity through education of the required negotiation skills and to extend these skills to the work of Artificial Intelligence into the landscape of ODR as a more effective way to combat the disparity of ADR culture across the Member States. AI is the study of the intelligence of machines designed to operate as human intelligence.¹³⁴ Two components can be viewed as AI, on the one hand, a device can behave intelligently as a result of human direction or in a literal sense a device can be intelligent without the use of external interferences to direct its actions.¹³⁵ The component that will be prescribed for the context of the paper is the former by combining the mediator's expertise to create a device that can function intelligently. The author suggests this method for the reason that it will promote transparency in the use of AI and will secure the fragments of the regulatory framework and eliminate data infringements as Article 14 section c of the General Data Protection Regulation enforces that an establishment shall explain how it derives at certain algorithmic-based decisions.¹³⁶ Therefore, the most suitable method proposed is the rule-based system; this method

¹³⁴Lodder, A.R., Zeleznikow, J. (2012). Artificial Intelligence and Online Dispute Resolution. 'Accessed at <https://www.semanticscholar.org/paper/Artificial-Intelligence-and-Online-Dispute-Lodder-Zeleznikow/297ae3b6b1bdf14baec2119a853509eeb1a03585#citing-papers> April 23rd, 2020.

¹³⁵Larson, D. (2010). Artificial Intelligence: Robots, Avatars and the Demise of the Human Mediator. *Ohio State Journal on Dispute Resolution*, Vol. 25, No. 1. 'Accessed at <https://ssrn.com/abstract=1461712> April 24th, 2010'

¹³⁶ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC *OJ L 119, 4.5.2016, p. 1–88*

is the simplest form of building AI systems that allows for the possibility to include human expertise from a particular field.¹³⁷ The method is based upon IF-THEN rules, where each rule derives a small piece of the expert's knowledge.¹³⁸ Due to the design strategies of the system, if there are changes in the field, only specific rules need to be modified by the expertise in the field, and the expertise will become available to everyone operating in the field.¹³⁹ Consequently, the expertise of mediators should highlight the key concepts that will provide a more efficient method into the use of AI as it is proposed that this will be centralised across the Member States.

Moreover, it is worth recognising another additional method that can be adopted across the Member States concerning the promotion and development draft procedural rules of The United Nations Commission for International Trade Law (UNCITRAL) Working Group III.¹⁴⁰ The United Nations have also envisioned the need to promote and develop redress in cross border trade precisely in the e-commerce environment. Similarly to the EU legislation, the rules aim to solve issues of low value, high volume disputes from e-commerce but inclusive of both Consumer to Business disputes and Business to Business disputes. It is a point of reference to consider as the model rules of UNCITRAL can be substituted with that of the EU to resolve a conflict between consumer and traders.

3.1 Proposal for incorporating Expertise of Negotiators in Artificial Intelligence

Artificial intelligence is developing fast, and the combination with ODR will improve the efficiency of production systems through predictive maintenance and increasing the security of European's. The Commission has been committed to preserving the EU's technological management as utilising ICT's can improve lives while respecting their rights as reflected in the EU White Paper on Artificial Intelligence.¹⁴¹ Therefore, incorporating Artificial Intelligence into the ODR platform will create a centralised model where algorithms can be given to expert

¹³⁷Carneiro, D., Novais, P., Andrade, F. *et al.* (2014). Online dispute resolution: an artificial intelligence perspective. *Artif Intell Rev* 41, 211–240.

¹³⁸ *Ibid.*, 13

¹³⁹ Carneiro, D., Novais, P., Andrade, F. *et al.* (2014). *Supra* Nota 124, 13

¹⁴⁰ See http://www.uncitral.org/uncitral/commission/working_groups/3OnlineDisputeResolution.html.

