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«Mediation to Foster European Wide Settlement of Disputes»

Chapter X

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International and EU Perspective on Mediation: The EU Digital Agenda and Online Mediation in the Digital Single Market and the UNCITRAL's Working Group III on Online Dispute Resolution

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1. The concept of mediation: EU perspectives

EU law provides an autonomous definition of mediation, which is, as known, necessary to ensure uniform application of EU law in all Member States¹. According to the Directive 2008/52 (hereinafter, Mediation Directive)², «*Mediation* means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State. It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seized to settle a dispute in the course of judicial proceedings concerning the dispute in question»³. Such a procedure necessarily requires a third person, entrusted with the task to conduct an effective and impartial mediation. The directive is nowadays setting substantive private law principles, which are also valid in the field of mediation procedures in consumer matters⁴.

¹ On the relevance of autonomous interpretation in EU law, see *ex multis* CARBONE S.M., *Lo spazio giudiziario europeo in materia civile e commerciale. Da Bruxelles I al regolamento CE. 805/2004*, Torino, 2009, p. 35; R. HAUSMANN, I. QUEIROLO, *Introduzione*, in T. SIMONS, R. HAUSMANN, I. QUEIROLO (eds.), *Regolamento «Bruxelles I». Commento al Regolamento (CE) 44/2001 e alla Convenzione di Lugano*, Munich, 2012, p. 4, at p. 30, and C. HEIBEL, *Some Remarks on Inheriting Shares in German Partnerships: The Delineation of Partnership and Succession Law with Regard to German Special Succession Rules under Regulation (EU) No 650/2012*, in M.E. DE MAESTRI, S. DOMINELLI (eds.), *Party Autonomy in European Private (and) International Law, Tome II*, Rome, 2015, p. 127, at p. 140 ff.

² Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, in *OJ L* 136, 24.5.2008, p. 3.

³ Directive 2008/52/EC, art. 3 (1) (a). On the definition of cross-border mediation in the Directive, see C. LEGNER, *Cross-Border Mediation in der Europaischen Union*, in F. HAFT, K. GRAEFIN VON SCLIEFFEN (eds.), *Handbuch Mediation*, Munich, 2016, p. 1415, at p. 1416, and A. DE LUCA, *Mediation in Italy, Feature and Trends*, in C. ESPLUGUES, L. MARQUIS (eds.), *New Developments in Civil and Commercial Mediation Global Comparative Perspectives*, Heidelberg, 2015, p. 345, at p. 362.

⁴ J. SUQUET CAPDEVILA, *The European Legal Framework on Consumer Online Dispute Resolution (ODR)*, in J.S. BERGÉ, S. FRANCO, M. GARDEÑES SANTIAGO (eds.), *Boundaries of European Private Law*, Brussels, 2015, p. 161, at p. 170 ff.

Mediation is not the only way parties can reach an amicable solution without seising a court of law⁵: practice has developed a number of Alternative Dispute Resolution Systems (ADR) where the involvement of such a third party sensibly differs, such as, for example, in arbitration where the arbitrators do not help the parties in reaching a solution, but rather act as private judges, imposing solutions on the parties⁶, and thus lead to a final outcome that is not the result of party autonomy⁷.

In comparison with the previous legal framework, nowadays the EU has direct competences in the promotion of ADR systems. At the time the Mediation Directive was adopted, the Communities had competence, according to art. 61 (c) of the TEC to adopt measures in the field of judicial cooperation in civil matters to ensure the establishment of an area of freedom, security, and justice in the EU judicial space. In particular, such measures were, as prescribed in art. 65 TEC, intended for: (a) improving and simplifying the system for cross-border service of judicial and extrajudicial documents, cooperation in the taking of evidence, the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases; (b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction; (c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States. All these measures, moreover, were only to be taken by the Council insofar as these were deemed to be necessary for the proper functioning of the internal market, in accordance to the procedure that has now become the ordinary legislative procedure (see former TEC, art. 67). The directive was adopted even though at the time the legal basis did not explicitly make any reference to measures to promote ADR⁸. Nowadays, there is no doubt that the EU has a clear concurring competence: art. 81 TFEU now prescribes that the Union shall develop judicial cooperation in civil matters having cross-border implications, also by adopting measures for the approximation of the laws and regulations of the Member States when necessary for the proper functioning of the internal market, aimed at ensuring effective access to justice, and the development of alternative methods of dispute settlement⁹.

The Mediation Directive's aim is to promote out of court mediation, but its scope of application is limited, since it only finds application for cross-border cases¹⁰ in civil and commercial matters. Moreover, the harmonization pursued with the directive is minimal, since only some aspects of the mediation procedure are governed by the act, whilst others, such as aspects related to professional requirements of mediators, are left to the regulation of Member States¹¹.

In order to exactly determine the scope of mediation, to fully understand the goals of mediation, one must take into account the foreign legal thoughts from legal orders where mediation was born and deeply studied. It is assumed that (contemporary) mediation was born in the United States at the beginning of the 20th century in the field of labour and family disputes, becoming in time one the pillars of the US justice system¹². From the fields in which mediation was developed first by practice, and afterwards normatively regulated, it seems clear that legislators became aware that mediation can be successful especially where people have long-lasting relationships: only where people have to live together they are most likely to be willing to find an agreement instead of going to court. Where people have no long-

⁵ F. OCCHIOGROSSO, *La mediazione tra imputato minorenni e vittima del reato: la prospettiva giuridica*, in L. PICOTTI (ed.), *La mediazione nel sistema penale minorile*, Padova, 1998, p. 225 ff.; G.V. PISAPIA, *La scommessa della mediazione*, in G.V. PISAPIA, D. ANTONUCCI (eds.), *La sfida della mediazione*, Padova, 1997, p. 5; L. MONTEVERDE, *Mediazione e riparazione dopo il giudizio: l'esperienza della magistratura di sorveglianza*, in *Minori e Giustizia*, 1999, 2, p. 86 ff., and G. MANNOZZI, *Collocazione sistematica e potenzialità deflative della mediazione penale*, in G. DE FRANCESCO, E. VENAFA (eds.), *Meritevolezze di pena e logiche deflative*, Turin, 2002, p. 117 ff.

⁶ T. GALLETTO, *Il modello italiano di conciliazione stragiudiziale in materia civile*, Milano, 2010, p. 5.

⁷ F. CUOMO ULLOA, *La conciliazione: modelli di composizione dei conflitti*, Padova, 2008, 9 ff.

⁸ L. CARPANETO, *La Direttiva n. 2008/52 sulla mediazione civile e commerciale. Uno strumento a tutela della parte debole*, in I. QUEIROLO, A.M. BENEDETTI, L. CARPANETO (eds.), *La tutela dei soggetti deboli tra diritto internazionale, dell'Unione europea e diritto interno*, Roma, 2012, p. 547, at p. 549.

⁹ I. BENÖHR, *Consumer Dispute Resolution after the Lisbon Treaty: Collective Actions and Alternative Procedures*, in *Journal of Consumer Policy*, 2013, 87, at p. 98 ff.

¹⁰ Nonetheless, some Member States, when transposing the directive, took the chance to revise their laws on mediation also for internal cases. For a study on the first law transposing the directive in Italy, see I. QUEIROLO, L. CARPANETO, S. DOMINELLI, *Italy*, in C. ESPLUGUES MOTA, J.L. IGLESIAS, G. PALAO (eds.), *Civil and Commercial Mediation in Europe. National Mediation Rules and Procedures*, Cambridge, 2012, p. 245 ff.

