

What We Talk About When We Talk About Consumer ODR: The EU ODR Regulation and its Preliminary Lessons

Giorgio Fabio Colombo

This contribution was originally published in the *International Journal of Procedural Law* 2021 no. 2.

The multilingual *International Journal of Procedural Law* (IJPL) provides an international research platform for scholars and practitioners in the field of procedural law, especially in civil matters. In addition to articles in five different languages examining current developments in judicial and alternative dispute resolution, the IJPL also publishes articles devoted to the theoretical foundations of procedural law.

*Editors-in-Chief: Fernando Gascón Inchausti,
Burkhard Hess and Eduardo Oteiza*
General Assistant-Editor: Kamalia Mehtiyeva



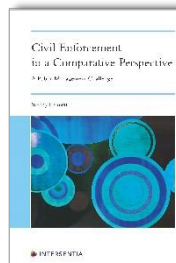
To find out more or to subscribe, visit:
www.intersentia.com/en/international-journal-of-procedural-law-37762.html

Featured recommendations



*Effective Judicial
Protection in Consumer
Litigation*
Anna van Duin

ISBN 9781839701948
March 2022
xxxviii + 278 pp.
hardback
£89 | €94 | \$113



*Civil Enforcement in a
Comparative Perspective:
A Public Management
Challenge*
Wendy Kennett

ISBN 9781780688183
Nov 2021 | xx + 688 pp.
paperback
£94 | €99 | \$119

This contribution is made available under the terms of the Creative Commons Attribution, NonCommercial, ShareAlike Creative Commons Licence (<https://creativecommons.org/licenses/by-nc-sa/4.0/>), which permits non-commercial re-use, distribution, and reproduction in any medium, provided the original work is properly cited and derived works are published under the same licence. For any queries, or for commercial re-use, please contact Intersentia at mail@intersentia.co.uk or on +44 (0) 1223 370170.

WHAT WE TALK ABOUT WHEN WE TALK ABOUT CONSUMER ODR: THE EU ODR REGULATION AND ITS PRELIMINARY LESSONS

GIORGIO FABIO COLOMBO*

Abstract

After providing a short theoretical framework about the definition and the boundaries of the notion of “Online Dispute Resolution” (ODR), this article carries out a preliminary analysis of the impact of EU Regulation No 524/2013 on online dispute resolution for consumer disputes. This critical assessment is also used as a basis for a broader reflection on the still-unexpressed potential of ODR. From this perspective, the article offers some suggestions on how to effectively implement successful ODR legislation based on the successes and pitfalls of several EU countries’ experiences. In particular, the article argues that a tool primarily conceived for solving cross-border consumer disputes may indeed also be used for domestic disputes, as well as for B2B differences.

Une fois posé le cadre théorique relatif à la définition et les limites de la notion de « Règlement en ligne des litiges » (RLL), l'article tend à conduire une analyse préliminaire de l'effet du Règlement No. 524/2013 sur le règlement en ligne des litiges de consommation. Cette évaluation critique sert également de base à une réflexion plus large sur le potentiel encore inexprimé du RLL. Dans cette perspective, l'article propose quelques pistes sur la mise en œuvre efficace de la législation en matière du RLL, en s'appuyant sur les succès et les écueils de l'expérience de plusieurs pays de l'Union européenne. En particulier, l'article fait valoir qu'un outil principalement conçu pour résoudre les litiges transfrontaliers de consommation peut également être utilisé pour les litiges nationaux, ainsi que pour les litiges entre entreprises.

* Professor of Law, Nagoya University Graduate School of Law. This article was made possible by the JSPS-Kaken-hi Grant-in-Aid for Basic Research (C) 19K01368, *Critical Considerations for Institutional Design of Consumer Online Dispute Resolution*.

Nach einer kurzen theoretischen Erörterung der Definition und der Grenzen des Begriffs „Online-Streitbeilegung“ (OS) wird in diesem Beitrag eine vorläufige Analyse der Auswirkungen der EU-Verordnung Nr. 524/2013 auf die Online-Streitbeilegung für Verbraucherstreitigkeiten vorgenommen. Diese kritische Bewertung dient auch als Grundlage für eine umfassendere Reflexion über das noch nicht ausgeschöpfte Potenzial der Online-Streitbeilegung. Unter diesem Blickwinkel bietet der Beitrag einige Vorschläge, wie eine erfolgreiche OS-Gesetzgebung effektiv umgesetzt werden kann, basierend auf den Erfolgen und Fallstricken der Erfahrungen mehrerer EU-Länder. Insbesondere wird argumentiert, dass ein Instrument, das in erster Linie für die Beilegung grenzüberschreitender Verbraucherstreitigkeiten konzipiert wurde, auch für inländische Streitigkeiten sowie für Streitigkeiten zwischen Unternehmen genutzt werden kann.

Dopo aver fornito un breve quadro teorico circa la definizione e i confini della nozione di “Online Dispute Resolution” (ODR), questo lavoro sviluppa un’analisi preliminare dell’impatto del Regolamento UE n. 524/2013 sulla risoluzione delle controversie online per le controversie dei consumatori. Questa valutazione critica viene utilizzata anche come base per una riflessione più ampia sul potenziale ancora inespresso delle ODR. In questa prospettiva, il lavoro offre alcuni suggerimenti su come attuare efficacemente una legislazione ODR di successo sulla base dei pregi e dei difetti registrati nelle esperienze di diversi paesi dell’UE. In particolare, nell’articolo si sostiene che uno strumento concepito principalmente per risolvere le controversie transfrontaliere in materia di consumo può effettivamente essere utilizzato anche per le controversie interne, oltre che per le differenze Business to Business.

