

AN EFFECTIVE ON-LINE DISPUTE RESOLUTION NETWORK FOR ENHANCING COLLECTIVE REDRESS IN EUROPE: HOW TO HANDLE MASS SMALL CLAIMS THROUGH AN INTEGRATED APPROACH*

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ABSTRACT: The ESCP disappointing results, the scarce interconnection between Reg. 861/2007, ADR legislation and Directives 2019/2161 and 2020/1828, as well as the suboptimal functioning of the ODR platform urge for a global rethinking. The Author points out some possible interventions to implement consumers' and users' protection in relation to small and homogenous claims, hoping that the European Institutions will soon consider a reform aimed at establishing an online integrated justice service in which court procedures merge with mechanisms of amicable solution.

KEYWORDS: Reg. 861/2007; Dir. 2013/11; Reg. 524/2013; Dir. 2019/2161; Dir. 2020/1828; Small claims; Enforcement of consumer rights; Alternative Dispute Resolution; Online Dispute Resolution Platform; Collective Redress and Settlements; E-justice; ADR/ODR and Adjudication as Different Levels of an Integrated Public Service Provided Online.

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1 IS THE ODR ARCHITECTURE OF CONTROL LAID OUT BY THE EUROPEAN LEGISLATOR SUFFICIENTLY STURDY IN ORDER TO MAXIMISE THE OUTCOMES IN TERMS OF MASSIVE ENFORCEMENT OF EU RIGHTS FOR CONSUMERS?

This paper addresses the question whether the tools set by the EU legislator in relation to ODR for consumers and users are apt to face effectively the myriads of small claims that can arise especially in the field of electronic commerce and that, if not timely and efficiently resolved, may affect consumers' and users' rights.

After the enactment of Reg. no. 861/2007, that refers to simplifying and speeding up the settlement of cross-border litigation on small claims with a view to facilitating access to justice, the European Institutions have tried to improve the enforcement of consumer rights also through the harmonisation of ADR methods. Given the increasing importance of online commerce and in particular cross-border trade as a pillar of Union economic activity, a properly functioning of ADR infrastructure for consumer disputes and a properly integrated ODR framework for consumer disputes arising from online transactions have been deemed necessary in order to achieve the aim of boosting citizens' confidence in the internal market.

The purpose of Dir. 2013/11 is, through the achievement of a high level of consumer protection, to ensure that consumers can, on a voluntary basis, submit complaints against traders to entities offering independent, impartial, transparent, effective, fast and fair alternative dispute resolution procedures. Reg. no. 524/2013 provides for the establishment of an ODR platform which offers consumers and traders a single point of entry for the out-of-court resolution of online disputes, through ADR entities which are linked to the platform and offer ADR through quality ADR procedures¹. Online traders and online marketplaces are indeed required to include on their websites an electronic link to the ODR platform².

On 11th April 2018 the Commission launched the "New Deal for Consumers" initiative aimed at strengthening enforcement of EU consumer law in light of a growing risk of EU-wide infringements and at modernising EU con-

¹ The availability of quality ADR entities across the Union is thus a precondition for the proper functioning of the ODR platform. As is well known, the ODR platform is a multilingual interactive website that allows consumers to submit online their consumer-to-business disputes over (domestic or cross-border) online purchases. It informs the parties on the quality-certified ADR entity or entities which is/are competent to handle their case and transmits the dispute to the ADR entity on which the parties have agreed. The ADR entity has then the possibility to use the platform's case management tool and handle the case online on the platform. If the parties do not agree on an ADR entity within 30 days from submission of the complaint, the case is automatically closed on the platform. There is obviously no prejudice to the consumer's possibility to pursue his or her complaint outside the platform e.g. by submitting the complaint directly to an ADR entity.

² Online traders are furthermore obliged to provide their e-mail address.

sumer protection rules in view of market developments. This brought about the adoption of the Dir. 2019/2161 on better enforcement and modernisation of EU consumer protection³ and of the Dir. 2020/1828 on Representative Actions⁴. Particularly, this latter Directive aims to ensure that at Union and national level at least one effective and efficient procedural mechanism for representative actions for injunctive measures and for redress measures is available to consumers in all Member States. This goal would boost consumer confidence, empower consumers to exercise their rights, contribute to fairer competition and create a level playing field for traders operating in the internal market.

Although Dir. 2013/11 and Reg. no. 524/2013 share with the New Deal package the same objective (strengthening consumers' rights), the interconnections between the ADR/ODR set of rules, the Reg. on small claims and the two new Directives are negligible.

On the one hand, the entire ADR/ODR architecture seems to be conceived only to manage individual claims: as regards collective claims, no provision can be found in Reg. no. 524/2013, while just a brief reference appears in Dir. 2013/11⁵.

On the other hand, Dir. 2019/2161 confines itself to adopting the same notion of marketplace used by the ODR platform, while Dir. 2020/1828 provides only for the possibility that pending a representative action for redress:

³ This Directive, adopted by the European Parliament and the Council on 27th November 2019 (<https://eur-lex.europa.eu/eli/dir/2019/2161/oj>), amends the existing EU instruments in line with digital developments particularly in order to get:

- more transparency on online marketplaces (about seller's identification, consumer reviews, application of algorithms for personalizing prices and criteria for ranking the offers on platforms);
- the same protection in relation to service contracts under which the consumer pays or undertakes to pay a price as well as to contracts for digital services under which the consumer provides personal data to the trader without paying a price;
- individual remedies (such as ending the contract, getting a price reduction or financial compensation) when consumers are affected by unfair commercial practices;
- more effective penalties for cross-border infringements;
- better protection against unfair practices in doorstep selling and commercial excursion.

⁴ Adopted by the European Parliament and the Council on 25th November 2020 (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2020.409.01.0001.01.ENG).

⁵ Recital 27 of Directive 2013/11 merely states that Member States can maintain or introduce ADR procedures dealing jointly with identical or similar disputes between a trader and several consumers. The clarification is accompanied by two general recommendations: firstly, comprehensive impact assessments should be carried out on collective out-of-court settlements before such settlements are proposed at Union level; in the second place, the existence of an effective system for collective claims and easy recourse to ADR should be complementary and they should not be mutually exclusive procedures. The solution of these difficult issues is therefore completely left out and remitted to the discretionary choices made by the national legislators. *Amplius* LUZAK, *The ADR Directive: designed to fail?, A Hole-Ridden Stairway to Consumer Justice in Eur. Rev. Private Law*, 1-2016, 81 ff. (especially at 92), where the Author points out that the ADR directive «does not enable consumers bringing collective claims to ADR entities», and VOET, «Where the Wild Things Are» – *Reflections on the State and Future of European Collective Redress*, 8 february 2017, in www.ssrn.com, 56 ff., who hopes for «an integrated and holistic framework».

- the parties jointly propose a settlement or
- the seized authority invite the trader and the qualified entity that commenced the proceeding to enter negotiations⁶.

As far as Reg. 861/2007 is concerned, art. 12 § 3 simply enables the judge of the small claim procedure, whenever appropriate, to seek to reach a settlement between the parties.