¹¹ HOPT K.J., STEFFEK F., *Mediation: Comparison of Laws, Regulatory Models, Fundamental Issues*, in HOPT K.J., STEFFEK F. (edited by), *Mediation. Principles and Regulation in Comparative Perspective*, Oxford, 2012, p. 3, at p. 6.

¹² N. ROGERS, C. McEWEN, *Mediation: Law, Policy and Practice*, Los Angeles, 1994. On the Japanese experience, see J. HALEY, *The Politics of Informal Justice: The Japanese Experience, 1922 - 1942*, in *The Politics of Informal Justice*, 1982, p. 125.

lasting relationship, they are more likely to be willing to go before a court of law and make use of the adversarial system, where one party is destined to “lose the game”. The same goes for cases where very important individual values are at stake, like, for example, medical cases where operations have caused significant harm. Also in these circumstances the parties, or in this case the damaged party, is more likely to be willing to fight into a court of law, making mediation almost impossible, or even detrimental if mediation is imposed upon the parties. Mediation is meant to give a chance to people to regain the power to reorganise their relationships, give them the possibility to express their feelings and confront themselves on the causes of the conflict, making possible to reach alternative solutions reaching out to equity principles¹³.

The result of mediation is the result of party autonomy, a contract¹⁴, and by encouraging a private resolution of disputes, mediation gives the possibility to the judiciary to focus on more complex cases¹⁵, thus reducing its workload that is limiting the effectiveness of the judicial protection. In this sense, in more general terms, mediation can be able to settle a mistrust in the judiciary system that has developed due to slow dockets¹⁶. Where individuals are called to administrate justice themselves¹⁷, and the result of this administration is the fruit of party autonomy, such individuals will be probably more satisfied of this solution that the one imposed by courts. This contributes to raise the feeling of justice of the solution. In addition, the less overloaded dockets will give courts the possibility to speed trials, raising the feeling of effective justice also in those who do not take part in mediation¹⁸.

Usually, mediation is the result of a bottom up regulation, meaning that legislators started to regulate a phenomenon that was already existing; nonetheless, legislators were not able to bring the practice to an *unicuum*, not being able to elaborate a definition that could sue every case of mediation that was born out of practice¹⁹. This means that national legislations were about to intervene with rules and laws of procedure imposing their views on practitioners that were used to work quite freely. Of course, fragmentation of laws does not suit the interest of promotion of the positive outcomes of mediation. Hence, to fully endorse access to mediation in civil and commercial matters, the EU has adopted the Mediation Directive which sets common rules on access to mediation, confidentiality of the procedure, and enforceability of the agreement. Following the same line of argument, the international arena is also trying to boost international commerce by way of promoting ODR, even though the principles of international law do not escape the problems, which appear to be intrinsic in online mediation.

¹³ J. BONAFÉ-SCHMITT, *Una, tante mediazioni dei conflitti*, in G.V. PISAPIA, D. ANTONUCCI (eds.), *La sfida della mediazione*, Padova, 1997, p. 30.

¹⁴ J. BONAFÉ-SCHMITT, *Una, tante mediazioni dei conflitti*, cit., p. 30; V. ANTONELLI, *Cittadini si diventa: la formazione alla democrazia partecipativa*, in D. BOLOGNINO, G.C. DE MARTIN (eds.), *Democrazia partecipativa e nuove prospettive della cittadinanza*, Milano, 2010, p. 103, and P. NICOSIA, *La tutela extragiudiziale degli interessi. Negoziazione, conciliazione, mediazione e arbitrato. Come tutelare i propri interessi sulla base dell'autonomia privata*, Piacenza, 2002, p. 101. Cfr. in partially different terms, speaking of “assisted contracts”, F. CUOMO ULLOA, *La conciliazione: modelli di composizione dei conflitti*, cit., p. 251.

¹⁵ P. NICOSIA, *La tutela extragiudiziale degli interessi. Negoziazione, conciliazione, mediazione e arbitrato. Come tutelare i propri interessi sulla base dell'autonomia privata*, cit., p. 95 ff, and E. RESTA, *Il diritto fraterno*, Bari, 2002, p. 66 ff.

¹⁶ L. ARNAUDO, *Mediazione e diritto penale*, in *Sociologia del diritto*, 1999, p. 127; G. ALESSI, *Giustizia pubblica, private vendette. Riflessioni intorno alla stagione dell'infragiustizia*, in *Storica*, 2007, p. 110, at p. 111; G. CABRAS, D. CHIANESE, E. MERLINO, D. NOVIELLO, *Mediazione e conciliazione per le imprese. Sistemi alternativi per la risoluzione delle controversie nel diritto italiano e comunitario*, Torino, 2003, p. 3, and R. RICIOTTI, *La giustizia penale minorile*, Padua, 2007, p. 104. For a study on the increasing animosity, its reasons, and possible effects on the judiciary system, see M.L. MARCUS, *Judicial Overload: the Reasons and the Remedies*, in *Buffalo Law Review*, 1979, p. 111, where already in the abstract it can be read «[a]n animosity towards lawyers, perennial in our social history long before Watergate, parallels a contradictory and equally persistent belief in judges as problem-solvers for a variety of personal, economic, educational and political ills. An increasing number of litigants are bringing to the courts not only the class of disputes that has been the traditional fare of judicial decision-making, but also an array of issues that were formerly resolved in private meetings, at hospitals, in schools, or at home. The causes of this explosion of lawsuits and the possible buffers [might cause] an eventual implosion in our judicial system». Also on the reasons causing judiciary overload, see J.W. COOLEY, *Puncturing Three Myths about Litigation*, in *ABA Journal, The Lawyer's Magazine*, 1984, p. 75.

¹⁷ G. COSI, M. FODDAI, *Lo spazio della mediazione*, Milano, 2003, p. 7, and G. MOSCONI, *La mediazione. Questioni e diritto penale*, in G.V. PISAPIA (ed.), *Prassi e teoria della mediazione*, Padova, 2000, p. 5.

¹⁸ Cf. C. ESPLUGUES, *General Report: New Developments in Civil and Commercial Mediation – Global Comparative Perspectives*, in C. ESPLUGUES, L. MARQUIS (eds.), *New Developments in Civil and Commercial Mediation Global Comparative Perspectives*, Heidelberg, 2015, p. 1, at p. 2.

¹⁹ G.V. PISAPIA, *Introduzione*, in G.V. PISAPIA (ed.), *Prassi e teoria della mediazione*, Padova, 2000.

2. EU, common market, and protection of consumers: the EU digital agenda and online mediation

In the aftermath of the economic crisis, the EU Commission noted that the «*crisis has wiped out years of economic and social progress and exposed structural weaknesses in Europe's economy. [...] To] guarantee increasing standards of life for Europeans [...] the Digital Agenda makes proposals for actions that need to be taken urgently to get Europe on track for smart, sustainable and inclusive growth*»²⁰.

The Commission acknowledged the importance of e-commerce for the growth of the EU's economy. In this sense, European Union Institutions have noted that «*[t]he global economy is rapidly becoming digital. Information and Communications Technology (ICT) is no longer a specific sector but the foundation of all modern innovative economic systems. The Internet and digital technologies are transforming the lives we lead, the way we work – as individuals, in business, and in our communities as they become more integrated across all sectors of our economy and society*»²¹.

To boost sustainable growth in the digital market²², the Commission intended to explore initiatives on consumer ADR in the EU with a view to making proposals for an EU-wide Online Dispute Resolution system for e-commerce transactions. These actions have led, in 2013, to the adoption of the so called ODR Regulation²³ and the Directive on consumer ADR²⁴.

