

MIND THE GAP? A CRITICAL ANALYSIS OF THE RECOGNITION AND ENFORCEMENT OF CROSS-BORDER CONSUMER ODR OUTCOMES IN THE EU

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ABSTRACT: The EU ODR platform was created with the objective of offering better access to justice for the consumer, especially for cross-border disputes. The recognition and enforcement of cross-border ODR outcomes in the EU is however a complex procedure, and not always possible under the current EU legal framework. This article therefore questions whether a digitalised ESCP procedure is a better alternative to the enforcement of consumer redress for cross-border electronic-based small claims procedures.

KEYWORDS: ODR, consumer redress, access to justice, ESCP, small claims, digitalisation, recognition and enforcement, cross-border disputes.

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On 15 February 2016, the European Union Online Dispute Resolution (ODR) platform became available for use by consumers and traders across the EU, in order to resolve disputes arising from business-to-consumer (B2C) e-commerce transactions.¹ The platform was built with the objective of enabling easier access to a remedy for small claims arising from these transactions. The simplification of access to a remedy through the ODR platform can therefore be seen as key for building consumer confidence, particularly for EU cross-border trade. The necessity of having simplified ICT-based access to a remedy for disputes was especially demonstrated in the wake of the Covid-19 pandemic as a large wave of consumer claims ensued.²

ODR was first developed in the 1990s as a method for the resolution of the increasing number of internet-based disputes.³ One of the earliest and most successful ODR systems is the eBay dispute resolution center, which reported to have dealt with up to 60 million disputes per year in 2010.⁴ There is no established uniform definition of ODR, and a definition is also lacking in the EU Regulation on consumer ODR.⁵ ODR can however be defined as being a form of alternative dispute resolution (ADR) that is adapted through the use of ICT.⁶ There is no common definition of ADR in any legal instrument either, but it normally includes negotiation, mediation, conciliation and arbitration.⁷ ODR has come to also encompass problem diagnosis tools, community courts, ombudsmen and other similar variations.⁸ The EU Directive on consumer ADR does not indicate to Member States what type of procedure design they need to adopt, which gives them the freedom to choose the type of procedure to apply in their jurisdictions.⁹ It can be noted though that one of the mostly used ADR methods in ODR in the EU is mediation.¹⁰

¹ The platform was established under the application of 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).

² The European Consumer Centres (ECC) have reported a sharp increase in consumer complaints since the beginning of the COVID-19 pandemic in March. A special webpage on Covid-19 was set-up by the EU Commission to show the extent of these complaints. This information is available at https://ec.europa.eu/info/live-work-travel-eu/consumers/resolve-your-consumer-complaint/european-consumer-centres-network-ecc-net/ecc-net-and-covid-19_en

³ Katsh E., 'ODR: A Look at History: A Few Thoughts About the Present and Some Speculation About the Future,' 2012, p. 27 available at <https://www.mediate.com/pdf/katsh.pdf>

⁴ *Ibid.*

⁵ Koulu R., 'Law, Technology and Dispute Resolution: Privatisation of Cercion,' Routledge, 2019, p. 7.

⁶ See Schmitz A., 'Measuring "Access to Justice" in the Rush to Digitise,' 88 *Fordham Law Review* 2381 (2020), p. 2382.

⁷ See Micklitz H.W. and Saumier G., 'Enforcement and Effectiveness of Consumer Law,' in Micklitz H.W. and Saumier G. (eds.), *Enforcement and Effectiveness of Consumer Law, Ius Comparatum: Global Studies in Comparative Law* (Springer International Publishing, 2018), p. 4.

⁸ Schmitz A., *supra* n. 6, p. 2382.

⁹ Storskrubb E., 'Alternative Dispute Resolution in the EU: Regulatory Challenges,' *European Review of Private Law* 1-2016, 7-32, p. 23.

¹⁰ A large number of ADR providers on the EU ODR platform offer mediation (and/or conciliation) as the main ODR method. This observation is based on the current list of ADR providers that

The use of ODR for cross-border B2C transactions has advantages of being a quick, accessible, simple and low-cost procedure for obtaining consumer redress that does not require any physical displacement.¹¹ These advantages apply to the use of the EU ODR platform. The consumer can use the platform to communicate with the trader in case of a problem with the transaction and eventually pass on the complaint to an ADR entity to start the ODR process. The procedure is free for the consumer and offers translated information in cases where several languages are involved.

According to the most recent EU Commission report on the application of the Directive on consumer ADR and the Regulation on ODR for consumer disputes¹², the platform was used in 44% of the cases for the resolution of cross-border consumer disputes. The report nevertheless states that parties agreed on appointing an ADR entity in only 2% of the cases, and that in about 80% of the cases the trader had not engaged with the ODR process which led to the automatic closure of the proceedings.¹³ Given that such non-engagement by the traders is due to the non-coercive nature of the ODR procedure¹⁴, the question that arises is whether traders would be legally obliged to enforce the ODR outcomes should they decide to engage with the entire process. This question arises especially for cross-border recognition and enforcement of ODR outcomes across the EU due to the different legal systems involved.¹⁵

As ADR falls outside the remit of the Brussels I (recast) Regulation¹⁶, it is not made very clear to the consumer what the legal framework supporting the cross-border judicial enforcement of ODR outcomes would be. This also leaves us with the uncertainty of how courts of the EU member states would recognise and enforce each other's decisions regarding the enforcement of ODR outcomes. Not all types of ODR outcomes are binding of course, but for those that are considered to be binding such as a settlement agreement following a mediated outcome the question is posed. This legal gap creates un-

is found on the EU ODR platform. The information is available at <https://ec.europa.eu/consumers/odr/main?event=main.adr.show2>

¹¹ See Schmitz A. and Rule C., 'The New Handshake: Online Dispute Resolution and the Future of Consumer Protection,' (ABA Book Publishing, 2017) and Schmitz A., *supra* n. 6, p. 2383.