¹⁴¹ White Paper on Artificial Intelligence: a European approach to excellence and trust. (2020). 'Accessed at https://ec.europa.eu/info/publications/white-paper-artificial-intelligence-european-approach-excellence-and-trust_en March 1st, 2020.

negotiators to eliminate the disparity where ADR culture did not exist, or adoption challenges occur. The use of this technology is on the way and embracing the mechanics of AI sooner than later will provide the needed consumer redress that is lacking equivalently across the EU. However, as mentioned, the method of IF-THEN rules entails expertise knowledge to perform specific tasks, in addition to this method, are other strategies in which subfields of AI technology are closely connected to conflict management to resolve disputes that can apply. The table below will illustrate the symbiotic relationship between law and technology.

Additionally, emphasis is placed on combining the principles of ADR captioning the necessary conflict management skillsets used in negotiation, such as managing emotions within the scope of an intelligent environment through Ambient Intelligence.¹⁴² The main gain of this method is that it supports conflict management techniques by specifically developing mediation and negotiation algorithms that can identify changes in the parties in real-time and readapt strategies that will reflect in the interaction process and produce valuable results.¹⁴³ The figure in appendix eight will demonstrate the process of using an intelligent environment with a conflict resolution model.

¹⁴² Carneiro, D., Novais, P., Andrade, F. *et al.* (2014). *Supra Nota* 124, 23-24

¹⁴³ *Ibid*

Table 3. Features of several sub-fields of Artificial Intelligence from the conflict resolution point of view

Technology	Major Features
Decision Support System	Compile and provide useful information Provide support for decision processes Propose actions based on the analysis of facts
Expert System	Model human knowledge and inference mechanisms Reason similarly to human experts Automation of “simple” tasks by applying an inference engine to a knowledge
Knowledge Base System	Model complex knowledge Represent norms and judgment under uncertainty
Intelligent Interferences	Build a layer of abstraction for complex systems Faster, intuitive and more efficient access to information
Case-Based Reasoning	Reasoning processes similar to the legal ones Contextualised retrieval of information Information is organised according to meaningful attributes
Multi-Agent System	Distributed problem solving Implement negotiation protocols Support for argumentation
Legal Ontologies	Representation of legal knowledge Inference Pattern extraction
Rule-Based System	Encode knowledge, expertise and processes of human experts. Reasonably simple way of interpreting and reasoning with rules

Source: Carneiro, D., Novais, P., Andrade, F. *et al.* (2014). Online dispute resolution: an artificial intelligence perspective. *Artif Intell Rev* 4

Artificial Intelligence requires a considerable amount of regulation to safeguard data protection rights and a process that will uphold the ADR principles throughout its application. As a result, discovering systems within technology that can achieve the same quality as a traditional method of ADR will maintain the fragments of the procedural justice. The above systems are built to include the expertise of negotiators in order to generate fair results.

CONCLUSION

The research aimed to explore the adoption of ADR and ODR methodologies in the EU to identify the advancement and shortcomings that currently exist. The landscape of ADR methodologies across the EU member states have proven to be insufficient in resolving consumer to business disputes that occur via the pan- European ODR platform. Therefore, maintaining legitimacy, validity, and the rule of law, which is significant in the contains of the due process has become disputed. The primary factor of the insufficiency concerns the educational awareness on how to adopt ADR mechanisms effectively because of lack of knowledge of the procedures and benefits of the extra-judicial process. A comparative method was applied across the EU with narrowed interests towards Estonia and the UK to establish the status quo that currently exists and observe the landscape of ADR. It was discovered that there is a prevalent culture by the Government and private bodies that encourages mediation as a better form of dispute resolution in the UK in contrast to a more lenient approach in Estonia. The political climate was a factor observed as most eastern European countries under a socialist regime developed ADR in education institutions after most countries advanced in this section. Therefore, it is deemed as unprecedented to anticipate an equal reflection and incorporation of ADR within national states amidst the subsidiary principle. The directive 2013/11 on ADR endorsed the use of voluntary mediation across the EU Member States and the Regulation on ODR that followed filled the gap of disputes occurring online. However, the similar trend of the legislations not achieving its full potential was yet illustrated where the majority of cases by consumers were unresolved and proved ineffectual. Although resolving consumer complaints will enhance the economic growth of the EU as ADR maintains relations and offers a transformative method of conflict management, the results are yet minimal. The extent of this is particularly accurate for consumers whose nature of complaints are often of a low value which is not reasonable to undertake the court fees and legal costs involved. Additionally, the volume of disputes of cases are significantly high which can place an intolerable burden on the court system, but a viable method for dispute resolution such as ODR that has a given timeframe disputes should be settled and a more proportionate manner. The literal method