Before turning attention to the provisions of the ODR Regulation and the ADR Directive, the intention of the Commission that was made clear in the Digital Agenda has to be highlighted. The aim of the rules is not to ensure access to justice or develop ADR *per se*, but, rather to create instruments that are able to offer adequate protection to consumers that, in given circumstances, might lose faith in cross-border e-commerce²⁵, for example where there is a breach of contract and the limited amount of the damage for the single consumer does not make it economically interesting to seek cross-border redress²⁶. Even though in such scenarios the damage is of limited amount for the single consumer, the aggregated enrichment of the business entrepreneur might be exponential, as the damages to the EU e-market are, in so far as mistrust in e-commerce leads a variety of buyers to refrain from online shopping²⁷. The adoption of the ODR Regulation and the ADR Directive is thus primarily directed to boost the internal market and the protection of consumers. This, of course, has consequences on the very legal basis of the instruments of secondary law that have been adopted.

Bearing in mind the goals of the EU and the system of competences, it has to be reminded that in the field of the creation of the internal market, which, in comparison to a common market also requires, other than the free movement of people, goods, services and capitals, also economic cohesion and

²⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Agenda for Europe COM/2010/0245 final, 19.5.2010. Cf., J. HÖRNLE, *Encouraging Online Dispute Resolution in the EU and Beyond - Keeping Costs Low or Standards High?*, Queen Mary School of Law Legal Studies Research Paper No. 122/2012, p. 1.

²¹ Communication from the commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe, Brussels, 6.5.2015, COM(2015) 192 final.

²² On ADR and ODR, and the EU's Digital Agenda, see *ex multis* V. MAK, K. NEMETH, *The EU's Digital Agenda: New Proposals for Online and Offline Consumer Disputes, E-Commerce and Card, Internet and Mobile Payments*, in *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht*, 2012, p. 112, at p. 113.

²³ Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR), in *OJ L* 165, 18.6.2013, p. 1.

²⁴ Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, in *OJ L* 165, 18.6.2013, p. 63.

²⁵ Cf. the Commission Communication of 13 April 2011 entitled 'Single Market Act — Twelve levers to boost growth and strengthen confidence — "Working together to create new growth"', where the Commission identified legislation on ADR (e-commerce included) as one of the levers to boost growth of Single Market.

²⁶ Communication from the Commission to the European Parliament, The Council, The Economic and Social Committee and the Committee on the Regions A European Consumer agenda - Boosting confidence and growth, COM (2012) 225 final, 22/05/2012, p. 6; cf. also ODR Regulation, recital 7 («*[b]eing able to seek easy and low-cost dispute resolution can boost consumers' and traders' confidence in the digital Single Market. Consumers and traders, however, still face barriers to finding out-of-court solutions in particular to their disputes arising from cross-border online transactions. Thus, such disputes currently are often left unresolved*»), and V. MAK, K. NEMETH, *The EU's Digital Agenda: New Proposals for Online and Offline Consumer Disputes, E-Commerce and Card, Internet and Mobile Payments*, cit., p. 112.

²⁷ ADR Directive, recital 2: «*[t]he internal market should provide consumers with added value in the form of better quality, greater variety, reasonable prices and high safety standards for goods and services, which should promote a high level of consumer protection. Fragmentation of the internal market is detrimental to competitiveness, growth and job creation within the Union. Eliminating direct and indirect obstacles to the proper functioning of the internal market and improving citizens' trust is essential for the completion of the internal market. Ensuring access to simple, efficient, fast and low-cost ways of resolving domestic and cross-border disputes which arise from sales or service contracts does indeed benefit consumers and therefore boost their confidence in the market*».

common policies to protect the interests of the market itself, the EU enjoys a shared competence, meaning that Member States cannot adopt any piece of legislation where EU law is given, but, at the same time, that the EU is not completely free to enact in such fields, being obliged to prove the respect of proportionality and subsidiarity in its actions (art. 4 TEU).

Measures in matters of consumer policy are adopted by the Council and the Parliament, upon proposal of the Commission, following the ordinary legislative procedure. In such a field, Member States are free to offer a higher standard of protection than the one imposed upon them by EU law, as long as no provision of EU law is infringed by the domestic legislation. In its consumer policy, the EU has to promote consumers' interests, in particular their health, safety and economic interests²⁸. The Commission, acting under art. 114 TFEU, rather than under art. 81 TFEU²⁹, proposed the ODR Regulation and the ADR Directive to ensure access to simple, efficient, fast and low-cost ways of resolving disputes which arise from sales or service contracts³⁰. The action of the Commission was driven by a number of considerations, such as that: i) access to ADR should apply for both online and offline transactions³¹; ii) ADRs were not sufficiently and consistently developed in the different Member States³²; iii) disparities in ADR coverage, quality and awareness in Member States were considered an obstacle for the internal market, possibly being the cause of refraining from online shopping³³. Nonetheless, in comparison to the Mediation Directive, the scope of application of the Commission's intervention is wider, since it does not only cover some aspects of cross-border mediation, but rather it regards ADR in general, both for internal and cross-border disputes³⁴.

The reasons for the intervention in the ADR field in connection with e-commerce, are, in sum well exemplified by the words of the ADR Directive, where it can be read that «[g]iven the increasing importance of online commerce and in particular cross-border trade as a pillar of Union economic activity, a properly functioning ADR infrastructure for consumer disputes and a properly integrated online dispute resolution (ODR) framework for consumer disputes arising from online transactions are necessary in order to achieve the Single Market Act's aim of boosting citizens' confidence in the internal market»³⁵. In this sense, it can be understood, on the one side, how the two instruments are linked and complementary one to another³⁶, since the Regulation offers consumers the possibility to enter in contact with ADR centres, whose principles are governed by the ADR Directive. Nonetheless, on the other side, connections with the digital agenda become weaker since these instruments are to be applied also to offline transactions.

²⁸ ODR Regulation, and ADR Directive, recital 1. This is consistent with art. 38 of the Charter of Fundamental Rights of the European Union, according to which Union policies are to ensure a high level of consumer protection.

²⁹ On the impossibility to use art. 81 TFEU, given on how the proposal has been drafted by the Commission, see Reasoned opinion of the Bundesrat of the Federal Republic of Germany on the proposal for a Directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), point 5.

³⁰ ODR Regulation, recital 2, and ADR Directive, recital 4.

³¹ ADR Directive, recital 4.

³² *Ibidem*, recital 5.

³³ *Ibidem*, recital 6.

³⁴ *Ibidem*, recital 7.

³⁵ *Ibidem*, recital 11. Noting how access to alternative means to settle disputes, given that for small claims it is unlikely that a person starts a cross-border proceeding, J. SUQUET CAPDEVILA, *The European Legal Framework on Consumer Online Dispute Resolution (ODR)*, cit., p. 162.

³⁶ *Ibidem*, recital 12. Cf. ODR Regulation, recital 9.

3. The ADR Directive

The aim of the directive is to ensure that all consumers have in all EU Member States the right to access ADR schemes³⁷, without prejudice to access a court of law³⁸, and without prejudice to domestic legislation providing mandatory ADR solution as a condition to seize a court of law³⁹. Nonetheless, its scope of application is limited, since only C2B (and not B2C⁴⁰) are covered by the directive. This means, that, save different possible domestic legislations, the rules are not applicable in B2B disputes. Additionally, the reduced scope of application is caused by the fact that, should the trader not have its seat in the EU, or should the consumer have his/her habitual residence outside the EU, the directive does not apply (art. 2). Furthermore, the rules that set minimum standards for the quality of the procedure apply only to those ADR centres that require their Member State to qualify them as “ADR centre” under the directive. The centres that make such request will be subject to public controls (art. 19).