It is hardly necessary to say that most of unfair commercial practices cause minor damages to consumers and therein lies the problem, as the small value of the claims makes really unlikely for the weaker market players to search for right compensation before Courts. The small claim procedure is, regrettably, still not well-known among litigants, especially in some countries⁷, and its application scope does not cover domestic disputes, however. To be truly

⁶ According to article 11, in both situations the settlement which may have been reached shall be subject to the scrutiny of the court or administrative authority to ensure that it is not contrary to mandatory provisions or includes conditions that are not enforceable, taking into consideration the rights and interests of all parties, and in particular those of the consumers concerned. The Directive on representative actions is aimed at a minimum harmonisation: the basic provisions outlined by article 11, here summarized, are consistent with the reluctance of the European law systems to embrace the U.S. class action model. In fact, in the Old Continent national legislation on collective redress doesn't seem to be enhancing class settlements, with the sole exception of the Netherlands, Belgium and, to some extent, Italy (see, respectively, VAN DER ELST AND WETERINGS, *The Dutch Mechanisms for Collective Redress: Solid, and Excellent within Reach* in *The Cambridge Handbook of Class Actions, An international Survey*, edited by Fitzpatrick and Thomas, Cambridge, p. 272 ff. (2021); NOTHOMB, *L'action en réparation collective à la belge, état des lieux presque deux ans après son entrée en vigueur*, in <https://dial.uclouvain.be/memoire/ucl/en/object/thesis%3A3891>; ZUFFI, *The Italian Class Actions Reform: a Conservative Revolution* in *ZZP Int - Zeitschrift für Zivilprozess International*, 2020, p. 23 ff., vol. 24 (2019)).

⁷ A survey conducted in 2012 by the ECC-net, known as *ECC-Net European Small Claims Procedure Report* (https://ec.europa.eu/info/sites/info/files/small_claims_international_claims_2012_en.pdf) has shown that the awareness about the Reg. no. 861/2007 was rather scarce, with the exception of Estonia, Ireland and UK, where the ESCP is more widely known and used, probably because those legal systems have provided for a small claim procedure also as far as no-cross-border litigation is concerned. According to the outcomes of the interviews made for the Special Eurobarometer 395, disclosed in April 2013, three-quarters of respondents have not heard of the simplified procedure for small claims in their country; slightly less than one in five respondents have heard of the procedure (19%) and an additional 3% of Europeans have used it. Some statistical data about the number of ESCP applications received by the Courts in Europe have been gathered by the Deloitte Report (*Assessment of socio-economic impact of policy options for the future of ESCP Reg., Final Report*), published in November 2013 (http://www.marinacastellaneta.it/blog/wp-content/uploads/2013/11/com_2013_795_en.pdf): they are referred to below in chart no. 1. Unfortunately, most Member States do not collect in a systematic manner the figures about the European small claim proceedings commenced or the ESCP judgments issued by their judicial authorities, hence no constant monitoring on the enforcement of Reg. no. 861/2007 is available. This is also the case for Italy, as the IT-system used by the Justices of the Peace and the Tribunals does not allow to label the European small claims proceedings and so it is not possible to launch a query to extract the relevant case-files. To have a rough idea of how many ESCP have been initiated in Italy in the last years I searched through various sources the rulings made pursuant to Reg. no. 861/2007 by Italian Courts and I found 24 final judgments. Furthermore, I sent an e-mail to the Justices of the Peace of the main Italian cities, asking if they have in any way recorded or tracked the European small claim procedures pending or defined before them. Some clerks, judges and officers kindly replied to my request and I would like to express here my gratitude to all of them. Read in chart no. 2 the results of this very incomplete enquiry.

Chart no. 1 – ESCP in Europe

cost-effective ESCP should rely heavily on ICT⁸, while in the majority of jurisdictions, there is a gap between providing information about small claims procedure and actually offering online services⁹. This deficiency looks likely

Member State	Number of ESCP applications received by the Courts of the MS (from Deloitte Report – table 54)				
	2009	2010	2011	2012	Total
Austria				222	
Bulgaria				3	
Finland	12	7	9	46	
France	3	27	49	54	
Germany		187	332		
Malta	1	3	8	3	
Portugal		3	6	15	
Poland					193
UK					526

Chart no. 2 – ESCP in Italy

Justice of the Peace	no. ESCP per year	Total ESCP
Aosta		1 (2018)
Reggio Calabria		19 (2017-2020)
Milano	20-25	
Bologna		30 (2017-2020)
Gorizia		1 (2018)
Udine		1 (2020)
Belluno		0
Vicenza		1 (2020)
Rovigo		4 (2016-2020)
Bolzano		5 (2012-2021)
Trento	2-3	
Tione		3
Rovereto		3 (2018-2020)
Egna		2 (2014, 2018)

⁸ As noticed by CORTÉS, *Online Dispute Resolution for Consumers in the European Union*, Oxon (2011), p. 4.

⁹ See the *2016 EU Justice Scoreboard* (<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1555419683920&uri=CELEX:52016DC0199>), page 21: as shown by the figure 22 only Estonia, Lithuania, Malta, and Portugal score 100 percent for online availability of ESCP. However, the gap could be soon filled. As a consequence of the Communication from the Commission on the *topic Digitalisation of justice in the European Union. A toolbox of opportunities*, 2.12.2020, COM(2020) 710 final, a Proposal has been put forward for a *Regulation on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation*, 1.12.2021, COM(2021) 759 final. According to article 20 of this draft, Reg. 861/2007 should be amended in order to provide for the compulsory digitalisation of the ESCP.

to worsen within the context of the digital market, where the ever-growing e-commerce¹⁰ brings about a substantial number of disputes, most of whom cross-border¹¹, that are expected to be defined electronically¹² or, anyway, through a quick and not expensive method.

2. THE FUNCTIONING OF ODR PLATFORM 7 SEVEN YEARS AFTER ITS INTRODUCTION REVEALS LARGE ROOM FOR IMPROVEMENT.

As already observed, the European legislator apparently has not seen fit to integrate the ADR/ODR system with the major tools recently designed to enhance consumers' protection against massive infringements and no adjustment has been made to connect the small claim procedure to out-of-court dispute resolution mechanisms.

The issue wouldn't be all in all paramount if the ADR/ODR system — meant just to guarantee access to simple, efficient, fast and low-cost alternative techniques of resolving domestic and cross-border disputes — was resulted very efficient and satisfactory in facing the bulk of small claims emerging from the internal market. Unfortunately, the report published by the Commission at the end of September 2019 on the application of Dir. 2013/11 and of Reg. 524/2013 illustrates that in about 80% of disputes submitted to the ODR platform the case was closed automatically after 30 days because the trader had not reacted to the notification of the claim and the invitation to propose an ADR entity to the consumer. Besides, only in 2% of the thin slice of cases in which the trader was willing to participate to ADR proceedings, the parties agreed on an ADR body¹³.

¹⁰ According to the final report 2018 on the *Retailers' attitudes towards cross-border trade and consumer protection – EU Commission*, dated February 2019, more than half of all retailers (53.1%) are currently engaged in distance selling, with e-commerce (37.8%), mobile commerce (18.4%) and tele-sales (17.9%), the three most common methods. Overall, four in ten retailers sell via e-commerce or mobile commerce (41.5%). More than one third of retailers (36.4%) sell online to final consumers in their country, 13.7% sell online to consumers in non-EU countries and 13.6% to those in other EU countries. As pointed out by the final report 2018 on the *Consumers' attitudes towards cross-border trade and consumer protection – EU Commission*, the average proportion of consumers who shop online in the European Union is 72.0%, with 63.0% having purchased goods or services online domestically, 28.3% crossborder from EU-based online retailers or service providers and 18.4% cross-border from online retailers or service providers located outside the EU.

¹¹ Almost four in ten retailers in EU27_2019 have received complaints from domestic consumers in the last 12 months, and a large majority of these were about the product itself. More than one third of retailers (35.1%) have received complaints from consumers in their own country in the past 12 months. 15.5% of retailers selling cross border received complaints from consumers located in other EU countries.

¹² ROGERS, *Knitting the Security Blanket for New Market Opportunities*, in Wahab, Katsh and Rainey (ed.), *Online Dispute Resolution: theory and practice*, The Hague, p. 95 ff. (2012) has suggested establishing a global online dispute resolution system for cross-border online transactions for the sale of goods.

¹³ Read page 14 in https://ec.europa.eu/info/sites/info/files/com_2019_425_f1_report_from_commission_en_v3_p1_1045545_0.pdf.