¹² Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes, Brussels, 25.9.2019, COM(2019) 425 final, p 15 available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2019:425:FIN>

¹³ *Ibid*, pp. 15-16.

¹⁴ See recital 49 of the 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 (Directive on consumer ADR).

¹⁵ See Storskrubb E., *supra* n. 9, p. 14.

¹⁶ 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 (Brussels I recast).

wanted uncertainty in this process for the consumers and discourages them from using ODR, which would consequently discourage cross-border trade.¹⁷

This paper therefore examines the extent to which there is a minimum standard of harmonisation within EU law in the enforcement of binding cross-border ODR outcomes in B2C disputes. Understanding the extent of harmonisation for consumer redress in the EU derives its importance from Article 81(2)(e) of the Treaty on the Functioning of the European Union (TFEU) which sets the importance of the adoption of measures aimed at ensuring effective access to justice for the proper functioning of the internal market.¹⁸ In light of the gaps affecting the EU cross-border enforcement of ODR outcomes, the question of the impact of the Covid-19 pandemic over EU small claims procedures arises. As the use of ICT in dispute resolution has become increasingly popular, it is starting to be picked up for use by public courts.¹⁹ This is an interesting development as the concept of ODR as it is currently understood is potentially shifting to include a public justice dimension.²⁰ Consequently, this paper also examines the degree to which technology-facilitated consumer small claims court decisions can be used across the EU for the enforcement of online consumer redress.

To do so, part 1 of this paper will examine the extent to which the current applicable EU law on ODR recognises the legal enforceability of cross-border consumer ODR outcomes. In part 2, a discussion of the reasons behind the limitations on the cross-border enforcement of consumer ODR outcomes in the EU will follow. The paper finally tackles the alternative solutions to this gap in the law in part 3, and shows the significance of the impact of the Covid-19 pandemic on the recognition of ICT-facilitated dispute resolution for consumer small claims in the EU.

1. THE APPLICABLE LAW TO THE RECOGNITION AND ENFORCEMENT OF EU CROSS-BORDER CONSUMER ODR OUTCOMES

The ODR outcome is the result of the ODR process which can be either binding or non-binding on the parties. Binding ODR outcomes consist of a settlement resulting from a mediation outcome, a conciliation agreement or

¹⁷ See Daniels C., 'Alternative Dispute Resolution for European Consumers: A Question of Access to and Standards of Justice,' in Daniels C., Cadet L., Hess B., Requejo Isidro M. (eds.), *Privatizing Dispute Resolution* (Nomos; Baden-Baden, 2019), p. 258.

¹⁸ See Farah Y. and De Oliveira L.V.P., 'Releasing the Potential for a Value-Based Consumer Arbitration under the Consumer ADR Directive,' *European Review of Private Law* 1-2016, 117-142, p. 118.

¹⁹ See Koulu R., *supra* n. 5, p. 6.

²⁰ The use of ICT by state courts is already referred to as 'courtroom technology.' See Koulu R., *supra* n. 5, p. 6. Also, see in Koulu R., *supra* n. 5, p. 6 the discussion on how the nomenclature of ODR that is used by developers has changed to 'legal technology.' Also see, Rabinovich-Einy O. and Katsh E., 'A New Relationship between Public and Private Dispute Resolution: Lessons from Online Dispute Resolution,' 32 *Ohio State Journal on Dispute Resolution*, 2017, 695.

an arbitral award. If the ODR outcome is binding and the trader for example does not comply with it, the consumer will have to resort to the enforcement of the ODR outcome. As ODR is an out-of-court procedure, the enforcement of the outcome would have to be effected by a public court. The EU ODR procedure is currently governed by the Directive on consumer ADR²¹ and the Regulation on consumer ODR.²² This part will analyse the legal provisions in these texts regarding the requirements for the legal enforceability of ODR outcomes. This part will also analyse whether the Brussels I (recast) Regulation²³ has any role in the recognition and enforcement of EU cross-border ODR outcomes.

1.1. The Enforceability of the Consumer ODR Outcome is Determined by Each Member State

Article 9(3) of the EU Directive on consumer ADR provides that “where, in accordance with national law, ADR procedures provide that their outcome becomes binding... .” This means that if the member state recognises the validity and binding effect of the ODR outcome in question, it would then be binding. Article 2(4) of the Directive also states that member states have the competence to decide whether ADR entities can impose a solution through the ADR process.²⁴

Based on these provisions, it can be deduced that the judicial enforceability of the ODR outcome is possible at national level as long as the member state recognises and enforces the nature of the ODR outcome in question. The majority of the EU member states recognise the validity of consumer mediation for example, which might explain why it is the most popular method for consumer ODR that is used in the EU.²⁵ When it comes to consumer arbitration however, the Directive on consumer ADR only refers to arbitration in recital 29 which shows that the Directive distinguishes arbitration from other ADR procedures.²⁶ The Directive on consumer ADR does not give much guidance on the regulation of consumer arbitration proceedings which could affect the consumer’s adequate access to justice.²⁷ The enforcement of consumer arbitral awards is therefore a matter that is left to be regulated by the national laws of the member states.²⁸

²¹ *Supra* n. 14.

²² *Supra* n. 1.

²³ *Supra* n. 16.

²⁴ See Daniels C., *supra* n. 17.

²⁵ See *supra* n. 10.

²⁶ Farah Y. and De Oliveira L.V.P., *supra* n. 18, p. 136.

²⁷ See *ibid.*, pp. 139-140. The authors discuss that lack of regulation of consumer arbitration in the Directive on consumer ADR could lead to obstacles such as the refusal of member states to accredit an ADR entity or revoking the accreditation of such entities.

²⁸ *Ibid.*, p. 120. See the discussion on this point by Eidenmuller H. and Engel M., ‘Against False Settlement: Designing Efficient Consumer Rights Enforcement Systems in Europe,’ *Ohio State Journal on Dispute Resolution*, 29(2), 2014, 261-298, p. 292.