Después de fijar un marco conceptual sobre la definición y los límites de la noción “resolución de litigios en línea” (ODR), el trabajo lleva a cabo un análisis preliminar del impacto del Reglamento núm. 524/2013 sobre resolución de litigios en línea en materia de consumo. Este análisis crítico se utiliza como base para una reflexión más amplia sobre el todavía inexplorado potencial de los ODR. Con esta perspectiva, el trabajo ofrece algunas sugerencias sobre como implementar eficientemente la legislación sobre los ODR con base en los aciertos y los errores aprendidos de la experiencia de distintos Estados de la Unión Europea. En particular, el trabajo sostiene que una herramienta concebida principalmente para resolver conflictos transfronterizos de consumo podría utilizarse también para conflictos nacionales, así como para conflictos entre empresarios (B2B).

Keywords: ODR Regulation; ADR Directive; Consumer ADR Directive; ODR Platform; cross-border dispute resolution; EU law

Mots-clefs: Règlement RLL; Directive relative aux modes alternatifs de résolution des conflits; Directive relative au règlement extrajudiciaire des litiges de consommation; plateformes RLL; résolution des litiges transfrontaliers; droit de l'Union européenne

Stichwörter: OS-Verordnung; AS-Richtlinie; AS-Richtlinie für Verbraucher; OS-Plattform; Grenzüberschreitende Streitbeilegung; EU-Recht

Parole chiave: Regolamento ODR; Direttiva ADR; Direttiva ADR per i consumatori; Piattaforma ODR; risoluzione delle controversie transfrontaliere; diritto dell'UE

Palabras clave: Reglamento sobre resolución de litigios en línea; Directiva ADR; Directiva ADR de consumo; plataforma de resolución de litigios en línea; derecho de la UE

Contents

I.	Introduction.....	258
II.	The EU ODR Regulation and its History.....	260
III.	The Story So Far: Mission Unaccomplished?	265
	A. The 2019 Report.....	265
	B. Playing with Numbers: A Preliminary Attempt of Quantitative Analysis.....	268
IV.	Possible Future Developments and Acquired Lessons.....	271

I. INTRODUCTION

The topic of law and technology, broadly construed, is one of the areas which garners a higher level of academic interest, and, somewhat consequently, a higher level of misunderstanding as well.

The field may in fact span from AI-assisted judicial decisions¹ and blockchain-based self-executing contracts² on one end to the simple usage of e-mails in communicating

¹ Arno R Lodder and Ernest M Thiessen, 'The Role of Artificial Intelligence in Online Dispute Resolution' in *Proceedings of the UNECE Forum on ODR 2003* (Geneva, UNECE 2003); Arno R Lodder and John Zeleznikow, 'Artificial Intelligence and Online Dispute Resolution' in Mohamed Abdel Wahab and others (eds), *Online Dispute Resolution Theory and Practice* (Eleven International Publishing 2012); Davide Carneiro and others, 'Online Dispute Resolution: An Artificial Intelligence Perspective' (2014) 41 *Artificial Intelligence Review* 211; Mariusz Załucki, 'AI and Dispute Resolution' in Javier García González and others (eds), *El derecho público y privado ante las nuevas tecnologías* (Dykinson 2020).

² Jeremy Barnett and Philip Treleaven, 'Algorithmic Dispute Resolution – The Automation of Professional Dispute Resolution Using AI and Blockchain Technologies' (2018) 61 *The Computer Journal* 399.

during a dispute³ on the other. The area of online dispute resolution (ODR) suffers, to some extent, from the same heterogeneity of forms.⁴ When discussing ODR, scholars may introduce subject matter that ranges from online hearings with hyperlinking to the documents being debated⁵ and sophisticated emotion detection⁶ to the simple complaint e-mail sent by a customer to a web shopping page.

This article takes a down-to-earth, pragmatic approach: its main purpose is to analyse the impact EU Regulation No 524/2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (ODR Regulation) had on the dispute resolution environment in Europe. This assessment, however, will be used as a basis for a broader reflection on the still unexpressed potential of ODR; it will also offer some suggestions on how to effectively implement successful ODR legislation based on the successes and pitfalls of several EU countries' experiences. Moreover, it makes little to no sense to analyse the ODR Regulation in a vacuum, as it is tightly intertwined with other instruments developed by the European Union – the most important of which is Directive 2013/11/EU on alternative dispute resolution for consumer disputes (Consumer ADR Directive). This is made clear by the Commission itself in its latest report on the matter.⁷

The observations I will propose are mostly practical in nature, and they willingly ignore the key fact that, in any case, any ADR entity would need to comply with the requirements set forth by the Consumer ADR Directive, i.e. (i) expertise,

³ The very use of the word 'dispute' in the field of ADR and ODR is debated, as it is not fully clear whether parties aiming to resolve a difference using some form of non-adversarial, non-adjudicative procedure are already parties to a proper 'dispute' or whether they stand somewhere before that. This of course led to a wider debate about whether ADR should instead be read as *amicable* dispute resolution rather than as *alternative* dispute resolution, and whether arbitration should be still be considered a form of ADR given its adjudicative nature. For the purpose of this article, I do not believe it is necessary to address these methodological and taxonomical concerns.

⁴ Mirbze Philippe, 'Now Where Do We Stand with Online Dispute Resolution (ODR)?' (2010) 2010 International Business Law Journal 563; Pavel Loutocký, 'Online Dispute Resolution to Resolve Consumer Disputes from the Perspective of European Union Law: Is the Potential of ODR Fully Used?' (2016) 10 Masaryk University Journal of Law and Technology 113; Mirize Philippe, 'ODR Redress System for Consumer Disputes' (2014) 1 International Journal of Online Dispute Resolution 57.

⁵ Scott J Shackelford and Anjanette H Raymond, 'Building the Virtual Courthouse: Ethical Considerations for Design, Implementation, and Regulation in the World of ODR' [2014] Wisconsin Law Review 615.