This failure is probably due to several factors. A statistical survey conducted among retailers during the period 2016-2018 shows that the awareness about ADR is still scarce (43,4% of retailers do not know any ADR body) and there is a not insignificant percentage of traders (8%) who acknowledge the system, but do not want to use it¹⁴. Besides, according to the 2017 web-scraping study on ODR, less than a third part of the investigated traders' websites include a link to the ODR platform¹⁵.

To work on these flaws, the platform's homepage and messaging were overhauled and new information pages and a feedback system introduced. The Commission also conducted a targeted ADR communication campaign aiming to improve traders' awareness of and engagement on the ODR platform. As a result, the number of traders registered in the platform increased by 54% in 2018 and by another 24% in the first five months of 2019¹⁶.

One of the main shortcomings of the ODR platform was the cumbersome flow designed to handle the claims: the requirement that the parties need to agree on an ADR entity before the platform transmits the dispute to it was perceived as an unnecessary passage. Most of the queries addressed by consumers to the ODR contact points have concerned the automatic closure of the case when the trader does not respond to the complaint submission on the platform: indeed, they believed that the platform factually provides for ADR proceedings.

To respond to these criticisms, some novelties were introduced in mid-2019¹⁷. The ODR platform now enables the consumer to contact the trader to resolve the dispute directly, instead of trying to agree on an ADR body: this is certainly a step forward, but the system is still far from being efficient. According to the last report, published in December 2021¹⁸, there was a sharp increase in the number of unique visitors to the ODR platform in

¹⁴ See page 52 of the *Consumer Conditions Scoreboard*, 2019 edition (https://ec.europa.eu/info/sites/info/files/consumers-conditions-scoreboard-2019_pdf_en.pdf).

¹⁵ Read *Online Dispute Resolution: web-scraping of EU Traders' websites, Executive summary*, November 2017, page 2 (https://ec.europa.eu/info/sites/info/files/odr_web scraping_executive_summary_en.pdf).

¹⁶ See page 15 of the Report referred to at footnote 8.

¹⁷ A "self-test" helps consumers to identify a redress solution most appropriate for their specific problem: launching a complaint on the ODR platform, contacting the trader bilaterally or a European Consumer Centre or an ADR entity directly. Indeed, since July 2019 there has been the chance to make a request for direct talks: the consumers are given an option to share a draft complaint with a trader before submitting it officially, to try to settle the dispute directly.

¹⁸ See it at <https://ec.europa.eu/info/sites/default/files/2021-report-final.pdf>. Side-by-side comparison to 2019 (August to December) shows a 70% increase in submissions (both for traditional complaints and for direct talks). The report confirms the failure of the ODR complaints system: in 2020 as well 89% of complaints formally launched on the platform were automatically closed after the 30-day legal deadline for the trader to eventually agree to proceed to an ADR procedure; 6% were refused by the trader and 4% withdrawn by the consumer. As a result, only 1% of the complaints reached an ADR body. The report finally notes that in a survey of all consumers who launched a complaint or made a request for direct talks, 20% of respondents say that their dispute had been resolved either on the platform or outside the platform, and a further 19% responded that they were continuing to discuss with the trader.

2020, especially due to the pandemic (3.3 million, with an average of 275,000 per month), but, in the end, only a small proportion of visitors submitted a finalised complaint (17,461) or a request for direct talks (30,319). This begs the question of whether the ODR system is really offering the service that consumers/users expect.

3. SOME PROPOSALS ON HOW TO ENHANCE ODR PROCEEDINGS ESPECIALLY IN RELATION TO HOMOGENOUS INDIVIDUAL RIGHTS... TOWARDS AN INTEGRATED SERVICE OF E-JUSTICE FOR SMALL CLAIMS?

The competence of the European Parliament and Council in adopting measures aimed at the development of alternative methods of dispute settlements, insofar as they are necessary to ensure the proper functioning of the internal market, is founded, as is widely known, on art. 81, letter g), of the TFUE, which allows for different degrees of implementation¹⁹. The disappointing outcomes of the CADR package should nudge the European Parliament towards abandoning the minimum harmonization approach adopted so far²⁰ to the advantage of a new more engaging and thorough vision, intended for offering an integrated on-line service of (formal and consensual) justice in relation to consumer small claims throughout the European Legal Area, as I will try to better explain at the end of this paragraph²¹. The futuristic scenario just sketched out could also be justified by the spectacular failure of the ESCP, which turned out to be incapable of facilitating access to justice for low value disputes. In any case, while waiting for such a revolutionary makeover, several improvements could make the current ADR/ODR system more efficient. In the six points hereunder listed some areas of possible intervention are recommended especially in order to implement consumers' and users' protection in relation to small and homogenous claims.

I. DIVERSITY of ADR MODELS. One of the issue that have so far arised from the practice is that ADR landscapes are highly diverse across Member

¹⁹ DE LA ROSA, *Principios de protección del consumidor para una iniciativa europea en el ámbito de la resolución electrónica de diferencias (ODR) de consumo transfronterizas*, op. cit., 10 ff. Cf. ROTT, *Consumer ADR in Germany*, in *EuCML*, 3-2018, 121.

²⁰ See also CORTÉS, *The impact of EU law in the ADR landscape in Italy, Spain and the UK: Time for change or missed opportunity?*, ERA Forum, 16, pp. 125–147 (2015); Loos, *Enforcing consumer rights through ADR at the detriment of consumer law*, *European Review of Private Law*, 1, pp. 61–80 (2016); BIARD, *Monitoring consumer ADR in the EU: A critical perspective*, *European Journal of Private Law*, 2, pp. 171–196 (2018); Id., *Impact of Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK*, *Journal of Consumer Policy*, 42, 109–147 (2019). Read SCHULTE-NÖLKE, *The Brave New World of EU Consumer Law – Without Consumers, or Even Without Law?*, in *EuCML*, 4-2015, 135 ff., who advocates for the move for full harmonisation.

²¹ The introduction of the new system could be envisaged only for cross-border litigation, leaving to the Member States the choice to extend it also to national cases or, alternatively, it could at first be “tested” in relation to e-commerce disputes only.

States, in particular as regards the number of certified ADR entities and ADR models in terms of corporate identity, funding, coverage and type of ADR procedure operated²². According to the 2019 Report on the application of Dir. 2013/11 and Reg. no. 524/2013, the «diversity of ADR landscapes makes them difficult to navigate for consumers and traders, in particular in the Member States with a large number of certified ADR entities. Overall, there is less clarity about the ADR entity to which consumers and traders can turn when there is more than one ADR entity per retail sector. A specific difficulty in navigating a Member State's ADR landscape arises when it features ADR entities whose scope is limited to specific aspects of a dispute in a given retail sector – to the effect that the consumer might need to turn to two ADR entities to have his or her issue dealt with fully»²³. Therefore, wouldn't it be better to make this landscape more uniform and less confusing, for example through the identification of a unique model of Ombudsman or negotiation/mediation service (maybe a combination of both these tools would be better) to be enforced in all member states as far as consumer disputes are concerned?

II. FAIRNESS IN DISPUTE AVOIDANCE. In many cases e-commerce platforms and large traders provide for dispute avoidance mechanisms such as internal complaint procedures, feedback systems and trustmarks²⁴. The proliferation of trustmarks has brought confusion instead of promoting confidence in legitimate business: that's why European Institutions have come to develop, in collaboration with consumers' associations of 16 countries, the Ecommerce Europe Trustmark²⁵, bound to one set of rules (the Code of Conduct): if you see the Ecommerce Europe Trustmark on the website of an online shop you are visiting, it means that the company has made a commitment to work in compliance with the ethical standards laid down for the digital marketplace. This goal is ensured also because webshops which use

²² Read page 9 of the Report. Cf. LUZAK, *The ADR Directive: designed to fail?, A Hole-Ridden Stairway to Consumer Justice*, *op. cit.*, 87.