Consumer arbitration is seldom used in practice as a method for dispute resolution on the EU ODR platform. Spain is amongst the few EU member states that has adopted consumer arbitration.²⁹ Many member states prohibit the binding effect of consumer arbitral awards. In France it is considered to be an unfair contract term.³⁰ This position on consumer arbitration was reconfirmed by a recent Court of Cassation ruling where it was held that the arbitration agreement was not binding on the consumer.³¹ The same stance was adopted in Germany as it does not recognise and enforce arbitration awards against consumers.³² Czechia is also another member state that prohibits consumer arbitration and that would not recognise the enforceability of the arbitral award against a consumer.³³ Moreover, the Court of Justice of the EU (CJEU) has adopted the position that tends to limit the inclusion of arbitration as a method for resolving consumer disputes. This position can be seen for example from the CJEU preliminary ruling in *Content Services Ltd v Bundesarbeitskammer*.³⁴ The CJEU stated in this case that it is important to use a durable medium when communicating with a consumer and stressed on the strict interpretation of what such a method of communication would be in order to protect the consumer's rights.³⁵

Regarding enforceability of the ODR outcome, there is mention in the Directive for ADR entities to publish the legal effect of the outcome of the ADR procedure, including the penalties for non-compliance in the case of a decision having binding effect on the parties,³⁶ the enforceability of the ADR decision,³⁷ and the rate of compliance, if known, with the outcomes of the ADR procedures.³⁸ Nevertheless, there are no provisions in the Directive that impose the requirement for judicial enforcement of the ADR outcome, and there is also no such provision for the cross-border recognition of the binding effect and enforcement of the ODR outcome. This means that the enforcement of the consumer ODR outcomes is limited to the legal systems that recognise the ADR method used in the procedure, and that this is a clear

²⁹ Cortes P., 'The Impact of EU Law in the ADR Landscape in Italy, Spain and the UK: Time for Change or Missed Opportunity?' ERA Forum, 16(2), 2015, 125-147 and Esteban de la Rosa F. and Marques Cebola C., 'The Spanish and Portuguese Systems: Two Examples Calling for a Further Reform- Uncovering the Architecture Underlying the New Consumer ADR/ODR European Framework,' *European Review of Private Law*, 6-2019, 1251-1278, p 1264 and p. 1275.

³⁰ Farah Y. and De Oliveira L.V.P., *supra* n. 18, p. 123-124.

³¹ Arrêt n° 556 du 30 septembre 2020 (18-19.241) - Cour de cassation - Première chambre civile - ECLI:FR:CCASS:2020:C100556

³² See Cortes P., 'The Impact of EU Law in the ADR Landscape in Italy, Spain and the UK: Time for Change or Missed Opportunity?', *supra* n. 29.

³³ Micklitz H.W. and Saumier G., *supra* n. 7, p. 23.

³⁴ C-49/11, [2012] ECR I-02213.

³⁵ See for a more detailed discussion on this point in Hanriot M., 'Online Dispute Resolution (ODR) as a Solution to Cross-Border Consumer Disputes: The Enforcement of Outcomes,' *McGill Journal of Dispute Resolution*, Vol. 2, 2015-2016, 1-22, p. 11.

³⁶ Article 7(1)(n) of the EU Directive on consumer ODR, *supra* n. 14.

³⁷ Article 7(1)(o), *ibid*.

³⁸ Article 7(2)(g), *ibid*.

limitation for the recognition and enforcement of ODR outcomes across the EU.³⁹

1.2. The Enforceable ODR Outcome: Obligation to Inform the Consumer and Unilateral Effect

If an ODR outcome is recognised as binding and enforceable by a member state, the consumer needs to have been informed in advance of the enforcement of the outcome that it is binding and the binding effect is only unilateral. According to Article 10(2) of the Directive on consumer ADR, the solution given by the ADR entity may be binding on the parties if they were informed of this in advance and accepted this binding solution. This provision goes further to specify that the consent of the trader is not required if the law of the member state provides that the outcome is binding on the trader.

Concerning the unilateral effect of the enforceable ODR outcome, Article 9(3) of the Directive states that the outcome of the ADR procedures becomes binding on the trader once the consumer has accepted the proposed solution. This provision continues to state that Article 9(2) shall be read as applicable only to the consumer. The Directive on consumer ADR provides that the ODR outcome is therefore unilaterally binding on the trader, and not binding on the consumer.

Most often, the consumer ODR procedure would be based on a pre-dispute ADR (or ODR) agreement which means that the consumer would enter into an agreement to resolve any future disputes through ODR prior to the dispute taking place. This agreement is normally incorporated within the main contract between the consumer and the trader. Article 10(1) of the Directive on consumer ADR disposes that a pre-dispute agreement to submit to ADR (or ODR) is not binding on the consumer. Recital 43 of the Directive adds that a pre-dispute agreement is not binding on the consumer and does not affect his right of access to court. It is therefore possible for the consumer, but not the trader, to withdraw from the ODR procedure at any time, and start court proceedings instead.⁴⁰ This right of withdrawal of the consumer would apply even in case where the consumer and the trader conclude an agreement based on the ODR outcome.

Article 11 of the Directive explains the reason behind the unilateral binding effect of the outcome and provides that the solution given by the ADR entity cannot deprive the consumer of the protections that he is entitled to. Moreover, recital 49 of the Directive states that the outcome of the procedures should not be binding and should not prevent the parties from having access to court. The main reason for this is to protect the consumer and to not pre-

³⁹ Luzak J., 'The ADR Directive: Designed to Fail? A Hole-Ridden Stairway to Consumer Justice,' *European Review of Private Law*, 1-2016, 81-102, pp. 89-90.