applied in the paper observed the meaning of the legislation that the EU has implemented to protect consumers within the member states to ascertain whether the lack of adoption that is being reflected in member states is a result of gaps in the legislation or other variables. The legislation adopted yielded a presence of ADR in countries that required an incentive to pursue the voluntary instrument and go beyond the minimum requirements outlined. Thus, it can be determined that the legislation does not create a challenge in the adoption of ADR methodologies but rather the clarification on executing ADR in the platform of ODR. The predominance of technology has captured a more considerable amount of consumers to convey disputes, but the lack of effective incorporation of ADR and tools of technology have not been maximised. The limitation observed by the author was the short timeframe of the launch of ODR in order to analyse the structure and capacity to handle disputes to decipher whether an insufficient use will continue or an improved structure will develop. The current ODR platform operates solely as a location for complaints to generate, while the intention was to be a medium to settle conflicts that occur through the usage of technology. In the view of the author, technological tools such as forums and instant messaging between the parties and the ADR authority will assist in advancing the challenges currently faced with providing access to justice, results have indicated that mediators incorporating tools of technology in the process will achieve efficient results. Moreover, AI as a developing area of technology can be inaugurated into ODR as a future advancement to champion the challenges of disputes. Governments and supranational entities embracing the digital revolution as the new industrial revolution in making the process more efficient, accessible, reliable, secure and effective will pave a more conducive way of resolving conflicts through dispute resolution.

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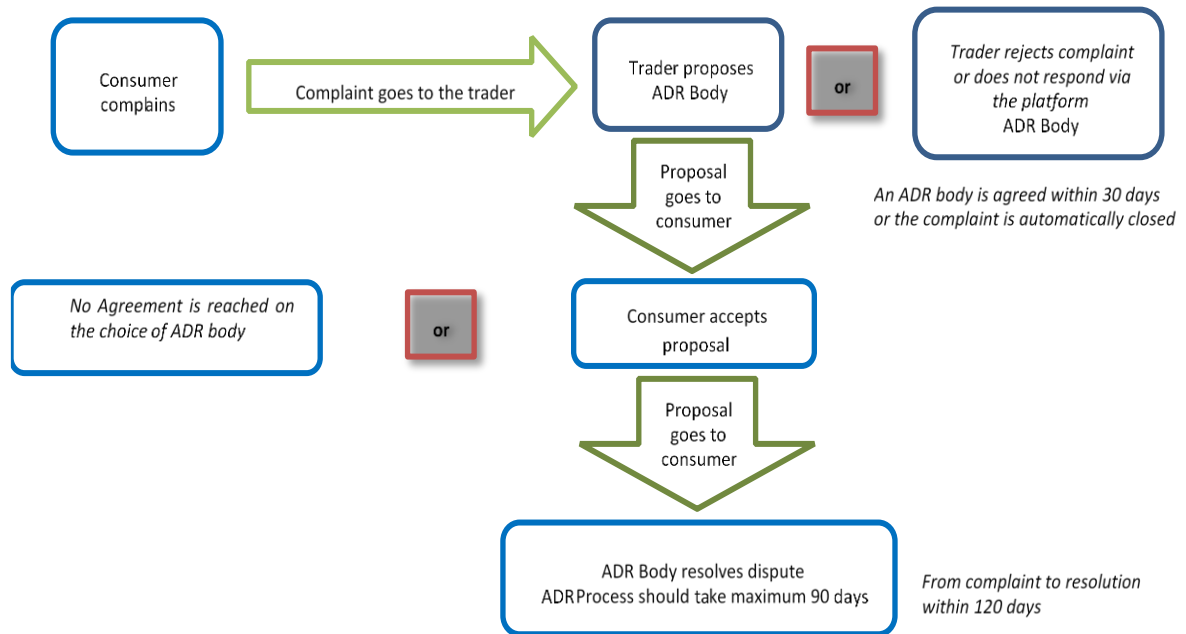
APPENDICES