⁶ Josep Suquet and others, 'Consumedia. Functionalities, Emotion Detection and Automation of Services in a ODR Platform' in Pompeu Casanovas and others (eds), *AI Approaches to the Complexity of Legal Systems*, vol 8929 (Lecture Notes in Computer Science, Springer 2014).

⁷ European Commission, 'Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the Application of Directive 2013/11/EU of the European Parliament and of the Council on Alternative Dispute Resolution for Consumer Disputes and Regulation (EU) No 524/2013 of the European Parliament and of the Council on Online Dispute Resolution for Consumer Disputes' (25 September 2019).

independence, and impartiality; (ii) transparency; (iii) effectiveness; (iv) fairness; (v) liberty; and (vi) legality.⁸ Such values have been analysed in great detail by scores of scholars and are so fundamental that, for the purposes of this analysis, I consider them to be *conditions precedent* to any meaningful discussion on the matter – with the awareness that the reality may differ. Also, this article does not deal with the very well-known issues of data leakage and technological standards.⁹ While central to the issue, they are of a mostly technical nature, about which I am largely unequipped to provide any meaningful contribution.

Any analysis of ODR carried out in 2020 (irrespective of COVID-19) should probably start from at least four basic postulates.

First: presently, *most* if not *all* dispute resolution procedures involve some degree of technology use and at least partly take place online.¹⁰ Lawyers regularly exchange e-mails, online procedures have become the standard for filing consumer complaints, etc. If we were to adopt such a broad definition of ODR, basically *every* dispute could be considered an online dispute.

Second: State-managed dispute resolution systems are being eclipsed by a wide array of entirely privately managed procedures. Most complaints against web-based services (including social networks, sharing economy services, dating apps, etc.) are almost exclusively dealt with by the concerned company's internal procedures. The implications of this enormous transfer of judicial (in a broad sense) activities (if not sovereignty) from the State to private actors still needs to be fully processed and understood,¹¹ as legislators still loll in the somewhat self-consolatory – but nevertheless still mostly true – consideration that, as a bottom line, most clients/consumers/users who are unhappy with the handling of their claim may still resort to a State court somehow (at least in the EU).

Third: while the definition between consumers and professional users is becoming more and more blurred, it is necessary to acknowledge that many lessons learned from consumer (i.e. business-to-consumer, or B2C) ODR may, of course *mutatis mutandis*, also be applicable in a commercial (i.e. business-to-business, or B2B) environment.

Fourth: the primary purpose of ODR in Europe was to provide consumers with an effective redress mechanism to solve cross-border disputes. The benefits are obvious and do not need to be listed here.¹² However, as it will also be discussed *infra*, lessons learned in an international environment may be easily replicated, and

⁸ Consumer ADR Directive, Arts. 6–11.

⁹ Jie Zheng, *Online Resolution of E-Commerce Disputes: Perspectives from the European Union, the UK, and China* (Springer 2020) 211.

¹⁰ Jean R Sternlight, 'Pouring a Little Psychological Cold Water on Online Dispute Resolution' (2020) 1 *Journal of Dispute Resolution* 5.

¹¹ Horst Eidenmüller and Martin Engel, 'Against False Settlement: Designing Efficient Consumer Rights Enforcement Systems in Europe' (2014) 29 *Ohio State Journal on Dispute Resolution* 261, 269.

¹² Karolina Mania, 'Online Dispute Resolution: The Future of Justice' (2015) 1 *International Comparative Jurisprudence* 76.

applied even more effectively, in a domestic setting. Statistics collected so far by the European Commission reinforce this assumption: a tool created mainly for cross-border disputes is, as it turns out, mostly used in purely domestic issues.

These considerations help to set the boundaries of the present analysis. For the purpose of this article, the definition of ODR is the one inferred from the reading of the ODR Regulation itself (which, somewhat surprisingly, refrains from providing an “official” definition in the list under Article 4).

II. THE EU ODR REGULATION AND ITS HISTORY

Considering the incredibly fast development of ODR, it is almost ironic to consider a normative framework enacted in 2013 to be the “latest” comprehensive development in the field. However, this needs to be put in context: it is the Regulation itself that provides for its own flexibility and adaptability over time, creating a periodic internal review mechanism.¹³

The idea of creating an effective, cheap, and easily available system to solve cross-border disputes has always been a cornerstone of the European effort to create a real single market: any risk of having to undergo complex or expensive procedures to settle disputes would discourage European consumers from purchasing goods or services in other countries.

The EU has indeed been quite successful in establishing common rules for jurisdiction and recognition as well as for enforcement of judgments inside the European legal environment. This process of creating a consistent framework (albeit with some “cracks”, e.g. the partial opting out of Denmark) started with the 1968 Brussels Convention and is now enshrined in Regulation (EU) No 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 – known in short as the Brussels I Regulation (recast).

However, the European legislature has always been very aware of the fact that, no matter how good a judicial system may be, providing only judicial outlets to solve consumer disputes would be of little to no use. In most cases, in fact, the amount at stake would not justify the decision to go to court. There are indeed some leading cases which helped shape the boundaries of consumer law in Europe, but it is not a wise institutional choice to leave the matter to the discretion of a small number of individuals. Indeed, the creation of efficient and effective ADR mechanisms was not limited to consumers, and the main piece of legislation in this regard is Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters (Mediation Directive), which applies to a wide array of disputes (not excluding B2Cs). While this Directive is not considered part of the so-called “EU toolbox for the

¹³ ODR Regulation, Art. 21(1) and (2).

private and public enforcement of consumer law”,¹⁴ it is worth mentioning here because it kept national legislatures busy with the notion of ADR for a few years. The adoption of the Mediation Directive was not homogeneous across the table, with some countries using a “soft touch” and other going to the extreme of distorting the very purpose of the Directive in order to pursue local objectives,¹⁵ above all the provision of relief to overburdened court systems.¹⁶