On the other hand, some elements contribute to extend the scope of application of the directive: in particular, the provisions not only apply to cross-border online transactions, but to offline transactions (recitals 4, 16, 40; artt. 5 (2) (c), 8 (a)) and to internal transactions as well (art. 2).

³⁷ Cf. J. SUQUET CAPDEVILA, *The European Legal Framework on Consumer Online Dispute Resolution (ODR)*, cit., p. 173 ff. On the gaps between Member States, see Study on the use of Alternative Dispute Resolution in the European Union: Final Report Submitted by Civic Consulting of the Consumer Policy Evaluation Consortium (CPEC) Framework Contract Lot 2, DG SANCO http://ec.europa.eu/consumers/archive/redress_cons/adr_study.pdf, p. 56 ff. Cf. C. HODGES, *Current Discussions on Consumer Redress: Collective Redress and ADR*, in *Era Forum*, 2012, p. 11, at p. 23; A. JUSKIS, N. ULBAITE, *Alternative Dispute Resolution for Consumer Disputes in the European Union: Current Issues and Future Opportunities*, in *Business and Law*, 2012, p. 25, at p. 28; J. HÖRNLE, *Encouraging Online Dispute Resolution in the EU and Beyond - Keeping Costs Low or Standards High?*, cit., p. 10, and A. BANASZEWSKA, *Recent Developments in Consumer Dispute Resolution Systems in the European Union*, in M.E. DE MAESTRI, S. DOMINELLI (eds.), *Party Autonomy in European Private (and) International Law, Tome II*, Rome, 2015, p. 33, at p. 49.

³⁸ The right to access a court has been a reason for opposition in some state to ADR; cf. C. HODGES, *Current Discussions on Consumer Redress: Collective Redress and ADR*, cit., p. 18. In particular, in respect to mandatory mediation, Lord Justice Dyson argued that «[e]ven if (contrary to our view) the court does have jurisdiction to order unwilling parties to refer their disputes to mediation, we find it difficult to conceive of circumstances in which it would be appropriate to exercise it. We would adopt what the editors of Volume 1 of the White Book (2003) say at para 1.4.11: "The hallmark of ADR procedures, and perhaps the key to their effectiveness in individual cases, is that they are processes voluntarily entered into by the parties in dispute with outcomes, if the parties so wish, which are non-binding. Consequently the court cannot direct that such methods be used but may merely encourage and facilitate"» (*Halsey v Milton Keynes NHST* [2004] 4 All ER 920, 9).

³⁹ ADR Directive, art. 1. Nonetheless, the founding principle of the directive is that the parties freely enter and ADR scheme before going to court, or even in course of judicial proceedings.

⁴⁰ A. BANASZEWSKA, *Recent Developments in Consumer Dispute Resolution Systems in the European Union*, cit., p. 42. On the action of the EU in B2B ADR, cf. C. HODGES, *Current Discussions on Consumer Redress: Collective Redress and ADR*, cit., p. 31.

This has led some Member States to argue that the proposed directive was against the principle of subsidiarity⁴¹. In spite of the questions raised by some Parliaments of the Member States, the applicability of the directive to purely internal cases has been maintained.

To ensure to the consumers the right to access ADR schemes, the directive tackles 3 main issues that had been highlighted during consultation: 1) gaps in the coverage of ADR; 2) lack of awareness of ADR systems and 3) variable quality of ADR systems.

To ensure that there are no gaps in ADR coverage in EU Member States, the directive imposes an obligation on Member States to grant access to ADR schemes (art. 5). This means that states not having ADR systems are urged to create them.

With regard to the second issue, Member States must ensure that professionals inform clients about the existence of ADR and the possibility to take it (artt. 13 ff.). In particular, «*Member States shall ensure that traders established on their territories inform consumers about the ADR entity or ADR entities by which those traders are covered, when those traders commit to or are obliged to use those entities to resolve disputes with consumers. That information shall include the website address of the relevant ADR entity or ADR entities*».

With regard to the last issue, even if the directive does not entail clear rules on the training of mediators, it imposes on Member States the duty of monitoring national ADR centres (artt. 18 ff.), in particular to make sure that quality requirements are respected by the ADR centres (art. 20). These quality requirements are various, and cover obligations for the ADR centres i) to offer information (art. 5 (2) (a)); to accept both domestic and cross-border cases (art. 5 (2) e)); iii) to ensure expertise, impartiality and independence (art. 6), transparency (art. 7), effectiveness, and, in particular the obligation that the outcome of the ADR procedure is made available within a period of 90 calendar days (extended of furthermore 90 days for complex disputes) from the date on which the ADR entity has received the complete complaint file (art. 8 (e)). Moreover, fairness of the procedure (art. 9) must be ensured.

⁴¹ Eerste Kamer der Staten Generaal, 24 January 2012, where it can be read that «[t]he Senate considers that the proposal does not comply with the principle of subsidiarity as the reasons given for the need to adopt this approach to harmonisation are not adequate. The Senate arrives at this conclusion first of all because this proposal for a Directive obliges the Member States to introduce legislation under which an entity is established to arrange for alternative dispute resolution providing a high level of consumer protection. A successful form of dispute resolution is already in operation in the Netherlands. However, this system does not have a statutory basis, but is instead founded on self-regulation and the voluntary participation of the parties. This system is of a fairly advanced nature in comparison with the situation in other Member States. Voluntariness and self-regulation have been factors in the system's success. The Senate therefore sees no reason to adopt legislation providing for a system of alternative dispute resolution. It believes that if the European Commission wishes to achieve its goals the first step should be to adopt appropriate policy measures and that the possibility of making proposals for a directive need only be considered later. As regards the proposal for a Directive on consumer ADR the Senate would also note that this appears to disregard aspects of private international law which may arise, for example, in answering the question in which Member State an ADR entity could or should hear a dispute. The Senate also notes that in Article 2 and Article 5 (2) of the proposed Directive on ADR for Consumers it is provided that the Directive will apply not only to cross-border consumer disputes but also to domestic consumer disputes. As the Senate considers that the scope of the Directive goes further than necessary, it makes a subsidiarity objection on this point as well. The Senate sees no reason why the alternative resolution of domestic consumer disputes should be regulated in a European directive». Cf. Reasoned opinion of the Bundesrat of the Federal Republic of Germany on the proposal for a Directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), where it can be read, at points 3 f., «[t]he Bundesrat takes the view that the proposal for a Directive on alternative dispute resolution, in its current form, cannot be supported by any of the legal bases under the Treaties that are required for action to be taken by the EU. Furthermore the proposal does not comply with the principle of subsidiarity. The proposal for a Directive on alternative dispute resolution is not covered by the stated legal basis (Article 114 TFEU) in that it provides for the establishment and funding of a comprehensive infrastructure of out-of-court bodies for the resolution of consumer disputes arising from the sale of goods or provision of services that would also apply to purely internal (national) disputes. According to the explanatory memorandum to the proposal, its single market dimension – as required by Article 114 TFEU – consists in the fact that cross-border retail trade can be boosted by strengthening consumer confidence in out-of-court dispute resolution systems. In the Bundesrat's view it is at least conceivable that the existence of an infrastructure for the out-of-court settlement of cross-border disputes would strengthen consumer confidence in cross-border trade, and boost consumer demand for products and services offered for sale in other Member States. There is, however, no logical reason why the Member States, in the interest of promoting cross-border trade, should be required to adopt rules on the system of legal protection via out-of-court dispute settlement for purely internal situations. The regulation of purely internal disputes has no perceptible effect on consumer motivation to shop across borders. Nor is this necessary in order to secure the proper functioning of the out-of-court resolution of cross-border disputes. Specialised alternative dispute resolution bodies can be created specifically for cross-border disputes, which give rise to particular additional difficulties (language of the dispute resolution, determination of the applicable law, etc.). For that purpose there is no need to have recourse to dispute resolution bodies for internal disputes. The Bundesrat takes the view that, given the number of disputes and the extent of the intervention in Member States' competences that this represents, it would not be proportionate even if one assumes that it would give a boost in future to cross-border retail trades». In the legal literature see A. JUSKIS, N. ULBAITE, *Alternative Dispute Resolution for Consumer Disputes in the European Union: Current Issues and Future Opportunities*, cit., p. 32, and J. HÖRNLE, *Encouraging Online Dispute Resolution in the EU and Beyond - Keeping Costs Low or Standards High?*, cit., p. 12.