Appendix 1. Table 1. Legal Landscape of Consumer Protection in the EU

Consumer Protection Legal Framework	Public Regulatory Compliance
Directive on Unfair Terms in Consumer Contracts	Consumer Protection Cooperation (CPC)
Directive on Misleading Advertising	European Consumer Centre (ECC-Net)
Directive on Unfair Terms in Consumer Contracts	Financial Dispute Resolution Network (FIN-NET)

Source: Cortes, P. (2017).The Law of Consumer Redress in an Evolving Digital Market: Upgrading from Alternative to Online Dispute Resolution.

Appendix 2. The current process the European Online Dispute Resolution Platform



Source: European Commission Report on the Functioning of the European ODR Platform Statistics 2nd year

Appendix 3. Table 2. ADR and ODR tools and techniques, based on different modes of communication

	ADR	ODR
	Face-to-face communication (F2FC)	Computer-mediated communication (CMC)
Synchronous communication	Negotiation/mediation session in a physical place	Instant messaging Chat Video conference Voice IP
Asynchronous communication	Shuttle mediation Caucusing	Email Posting Online caucusing

Source: Poblet, M. Casanovas, P. (2007). Emotions in ODR: International Review of Law, Computers, and Technology. Vol. 21, No. 1. England: Routledge

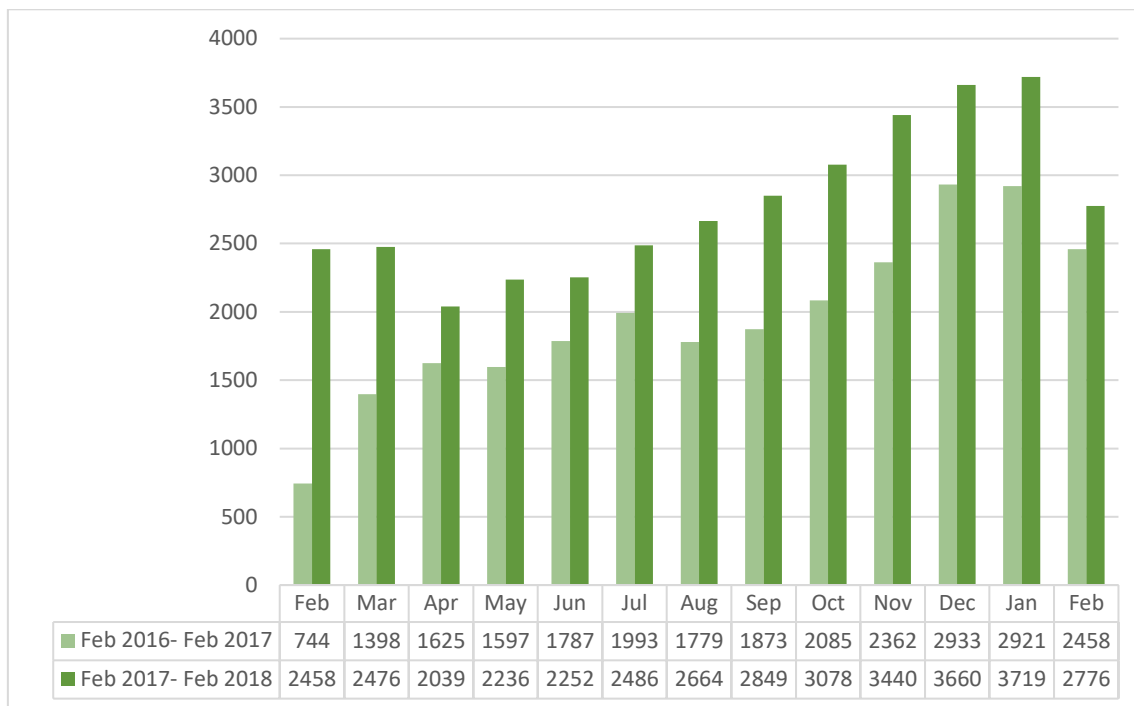
Appendix 4. Consumers' trust across the EU Member States