²³ According to HODGES, *Consumer Redress: Implementing the Vision*, in *University of Leicester, School of Law Research papers*, no. 16-27, 2016, p. 6: «A CDR system should have a unified and not a pluralist design. Treating CDR as a market and hence permitting multiple diffuse CDR entities is unlikely to attract maximal usage or data. If the five functions are to be delivered, CDR coverage should be provided by a restricted number of entities». This leads the Author to conclude that the best current model is that of «a unified Consumer Ombudsman. At the least, the EU regulatory regimes in regulated sectors (financial services, energy, communications, utilities) should switch from requiring ADR to requiring Ombudsmen».

²⁴ For an overview of the O.D.A. phenomenon, defined as the use of ICT to impede the occurrence of disputes between the parties and the resolution of disputes at an early stage without requiring the disputants to become fully engaged in a dispute resolution process, see CORTÉS, *Online Dispute Resolution for Consumers in the European Union*, *op. cit.*, p. 59 ff.

²⁵ The Ecommerce Europe Trustmark – operating in Austria, Belgium, Czech Republic, Denmark, Estonia, France, Germany, Greece, Ireland, Italy, the Netherlands, Norway, Portugal, Spain and Switzerland – has been developed in continuing dialogue with consumer organizations. It is meant to stimulate the cross-border e-commerce through better protection for consumers and merchants by establishing one Code of Conduct and by ensuring clear communication of these rules. Online shops may carry the Ecommerce Europe Trustmark for free via one of the National Associations that has joined Ecommerce Europe: sellers or traders who use the Trustmark without proper authorization from Ecommerce Europe are blacklisted in the website (see <https://ecommercetrustmark.eu/>).

Ecommerce Europe Trustmark without proper authorization are inscribed in a black list. A further problem is that many of the traders' internal complaint procedures are not fair and they often lack transparency. Also on this side a lot of work has been made by designing and integrating into the ODR platform infographics and simple information about EU' rights and thus by leading consumers to understand if the solution envisaged by the internal complaint procedure or by the negotiation occurred with the trader can be considered just. Nevertheless, more should be done: individualized assistance should be available to online users and the traders' websites should show the ADR system as a clear alternative to their internal complaint procedures: what, for example, if vendors had to post the link to the ODR platform in the same position and with the same accessibility reserved to their internal dispute avoidance mechanisms? What if they had to outline their internal complaint procedures and the European ADR/ODR framework²⁶, letting users to comparatively evaluate the two systems from the beginning of the dispute?

III. CONFIDENCE AND COMMITMENT IN ADR. We have seen that many (especially small) traders do not know or trust the ADR system (maybe because they perceive the ADR bodies as tied to the consumers' perspective); most websites are not connected to the ODR platform. These issues need a double-face approach: to conquer traders' trust it would be probably convenient for the ADR/ODR framework to be backed by national authorities and to become part of a greater integrated service of justice (read *infra*); in order to increase the traders' uptake in ADR I think the obligation to post the link for the ODR platform on their websites should be more effectively enforced by inscribing those who do not comply in a black list²⁷, which could be conveniently advertised on the website of the Ecommerce Europe Trustmark²⁸.

²⁶ *Amplius* ABEDI, ZELEZNIKOW AND BELLUCCI, *Universal standards for the concept of trust in online dispute resolution systems in e-commerce disputes*, in *International Journal of Law and Information Technology* (2019), 27 (3), pp. 209-237 note that «One of the main elements that contribute to evaluation of trust in ODR systems is the existence of knowledge about the process. It is important that individuals have adequate information and knowledge about ODR systems, in order to trust them. Moreover, there is a strong relationship between reputation of government authorities and trust. Therefore, a well-designed ODR platform should provide knowledge for individuals. This could occur in two ways: (i) Reputation and endorsement by official bodies: for example, ODR providers could create a strong reputation by using feedback systems and review forums, gain endorsement by recognized law firms or government bodies and by presenting official logos on their website. (ii) Transparency of the procedure: ODR providers should offer a full road map of the process for users, including how their system works, how long the process will take, what are the steps in the ODR process and what are the possible outcomes».

²⁷ Reputational sanctions can be very powerful in the fields where to be trustworthy is essential: the stigma attached to the act leading to the blacklist might entice players to "spontaneously" comply with rules, because the consequences of a "bad exposure" are unbearable not only in terms of shaming, but also as regards with the financial losses implied. For instance, in Italy the publication of the non-compliers in a blacklist has proven very effective in assuring the enforcement of non-binding decisions of the Banking and Financial Ombudsman (ABF - *Arbitro Bancario Finanziario*). This is an out-of-court system introduced in 2009 for the resolution of disputes concerning banking and financial transactions and services, as well as payment services. The procedure, made available to the clients of banks and financial intermediaries, is essentially free of charge (the small sum of € 20 paid at the sub-

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IV. FAIRNESS IN ADR. Mediation, arbitration and ODR have been criticised for being open to manipulation by vendors, especially when these services are paid by them²⁹. What can guarantee that these providers do not tweak the system in favour of their paymasters? To avoid biases in ADR, Dir. 2013/11 essentially states the duty of impartiality and independence for the natural person or collegial body in charge, but it allows that she/he/it is employed or receives remuneration from the trader or from a professional organisation or a business association of which the trader is a member. The requirement that a separate and dedicated budget has to be at their disposal seems not sufficient, according to many commentators³⁰. In my opinion reg-

mission of the claim is returned in case of “victory”) and quicker to respond than the ordinary justice system. According to the last Annual Report (published in July 2021: you can also find an abridged English version at <https://www.arbitrobancariofinanziario.it/abf/relazione-annuale/index.html>), the Ombudsman has received a total of 30,918 complaints. Since its establishment, roughly 150,000 decisions were issued and despite the fact that these rulings are not legally binding neither for the financial intermediaries nor the clients, the compliance rate is very high (it recently fell due to disagreement on the part of intermediaries with decisions concerning the pledge of one-fifth of salary and postal savings bonds, but apart from these matters, the compliance rate with the decisions of the Panels is close to 98 %). Between 2015 and 2020 more than €100 million have been awarded to complainants. In 2017 a new ADR service for disputes between retail investors and financial intermediaries has been instituted by the National Securities and Exchange Commission (CONSOB) with the name of ACF - *Arbitro per le Controversie Finanziarie*: it deals with different kinds of disputes, but it works in a similar way to the ABF. In the first five years of functioning the ACF received 8,582 claims and issued 7,016 non-binding decisions for a total amount of €111,066,146 awarded to investors (data relating to the 2017-2021 period are available at <https://www.acf.consob.it/publicazioni/relazioni-annuali>). ACF decisions were complied with by financial intermediaries in 95.6 % of cases, except for the disputes relating to the failure of some banks, where the non-compliance rate reached acute levels. The decisions of both procedures, ABF and ACF, are adopted by panels of highly-skilled experts and are published in the corresponding websites, providing bank customers, investors and financial operators with useful guidance.

²⁸ See DE LA ROSA, *Principios de protección del consumidor para una iniciativa europea en el ámbito de la resolución electrónica de diferencias (ODR) de consumo transfronterizas*, in *Revista General de Derecho Europeo*, 2011 (25), 37 ff., who wishes for the introduction of a quality-labelling system for the ADR bodies in order to ensure conformity with the standards provided for by the European legislator.

²⁹ As demonstrated by some empirical studies, ADR services funded by companies and traders impair the impartiality of the procedures, whose outcomes tend to favour the funding party: see CFPD, *Arbitration study – Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)*, Iowa City, Consumer Financial Protection Bureau, 2015; DRAHOZAL AND ZYONTZ, *Empirical Study of AAA Consumer Arbitrations Samantha*, in *25 Ohio State Journal on Dispute Resolution* (2010), 843 ff. Read also: LOOS, *Enforcing Consumer Rights through ADR at the Detriment of Consumer Law*, in *Eur. Review of Private Law*, 1-2016, 66 ff. and, *amplius*, CONDLIN, *Online Dispute Resolution: Stinky, Repugnant, or Drab?*, Digital Commons @UM Carey Law, Faculty Scholarship, 1576, in *CARDOZO Journ. of Conflict Resolution* (2017), vol. 18:717 ff., at 722: «When not based on normative standards, dispute resolution is just another form of bureaucratic processing, the resolution of disagreements according to a set of tacit, often biased, intra-organizational, administrative norms (e.g., the seller is always correct), that are defined by repeat players who “capture” the system and use it for their private ends».