However, the specificities of consumer contracts, and the peculiar protection weaker parties enjoy in the European framework, led the institutions in Brussels to conceive and implement legislation for the specific promotion of *consumer* ADR services across the whole continent. This again took the form a Directive: 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. This Directive, based on establishing a “lowest common denominator”, focused on making sure that entities providing ADR services for consumers complied with the basic principles of “accessibility, expertise, independence, impartiality, transparency, effectiveness, fairness, liberty and legality as binding quality requirements for ADR entities”;¹⁷ the pivotal point around which the system revolved was, similarly to the Mediation Directive, the State supervision of ADR providers: in order to offer dispute resolution services aimed at consumers, the entity must register with a list kept by the relevant State authority. A remarkable point is that the Consumer ADR Directive did not differentiate between purchases of products or services made online and offline, and both parties to traditional and online consumer contracts could resort to the ADR structure created after the European legislation.

The ODR Regulation was put in connection with the existing framework. Given the growth and importance of e-commerce,¹⁸ it would only make sense that the European institutions would want to regulate consumers’ dispute resolution in this field. The Regulation is written with the idea of a consumer bringing a complaint against a business in mind, but it also allows Member States (Art. 2(2)) to permit the opposite situation (i.e. a trader acting against a user).

¹⁴ European Commission (n 7) 18 (Annex 1).

¹⁵ Machteld W de Hoon, ‘Making Mediation Work in Europe. What’s Needed is a New Balance Between Mediation and Court Proceedings’ (2014) 20 *Dispute Resolution Journal* 23.

¹⁶ Italy is the most striking example of the second trend. See Giorgio Fabio Colombo, ‘Alternative Dispute Resolution (ADR) in Italy: European Inspiration and National Problems’ (2012) 29 *Ritsumeikan Law Review* 71; Michele Angelo Lupoi, ‘Facing the Crisis: New Italian Provisions to Keep Disputes out of the Courtroom’ (2014) 19 *Zeitschrift fuer Zivilprozess International* 95; Elisabetta Silvestri, ‘Too Much of a Good Thing: Alternative Dispute Resolution in Italy’ (2017) 21 *Nederlands-Vlaams Tijdschrift voor Mediation en Conflictmanagement* 77.

¹⁷ European Commission (n 7) 3.

¹⁸ According to the figures provided by EUROSTAT in its ‘Digital economy & society in the EU – 2018 Edition’, in 2017, online sales amounted to 18% of the entire turnover of European business. See <https://ec.europa.eu/eurostat/cache/infographs/ict/index.html>.

The ODR Regulation basically aims to connect a central ODR institution to the “power grid” of ADR entities already put in place by the Consumer ADR Directive: the Commission would maintain a central, Europe-wide ODR platform, which receives complaints from consumers who entered into an online contract. The portal then informs the parties about certified ADR institutions which may help them resolve the case. The parties have to agree on an ADR entity within 30 calendar days of the submission of a complaint (Art. 9(8)), otherwise the case is not processed any further.

The central portal is supported by national ODR “contact points”, which need to employ at least two “ODR advisors” (Art. 7). Such “contact points” do not handle cases themselves, but serve as support to the users from one side (by facilitating communications between the parties and the ADR entity) and to the Commission and the relevant Member State from the other (by providing activity reports every two years).

In short, the procedure is as follows: a party (usually a consumer, but where allowed also a business) willing to submit a complaint accesses the ODR platform. They submit a form prepared by the platform, and the platform itself forwards it to the party against whom the complaint is made, informing them about the possibility to refer the issue to a certified ADR entity. If the parties, within 30 days, come to an agreement about a suitable ADR entity through which to solve their issue, the case is moved to said entity; otherwise the procedure stops there. Parties are also encouraged to negotiate directly among themselves, of course without prejudice, in pursuing other forms of redress, including judicial proceedings.

The combined effect of the Consumer ADR Directive and the ODR Regulation attempted to create a landscape that, according to the Commission,¹⁹ aimed to solve three main problems: the incomplete coverage (both geographical and sectorial) of consumer ADR; the lack of awareness about ADR among both consumers and traders; and the need to ensure an adequate quality of ADR entities across the board.²⁰

As is already clear from the short summary above, the commendable intent of the EU institutions to create an effective system encountered quite a few issues in its implementation. First of all, the normative framework lacks effective coordination,²¹ especially at a national level: countries were still struggling with

¹⁹ European Commission, ‘Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee. Alternative Dispute Resolution for Consumer Disputes in the Single Market’ (22 November 2011).

²⁰ Alexandre Biard, ‘Towards High-Quality Consumer ADR: The Belgian Experience’ in Loïc Cadet and others (eds), *Privatizing Dispute Resolution: Trends and Limits* (Studies of the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law 18, 2019) 80–81.

²¹ Joasia Luzak, ‘The ADR Directive: Designed to Fail? A Hole-Ridden Stairway to Consumer Justice’ (2016) 24 *European Review of Private Law* 81.

the implementation of the Mediation Directive when they had to deal with the Consumer ADR Directive,²² then on top of that, the ODR Regulation was put in place. This created a very uneven picture, which did not help in navigating the system.²³ There had already been calls for revisions of the Mediation Directive as early as 2013,²⁴ and such calls are all but getting louder.²⁵

Also, the legal tools used (Directive and Regulation) contributed to this confusion, as one of them (Directive) provides for “minimum harmonisation”, whereas the other (Regulation) applies in the same form for each country. While some scholars praised this approach as balanced and incremental,²⁶ this proved to be a very risky choice,²⁷ as the success of the ODR Regulation – an instrument (almost) fully under the control of European institutions – was entirely dependent upon the correct implementation of the Consumer ADR Directive, as the Commission had expressly acknowledged.²⁸