Countries	Consumers' trust in consumer associations/ associational consumer protection index
UK	85.9
France	84.3
Ireland	83.7
Hungary	83.2
Luxembourg	83.0
Austria	82.8
Germany	82.1
Belgium	73.3
Finland	70.5
Portugal	67.7
Netherlands	67.6
Denmark	66.8
Poland	66.8
Italy	66.5
Malta	65.6
Spain	64.4
Mean (28 countries)	63.5
Slovenia	58.6
Romania	58.4
Estonia	57.4
Croatia	55.9
Cyprus	51.2
Sweden	50.2
Slovakia	47.8
Lithuania	46.9

Czech Republic	43.7
Latvia	42.5
Bulgaria	36.3
Greece	34.5

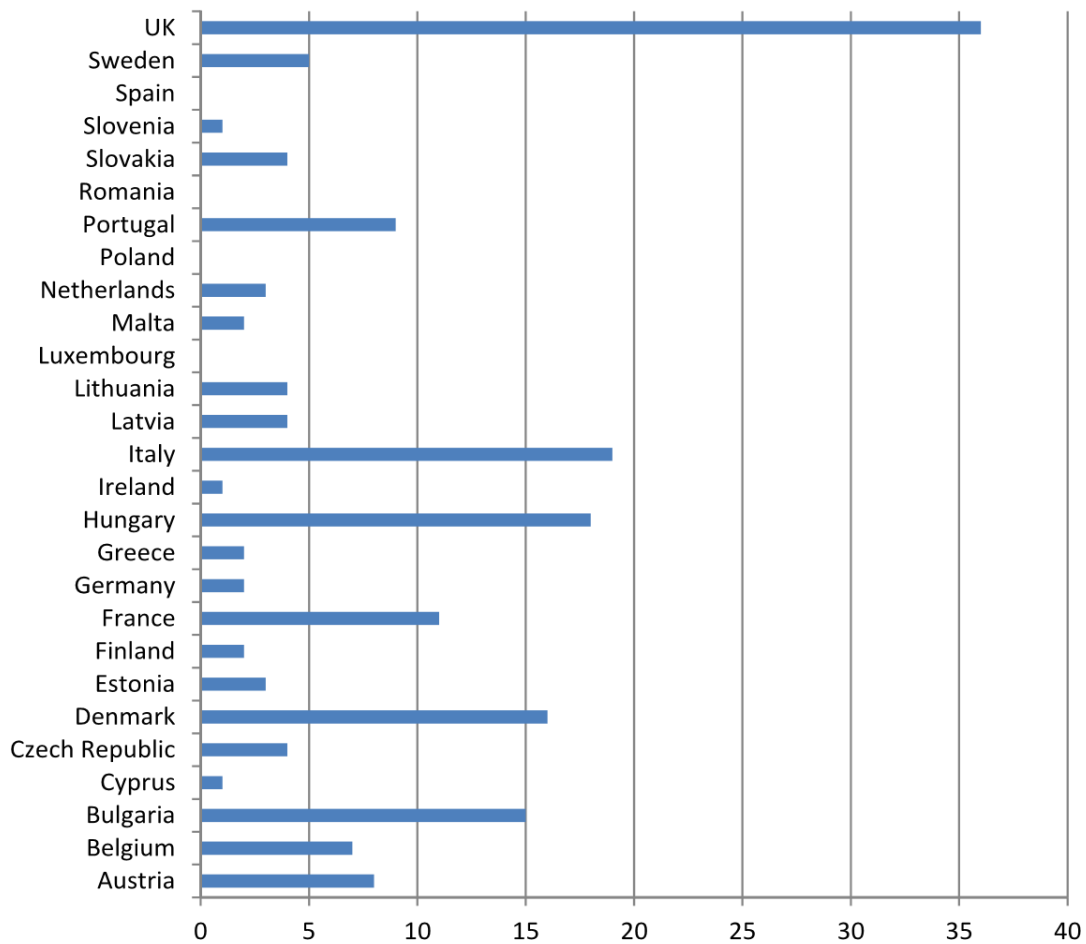
Source: Nessel, S. (2019). Consumer Policy in 28 Member States: An empirical assessment in four dimensions. *Journal of Consumer Policy*. 42 (1) pg 455-482