³⁰ For a critical analysis of the weaknesses in the Dir. 2013/11 as regards impartiality and independence of ADR bodies read: WAGNER, *Private Law Enforcement through ADR: Wonder Drug or Snake Oil?*, in *54 Common Market L. Review* (2014), 174-5, 174 ff.; WEBER, *Is ADR the Superior Mechanism for Consumer Contractual Disputes? – An Assessment of the Incentivizing Effects of the ADR Directive*, in *Journ. Consumer Policy*, May 2015, 18; DE LA ROSA AND CORTÉS, *Un nuevo derecho europeo para la resolución alternativa y en línea de litigios de consumo*, in *La Protección del Consumidor en dos Espacios de Integración – Una perspectiva de Derecho Internacional, Europeo y Comparado*, edited by De La Rosa, Valencia, 2015, 514 ff.; GIOIA, *L’uniforme regolamentazione della risoluzione alternativa delle controversie*

istered ADR entities should mainly rely on public funding and on users' fee income, while the possible traders' contribution should be limited to that which is strictly necessary³¹. Also, the creation of a database, integrated into the platform, gathering the decisions issued by the ADR bodies as well as the most relevant and "typical" settlement agreements reached for sets of issues/disputes could contribute towards building a trustworthy and solid system of alternative justice for consumers and users³².

V. SMALL MONETARY CLAIMS AND COLLECTIVE REDRESS. Most small disputes refer to money issues: consumers usually seek restitution/reduction of the price paid for a defective product or may ask to be compensated for non-fulfilment of a service contract. For these claims we might perhaps consider to supplement the ODR platform with a blind bidding software³³, which enables parties to find a satisfying and quick solution straight on the institutional European website for ODR. Obviously due cautions shall be prompted: litigants should be guided in filling a preliminary on-line form

con i consumatori, in Contratto e impresa. Europa, 2016, 501 ff.; LUZAK, *The ADR Directive: designed to fail?, A Hole-Ridden Stairway to Consumer Justice*, op. cit., 99; DALLA BONTÀ, *Una giustizia "coesistenziale" online nello spazio giuridico europeo?*, in *Giustizia consensuale*, 2021, 191 ff., especially at 219 ff.

³¹ In Italy the ADR schemes of ABF and ACF, which have proved rather efficient at handling a large bunch of disputes with high standards of competence and fairness (see footnote 27), are based on several sources of funding such as: the fees due at the submission of the complaints by the clients, the contributions paid by banks and financial intermediaries and also a percentage of the amount of penalties collected by the competent authorities for the infringements of financial and banking regulations. Other possible solutions, as far as funding of ADR bodies is concerned, are enumerated by DE LA ROSA, *Justicia digital, Mercado y solución de litigios de consumo*, Aranzadi Thomson Reuters, 2021, 319.

³² According to research conducted on 266 cases decided by the Dutch *Geschillencommissie*, the main ADR entity in the Netherlands, which as such is well respected, it seems that the consumers were not offered the minimum protection of the law in at least 58 disputes: see PAVILLON, *Geschillencommissies en dwingend recht. Over de gevolgen van een door de ADR-richtlijn gedwongen huwelijk*, 5. TvC (*Tijdschrift voor Consumentenrecht en handelspra ktijken*) 2015, pp 239–252. Several scholars, particularly in Germany, have raised criticisms about the enforcement of something different from consumer law with the ADR/ODR: SCHULTE-NÖLKE, *The Brave New World of EU Consumer Law – Without Consumers, or Even Without Law?*, op. cit., 137; WAGNER, *Private Law Enforcement through ADR: Wonder Drug or Snake Oil?*, op. cit., 186. As a corrective to this underlying flaw it has been proposed to publish all ADR cases: read WEBER, *Is ADR the Superior Mechanism for Consumer Contractual Disputes? – An Assessment of the Incentivizing Effects of the ADR Directive*, op. cit., 19 and DE LA ROSA, *Justicia digital, Mercado y solución de litigios de consumo*, op. cit., 309. Indeed, the statistical reports that ADR bodies have to publish every year don't give the consumers «any information on the type of cases that have been won or lost by consumers or discontinued by either part[y]. It seems, therefore, that the ADR Directive does not diminish the uncertainty as to the consumers' chances of winning and, consequently does not reduce this element of consumer enforcement costs» (in such terms, see: LUZAK, *The ADR Directive: designed to fail?, A Hole-Ridden Stairway to Consumer Justice*, op. cit., 88 ff.). An interesting remark on the tension existing in this regard between the principles of transparency and confidentiality is made by ROTT, *Consumer ADR in Germany*, op. cit., 124, who rightly points out that «businesses want to keep the outcomes of their ADR proceedings secret, so as to avoid broader effects, in particular, when they lose the case. And if they do not have confidentiality guaranteed, they may not participate in ADR in the first place. At the same time, ADR being a black box in terms of outcome of procedures, can be a disincentive for consumers to engage with ADR, as they may suspect that they are unlikely to have their claims fulfilled entirely; which is however denied by ADR practitioners. [...] The middle ground between the principles of transparency and confidentiality appears to be the publication of anonymised decisions or recommendations».

³³ See also DE LA ROSA, *Justicia digital, Mercado y solución de litigios de consumo*, op. cit., 312.

to help them focus on the legal terms of the claim and the fairness of the bid outcome could be afterwards controlled by a judicial or administrative authority on the request of the party who wants to be sure that justice is done³⁴. As regards massive infringements of consumers' or users' rights, I think a special IT tool could be designed to handle collective ODR proceedings. A first modest step taken in this direction could be found, for example, in art. 139, lett. b)-ter of Italian consumer code (before articles from 139 to 140-bis were repealed by law n. 31 of 2019), which apparently entitled consumer associations to submit a complaint through the ODR platform in the collective interests of consumers. But to my knowledge no device was adopted to make feasible that provision. Instead, an interesting experiment has been driven by *Belmed*, the Belgian Digital Portal for Consumer ADR services: *Belmed* is a public entity, which acts as a "serving-hatch", i.e. it only administers ADR proceedings (conducted by mediation or negotiation bodies or authorities). This portal operator collects the statistical data of all the proceedings administered also for the purpose of identifying the widespread problems and of stimulating some initiatives for collective redress³⁵. This seems to be an attempt to build «a multi-layered framework of regulation, lawmaking and law application»³⁶, that could be conveniently extended to the entire common market. Already in 1975, Mauro Cappelletti wrote that optimal collective redress can only be achieved by a matrix of intertwined models³⁷. So, why not

³⁴ To this regard, for instance, the achievements of *Rechtwijzer*, the Dutch platform for separating couples, could be taken into consideration. This tool – as illustrated by ZELEZNIKOW, *Using Artificial Intelligence to provide Intelligent Dispute Resolution Support*, in *Group Decision and Negotiation* (2021) 30, 789 ff. especially at 802 –, works through a case management process where the prevalent dispute resolution model is integrative negotiation, «focussing upon the childrens' and parents' interests rather than haggling about rights. Nevertheless, the ex-partners are informed of relevant processes – such as those for dividing property, child support and standard arrangements for visiting rights. This allows the disputants to agree based on informed consent, and essentially allows the parties to Bargain in the Shadow of the Law». It is also important to notice that final agreements are reviewed by an independent lawyer. The platform uses algorithms to find points of agreement and then proposes solutions that couples are free to adopt or not. If these solutions are not accepted, the disputants can request a mediator or ask for a binding decision to be made by an adjudicator.