⁴⁰ Hanriot M., *supra* n. 35, p. 9.

vent the consumer from having access to a public court for the resolution of the dispute.⁴¹

2. THE ENFORCEMENT OF CROSS-BORDER CONSUMER ODR OUTCOMES IN THE EU

If a consumer needs to enforce an ODR outcome, that ODR outcome needs to be binding. Mediation and conciliation outcomes for example are not binding on their own and do not have any enforceability value as they are the outcomes of a non-adjudicatory procedure. These outcomes can however be agreed upon by the parties and can be materialised in the form of a settlement agreement.⁴² A settlement agreement resulting from a mediation or a conciliation outcome is a post-dispute agreement. These agreements can come under the application of Article 18(1) of the Regulation and benefit from the simplified proceedings for enforcement. Article 18(1) of the Regulation states that “a consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled.” The consumer would thereby be able to apply for the judicial cross-border enforcement of the outcome of the online mediation procedure or the online conciliation procedure across the EU. A more detailed discussion of this solution will be discussed in part III(A) of the paper, as it is aided by the application of the EU Directive on Mediation.⁴³

Since the Brussels Regulation only refers to consumer contracts in Article 18(1) and not ADR or ODR-based agreements as such, uncertainty regarding the manner in which member states would enforce the mediation or conciliation agreement would still loom. As seen in section I(A) of this paper, each member state is given the choice to determine the enforceability of ADR outcomes as per the Directive on consumer ADR. Each member state would therefore be able to give its own interpretation of whether a mediation or conciliation agreement is a valid consumer contract according to the meaning of the Brussels I Regulation.

Another major issue that affects the judicial enforcement of cross-border ODR binding outcomes in the EU is that there is no online procedure or simplified mechanism available to the consumer to carry this out. Applying the Brussels I Regulation to recognise and enforce an ODR outcome would require the consumer to bring proceedings against the trader in court. Even though the consumer has the option to bring proceedings where he is domiciled, the risk of not having the trader show up to the proceedings runs.

⁴¹ See *Ibid*, p. 8. Also see Daniels C., *supra* n. 17, pp. 283-284 on this point.

⁴² Hanriot M., *supra* n. 35, p. 8.

⁴³ 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.

The consumer also has the option to open proceedings against the trader in the member state where the trader is domiciled. In both circumstances, this would inconvenience the consumer with the cost of the proceedings and the time spent pursuing them. Having court proceedings against the trader in a different jurisdiction would have additional disadvantages and barriers in addition to the costs involved such as the lack of knowledge of the legal system, of the language, of hiring a lawyer etc. This would obviously result in the consumer being discouraged from pursuing the judicial cross-border enforcement of an ODR outcome, even if it is considered to be legally binding.

These issues stem from the lack of a provision in the Directive on consumer ODR and the Regulation on consumer ODR on the domestic and cross-border judicial enforcement of binding ODR outcomes. The request for the judicial enforcement of ODR outcomes requires an online avenue that is tailor-designed to the this type of procedure.

3. ANALYSIS OF THE LIMITATIONS IN THE EU LEGISLATION ON THE RECOGNITION AND ENFORCEMENT OF EU CROSS-BORDER ODR OUTCOMES

The EU ODR mechanism was introduced to raise consumer trust in cross-border trade in the EU.⁴⁴ The extent to which such trust can be raised is put into question in light of the current legal limitations affecting the enforcement of EU cross-border ODR outcomes, as discussed in section I(C) above. On one hand it can be argued that these limitations act as an obstacle for providing the consumer with effective access to justice or a remedy. On the other hand, the question of whether the enforcement of B2C ODR outcomes is necessary is also posed. It may be argued that cross-border enforcement of the ODR outcome might not be needed as enforcement is important in the country where the trader is located. According to the EU ODR system the consumer would have to contact an ADR entity that is located in the trader's jurisdiction to carry out the procedure which would solve this dilemma. The problem of access to a remedy would however persist in cases where the jurisdiction in question does not provide or allow for the enforcement of ODR outcomes. After all, the success of a dispute resolution procedure hinges on the ability of the winning party, or the consumer in this case, to enforce the final outcome.⁴⁵

This part is going to examine the impact of the gap in the law on the consumer's ability to have effective access to justice in the first sub-section, and

⁴⁴ Loos M.B.M., 'Enforcing Consumer Rights through ADR at the Detriment of Consumer Law,' *European Review of Private Law*, 1-2016, 61-80, p. 67.

⁴⁵ See Cortés P., 'Online Dispute Resolution for Consumers in the European Union,' *Routledge Research in IT and E-commerce Law*, (Routledge, Taylor & Francis Group, London, 2010), p. 35.

then conduct an analysis of the reasons behind the existence of this gap in the second sub-section.

3.1. The Limitations in the EU Legislation: An Obstacle for Access to Justice for the Consumer?

According to the famous ‘Florence project’ on access to justice conducted in the late 1970s by Mauro Cappelletti and Bryant Garth it was concluded that one of the ways to open up access to justice is to make such access cheaper and more effective.⁴⁶ Namely, Cappelletti and Garth considered that access to justice would be improved through the introduction of alternative forums to the traditional court system. The study found that the use of out-of-court alternative methods of dispute resolution was part of a third wave of access to justice that would improve such access for individuals.⁴⁷ Access to justice in this third wave had an expanded meaning which did not only include the idea of improving access to legal justice.⁴⁸ The conception of access to justice according to the study also covered the idea of guaranteeing the legal rights of all.⁴⁹ Effective access to justice that guarantees legal rights was therefore considered to be the most basic requirement as a human right by Cappelletti and Garth.⁵⁰

It can be said that the EU consumer ADR and ODR procedures form part of this third wave of access to justice.⁵¹ It would therefore be important for these procedures to offer such a guarantee of legal rights through the recognition and enforcement of their outcomes.⁵² EU legal instruments of course embrace the importance of access to justice as a general principle. Article 67(4) of the TFEU provides that ‘the Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.’ Also, Article 47 of the Charter of Fun-

⁴⁶ Cappelletti M. and Garth B., ‘Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective,’ 27 *Buffalo Law Review*, (1978), pp. 186-190.

⁴⁷ *Ibid*, p. 224 and p. 232.