In addition, to assure protection of the contractually weaker parties, according to the directive, Member States have to provide that an agreement between a consumer and a trader to submit complaints to an ADR entity is not binding on the consumer if it was concluded before the dispute has arisen and if it has the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the dispute (art. 10). This provision apparently requires that two conditions have to be fulfilled at the same time: that the agreement to submit the dispute to an ADR is concluded before a dispute has arisen, and that the effect of such agreement is to deprive the weaker party of the protection this party would otherwise be entitled to.

Where this double condition seems consistent with the aim of enhancing ADR, since this provision makes legitimate ADR agreements to mediate imposed upon the weaker parties where such agreement is not detrimental to the interests of this party, the solution does not seem fairly consistent with the title of the provision itself (“*Liberty*”). In any case, even though there might be some favourable imposition, as noted in the legal literature, the binding nature of the agreement to mediate is weak if one thinks in terms of enforceability of the agreement, or in terms of the possibility to obtain redress in cases of its breach⁴². In any case, if agreements to submit a dispute to an ADR respect such conditions, the provision does not forbid Member States from prescribing their binding nature. This, in light of the fact that ADR does not limit access to court, which shall always be granted⁴³. However, one could wonder, in practical terms, if a mediation agreement could impair access to court where the negative consequences (in terms of costs) connected to the refusal of the agreement discourage a judicial action⁴⁴.

Again at the level of dogmatic question, one could wonder when a dispute can be considered as being “arisen”. Taking inspiration from uniform rules on international civil procedure in insurance matters⁴⁵, where it is admitted that weaker parties can enter choice of court agreements with the insurance undertaking after a dispute has arisen, a number of hermeneutic options have been addressed in the legal literature⁴⁶. In general, it is admitted that a lower protection is acceptable after a dispute has arisen, since the weaker party will be more hesitant to enter new agreements. The simple existence of a dispute between the parties should fill with doubts the weaker party who is requested to sign a clause: such doubts should reasonably stop any weaker party from entering an agreement. Nonetheless, such doubts are alone not sufficient to compensate the lack of bargaining power and of legal knowledge, thus it could possibly also be argued that a dispute has to be considered “arisen” not only where the parties disagree on the execution of the contract, but when the consumers seek help in contemplation of legal proceedings.

On the contrary, the same provision obliges Member States to recognise binding effects of the solutions of ADR procedures which aim at resolving the dispute by imposing a solution⁴⁷. This is however subject to the condition that both parties⁴⁸, and not the consumer alone, were informed of its binding nature in advance and accepted this, save for trader who do not have to specifically accept this binding nature if domestic rules already provide that solutions are binding on traders.

With regard to the relationship between ADR and access to court, again in an attempt not to discourage judicial protection, the directive, with a provision that is similar to the Mediation Directive, prescribes that ADR procedures do not negatively affect limitation or prescription of rights (art. 12).

When setting common minimum principles on ADR procedures, even though leaving space to Member States to provide differently, the directive sets a flexible mechanism of ADR promotion based on non-binding participation, like envisaged in the Commission Recommendation 98/257 EC on the principles applicable for the bodies responsible for out of court settlement of consumer disputes, and the

⁴² Cf. I. QUEIROLO, *Mediation in Civil and Commercial Matters: Private International Law Issues*, in this Volume, and E.B. CRAWFORD, J.M. CARRUTHERS, *United Kingdom*, in C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe. Cross-Border Mediation*, Cambridge, 2014, p. 461, at p. 476.

⁴³ Cf. J. SUQUET CAPDEVILA, *The European Legal Framework on Consumer Online Dispute Resolution (ODR)*, cit., p. 179.

⁴⁴ On this issue, cf. S. DOMINELLI, *La mediazione familiare nel diritto comparato: problemi della mediazione obbligatoria alla luce dei principi di diritto sovranazionale*, in A. CAGNAZZO, F. PREITE, V. TAGLIAFERRI (eds.), *Il nuovo diritto di famiglia: profili sostanziali, processuali e notarili, Vol IV, Tematiche di interesse notarile, Profili internazionalprivatistici*, Milano, 2015, p. 1293, at p. 1338 ff.

⁴⁵ 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 (recast), in OJ L 351, 20.12.2012, p. 1, (Brussels I bis Regulation), art. 15, on which see DOMINELLI S., *Settling the Democratic Deficit in the Insurance Market Through European Rules of Private and Procedural International Law: Proposing a «Weakness Clause»*, in *Party Autonomy in European Private (and) International Law, Tome II* (edited by DE MAESTRI M.E., DOMINELLI S.), Rome, 2015, p. 173, at p. 197 f., where further references.

⁴⁶ BRIGGS A., *Civil Jurisdiction and Judgments*, New York, 2015, p. 133.

⁴⁷ ADR Directive, art. 10 (2).

⁴⁸ Cf. J. SUQUET CAPDEVILA, *The European Legal Framework on Consumer Online Dispute Resolution (ODR)*, cit., p. 179.

Commission Recommendation 2001/310 EC on the principles applicable for out of court bodies involved in consensual resolution of consumer disputes. Nonetheless, not only the directive supports voluntary (understood in light of the above) ADR, but, as seen, in comparison to the recommendations, also envisages procedures for monitoring and compliance with such principles. In particular, the directive obliges Member States to lay down effective, proportionate and dissuasive penalties applicable to infringements of the national provisions adopted in transposing the directive into national law. Not only ADR centres are subject to penalties should they not respect the common minimum rules (for example on fairness, quality, expertise, independence), but also traders might be subject to penalties, should they not respect their information obligations (art. 21).

To conclude on the directive, it has to be noted that the instrument in no way provides for rules on the territorial competence of the ADR centres, both in internal and in cross-border cases: this solution is consistent with the founding principles of the directive. No rule on territorial competence is given since the centre is supposed to be freely chosen by the parties.

4. The ODR Regulation

According to its art. 1, the purpose of the ODR Regulation is, through the achievement of a high level of consumer protection, to contribute to the proper functioning of the internal market, and in particular of its digital dimension by providing a European ODR platform ('ODR platform') facilitating the independent, impartial, transparent, effective, fast and fair out-of-court resolution of disputes between consumers and traders online. For this purpose, the regulation has introduced an online entry-point for online dispute resolution, which has become operative in January 2016. The purpose of the ODR platform is to be the channel through which disputes can be forwarded to ADR centres in EU Member States⁴⁹. Even though the ODR Regulation and the ADR Directive are complementary and should, together taken, implement growth of the market, their scope of application is not identical. In fact, the ODR Regulation only applies to C2B and to B2C⁵⁰ disputes related to e-commerce⁵¹ (whilst the directive also applies to offline transactions). An element that determined the different scope of application between the two instruments has been changed in the final text, in comparison to the proposed regulation. Where the proposal⁵² for the ODR Regulation limited its scope of application to online cross-border B2C/C2B transactions, the final text is applicable, as the ADR Directive, also to purely internally disputes⁵³.