Appendix 5. Comparison of Consumer Complaints between the year 2016 and 2018



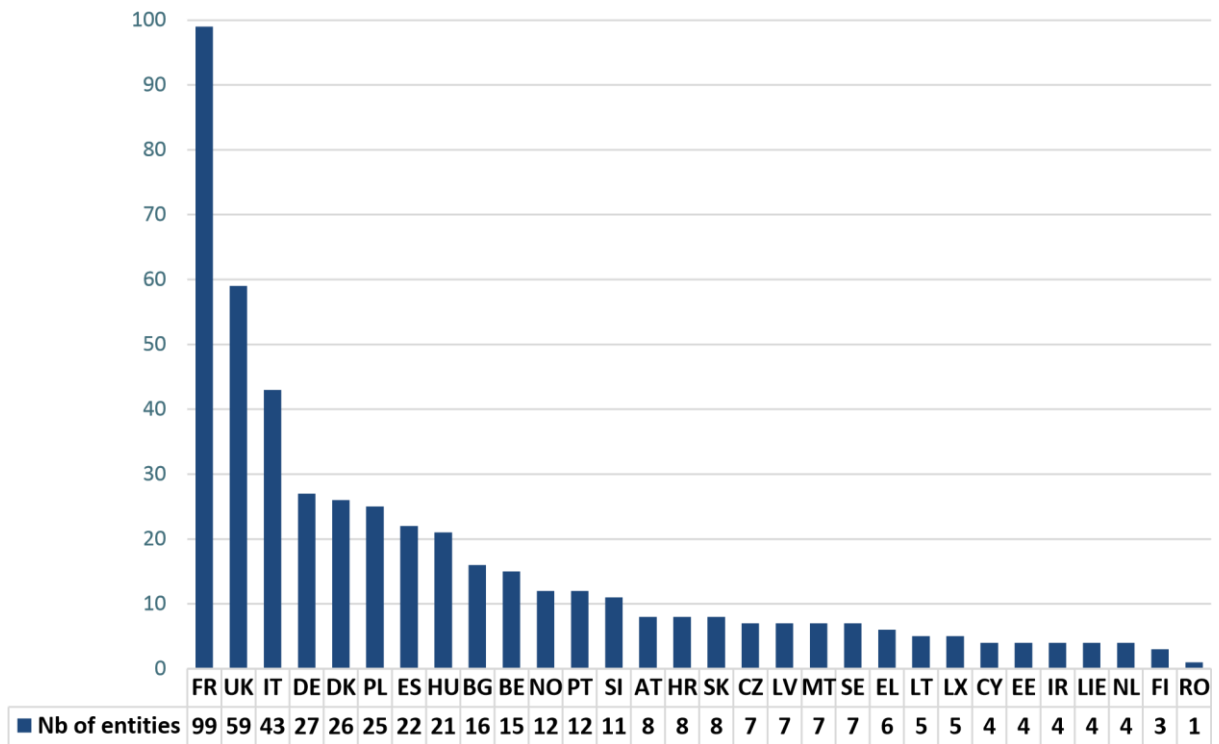
Source: European Commission Report on the Functioning of the European ODR Platform
 Statistics 2nd year

Appendix 6 Number of ADR bodies on the ODR platform in 2016



Source: Page, J, Bonnyman, L. (2016) ADR and ODR- achieving better dispute resolution for consumers in the EU. *ERA Forum*