Finally, the overlap between tools does not help either end-users or national institutions in navigating the system.²⁹ In most cases, “general” ADR may also still be used for consumer disputes; consumer ADR may be used for both online and traditional contracts; ODR services are provided by “traditional” institutions, but they can only be used in case of online contracts; and the request for ODR through the platform may end up in an offline procedure with an ADR entity. In sum, the Regulation seems to have failed in fulfilling the purpose set forth by its Article 5(2), i.e. “[t]he ODR platform shall be a single point of entry for consumers and traders

²² Naomi Creutzfeldt and Christopher Hodges, ‘Consumer Dispute Resolution (CDR) in Europe’ (2014) 2 *Nederlands-Vlaams Tijdschrift voor Mediation en Conflictmanagement* 29; Nicola Scannicchio, ‘The Fake Implementation of a Fake Consumers’ ADR Directive? A Case Study on Rights’ Enforcement by Regulatory Powers in Italy’ (2019) 5 *Italian Law Journal* 323.

²³ Alexandre Biard, ‘Impact of Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK’ (2019) 42 *Journal of Consumer Policy* 109, 113.

²⁴ Giuseppe De Palo and others, ‘Rebooting the Mediation Directive: Assessing the Limited Impact of Its Implementation and Proposing Legislative and Non-Legislative Measures to Increase the Number of Mediations in the EU’ (European Parliament 2013).

²⁵ Giuseppe De Palo, ‘A Ten-Year-Long “EU Mediation Paradox”. When an EU Directive Needs To Be More ... Directive’ (European Parliament 2018).

²⁶ Geraint G Howells and others, *Rethinking EU Consumer Law* (Routledge 2018) 290.

²⁷ Franziska Weber, ‘Is ADR the Superior Mechanism for Consumer Contractual Disputes? An Assessment of the Incentivizing Effects of the ADR Directive’ (2015) 38 *Journal of Consumer Policy* 265.

²⁸ “[T]he functioning of the ODR platform is linked to the proper implementation of the Directive. Once full coverage of ADR entities dealing with contractual consumer disputes linked to the sale of goods or provision of services has been accomplished in all Member States, the ODR platform will be able to function fully and serve its purpose”: European Commission (n 19) 9.

²⁹ Some scholars have even suggested changing the lexicon and referring to consumer alternative dispute resolution as ‘CDR’. See Naomi Creutzfeldt, ‘The Origins and Evolution of Consumer Dispute Resolution Systems in Europe’ in Christopher Hodges and Astrid Stadler (eds), *Resolving Mass Disputes ADR and Settlement of Mass Claims* (Edward Elgar 2013).

seeking the out-of-court resolution of disputes covered by this Regulation.” For the avoidance of doubt, the platform *is indeed* a single point of contact, but it is not *perceived* as such.

Nothing discussed above is a problem *per se*, and actually a wide availability of services should always be an advantage. However, in a field where simplicity and user-friendliness are of paramount importance (as discussed *infra*), these factors did not help, especially because the national frameworks on which European legislation was superimposed were already heterogeneous and barely coordinated.³⁰

III. THE STORY SO FAR: MISSION UNACCOMPLISHED?

A. THE 2019 REPORT

The ODR Regulation is dated 2013, but it was the document itself that provided for a delayed entry into operation. The Commission was bound to carry out a test of “the technical functionality and user-friendliness of the ODR platform” by 9 January 2015.³¹ The platform was then launched in January 2016 and was made accessible to the public on 15 February 2016. From that moment onwards, the Commission closely monitored the functioning of the platform and periodically reported on its activities. The latest available report is dated 25 September 2019.³²

The Report, which is probably slightly overly optimistic, is laudatory from a qualitative point of view, but less so from a quantitative one. This is clearly seen in the contrast between the number of accesses to the platform (“Since its launch, the platform has attracted more than 8.5 million visitors and 120 000 consumer-to-business disputes”)³³ and the number of disputes effectively handled through the platform itself: 2% of the total.³⁴

The Commission underlines that going through the platform helps parties to solve their disputes bilaterally without resorting to the system established by European rules (“However, in up to 42% of disputes submitted to the platform the parties

³⁰ Christopher Hodges and others (eds), *Consumer ADR in Europe* (Hart/Beck 2012). Many countries already had in place more or less successful ODR schemes. For the case of Belgium see Stefaan Voet, ‘Belmed: The Belgian Digital Portal for Consumer A(O)DR’ [2013] SSRN Electronic Journal 1.

³¹ ODR Regulation, Art. 6.

³² European Commission (n 7).

³³ *ibid* 15.

³⁴ “In about 80% of disputes submitted to the ODR platform the case was closed automatically after 30 days because the trader had not reacted on the platform to the notification of the dispute and the invitation to propose an ADR entity to the consumer. Only in about 2% of cases did the parties agree on an ADR entity and was the platform therefore able to transmit the dispute to an ADR entity”: *ibid*.

settled the dispute bilaterally”; “The high number of direct settlements triggered by the platform shows the platform’s added value for facilitating a bilaterally agreed solution, including in cross-border disputes where the platform’s multilingualism and translation functions enable communication between the parties”), but one may legitimately wonder whether the fact that people *do not* use a tool for its primary purpose may be read as a sign of success of the tool itself.

It is also fascinating to see how the ODR platform tried to present this phenomenon (which is almost a side effect) as an intended feature of the system. Its official website, in the version available on 8 July 2019,³⁵ opened with the words: “Online Dispute Resolution. Send your online consumer problem to an approved dispute resolution body.” Since 15 April 2020 however, it says: “Resolving your dispute on the ODR platform. Use the ODR platform to: Contact the trader to resolve the dispute directly. You have 90 days to reach an agreement. Or get a dispute resolution body to solve your dispute for you. You have 30 days to agree with the trader on a dispute resolution body to use.”