³⁵ Read VOET, *Belmed: The Belgian Digital Portal for Consumer A(O)DR*, 6 April 2013, in www.ssrn.com.

³⁶ VOET, "Where the Wild Things Are" – *Reflections on the State and Future of European Collective Redress*, *op. cit.*, 56.

³⁷ CAPPELLETTI, *La protection d'intérêts collectifs et le groupe dans le procès civil – Métarmorphoses de la procédure*, in *Rev. Int. de Droit Comparé*, 1975, 571 ff. We owe this Author the ground-breaking idea of a "social" protection of civil rights (as opposed to the traditional "individual" way of conceiving the due process of law). Effective access to justice should be seen, in fact, «as the most basic requirement – the most basic 'human right' – of a modern, egalitarian legal system which purports to guarantee, and not merely proclaim, the legal rights of all». The most important legacy of this Italian scholar is tied to the World-wide Movement for Access to Justice and to the three waves he imagined navigating for the purpose of overcoming the existing barriers: the first wave was intended to arrange mechanisms for providing legal aid; the second one aimed at giving representation to "diffuse" collective interests or to protect "homogeneous" individual interests through tools such as class actions and granting standing to sue to consumer and environmental associations; the third one involved the simplification of proceedings as well as the development of alternative methods of dispute resolution (see CAPPELLETTI AND GARTH, *Access to Justice: The Worldwide Movement to make rights effective*, *General Report*, in *Access to Justice, A World Survey*, vol. I (1978), 1 ff., especially at 9, 49 ff.). By placing the ADR in this complex

try to help consumer associations to collect directly from the European ODR platform the claims caused by the same reiterated trader behaviour and start a mediation/negotiation proceedings on the behalf of the group of damaged individuals³⁸? Or, more audaciously asking: couldn't the ODR platform embed a collective on-line settlement proceeding, possibly on an opt-out basis, as provided for in the Dutch WCAM legislation³⁹?

transformation of the legal systems and by affirming the need for a «co-existential justice», Cappelletti warned, however, about the danger of «a *second class justice* because, almost inevitably, the adjudicators in these alternative courts and procedures would lack, in part at least, those safeguards of independence and training that are present in respect of ordinary judges. And the procedures themselves might often lack, in part at least, those formal guarantees of procedural fairness which are typical of ordinary litigation»: CAPPELLETTI, *Alternative Dispute Resolution Process within the Framework of the World-Wide Access-To Justice Movement*, in 56 *Modern Law Rev.* (1993), 282 ff., especially 288. Cf. CAPONI, «Just Settlement» or «Just About Settlement»? *Mediated Agreements: A Comparative Overview of the Basics*, in *Rabels Zeitschrift für ausländisches und internationales*, Bd. 79, H. 1 (January 2015), 128, according to whom «an effective and efficient machinery of public justice is needed to ensure that the risk of unequal bargaining power between the parties giving rise to instances of unjust settlements remains as low as possible» and SCHMITZ, AKIN OJELABI, ZELEZNIKOW, *Researching Online Dispute Resolution to Expand Access to Justice*, in *Giustizia consensuale*, 2021, 269 ff., at 270: «Alternative dispute resolution (ADR) processes, particularly mediation, have been the subject of criticisms spanning from the privatization of justice to the delivery of second-hand justice. To improve [access to justice] despite these criticisms, ADR and ODR processes must address inequality by catering to the needs of the most vulnerable and addressing disadvantage that may result in procedural and substantive unfairness».

³⁸ «In evaluating the likely effects of ADR, the purview must not be limited to bilateral, i.e. one-one litigation in court. Rather it needs to include mechanisms of collective redress, i.e. mechanisms that aggregate multiple claims so that they can be enforced in a single lawsuit»: WAGNER, *Private Law Enforcement through ADR: Wonder Drug or Snake Oil?*, *op. cit.*, 166.

³⁹ Since 2005, thanks to the Dutch Act on the collective settlement of mass damages (*Wet Collectieve Afwikkeling Massaschade*, WCAM) it is possible to ask the Amsterdam Court of Appeals to approve an agreement concluded by the alleged tortfeasor and one or more social organizations (representative associations, foundations or even specifically-set «claim vehicles») about the compensation due for the damages suffered by a group of persons. The court shall verify that the associations or foundations representing the (purported) victims are sufficiently representative of their interests and that the group of persons on whose behalf the agreement was concluded is large enough to justify a binding declaration. Moreover, the court will check that there is a precise description of the group and of the conditions to meet in order to be considered part of it, with the most accurate possible indication of the numbers of persons belonging to it. With regards compensation, the court will make sure that the amount of compensation contractually awarded is «reasonable». Other necessary requirements are: sufficient security lodged from the purported tortfeasor in order to pay the contractually agreed amounts, the provision of an independent dispute resolution method for any issue which may arise from the agreement and, finally, the opportunity for the represented purported victims to be heard on their request. It is then fundamental that all those persons whose interests are at stake are properly notified, so that they may decide to join the proceedings before the court and provide input on the settlement which is sought to be declared binding. If the court grants application, the agreement is binding on the entire group of victims referred to in the contract between the tortfeasor and the social organization(s), unless said purported victims declare that they do not wish to be bound by the contract, by means of a written or e-mail notification to the address provided therein within the time set by the Court. Other interesting solutions are in this respect provided for by the Belgian and the Italian legislation. In Belgium the *action en réparation collective*, introduced in 2014 into the *Code de droit économique* at the *Chapitre XVII*, for the enforcement of an exhaustively listed number of specific statutory provisions, mainly dealing with consumer protection, is subject to a mandatory attempt to reach a settlement after the issue of the eligibility order: the Court shall set a time limit between 3 and 6 months, within which the parties may negotiate an agreement on the compensation due for the collective damages claimed. At the joint request of the parties a mediator can also be appointed. If a deal is concluded, the most diligent party shall ask for the Court approval. If the requirements laid down by the law are not satisfied or the terms

VI. SETTLEMENTS' ENFORCEMENT. The ADR/ODR architecture does not deal with the enforcement of the settlement agreements, mainly because the system is meant to embrace all kinds of proceedings whether they aim at proposing or imposing a solution to the litigants. However, in relation to the ADR techniques which lead to a binding contract, although the parties usually abide by the rules they have consensually stipulated, it may happen that one of them tries to draw back. Thanks to art. 6 of Dir. 52/2008 Member States have entitled the parties of a written agreement resulting from a mediation, to enforce it before courts. But what about other kinds of binding agreements reached through ADR/ODR proceedings? Would it be unthinkable to provide for reputational penalties in case of non-fulfilment?⁴⁰