The Platform is available in all official languages and free of charge. Once a petition has been filed online, the Platform automatically sends the petition to the ADR centre that has been chosen by the parties (art. 9 (6)). The Platform also offers an electronic case management tool free of charge. In other words, the Platform enables the parties and the ADR centre to conduct the dispute resolution procedure online through the ODR platform itself (art. 5 (4) (d)).

Even though the Regulation states that the Commission has to create a user-friendly platform which has to provide an entry point for mediation cases, the Regulation does not clearly provide in detail how this electronic tool should be constructed. This of course raises a number of questions on the intrinsic limits of online mediation, since given e-instruments, even though widespread (such as emails) do not appear to be suited, at least if they can be characterized as asynchronous instruments⁵⁴.

⁴⁹ ODR Regulation, recital 18.

⁵⁰ *Ibidem*, art. 2 (2) «[t]his Regulation shall apply to the out-of-court resolution of disputes referred [...] which are initiated by a trader against a consumer, in so far as the legislation of the Member State where the consumer is habitually resident allows for such disputes to be resolved through the intervention of an ADR entity».

⁵¹ *Ibidem*, recital 15.

⁵² Proposal for Regulation of the European Parliament and of the Council on online dispute resolution for consumer disputes (Regulation on consumer ODR), COM (2011) 794 final, 29/11/2011, art. 2, p. 11.

⁵³ ODR Regulation, recital 18 («[a]lthough in particular consumers and traders carrying out cross-border online transactions will benefit from the ODR platform, this Regulation should also apply to domestic online transactions in order to allow for a true level playing field in the area of online commerce»). Cf. A. BANASZEWSKA, *Recent Developments in Consumer Dispute Resolution Systems in the European Union*, cit., p. 46.

⁵⁴ On the effectiveness of various forms of online mediation, see T. LAPP, *Online-Mediation*, in F. HAFT, K. GRAEFIN VON SCHLIEFFEN (eds.), *Handbuch Mediation*, München, 2016, p. 510 ff., where, at p. 513, also suggest that such instruments could actually bear a benefit for the purposes of mediation where the parties do not wish to meet due to their strong opposition, as it could be the case in employment matters. Even though, of course, such an *animus* might be so strong to prevent finding an agreement between the parties.

Additionally, the Platform provides a feedback system which will allow the parties to express their views on the functioning of the ODR platform and on the ADR centre that handled their dispute. This seems particularly important, because the system of feedback is traditionally used in private virtual communities to rate quality service: where ADR centres do not respect quality standards, other than possible fines under the ADR Directive (given that ADR centres can operate through the Platform only if they require accreditation for the purposes of the ADR Directive, according to art. 4 (1) (i) ODR Regulation), the market will exclude operators from the market.

Also the ODR Regulation provides for information obligations. As a matter of general principle, online traders established within the Union shall provide on their websites an electronic link to the ODR platform (art. 14 (1)). Moreover, traders committed or obliged to use ADR 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 (art. 14 (2)). Of course, where the trader commits to a specific ADR centre, the consumer respondent has to agree on the chosen centre, otherwise the request will not even be processed by the Platform (art. 9 (3) (a)). It is indeed a principle of the regulation that parties have to agree upon the same ADR entity⁵⁵. However, such provision has to be read in light of art. 10 Mediation Directive which, as mentioned, foresees the limited possibility for Member States to provide – under given circumstances – binding agreements imposed upon the consumer.

Should the parties not agree upon an ADR centre within 30 days after submission of the complaint, the complaint will not be further processed by the Platform. Should the parties, on the contrary, reach such an agreement, the procedures (contrary to the initial proposal of the ODR Regulation⁵⁶) to be followed by the ADR centre are those prescribed in their minimum by the ADR Directive. Moreover, ADR centres, which can work through the ODR Platform, but are not obliged to do so, shall not require the physical presence of the parties or their representatives, unless its procedural rules provide for that possibility and the parties agree (art. 10 (b)).

5. Evaluating the possible effectiveness of online ADR under the current EU legal framework

In evaluating the possible practical effectiveness of the regulatory framework introduced by the EU in 2013, and in particular its attitude to pursue the Digital Agenda's aims to boost the internal electronic market by also enhancing online alternative dispute resolution mechanisms, practical data on online ADR in general seem fundamental. The Belgian experience, in this sense, appears relevant. The Belgian legislation concerning mediation (see articles 1724-1737 of the Belgian Code of Civil Procedure) did not provide for the possibility to have recourse to online mediation in Belgium. This means that online mediation, even though not prohibited, was not regulated, and had thus little use in practice⁵⁷. There exists however Belmed (Belgian Mediators), a four language online platform for online out-of-court consumer dispute resolution between consumers and companies registered in Belgium⁵⁸. Belmed consists of two pillars: one offering information on ADR, and the other providing ODR for consumers and enterprises⁵⁹ which offers the parties the possibility to make an online application for ADR, forwarding the request to the ADR centre⁶⁰, in a manner that is similar to the EU ODR Platform. Statistics released over Belmed, from its establishment (April 2011) to June 2013 raise questions on the

⁵⁵ ODR Regulation, art. 5 (4) (c). Cf. J. SUQUET CAPDEVILA, *The European Legal Framework on Consumer Online Dispute Resolution (ODR)*, cit., p. 179.

⁵⁶ In the proposal, it was stated that the procedure had to be completed within 30 days, whilst, in the proposed ADR Directive, the deadline has always been 90 days (in the proposal see art. 9 (a): «ADR entities to which a complaint has been transmitted in accordance with Article 8 shall: if, following the notification of the dispute to the parties, the parties agree to institute proceedings before the entity, accomplish the conclusion of the dispute resolution procedure within 30 days from when the proceedings have been instituted. In the case of complex disputes, the ADR entity may extend this time limit»).

⁵⁷ On the little use of online mediation, cf. J. SUQUET CAPDEVILA, *The European Legal Framework on Consumer Online Dispute Resolution (ODR)*, cit., p. 162. Cf. also G. DE PALO; L. D'URSO; M. TREVOR; B. BRANON; R. CANESSA; B. CAWYER; R. FLORENCE, 'Rebooting' the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU, Study of the European Parliament Policy Department Citizens' Rights and Constitutional Affairs, 2014, p. 163, where it can be read that «[o]nline mediation is still reported to be almost non-existent in most Member States, but even its availability, in certain countries, does not show any connection to frequent mediation use. In Member States where lawyers are required by law to inform their clients about mediation the number of mediations is not high for that single reason, and the same is generally true where litigants are required to attend a mediation information session before filing a lawsuit».

⁵⁸ S. VOET, *Belgium*, in C. HODGES, I. BENÖHR, N. CREUTZFELDT-BANDA (eds.), *Consumer ADR in Europe*, Oxford, 2012, p. 26.

⁵⁹ *Ibidem*, p. 28.

⁶⁰ *Ibidem*, p. 29.

effectiveness of online dispute resolution. Of over 638 cases, 379 were falling within the sectors covered by Belmed, and 25 were settled (a number which is not great, but that is nonetheless double of the mediations that have been rejected by the parties)⁶¹.

In this sense, even though the new rules are indeed likely to boost confidence in online market in as much as they will contribute to a cost-effective settlement of disputes, the success of the EU action, and in particular of the intention to strengthen online mediation, will necessarily have to deal with the fact that, in most cases, physical presence of the parties is of a fundamental importance. Only where the parties are physically present, mediators and conciliators, and in general third parties that are supposed to help consumers and traders find an amicable solution, can most effectively investigate the interests of the parties behind their positions⁶². Active and empathetic listening⁶³ that mediators employ to teach the parties the interests behind their positions⁶⁴ is better suited for meeting where the parties are physically present. Where this active and empathetic listening is not possible, or not effective at least for online mediation, the possibility for the impartial third party to help consumers and traders, drops, hence reducing the possibility for them to reach amicable solutions. It thus remains to be seen to what extent these new rules will in practice attain their results.