Shortcomings aside, the Report also shows some valuable information about how users approach ODR and hints at possible paths to allow the platform to express its full potential – a potential still very much underused, according to the vast majority of commentators.³⁶

First of all, the Report demonstrates that 56% of the submitted disputes are domestic, and only 44% are cross-border. This shows that, while the primary purpose of the ODR Regulation was to create a tool to assist European consumers and businesses in their international intra-EU operations, the system is most effective domestically. The data is significant because the platform may assist parties from countries where ODR is underdeveloped to access the procedure. Still, this information should not be overestimated, as the vast majority of e-commerce happens inside national borders.³⁷

One of the key problems identified by both the Commission and most experts is that the infrastructure is very fragile – in that it aims to be simple with a one-stop ODR platform, but then becomes complex as it redirects cases to an already existing ADR infrastructure about which users have still (and unfortunately) limited knowledge.³⁸ This double step generates confusion, and the already not particularly

³⁵ I used the ‘Wayback Machine’ service to recover the previous version of the page. This service is able to show a webpage in its version at a given date. It also identifies the days in which major changes were made to the page. See <https://archive.org/web/>.

³⁶ Pablo Cortés, ‘The Potential of Online Dispute Resolution as a Consumer Redress Mechanism’ [2007] SSRN Electronic Journal; Loutocký (n 4); Emma van Gelder and Alexandre Biard, ‘The Online Dispute Resolution Platform after One Year of Operation: A Work in Progress with Promising Potential’ [2018] SSRN Electronic Journal; Maria Jose Schmidt-Kessen and others, ‘Success or Failure? Effectiveness of Consumer ODR Platforms in Brazil and in the EU’ (no date) 17–19 Copenhagen Business School Law Research Paper Series 1.

³⁷ EUROSTAT, ‘Statistics Explained. E-Commerce Statistics for Individuals’ (January 2020) 7.

³⁸ Biard (n 23).

tech- – nor ADR- – savvy European users tend to be puzzled about how to navigate the system. Studies have already demonstrated that one of the weaknesses of ADR is that consumers often confuse ADR entities with the businesses' customer care services, and, conversely, traders tend to confuse such entities with consumers' associations;³⁹ these procedural steps tend to add to the confusion.

Moreover, the system as it is designed requires strong cooperation from traders: business entities are already under the obligation, provided for in Article 13 of Directive 2013/11/EU, to inform consumers about the ADR procedures by which these traders are covered and about whether or not they commit to use ADR procedures to resolve disputes with consumers. Article 14 of the ODR Regulation builds on this system:

1. Traders established within the Union engaging in online sales or service contracts, and online marketplaces established within the Union, shall provide on their websites an electronic link to the ODR platform. That link shall be easily accessible for consumers. Traders established within the Union engaging in online sales or service contracts shall also state their e-mail addresses.
2. Traders established within the Union engaging in online sales or service contracts, which are committed or obliged to use one or more ADR entities to resolve disputes with consumers, shall inform consumers about the existence of the ODR platform and the possibility of using the ODR platform for resolving their disputes. They shall provide an electronic link to the ODR platform on their websites and, if the offer is made by e-mail, in that e-mail. The information shall also be provided, where applicable, in the general terms and conditions applicable to online sales and service contracts

As already pointed out by Ross,⁴⁰ this creates a paradoxical situation in which traders are under the obligation to signal to consumers the availability of ODR entities (Art. 14(1)), but – at the same time – are not bound to submit themselves to it (unless relevant national legislation provides otherwise). In addition to this, another major weak point in the whole system is that, if the trader involved in the complaint does not reply to the ODR platform, the issue is automatically closed. This may lead to another paradox: there are many instances in European law under which business entities are bound to ADR (Art. 14(2)). Even in such instances, if the complaint is filed through the ODR platform, the issue is not redirected to the competent ADR authority, but simply and automatically closed, and the complainant is sent back to “square one” of the procedure. Aside from the inefficiency this process entails, the consumer may erroneously be led to think that ADR is not a viable option in

³⁹ European Commission (n 7) 9.

⁴⁰ Graham Ross, 'European Businesses and the New European Legal Requirements for ODR' (2016) 3 *International Journal on Online Dispute Resolution* 135.

this case, whereas in fact it may be the only legally correct procedure.⁴¹ Finally, even when parties agree on an ADR entity, there is no guarantee that this entity can provide ODR services: the presence of ODR is not required in order to receive the certification provided for under the Consumer ADR Directive. A complaint started online and intended to be solved online might hence be sent offline.

B. PLAYING WITH NUMBERS: A PRELIMINARY ATTEMPT OF QUANTITATIVE ANALYSIS

A famous saying in research goes, “If you torture data enough, they will tell you whatever you want”, and indeed it is difficult (and probably even inappropriate) to draw broad conclusions from a limited dataset,⁴² and dangerous to run a purely quantitative analysis without qualitative support.⁴³ However, even just for the sake of developing hypotheses or at least educated guesses, it is worth trying to read the reported data against other factors in some selected countries.

The Commission, on the website about Online Dispute Resolution, provides updated statistics about the number of cases, the countries they come from, and the “Top 10 most complained about sectors”.⁴⁴ It also mentions the number of ADR entities formally recognised for the purposes of the ODR Regulation.

As far as consumers are concerned, in terms of sheer numbers, Germany has the “lion’s share” of cases, with 31,428 cases (of which 23,635 are domestic) out of the total 145,156 reported. Germany is followed by the UK (27,527/18,994), France (17,737/7,990), Spain (15,654/8,585), and Italy (11,274/5,551).⁴⁵

On the traders’ side of the table,⁴⁶ again Germany stands out with 34,229 cases, followed by the UK (28,721), Spain (14,444), France (10,979), and

⁴¹ Fernando Esteban de la Rosa, ‘Scrutinizing Access to Justice in Consumer ODR in Cross-Border Disputes: The Achilles’ Heel of the EU ODR Platform’ (2018) 4 *International Journal of Online Dispute Resolution* 26, 29.