relating are deemed manifestly unreasonable, the judicial authority may invite the parties to reconsider, adjust or supplement the settlement. Once approved, the agreement will bind as *res judicata* all the consumers damaged who did not opt-out, but, as specified by art. XVII.46, the conclusion of such an agreement implies no admission of liability by the defendant enterprise. If no deal is reached or the agreement is not approved by the Court the trial continues (for more details read DE WULF, *Class actions in Belgium*, in *The Cambridge Handbook of Class Actions*, *op. cit.*, p. 194 ff.). As far as Italy is concerned, the reform enacted by Law no. 31 of 2019, entered into force on 19th May 2021, repeals articles 139, 140 and 140-bis of the consumer code (Legislative Decree no. 206 of 6th September 2005), which until then had provided for a compensatory class action and an injunctive collective expedient in the field of consumer protection. A broader and implemented version of both the remedies now finds regulation into the code of civil procedure. According to articles 840-bis and ff. c.p.c. every person, whether a consumer or not, as well as the associations or non-profit organizations aimed at protecting the rights involved, can launch a class action against private companies and providers of public services in order to get a refund or compensation for mass damages suffered in connection with illicit acts and behaviors implemented in the performance of their activities. The Italian class action works on an opt-in basis and the proceeding consists of several stages: if the claim is maintained, a first deadline to file the adhesions of other class members will be established. The adjudication of defendant's liability shall then follow: if the claim is accepted, the judgment will sentence the company to compensate the plaintiff (when he is an individual) and will define the elements characterizing the class member's rights, establishing a second (and last) deadline for the filing of adhesions. In the same decision the Tribunal shall appoint a delegated judge and a class representative for the distribution proceedings. On the settlement side, art. 840-quaterdecies c.p.c. enables the Tribunal to notify the individuals who have already filed their adhesions of a proposal for an amicable agreement, provided that this happens before the hearing dedicated to the discussion of the case. If the proposal is accepted by the parties, the agreement has to be communicated to the class members so that they can subscribe it, inserting, within a deadline, an acceptance declaration into the file-case. However, a serious attempt to settle the dispute at this very early stage is unlikely to be made, as the defendant will hardly consider a proposal before acknowledging the final number of class members who opt-in. It is far more realistic that the parties will look for an amicable solution after the adjudication on the liability of the enterprise/provider of public service, when the second lapse-time for the filing of adhesions has expired. According to art. 840-quaterdecies c.p.c., during the distribution stage, the class representative may draw up, together with the defendant, an outline of settlement agreement, which is served to the class members for possible objections. The delegated judge shall check this draft and if it results suitable for the interests of the class, may approve it. Only the class members who had contested the proposal in due time can revoke the mandate to the representative as far as the settlement subscription is concerned (see GIUDICI AND ZUFFI, *The New Italian Regulation on Class Actions* in *The Cambridge Handbook of Class Actions*, *op. cit.*, 217 ff., especially at 224 ff.).

⁴⁰ This arrangement is also suggested by LUZAK, *The ADR Directive: designed to fail?*, *A Hole-Ridden Stairway to Consumer Justice*, *op. cit.*, 90: «ADR entity could have been required to publish a list of traders who do not comply with their awards. Such a 'name and shame' practice could be quite effective».

By and large, perhaps the time has come to discuss a European integrated justice service in which court procedures merge with ODR mechanisms⁴¹. We could draw inspiration from the Canadian experience of the British Columbia Civil Resolution Tribunal, which has been operating online since 2012⁴², or from the Chinese Internet Courts⁴³. The first on-line tribunal ever estab-

⁴¹ The 2016 Hiil Report IV *ODR and the Courts: The promise of 100% access to justice?*, in <https://www.hiil.org/projects/trend-report-4-odr-and-the-courts-the-promise-of-100-access-to-justice/> is geared also towards this direction.

⁴² The Civil Justice Reform Working Group to the British Columbia Justice Review Task Force was formed in 2004 to explore fundamental change to British Columbia's civil justice system from the time a legal problem develops through the entire Supreme Court litigation process in relation to non-family civil matters. The goal was to assist citizens in obtaining just solutions to legal problems quickly and affordably. This vision involved providing everyone, regardless of their means, with access to civil justice through two broad strategies:

- 1) providing integrated information and services to support those who want to resolve their legal problems on their own before entering the court system, and
- 2) providing a streamlined, accessible Supreme Court system where matters that can be settled are settled quickly and affordably and matters that need a trial get to trial quickly and affordably.

As explained in the report *Effective and Affordable Civil Justice*, released in November 2006 (in https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/justice-reform-initiatives/cjrwg_report_11_06.pdf) the first strategy should be pursued by creating a central hub to provide people with information, advice, guidance and other services they require to solve their own legal problems. At this regard the Working Group proposed to support dispute prevention and plan through plain language, legal education, preventive law and systems design; to facilitate access to mediation or other dispute resolution processes; to create a central hub initiated by government and guided by an advisory board of key stakeholders. The second policy line brought about the introduction of a case planning conference, which the parties have personally to attend before they actively engage the system. The most visible and popular novelty introduced on the heels of this report was the establishment, under the Civil Resolution Tribunal Act (2012) of the Civil Resolution Tribunal (CRT), Canada's first online tribunal. The CRT initially had jurisdiction over small claims up to \$5,000 and strata property (condominium) disputes. On 23rd April 2018, the government of British Columbia introduced legislation to expand the CRT's jurisdiction to include certain motor vehicle accident disputes, disputes under the Societies Act, and the Co-operative Association Act. The CRT encourages a collaborative, problem-solving approach to dispute resolution, rather than the traditional model. It works on a platform, which is accessible 24 hours a day, 7 days a week, from a computer or mobile device that has an internet connection. CRT services are also available by phone. A timely and effective access to justice is thus ensured in the abovementioned sectors of litigation by providing legal information, self-help tools and dispute resolution services.

The reform process of the British Columbia judiciary has not stopped yet: the Ministry of Attorney General has recently launched the *Court Digital Transformation Strategy 2019-2023* (in <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/justice-reform-initiatives/digital-transformation-strategy-bc-courts.pdf>), a roadmap of initiatives aimed to furtherly modernize the whole court system. The path traced implies to secure self-serve access from anywhere, anytime to digital court information, proceedings and decisions. Herebelow some of the keywords of the project: *Self-Service* - This starts with the ability of the litigant or public to access court services online and includes online filings, services with paperless options with 24/7 access and self-service kiosks in the courthouses; the access to court information enabled by the use of technologies such as Blockchain for authentication and verification of users and content; guided-form submissions and possibility to submit documents and evidence digitally; *Digital Court Room* - A digital courtroom operating without paper thanks to a digital court file; online procedural guidance helps participants to navigate court processes and helps to find the right services (enabled by Artificial Intelligence and other technologies); this could include convenient one-stop online resources on civil proceedings for self-represented litigants and streamlined processes for inmates to access court documents and legal advice.

⁴³ China established the first Internet Court in Hangzhou in August 2017. The following year two other Internet Courts became operative in Beijing and Guangzhou. These judicial authorities deal only

lished likely offers the better benchmark to be considered: the Canadian CRT follows a stepped ODR process, beginning with a problem solving “wizard”, that helps complainants assess their problem and decide the best option to proceed in dealing with the issue. If the parties don’t find a solution thanks to the wizard, the process moves to an ODR portal, which begins with party-to-party negotiations. If this attempt also fails, a mediation will take place. Should the litigants still be unable to reach a mutually agreeable solution, an online arbitrator will make the ultimate decision after online or telephonic hearings. The process typically takes sixty to ninety days, with overall costs that are much lower than those of face-to-face proceedings.

Almost in the same direction, the UK has put forward a thoughtful proposal for a new structure of the judicial system: the coveted goal is that of using technology to deliver services and facilities that are not possible in a non-digital environment. Based on the reports so far published this project is entailing the introduction of a several-tier model of access to justice, embracing legal health promotion, dispute avoidance and containment and, finally, authoritative dispute resolution⁴⁴.