⁴⁸ Yuthayotin S., ‘Access to Justice in Transnational B2C E-Commerce: A Multidimensional Analysis of Consumer Protection Mechanisms (Springer International Publishing, 2015), p 46, citing Tunc A., ‘The Quest for Justice,’ in Cappelletti M. (ed.), ‘Access to Justice and the Welfare State,’ (1981), p. 315 in Daniels C., *supra* n. 17, p. 261.

⁴⁹ See Storskrubb E., *supra* n. 9, p. 15, and Cappelletti M. and Garth B., *supra* n. 48, pp. 183-185. Also see, Whytock, C. A., ‘Transnational Access to Justice,’ *Berkeley Journal of International Law (BJIL)*, Vol. 38, No. 2, (2020). UC Irvine School of Law Research Paper No. 2021-15, available at <https://ssrn.com/abstract=3790971> for a discussion of transnational access to justice.

⁵⁰ Cappelletti M., Garth B. and Trocker N., ‘Access to Justice: Comparative General Report,’ 40 *Rabel Journal of Comparative and International Private Law* (1976), 669, p. 672.

⁵¹ See Philippe M., ‘Access to Justice Through Online Dispute Resolution Is Not Science Fiction: A Practitioner’s Perspective on the Good, the Bad and the Future,’ in: Valladares L. and Hourani S. (eds), *Access to Justice in Arbitration: Concept, Context and Practice*, Wolters Kluwer (November 2020).

⁵² See Howells G., Twigg-Flesner C. and Wilhelmsson T. (eds), *Reyhinking EU Consumer Law*, (Routledge, 2018). Also see Gelinas F., Benyekhlef K., Bailey J and Burkell J. (eds), ‘eAccess to Justice,’ (University of Ottawa Press, 2017).

damental Rights of the European Union (EUCFR) states the importance of having a right to an effective remedy and a fair trial. It can be seen from these provisions that the TFEU places an importance on access to justice through out-of-court mechanisms, and that the EUCFR places emphasis on the significance of access to a remedy. The combination of these provisions would result in the understanding that it would be important to provide a remedy through an ADR procedure, which would mean that ODR offers access to justice and that it needs to offer a remedy as a result.

The main objective of consumer ODR is for consumers to have easier access to resolve their disputes through this forum. ODR helps consumers to resolve disputes more efficiently and avoid travel, stress and inconvenience.⁵³ In theory, the consumer would gain access to quick and easy remedies through a quick click.⁵⁴ From a theoretical perspective therefore, ODR seems to be one of the best modern solutions for the facilitation of access to a remedy for small claims. ODR seems to facilitate such access where courts have failed to provide access to justice for individual small claims.⁵⁵ Namely, courts in the majority of EU jurisdictions are perceived as slow and inefficient, which raises the necessity for ODR.⁵⁶ Moreover, reports have shown that ODR expands access to remedies for self-represented litigants.⁵⁷

The importance of having an efficient ODR procedure is reflected in parts of the Directive on consumer ADR and the Regulation on consumer ODR. Recital 4 of the Directive on consumer ADR states the importance of ensuring access to simple, efficient, fast and low-cost ways of resolving domestic and cross-border disputes. Recital 11 of the same Directive stresses the significance of providing a properly functioning infrastructure for ADR and ODR for boosting citizen's confidence to use cross-border online commerce in the EU internal market. Articles 1 and 2(3) of the Directive also place emphasis on the importance of having an efficient ADR procedure and ensuring that the consumer has access to an effective out-of-court redress mechanism throughout the EU. Also, recital 26 of the Regulation on consumer ODR mentions that the right to an effective remedy in ODR is based on Article 47 of the EUCFR.

Furthermore, the concept of access to a remedy through ODR in the EU is closely connected to the concept of consumer protection. Article 114(3) of the TFEU and Article 38 of the EUCFR both state that consumer protection in the EU benefits from a high level of protection. Article 169 of the TFEU stipulates that in order to achieve such a high protection, the Union shall contribute to protecting the health, safety and economic interests of consumers,

⁵³ Schmitz A., *supra* n. 6, p. 2386.

⁵⁴ *Ibid*, p. 2383.

⁵⁵ Hodges C. and Voet S., 'Consumer Dispute Resolution Mechanisms: Effective Enforcement and Common Principles,' in Hess B. and Kramer X.E. (eds.), *From Common Rules to Best Practices in European Civil Procedure*, (Baden-Baden: Hart/Nomos, 2017), p. 354.

⁵⁶ *Ibid*, p. 354.

⁵⁷ Schmitz A., *supra* n. 6, p. 2384.

as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.⁵⁸ Recital 1 and Article 1 of the Directive on consumer ADR reiterate the importance of this high level of consumer protection that needs to be achieved through ADR and ODR. It can be deduced from the above discussion that the meaning of consumer protection in the Directive on consumer ADR and the Regulation on consumer ODR encompasses the idea of offering an efficient remedy through these procedures to protect the economic interests of the consumer. This would mean that according to the EU texts, having an efficient access to justice for the consumer through ODR would mean having efficient access to a remedy.

It is therefore clear that the objective of the EU ODR platform and procedure is to provide a feasible and easily accessible forum through which consumers can pursue their rights quickly and effectively.⁵⁹ The EU ODR procedure does indeed offer access to a remedy through ODR outcomes, however this access is not as efficient as it can be due to the limitation in the legal framework regarding the judicial enforcement of these, especially at a cross-border level. Despite the importance given to having an efficient access to a remedy through the ODR procedure, the current EU legal framework weakens the effective enforcement of the consumer's right to a remedy. The lack of the judicial enforcement of the ODR outcome leads to the weakness of the ODR procedure and no commitment to it by the traders. Consumer rights need to be enforced to be effective.⁶⁰ It is concurred that the legal uncertainty concerning the enforcement of ODR is one of the major reasons that hinder the development of ODR.⁶¹

3.2. Analysis of the Reasons Behind the Gap in the EU Legislation

Even though EU legislation on consumer ADR and ODR seems to encourage having access to a remedy through ADR or ODR, access to justice in EU law is mainly understood as having access to public courts. Access to justice traditionally meant access to state courts under EU law.⁶² ADR entities are not considered to be tribunals in the sense of Article 267 of the TFEU. If there is a question regarding the interpretation of a legal issue for example, ADR entities do not have access to the CJEU to ask about this which would have a detrimental effect on the consumer's rights.⁶³ Article 47 of the EUCFR refers

⁵⁸ See Daniels C., *supra* n. 17, p. 262 for a further discussion on this.