⁴² Russell B Korobkin, ‘Empirical Scholarship in Contract Law: Possibilities and Pitfalls’ (2002) 2002 *University of Illinois Law Review* 1033.

⁴³ Giorgio Fabio Colombo and Hiroshi Shimizu, ‘Litigation or Litigiousness? Explaining Japan’s “Litigation Bubble” (2006–2010)’ (2016) 2016 *Oxford University Forum for Comparative Law*.

⁴⁴ EU Commission, Online Dispute Resolution, <https://ec.europa.eu/consumers/odr/main/?event=main.statistics.show>.

⁴⁵ According to the Commission, the main reason is the positive correlation between e-shoppers in these countries and the number of complaints filed. European Commission, ‘Functioning of the European ODR Platform. Statistics 2nd Year’ (December 2018) 3.

⁴⁶ Traders may also be allowed by national law to file complaints against consumers using the ODR platform, but to date this is only possible against consumers residing in Belgium, Germany, Luxembourg, or Poland.

Hungary (10,074).⁴⁷ The most complained about sectors are airlines (18.45% of the total cases), followed by clothing (10.31%), and information and communication technology goods (6.53%).

As for ADR entities, France leads the way with 99 recognised entities as of 1 July 2019. It is followed by the UK (59), Italy (43), Germany (27), and Denmark (26). A notable outlier is Romania, which has decided to concentrate the entirety of consumer ADR in a single entity (a public body).

As already mentioned, the majority of complaints are domestic, but in this aspect, it is possible to observe a wide discrepancy among countries. 75.2% of the complaints brought by German consumers are against German traders; in the UK, the percentage is 69%; and it is 54.84% in Spain, 49.2% in Italy, and 45.04% in France. However, the balance is tilted towards domestic disputes because of the decisive contribution brought by consumers in the most populated countries: the percentage is almost completely reversed if we consider smaller nations. At the bottom of the table stands Iceland, where only 3.63% of the complaints are against Icelandic traders (2 out of 55), but similar trends are present in countries such as Cyprus (10.22%), Finland (16.27%), and Austria (17.02%). Intuitively, these figures may be correlated with the better availability of products and services in bigger economies, but may also be a sign that the system is working for European consumers in smaller countries: they are able to shop in other EU jurisdictions disproportionately more than Germans or Spaniards, and – consequently – if something goes wrong, their frequency of usage of the ODR platform in international cases is disproportionately high. So, in sheer numbers, domestic cases still outnumber cross-border complaints – 54.95% to 45.05% (80,582 to 66,070) – but in the vast majority of countries (24 out of 28),⁴⁸ cross-border complaints outnumber national cases.

It is very easy to see the direct correlation between the number of e-consumers in each country and the number of complaints. The same correlation, however, cannot be observed between ADR entities and number of complaints. This is no surprise, as some countries have decided to centralise ADR services for certain sectors or trades.⁴⁹ Hence, the number of certified ADR entities is not correlated to the demand for their services.

⁴⁷ The case of Hungary is a noteworthy anomaly, as the number of cases is disproportionate both in terms of population and economic size. As a note, Romanian consumers have brought more complaints against Hungarian traders (1,132) than against local businesses (993). And this is even more noteworthy given that Romania has the lowest percentage of e-shoppers in Europe (only 29% of active domestic internet users). EUROSTAT (n 37) 3.

⁴⁸ Germany, the UK, Spain, and Hungary are the only EU countries out of 28 where domestic complaints outnumber cross-border ones.

⁴⁹ This issue was already observed during the implementation of the ADR Directive. In many countries, powerful ADR organisations (such as those managed by Chambers of Commerce or Bar Associations) monopolised the vast majority of cases, while a flurry of minor entities were left with a few or even no cases.

Table 1. Number of Complaints per Population, E-Consumers and ADR Entities

Country	Population ⁵⁰	E-Consumers ⁵¹	ADR Entities	Complaints ⁵²	Ratio
Germany	84,069,840	66,415,173 (0.79)	27	31,428	1:2,113
UK	68,077,834	59,227,715 (0.87)	59	27,527	1:2,151
France	65,325,133	45,727,593 (0.7)	43	17,373	1:2,632
Spain	46,798,331	27,723,032 (0.58)	22	15,654	1:1,770
Italy	60,442,138	22,968,012 (0.38)	43	11,274	1:2,037

Another aspect that may be worth exploring is whether there is any correlation between the development of ADR and digital justice in a given jurisdiction and the number of cases brought to the ODR platform. Here, the analysis become muddier and less significant, as the indicators provided to measure such factors (i.e. the World Bank's *Doing Business. Measuring Business Regulation 2020* report)⁵³ are questionable at best. For the sake of sheer experimentation, and to provoke a more specific analysis, here are the results.

Table 2. Judicial Quality Indicators and Number of Complaints

Country	DB2020 Ranking	ADR	Court Automation	Overall Quality	Complaints
Germany	13	3/3	3.5/4	12.5/18	31,428
UK	34	2/3	3.5/4	15/18	27,527
France	16	2.5/3	2/4	12/18	17,373
Spain	26	3/3	2.5/4	11.5/18	15,654
Italy	122	3/3	3/4	13/18	11,274

No significant correlation may be observed between these factors.

The *Doing Business* report, the scientific validity of which has already been challenged several times,⁵⁴ might be of some use for business regulation, but since it is focused on commercial contracts and court proceedings, it is of little to no use for the study of consumers' disputes. Moreover, since the overwhelming majority of consumers' issues do not reach a court of law, and even when they do, they are normally swallowed in the broad categories of civil litigation – and/or the small claims procedure – it is particularly challenging to collect hard evidence on trends and patterns.⁵⁵

⁵⁰ UN World Population Prospects 2019, <https://population.un.org/wpp/>.