Additionally, the fact that the Platform provides a feedback system which allows the parties to express their views on the functioning of the ODR Platform and on the ADR centre which has handled their dispute does not seem, when taken alone, to be enough to strengthen online commerce. Even though under the ODR Regulation online traders have an obligation to provide a link to the Platform, it has to be taken into consideration that buyers will not always, if ever, check the feedback system provided by the Platform before buying. Should they do so, it has also to be taken into consideration that buyers will not have any information on how the trades have been rated by previous buyers, since the system will only rate the Platform itself and the ADR centre. In this sense, part of the literature has correctly pointed out that also rules for rating of bad traders should be drawn⁶⁵, so as to allow those consumers that check before the purchase to decide whether or not they want to buy from entrepreneurs that have a number of unresolved disputes or unenforced ADR settlements.

Other than the issues of financing ADR centres⁶⁶, not taken into consideration by the regulation, who nonetheless imposes neutrality and impartiality of centres⁶⁷ (even if they are to receive funding from companies, or from traders associations), further reasons for doubts on the success of the goals of the two adopted instruments lie in the fact that the will to encourage online mediation does not provide any system of “automatic negotiation”, that reduces costs⁶⁸. Given that the goal of the ODR Regulation is to become an entry point, and not a tool for directly settle disputes, ADR centres will charge their activity according to their internal rules and domestic laws. For disputes whose value is not significant, the costs of online mediation could still be higher than the value of the claim. In this sense, the introduction of

⁶¹ For the data, see S. VOET, *Public Enforcement and A(O)DR as Mechanism for Resolving Mass Problems: a Belgian Perspective*, in C. HODGES, A. STADLER (eds.), *Resolving Mass Disputes: ADR and Settlement of Mass Claims*, Cheltenham, 2013, p. 270, at p. 292. Cases were 638. 379 did fall in the sectors of Belmed; 55 were still pending; 141 were rejected by the ADR agency; 131 were stopped by the Applicant, and 12 failed.

⁶² On the importance of the surroundings, see B. MANN, *Smoothing Some Wrinkles in Online Dispute Resolution*, in *International Journal of Law and Information Technology*, 2008, p. 83, at p. 98 ff. As noted, «[o]ne of the ways in which channels of communication can be opened up is through the refinement of developed listening skills» (D. SPENCER, M. BROGAN, *Mediation Law and Practice*, Cambridge, 2006, p. 163). «“Active” listening involves focusing on the words, the pitch and tone, the body language and other non-verbal information [...]» (T. SOURDIN, *Alternative Dispute Resolution*, Sydney, 2005, p. 43).

⁶³ On which see RABE, WODE, *Mediation: Grundlagen, Methoden, rechtlicher Rahmen*, Heidelberg, 2014, p. 73 ff.

⁶⁴ On the interests behind the positions, see H.G. MAEHLER, G. MAEHLER, *Familienmediation*, in F. HAFT, K. GRAEFIN VON SCHLIEFFEN (eds.), *Handbuch Mediation*, München, 2016, p. 669, at p. 683.

⁶⁵ P. CORTÉS, *A New Regulatory Framework for Extra-Judicial Consumer Redress: Where We Are and How to Move Forward*, University of Leicester School of Law Research Paper No. 13-02, p. 23. Cf. P. CORTÉS, *Developing Online Dispute Resolution for Consumers in the EU: A Proposal for the Regulation of Accredited Providers*, in *International Journal of Law and Information Technology*, 2011, p. 1, at p. 22 ff.

⁶⁶ C. HODGES, *Current Discussions on Consumer Redress: Collective Redress and ADR*, cit., p. 31, writing that «[t]here is a serious risk that the Commission’s ADR proposals will just not work unless businesses across Europe are persuaded to fund them. It is important that a campaign of information is now directed at business. There may be a price: an effective, comprehensive ADR system in exchange for an absence of collective actions». On the same problem, see P. CORTÉS, *Developing Online Dispute Resolution for Consumers in the EU: A Proposal for the Regulation of Accredited Providers*, cit., p. 8 ff.

⁶⁷ ADR Directive, art. 6 (3) (d), providing that «the dispute resolution entity does not have any hierarchical or functional link with the trader and is clearly separated from the trader’s operational entities and has a sufficient budget at its disposal, which is separate from the trader’s general budget, to fulfill its tasks».

⁶⁸ On the issue of costs, from a Finnish perspective, cf. S. SAARENSOLA, *The Risk of Legal Costs and Its Effects on Access to Court*, in L. ERVO, A. NYLUND (eds.), *The Future of Civil Litigation: Access to Courts and Court-annexed Mediation in the Nordic Countries*, Heidelberg, 2014, p. 231.

automatic negotiations, such as those adopted by major online sellers, appear desirable since automatically generated proposals do not require the intervention of a third party, and thus reduce costs of ADR⁶⁹.

Where there is no doubt that the instruments adopted by the EU are indeed able to attain the goal of promoting ADR⁷⁰, both online and offline, the question to what extent such results will be attained in practice cannot be answered, even though it seems clear that the remaining issues can still compromise the EU's action in boosting e-market by increasing recourse to ADR. In this sense, it has recently correctly been noted⁷¹ that, also in light of the domestic implementation of the EU legal framework, whilst the new rules might actually be useful in some cases (more specifically in those already connected to the internet⁷²), and thus indeed avoid recourse to courts and to cross-border judicial proceedings, consumers will not necessarily approach the international market without doubts and reservations. In any case, such new rules of the EU lawmaker have contributed to highlight the ups and downs of online mediation, which has been highly underdeveloped in some Member States⁷³.

6. The UNCITRAL Working Group III and ODR

As mentioned, and for the same reasons that have led the European lawmaker to enact new rules, the United Nations Commission on International Trade Law (UNCITRAL) has long ago acknowledged the importance of online disputed resolutions systems and, back in 2010, it established a Working Group (Working Group III) to undertake work in the field of online dispute resolution relating to cross-border e-commerce transactions, including business-to-business and business-to-consumer transactions, leaving to the new body the determination of the form of the legal standard to be prepared after further discussions⁷⁴. Recently, the group has adopted some principles in ODR⁷⁵.

The necessity to adopt fully international solutions stems from the very circumstance that, as seen above, regional systems such as the EU are tackling the issues connected to cross-border low-value claims. Where not all sensitive areas of the market in the world might have a legal framework expressly dealing with cross-border ODR, it is surely true that – in international and comparative perspective – this is a significant trend. For example, the Organization of American States has also discussed the possibility to adopt common rules on online dispute resolutions⁷⁶. The fear that connected markets might adopt divergent rules on the issue of online dispute resolution has thus led UNCITRAL to «*deal with the matter internationally from the outset in order to avoid development of inconsistent mechanisms*»⁷⁷.

⁶⁹ P. CORTÉS, *A New Regulatory Framework for Extra-Judicial Consumer Redress: Where We Are and How to Move Forward*, cit., p. 20; P. CORTÉS, *Online Dispute Resolution for Consumers in the European Union*, New York, 2011, p. 66 ff.; I. BARRAL VINALIS, *E-Consumers and Effective Protection: the Online Dispute Resolution system*, in J. DEVENNY, M. KENNY (eds.), *European Consumer Protection: Theory and Practice*, Cambridge, 2012, p. 82, at p. 96 ff.; B. MANN, *Smoothing Some Wrinkles in Online Dispute Resolution*, cit., p. 92, and M. CHALAMISH, S. KRAUS, *AutoMed - An Automated Mediator for Multi-Issue Bilateral Negotiations*, in *Autonomous Agents and Multi-Agent Systems*, 2012, 536.