⁵⁹ See Eidenmuller H. and Engel M., *supra* n. 28, p. 263.

⁶⁰ See Cortes P., 'The Impact of EU Law in the ADR Landscape in Italy, Spain and the UK: Time for Change or Missed Opportunity?', *supra* n. 29, p. 125. Also see, Cortes P. and Lodder A.R., "Consumer Dispute Resolution Goes Online: Reflections on the Evolution of European Law for Out-of-Court Redress", *Maastricht Journal of European and Comparative Law*, 21(1), 2014, 14-38, p. 19.

⁶¹ Cortés P., 'Online Dispute Resolution for Consumers in the European Union,' *supra* n. 47, p. 82.

⁶² Daniels C., *supra* n. 17, p. 257.

⁶³ Loos M.B.M., *supra* n. 46, pp. 29 and 76-77.

to having a fair trial, for a tribunal to provide an effective remedy and that everyone is entitled to have a public hearing. All of this wording alludes to the use of public courts to provide access to justice.⁶⁴ Additionally, consumer dispute resolution entities do not qualify as tribunals under Article 6 of the European Convention on Human Rights (ECHR).⁶⁵

This understanding of access to justice is corroborated in the Directive on consumer ADR and the Regulation on consumer ODR. Recitals 45 and 60 of the Directive on consumer ADR state that ADR does not replace access to justice to state courts and that it should not act as a restriction of having access to them. Recital 61 of the Directive and recital 35 of Regulation on consumer ODR stipulate that fundamental rights such as those stated in Article 47 of the EUCFR on access to justice are to be respected by both the Directive and the Regulation.

It can be argued that mandatory ODR can be detrimental to the consumers' right of access to justice to public courts and authorities.⁶⁶ The proliferation of the use of consumer ADR (or ODR) could lead to barring consumers from having the needed access to courts.⁶⁷ This could consequently be detrimental to the consumer's right of access to justice as it is currently understood in EU law.⁶⁸ According to the CJEU ruling in *Alassini*⁶⁹ ADR and ODR cannot impede over the consumers' right of access to justice to public courts.⁷⁰ The binding effect of the ODR outcome on the consumer could affect the degree to which the consumer would be able to challenge the outcome in court.⁷¹ The ADR agreement with the consumer could therefore turn into an unfair contract term for the consumer.⁷² Moreover, it is still not entirely clear what the standards of justice of Consumer ADR are, even in the EU context.⁷³ Also, the Directive on consumer ADR seems to undermine Article 6 of Brussels I recast Regulation as the proceedings are initiated in the trader's jurisdiction.⁷⁴ Consumer protection measures thereby need to be in place to avoid placing barriers for public access to justice, which could explain the lack of clear EU laws for the judicial enforcement of consumer ODR outcomes.

Another major reason that could explain the current limitations in the law regarding the judicial enforcement of ODR outcomes in the EU is the protec-

⁶⁴ See Daniels C., *supra* n. 17, p. 264.

⁶⁵ *Ibid*, pp. 274-275.

⁶⁶ Hanriot M., *supra* n. 35, p. 8. Also see Loos M.B.M., *supra* n. 46, p. 69.

⁶⁷ Daniels C., *supra* n. 17, p. 272.

⁶⁸ Storskrubb E., *supra* n. 9, p. 16, 17. Also see, Schmidt-Kessen M.J., Nogueira R. and Gamito M.C., 'Success or Failure? Effectiveness of Consumer ODR Platforms in Brazil and in the EU,' *Journal of Consumer Policy*, 43, 2020, 659-686, p. 663. Also see, Micklitz H.W. and Saumier G., *supra* n. 7, p. 23.

⁶⁹ ECJ, *Rosalba Alassini and Others v Telecom Italia*, [2010], C-317/08-C-320/08, ECR I02213.

⁷⁰ Hanriot M., *supra* n. 35, p. 7; Daniels C., *supra* n. 17, p. 279, Cortes P. and Lodder A.R., *supra* n. 60, p. 24.

⁷¹ Hanriot M., *supra* n. 35, p. 9.

⁷² *Ibid*, p. 6.

⁷³ Daniels C., *supra* n. 17, p. 159.

⁷⁴ Loos M.B.M., *supra* n. 46, pp. 78 and 74-75.

tion against the danger of the privatisation of justice.⁷⁵ So far, it is contended that research has shown that public bodies can provide better redress and access to justice for consumer disputes.⁷⁶ It has been argued that increasing efficiency in consumer dispute resolution via ADR and ODR goes against the idea of judicial scrutiny and the application of due process,⁷⁷ which could result in the danger of having a 'second-class' justice.⁷⁸ According to this line of reasoning, state courts cannot be 'side-lined' in the name of the efficiency of consumer ADR and/or ODR.⁷⁹ There is also a greater risk for private dispute resolution providers have to have a conflict of interest with providing adequate access to justice and enforcement consumer rights.⁸⁰ ODR processes thereby run the risk of not abiding by due process standards.⁸¹ It would consequently be essential to have a rights-based procedure than private and binding consumer ADR processes that have the objective of satisfying businesses.⁸² By adopting the above line of reasoning, this would be essential for the protection of the consumer as the weaker party.⁸³

4. OTHER EU LEGISLATIVE SOLUTIONS FOR THE RECOGNITION AND ENFORCEMENT OF EU CROSS-BORDER ODR OUTCOMES

In light of the current limitations in the Directive on consumer ADR and the Regulation on consumer ODR that are affecting the judicial enforcement of EU cross-border ODR outcomes, there are two other EU legislative solutions that could apply to reinforce them. This part will first examine the extent to which the Directive on Mediation⁸⁴ can be a relevant solution for simplifying the enforcement of consumer online mediation outcomes across the EU. Second, this paper is going to explore how the EU small claims procedure is embracing technology and the impact that this could have on the cross-border judicial enforcement of ODR outcomes.