⁵¹ EUROSTAT (n 37).

⁵² EU Commission, Online Dispute Resolution, <https://ec.europa.eu/consumers/odr/main/?event=main.statistics.show>.

⁵³ <https://www.doingbusiness.org/>.

⁵⁴ Remo Caponi, 'The Performance of the Italian Civil Justice System: An Empirical Assessment' (2016) 2 *The Italian Law Journal* 15.

⁵⁵ Schmidt-Kessen and others (n 36) 2.

Of course, the success of ADR (in general) in a given jurisdiction may depend on a number of issues which are not limited to the efficiency of the court system and the availability of ADR procedures. In addition to those, ODR specifically is also heavily affected by the availability of internet access in a given country;⁵⁶ also, digital literacy is important,⁵⁷ but the latter factor is extremely difficult to measure, and it is complex to correlate it with the former in a scientific way within the framework of ODR. A comprehensive, cross-factorial analysis is required before drawing any more structured conclusions.

IV. POSSIBLE FUTURE DEVELOPMENTS AND ACQUIRED LESSONS

The development of consumer ODR in Europe is still in an early stage. The experiment so far shows potential, but the road to successful and widespread usage is still long and winding. So far, consumer ODR seems to be somewhat (but not completely)⁵⁸ immune from the fierce debate about the mandatory use of ADR which is raging in Europe,⁵⁹ and this protects, in some ways, the “test tube” where the platform is still fermenting from the need for immediate and radical change. I am less pessimistic about the recent developments in consumer justice than scholars calling for a re-judicialisation of the sector,⁶⁰ also because the alternative to ODR (and ADR) does not seem to be the court, but rather the traders’ internal claim handling.⁶¹ Yet improvements are sorely needed.

As noted above, there are many weak points in the system. The platform requires strong cooperation between consumers, traders, and Member States; and while in some jurisdictions, this happens with reasonable success, in others this is missing. In particular, the Report shows very limited compliance with Article 14 of the ODR Regulation: in late 2017, only a little more than one quarter of online traders provided

⁵⁶ EUROSTAT (n 37).

⁵⁷ ECDL Foundation, ‘Perception & Reality. Measuring Digital Skills Gaps in Europe, India and Singapore’ (2018).

⁵⁸ Howells and others (n 26) 316.

⁵⁹ Jacqueline MNolan-Haley, ‘Is Europe Headed Down the Primrose Path with Mandatory Mediation?’ (2012) XXXVII North Carolina Journal of International Law and Commercial Regulation 981; Giuseppe De Palo and Romina Canessa, ‘Sleeping – Comatose Only Mandatory Consideration of Mediation Can Awake Sleeping Beauty in the European Union’ (2014) 16 Cardozo Journal of Conflict Resolution 713; Giorgio Fabio Colombo, ‘Successful Heresies, Contested Orthodoxies: Comparative Reflections on Recent Developments of ADR in Italy’ (2020) 287 Nagoya University Journal of Law and Politics 59.

⁶⁰ Eidenmüller and Engel (n 11).

⁶¹ Jacques de Werra, ‘Alternative Dispute Resolution in Cyberspace: The Need to Adopt Global ADR Mechanisms for Addressing the Challenges of Massive Online Micro-Justice’ (2016) 26 Swiss Review of International and European Law 289.

links to the ODR platform on their websites.⁶² Providing clear information about the process is fundamental for its success: both the Commission and Member States should probably adopt a “stick-and-carrot” approach, under which traders could be rewarded (for example, in the form of an official EU certification, or even with small fiscal incentives) if they play along with the system by providing the required information and registering themselves on the platform, and be sanctioned if they do not.

Also, ADR entities are not involved in the platform, but simply referred to by it. There is no obligation for them to cooperate, and they are not required in any way to change their structure to specifically accommodate ODR.⁶³ This may lead to the paradoxical situation of driving an online dispute offline. This should also be fixed.

Another contradiction may (and should?) be ironed out at the European level. As already mentioned several times, the primary purpose of the platform was to solve cross-border disputes generated from online contracts. However, since the reality shows that the system is also (mostly) used domestically, one may wonder whether it still makes sense to keep the scopes of the Consumer ADR Directive (applicable to both online and traditional contracts) and the ODR Regulation (which only covers online contracts) different. Since the system is already in place, it may as well be appropriate to conceive of a broader use of the ODR platform.

Finally, several experiences have already clearly demonstrated that no matter how good the entity concerned is, it is its identifiability and user-friendliness that make it successful (as is the case with many ombudsman-type institutions).⁶⁴ Whatever happens next, European and national regulators should bear in mind that access to ODR *per se* is almost worthless unless users can clearly identify the platform as the single point of contact it purports to be, and can be guided step by step through the procedure. In this endeavour, education is fundamental.

If these key challenges are successfully tackled, then the ODR Regulation may express its full potential and also provide guidance and an example for all those jurisdictions which intend to expand the use of ODR while still protecting consumers' rights in a strong way.⁶⁵

⁶² “At the end of 2017, the Commission conducted a webscraping exercise of websites operated by online retailers established in the Member States, Norway and Iceland to check compliance with Article 14 ODR of the Regulation. The exercise showed that at the time the compliance rate was at 28%”: European Commission (n 7) 15–16.

⁶³ Howells and others (n 26) 316.

⁶⁴ Naomi Creutzfeldt, ‘How Important is Procedural Justice for Consumer Dispute Resolution? A Case Study of an Ombudsman Model for European Consumers’ (2014) 37 *Journal of Consumer Policy* 527. See also the various examples reported in Hodges and others (n 30).

⁶⁵ Julia Hörnle, ‘Encouraging Online Dispute Resolution in the EU and Beyond – Keeping Costs Low or Standards High?’ [2012] SSRN Electronic Journal.