with disputes arising from the web and work totally paperless, through an online e-litigation platform which is accessible 24/7. MEIRONG GUO, *Internet court's challenges and future in China*, in <https://www.sciencedirect.com/science/article/pii/S0267364920301278>, stresses that the intent pursued by the Chinese Institutions was «to take full advantage of Internet technology to construct a professional, highly effective, convenient judicial operating system; to remove Internet-related cases from the existing adjudication system; to satisfactorily handle Internet-related disputes and to employ the Internet as a vehicle for judicial governance». The outcomes so far reached seem promising: as reported in the White paper *Chinese Courts and Internet Judiciary*, issued by the Supreme People’s Court (SPC) on 4th December 2019 (available, if you can read Chinese, at <https://drive.google.com/file/d/1T8i303Czq1GV3RAB-Jc7tHXpSPxT2nv-5/view>), the Internet courts had processed more than 88,000 cases and over 91% of the cases were conducted online throughout. The court hearing time and the trial cycle are half of the time spent in the traditional courts (it takes only 5 minutes to file a case and the court hearings last on average 28 minutes) and the costs borne by the parties are also reduced (on average, each litigant saved CNY 800 in case expenditure and 16 hours in transit). The ADR methods are also integrated into the E-Justice. In June 2016, the SPC promulgated two judicial interpretations on mediation, according to which, Chinese courts should cooperate with mediation institutions and establish a platform (the so-called “docking platform of litigation and mediation”) in order to ensure a synergy between litigation and mediation. To get an idea of the massive use of court-connected mediation, statistical data point out that in 2019 Beijing Internet Court dealt 29,728 mediation cases, all mediation being conducted online (with a success rate of 23.9%). Furthermore, on 1st August 2019, the SPC promulgated a new judicial interpretation, requiring all courts nationwide to establish one-stop multi-mechanism for dispute resolution and one-stop litigation service center by the end of 2020. The SPC has thus begun to promote the synergy between mediation and litigation nationwide, as well as to establish such a mechanism based on the litigation service center of the courts. In fact, the one-stop multi-mechanism for dispute resolution is not limited to the synergy between mediation and litigation, but will cover more issues related to dispute resolution within this one-stop mechanism. For example, various means such as settlement, mediation, notarization, arbitration, administrative mediation, administrative reconsideration, administrative adjudication and litigation will be combined to provide the parties with optimal dispute resolution services; third parties such as experts, scholars, lawyers, psychologists, notaries, appraisers and volunteers will participate in the dispute resolution; the court will provide all relevant litigation services to the parties in relatively fixed office premises and on the Internet.

⁴⁴ Despite the introduction of the 1998 CPR, implemented as a result of reforms suggested by the report published in 1996 by Lord Woolf and his committee, there were serious concerns regarding access to justice in the United Kingdom. To overcome some of these issues, after the creation, in 1990, of the County Court Business Centre (CCBC), enabled to issue and serve claims through information technol-

Nevertheless, as claimed by some scholars, this idea of an on-line combined service of consensual and formal justice, could potentially lead to «major problems for the digitally disadvantaged»⁴⁵. To deal with this dilemma, potential litigants could receive assistance in accessing the internet, but «the case for ODR is still weak on justice and fairness»⁴⁶. Many deeper studies have indeed to be conducted in order to identify the best human-centered and designed ODR models⁴⁷, that will probably have to be configured taking

ogy, the Money Claim Online procedure was established in February 2002. MCOL provides users who wish to issue a limited number of claims to commence and manage County Court proceedings using a website and to pay court fees online using a credit card. Nevertheless the court system seemed still too costly, too slow and too complex for effectively handling small value civil claims. In February 2015, Professor Richard Susskind, OBE Chair of Civil Justice Council's Online Dispute Resolution Advisory Group IT Adviser to the Lord Chief Justice, called for radical change. The principal recommendation contained in the Report *Online Dispute Resolution for Low Value Civil Claims* of the UK Civil Justice Council (in <https://www.judiciary.uk/publications/online-dispute-resolution-for-low-value-civil-claims-2/>) was indeed that HM Courts & Tribunals Service (HMCTS) should establish a new, Internet-based court service provided on a three-tier structure: Tier One dealing with *Online Evaluation*, deemed as a service apt to help users with a grievance to classify and categorize their problem, to be aware of their rights and obligations, and to understand the options and remedies available to them; Tier Two concerning *Online Facilitation* in order to bring a dispute to a speedy, fair conclusion without the involvement of judges (also through telephone conferencing facilities and automated negotiation); Tier Three providing *Online Judges*, *id est* full-time and part-time members of the Judiciary meant to decide suitable cases or parts of cases on an online basis, largely on the basis of papers submitted to them electronically as part of a structured process of online pleading. This major reform project is still in progress, but it led to a digital service for resolving civil money claims in a simple, accessible and proportionate way. According to the information available in <https://www.gov.uk/guidance/hmcts-reform-update-civil#what-our-reforms-have-delivered-so-far>, since March 2018 users have been able to issue and respond to online civil money claims of less than £ 10,000. By the end of April 2019, over 62,000 claims had been issued using this system and more than £ 6.36 million taken in court fees. Almost 90% of users of the service say they are satisfied or very satisfied with the new service and cases are being resolved more quickly too. The average time to settle a case using the online process is 5.2 weeks compared to 13.7 using the non-reformed services. The service also allows users to settle claims without the need for any third-party involvement. Parties can make and accept “without prejudice” offers online and a settlement agreement, drafted by the service, is provided to settle the case. By the end of April 2019, more than 200 settlements had been reached in this way. A version of the system designed to support legal professionals managing multiple claims on behalf of their clients has also been tested with 10 firms. Furthermore, an “opt-out” mediation service for defended cases up to £ 300 has been planned, meaning those claims that meet the criteria will be automatically scheduled for mediation in an attempt to resolve the case before to going to court, unless either party decides against it. The service is finally supposed to be expanded and improved to make available to users a complete digital end-to-end system, while further stages of the system are being built, enabling more online negotiation and settlement, as well as the uploading of evidence and giving judges the facility to decide cases ‘on the digital papers’ either at a face to face hearing or by determination on the digital papers.

⁴⁵ ZELEZNIKOW, *Using Artificial Intelligence to provide Intelligent Dispute Resolution Support*, *op. cit.*, 802.

⁴⁶ Thus concludes CONDLIN, *Online Dispute Resolution: Stinky, Repugnant, or Drab?*, *op. cit.*, 755, after a critical overview of all major ODR programs (text-based and video-based) in current operation; see also 744 ff.: «The jurisprudential premise of ODR—that outcomes dictated by algorithms based on Big Data and crowdsourced data will produce just results – isn't grounded in any well-known political or jurisprudential theory of procedural fairness or substantive justice, and it is based on somewhat of a contradiction. The algorithms in question are proprietary in nature and thus known only to their owners and creators. But a system of public dispute resolution must be based on substantive standards and procedural rules that are transparent and known equally to all. The conception of fair outcome underlying public dispute resolution cannot be private».

⁴⁷ *Amplius* ZELEZNIKOW, *Using Artificial Intelligence to provide Intelligent Dispute Resolution Support*, *op. cit.*, who emphasises the need to develop solutions that rely upon the needs and wants of

into the proper consideration both the kind of dispute (by diversifying the service delivered, e.g., according to the small/high value of the claim or to its typical/non-recurring character) as well as the different positions and skills of litigants (especially when they are self-representing).

With the awareness that without appropriate ethics and governance procedures, users and professionals will always be reluctant to engage in the ODR process, I wonder if in the near future European Institutions will launch a Second New Deal for consumers capable of transforming the current platform in a greater new concept: the virtual construction of a multi-door courthouse, a sort of coming true of the world-famous idea that Frank Sander had almost 50 years ago⁴⁸.

users. This Author outlines a six-stage model for constructing user-centric intelligent Online Dispute Resolution systems apt to integrate the following features: (1) Case management, (2) Triaging, (3) The provision of Advisory tools, (4) Communication tools, (5) Decision Support Tools and (6) Drafting software and Agreement Technologies.

⁴⁸ I am obviously referring to the speech, entitled *Varieties of Dispute Processing*, delivered at the 1976 Pound Conference convened by Chief Justice Burger. In this renowned address, considered as the official birth of the modern ADR movement, Professor Sander boldly imagined a court system that would function as a diagnostic gatekeeper for parties, directing them to the dispute resolution process (mediation, negotiation, litigation, arbitration, or some combination of these) best suited for their own dispute. Read about this concept and some examples of its implementation in SANDER AND HERNANDEZ CRESPO, *A Dialogue Between Professors Frank Sander and Mariana Hernandez Crespo: Exploring the Evolution of the Multi-Door Courthouse*, in 5 U. St. Thomas Law Journal (2008), 665.