⁷⁵ See Resnik J., 'A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations,' *North Carolina Law Review*, Vol. 96, 2018. Also see, Micklitz H.W. and Saumier G., *supra* n. 7, p. 36.

⁷⁶ Storskrubb E., *supra* n. 9, pp. 20 and 30.

⁷⁷ Eidenmuller H. and Engel M., *supra* n. 28, p. 263.

⁷⁸ Daniels C., *supra* n. 17, pp. 285-286.

⁷⁹ Eidenmuller H. and Engel M., *supra* n. 28, p. 263.

⁸⁰ *Ibid.*

⁸¹ Schmitz A., *supra* n. 6, p. 2383.

⁸² Eidenmuller H. and Engel M., *supra* n. 28, pp. 280-281.

⁸³ Storskrubb E., *supra* n. 9, p. 18.

⁸⁴ *Supra* n. 43.

4.1. The Enforcement of Online Mediation Outcomes through the Directive on Mediation

The EU Directive on Mediation applies to the mediation of civil and commercial matters, which includes consumer mediation. The Directive was created with the objective of encouraging the use of mediation for the resolution of cross-border disputes in the EU.⁸⁵ Therefore, this Directive complements the Directive on consumer ADR and the Regulation on consumer ODR as it offers clarity on the legal status of mediated outcomes, which elucidates the legality of their enforcement in the EU.

The Directive makes express reference to the possibility of the judicial enforcement of mediation agreements.⁸⁶ Namely, Article 6(1) of the Directive states that member states must ensure that a mediated agreement can be made enforceable upon the request of the parties. Article 6(2) continues to state that a mediation agreement can be enforced through a court decision, a decision of a public authority or through an authentic instrument issued from a court or a public authority. According to this provision, the enforcement procedure to be followed is decided by each member state. Thus, if the consumer concludes a mediation settlement with the trader that ensues from online mediation he could use these provisions as a basis to apply for its enforcement. What is interesting about this provision is that it gives the possibility to have a non-judicial enforcement of the mediation agreement, which could simplify the enforcement proceedings for the consumer as he would not be required to file for court proceedings to enforce the agreement.

Despite these clarifications and simplifications in the Directive on Mediation however, mediation agreements are still not directly enforceable at cross-border level in the EU. The application of Brussels I would still be needed for the cross-border recognition and enforcement of court decisions on the enforcement of the agreement. This means that the consumer would still have to have recourse to court proceedings in the member state where the trader is located to have the enforceability decision recognised and enforced by the local court.⁸⁷ The issue of having effective consumer redress through the enforcement of ODR outcomes encountered under the ADR Directive and the ODR Regulation is still not resolved by the Directive on Mediation for cross-border mediation procedures.

The cross-border enforcement procedure can also become complicated as the enforcement modalities and proceedings are left to each individual member state to regulate as prescribed in subsections 1 and 4 of Article 6 of the Mediation Directive.⁸⁸ The question of whether a court decision to enforce

⁸⁵ See Article 1 of the Directive on Mediation, and Cortes P. and Lodder A.R., *supra* n. 58, p. 22.

⁸⁶ See Daniels C., *supra* n. 17, p. 280.

⁸⁷ This would be possible through the proceedings provided in Article 18(1) of the Brussels I recast Regulation.

⁸⁸ Storskrubb E., *supra* n. 9, p. 25.

the mediation agreement can be recognised and enforced in another member state that does not recognise the validity of consumer mediation agreements ensues.⁸⁹

For example, the enforcement of mediated settlements for consumer disputes might be considered to be unconstitutional in some member states.⁹⁰ This is possible as the Directive on Mediation was not specifically designed for Consumer ADR. Spain for instance does not apply the mediation procedure for consumer claims and thus does not recognise the validity of consumer mediation agreements.⁹¹

4.2. Towards an Emerging Online-Based EU Small Claims Procedure?

The use of technology in the context of the European Small Claims Procedure (ESCP) is gradually being adopted. This development is important as the online format of the ESCP can be used as an alternative mechanism to ODR since both procedures would involve the use of an electronic-based procedure for the resolution of small claims. The advantage of using an online ESCP would be having easier enforcement of the judgment cross-border in the EU for the consumer.

The adoption of technology in the ESCP started to be seen through the possibility of conducting hearings online or via video or tele-conference if the equipment is available to the court for example. This option is brought forth by Article 8 of the ESCP Regulation⁹² in case there is a need for oral hearings to take place, and where it is considered that such hearings are more suitable than in-person hearings. Moreover, Regulation 2015/2421⁹³ amended the older ESCP Regulation by putting the electronic service of documents on an equal footing with a postal service and enhancing the use of distance means of communication for the purpose of conducting the hearings and taking of evidence.⁹⁴ This facilitates the enforcement of small claims judgments for the consumer for cross-border cases in the EU if the entire procedure is conducted electronically, and if the laws of the member states involved recognise the validity of electronic procedures and judgments.

⁸⁹ See Hanriot M., *supra* n. 35, pp. 13-14.

⁹⁰ Eidenmuller H. and Engel M., *supra* n. 28, p. 267.

⁹¹ Cortes P., 'The Impact of EU Law in the ADR Landscape in Italy, Spain and the UK: Time for Change or Missed Opportunity?', *supra* n. 29, pp. 6-7.

⁹² Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015.

⁹³ Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure.

⁹⁴ See Article 8 and 13 of Regulation 2015/2421. Hodges C. and Voet S., *supra* n. 55, p. 360.