⁷⁰ In a critical sense, see J. DAVIES, *How Well Placed is the Optimism Surrounding the New ADR/ODR Proposals?*, in *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht*, 2012, p. 63, at p. 64, where it is argued that «[t]he new proposals suggest the provision of a generic solution to reduce consumer detriment in a somewhat idealised and sanitised model of the consumer redress environment. Existing ADR schemes are so diverse, entrenched and potentially incomplete as to dilute any potential for conformity in the implementation of any residual scheme, or alternative, at Member State level and consumer behaviour indicates that the rhetorical optimism accompanying the proposals is overstated. Undoubtedly such schemes can bring significant benefit to consumers, businesses and market opportunity, but will these new proposals deliver the virtuous circle in which consumer and trader self-interest leads to the common good?».

⁷¹ S. MARINO, *La risoluzione alternativa delle controversie tra mercato interno e tutela del consumatore*, in *Il Diritto dell'Unione europea*, 2015, p. 779 ff.

⁷² A. DE LUCA, *Mediation in Italy, Feature and Trends*, cit., p. 364.

⁷³ *Ibidem*.

⁷⁴ In these terms, Report of the United Nations Commission on International Trade Law Forty-third session 21 June-9 July 2010 (A/65/17), para. 257.

⁷⁵ United Nations Commission on International Trade Law, Working Group III (Online dispute resolution), Thirty-third session, New York, 29 February-4 March 2016, Online dispute resolution for cross-border electronic commerce transactions, Draft outcome document reflecting elements and principles of an ODR process.

⁷⁶ See in the legal literature, C. RULE, V. ROGERS, L. DEL DUCA, *Designing a Global Consumer Online Dispute Resolution (ODR) System for Cross-Border Small Value-High Volume Claims – OAS Developments*, in *Uniform Commercial Code Law Journal*, 2010, p. 221, and A.F. PEREZ, *Consumer Protection in the Americas: A Second Wave of American Revolutions?*, in *University of St. Thomas Law Journal*, 2008, p. 698.

⁷⁷ Report of the United Nations Commission on International Trade Law Forty-third session, cit. para. 253.

The last session of the Working Group III⁷⁸ has been held in New York from 29th February to the 4th of March 2016⁷⁹. As of today, the Working Group has found consensus on a number of principles and issues, most of which rest on the already developed practice, and thus conform to the legal framework that has been adopted by the European Union, such as the principles of fairness and accountability⁸⁰. Furthermore, consensus has been found on the idea that «ODR ought to be simple, fast and efficient, in order to be able to be used in a “real world setting”, including that it should not impose costs, delays and burdens that are disproportionate to the economic value at stake»⁸¹. To this end, also in this case the creation of an ODR platform is suggested⁸².

What is significantly differing from the approaches followed by the European Union and the Working Group is on how the creation of a cross-border online platform has to be pursued. As noted in the legal literature, there are mainly three ways to ensure the creation of such an instrument⁸³.

The first, and perhaps the most effective way to ensure that the same criteria are respected by all ODR providers across the international market would be the creation of a truly international platform, with uniform criteria for mediation providers to fulfil in order to be admitted on the platform itself. It is though apparent that the creation of a truly global ODR platform seems unrealistic, if not for the problems connected with the creation of a new international body, at least for the problems related to the centralised management of possibly millions of low-value procedures across the globe⁸⁴.

The second way, the one pursued by the European Union, is to create a single entry point for a coordinated network, which of course does not seem feasible at the purely international level as well⁸⁵.

The third option, more suited for the international arena, is the creation of harmonised standards for service operators to be adopted through model laws⁸⁶.

It stems from the above that, reasonably, the Working Group's activity and influence is limited by the ontological nature of its acts, which are not binding unless ratified by the interested states. This not only means that an ODR platform as the one constructed within the European Union is unlikely to be transposed *sic et simpliciter* at the international level, but also means that the mandate of the Working Group is limited in as much no lower, nor different level of protection will be accepted by those who have a given legal framework. Furthermore, finding an agreement with those states might even become harder if negotiations have to take into consideration further and different regional rules for the protection of the contractually weaker parties. As noted in the legal scholarship indeed⁸⁷, the European Union has insisted that its private international law concepts were included within the negotiations, so as to make sure that no pre-dispute binding agreement postponing access to court might be reached by the parties, or, better yet, imposed by the contractually stronger party in general terms and conditions and contracts of adherence. This, of course, seems also consistent with art. 10 ADR Directive.

In this sense, even though a number of draft procedural rules and guidelines have been adopted in 2014 and 2016 by the Working Group⁸⁸, the general principles resemble the ones already developed by the European Union, without the technicalities that have been adopted at the regional level, leaving thus open the question on whether the Working Group will fulfil its mandate, and to what extent a possible UNCITRAL model law will inform domestic legal system towards uniformity, so as to effectively «deal with the matter [of ODR] internationally from the outset in order to avoid development of inconsistent mechanisms».

⁷⁸ UNCITRAL, at its forty-eight session in Vienna 2015 indeed agreed that the group would have been given either one more year of work or two sessions before being dismissed, regardless of the fulfilment of its duty. Cf. Report of Working Group III (Online Dispute Resolution) on the work of its thirty-second session Vienna, 30 November-4 December 2015 (A/CN.9/862), para. 5.

⁷⁹ A/CN.9/WG.III/WP.139, para. 3.

⁸⁰ Report of Working Group III (Online Dispute Resolution) on the work of its thirty-second session Vienna, 30 November-4 December 2015, cit., para. 26 f.

⁸¹ *Ibidem*.

⁸² *Ibidem*, para. 42.

⁸³ Z.S. TANG, *Electronic Consumer Contracts in the Conflict of Laws*, Oxford, 2015, p. 350 f.

⁸⁴ *Ibidem*.

⁸⁵ *Ibidem*.

⁸⁶ *Ibidem*.

⁸⁷ R.A. BRAND, *The Evolving Private International Law / Substantive overlap in the European Union*, in P. MANKOWSKI, W. WURMNEST (eds.), *Festschrift für Ulrich Magnus: zum 70. Geburtstag*, Munich, 2014, p. 371, at p. 382.

⁸⁸ More recently, see United Nations Commission on International Trade Law, Working Group III (Online dispute resolution), Thirty-third session, New York, 29 February-4 March 2016, Online dispute resolution for cross-border electronic commerce transactions, Draft outcome document reflecting elements and principles of an ODR process. All texts are available at http://www.uncitral.org/uncitral/commission/working_group-ups/3Online_Dispute_Resol-ution.html.

Furthermore, should there be a harmonised and suitable international legal framework in the field of ODR, the same issues that have been analysed under EU law will still stand. The necessity to address issues such as the difficulty of employing mediation techniques as the active and emphatic listening, the necessity of creating rating systems for traders – and consumers – for their behaviour during negotiations, the imperative to reduce costs also by way of introducing automatic negotiations mechanisms, as well as the issues related to cross-border enforcement of reached agreements, are all elements that – together taken – appear to be able to reduce the possible overall effectiveness of ADR mechanism.

In this sense, the relevance of the regional legal framework for international law becomes even more apparent, since the former not only stresses the problems connected to the regulation of ODR, but the results of its implementation will offer international lawyers practical data on the effectiveness and efficiency of ODR to be taken into account in the drafting of possible model laws.