Appendix 7 ADR coverage – number of notified ADR entities per country 2019



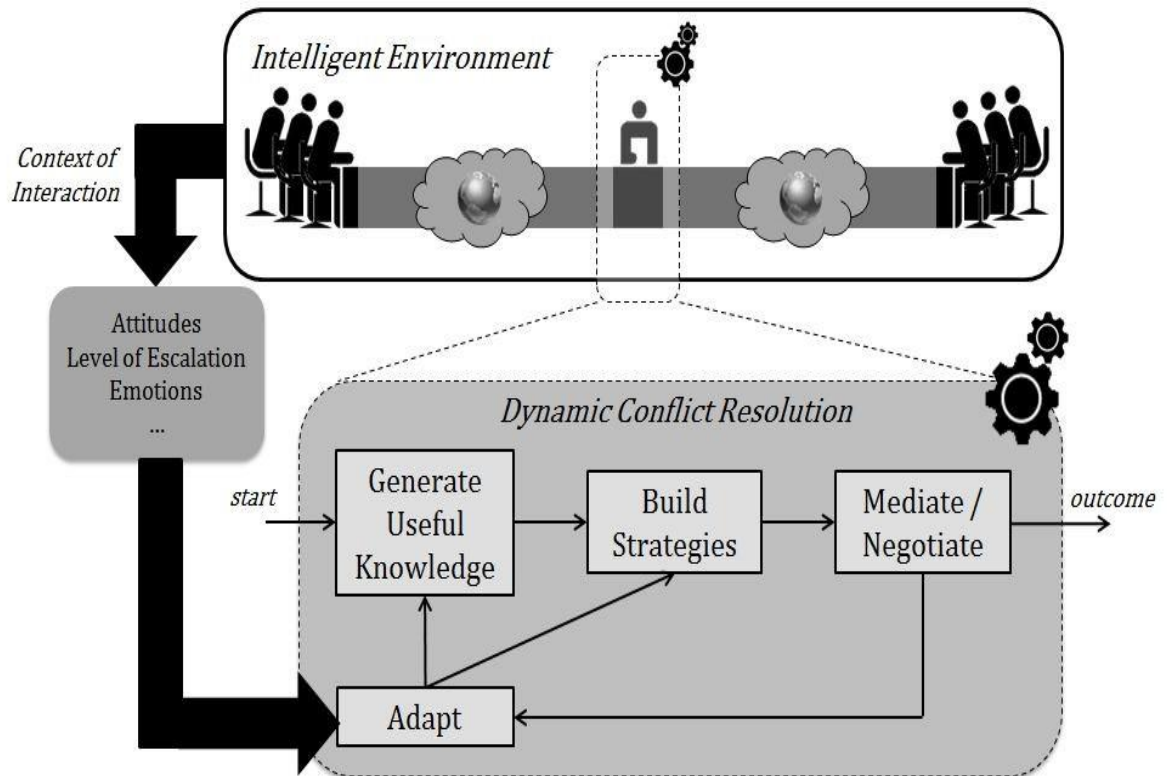
Source: Report from the Commission to the European Parliament and the Council on the Functioning of the European Online Dispute Resolution platform established under Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes, COM 2019

Appendix 7. Features of several sub-fields of Artificial Intelligence from the conflict resolution point of view

Technology	Major Features
Decision Support System	Compile and provide useful information Provide support for decision processes Propose actions based on the analysis of facts
Expert System	Model human knowledge and inference mechanisms Reason similarly to human experts Automation of “simple” tasks by applying an inference engine to a knowledge
Knowledge Base System	Model complex knowledge Represent norms and judgment under uncertainty
Intelligent Interferences	Build a layer of abstraction for complex systems Faster, intuitive and more efficient access to information
Case-Based Reasoning	Reasoning processes similar to the legal ones Contextualised retrieval of information Information is organised according to meaningful attributes
Multi-Agent System	Distributed problem solving Implement negotiation protocols Support for argumentation
Legal Ontologies	Representation of legal knowledge Inference Pattern extraction
Rule-Based System	Encode knowledge, expertise and processes of human experts Fairly simple way of interpreting and reasoning with rules

Source: Carneiro, D., Novais, P., Andrade, F. *et al.* (2014). Online dispute resolution: an artificial intelligence perspective. *Artif Intell Rev* 4

Appendix 8 Conflict Resolution through AI



Source: Carneiro, D., Novais, P., Andrade, F. *et al.* (2014). Online dispute resolution: an artificial intelligence perspective. *Artif Intell Rev* 4

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