Other examples of this move towards the adoption of technology for the conduct of the ESCP include the creation of the e-Justice online platform⁹⁵ which provides a portal for the filing of small claims.⁹⁶ The forms of application of the procedure can be found on the portal and can be filled out on a computer and printed out to be used for filing a claim. There is however currently no possibility of using the portal for submitting the claim via the platform itself. This limitation in the use of technology for the processing of an ESCP claim might however change as a result of the Covid-19 pandemic which had a major impact on the use of ICT in the ESCP, and the EU Digitalisation agenda that has been put in motion.

4.3. The Impact of Covid-19 and the Move Towards Digitalisation

The pandemic led to the need of the judiciary to rely much more heavily on digital tools for processing their work. Consequently, the ESCP procedures in many EU member states have become mainly electronic-based as court proceedings in these states moved online.⁹⁷ Measures that have been taken by member states for justice systems, according to the information provided by the e-Justice platform⁹⁸, include the use of remote means of communication for hearings and electronic-based communications.

For example, Austria, Bulgaria, Croatia, Ireland, Italy, the Netherlands and Spain all started using teleconferencing and virtual hearings for court proceedings. Finland started using virtual hearings to the largest extent possible, France opened the possibility to use them and Sweden reported that the use of video and telephone conferences in judicial proceedings has increased. Austria, Bulgaria, Croatia, Finland, Italy, the Netherlands, Spain and Sweden all confirmed that they shifted to the use of online and electronic communications with and by the judiciary. It was reported by Lithuania that bailiffs are required to register actions of enforcement processes issued by the judiciary via electronic means, which was in place before the Covid-19 crisis. It is to be noted that there was no particular mention of the ESCP procedure in these measures, but the natural presumption is that this has been adopted for all types of court procedures including the ESCP.

There is still currently no EU legal instrument to harmonise the use of an online or electronic-based ESCP procedure. As observed, these measures

⁹⁵ See the e-Justice portal for the EU Small Claims Procedure available at https://e-justice.europa.eu/content_small_claims-42-en.do

⁹⁶ Cortes P. and Lodder A.R., *supra* n. 60, p. 33.

⁹⁷ See the e-Justice page on the Impact of COVID-19 on the justice field available at https://e-justice.europa.eu/content_impact_of_the_covid19_virus_on_the_justice_field-37147-en.do. See the Comparative Table on Covid-19 Impact on Civil Proceedings and the Digital Tools in Member States list for the judiciary available on the same website.

⁹⁸ *Ibid.*

have been adopted at national level by the member states. Not all member states provided information on the measures taken, and not all of them adopted online or electronic-based procedures to be used by the judiciary and other legal services. EU member states have been however encouraged to use electronic communications for matters relating to judicial cooperation⁹⁹ for example, which could potentially have had an impact on the cross-border recognition and enforcement of ESCP judgments in the EU. Nevertheless, there is still no data about this that has been provided by the EU at the time of writing of this paper.

As a result of the Covid-19 crisis, the EU Commission conducted a fact-finding exercise to get an understanding of how to step up the digitalisation of justice in the EU. The European Commission consequently adopted a package of initiatives to modernise the EU justice systems through their digitalisation.¹⁰⁰ In December 2020, the Commission published a communication on the Digitalisation of justice in the European Union where it stated that it is seeking through this initiative to achieve the digitalisation of justice systems in the EU, at both national and EU level.¹⁰¹ The Communication focuses on the digitalisation of justice systems to improve access to justice for consumers and businesses, and to make cross-border judicial procedures more efficient and simple. To do so, the Commission proposed a number of tools to be adopted in order to achieve these objectives.

Some of the tools proposed in the Communication include making the digital channel the default option in EU judicial cooperation, establishing a “My e-Justice space”, which would be available for use by individuals and businesses as an electronic access point with links to available national services, and the use of IT tools for secure cross-border cooperation in civil, commercial and criminal matters such as the e-CODEX system. This software allows judicial authorities, legal practitioners and members of the public in the EU to communicate documents, legal forms, evidence and other information. Although this platform already exists, the Commission adopted a proposal to Regulate this software. The adoption of these tools and measures shows how keen the Commission is on the adoption of digitalisation for judicial proceedings.¹⁰²

⁹⁹ See the e-Justice page on the Covid-19 impact on civil and insolvency matters available at https://beta.e-justice.europa.eu/37843/EN/covid19_impact_on_civil_and_insolvency_matters?clang=en

¹⁰⁰ European Commission press release, ‘Modernising EU justice systems: New package to speed up digitalisation of justice systems and boost training of justice professionals,’ available at https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2246

¹⁰¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, ‘Digitalisation of justice in the European Union: A toolbox of opportunities,’ COM/2020/710 final available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2020:710:FIN>

¹⁰² See On anu E.A., ‘Encoding Justice: A Quest for Facilitating Access to Justice by e-Handling of Cross-Border Litigation. The Example of the European Uniform Procedures’ in: Burkhard Hess, Koen Lenaerts (ed.), *The 50th Anniversary of the European Law of Civil Procedure* (Nomos, 2020), pp. 473 – 506 for a deeper discussion on the adoption of digitalisation for the judiciary systems in the EU.

Such initiatives for the digitalisation of small claims procedures are on the rise.¹⁰³ The adoption of ODR and e-court solutions for the resolution of small claims is increasingly becoming the norm, especially after the Covid-19 pandemic in many parts of the world too.¹⁰⁴ Such public ODR projects have also been launched in the USA, Canada and China for example.¹⁰⁵ These ODR projects make it possible to incorporate negotiation and mediation stages prior to the online litigation stage to save courts from the administrative burden.¹⁰⁶

To illustrate a recent example, courts in the State of Utah are launching an online small claims program¹⁰⁷, and a small claims ODR program has already been implemented in the State.¹⁰⁸ Another recent ODR initiative in the US is the Manhattan ODR platform for small claims.¹⁰⁹ This platform can be used to file small claims of up to \$10,000 and the claim is filed in the Small Claims Part of the New York County (Manhattan) Civil Court. The process consists of the possibility of the parties to bid on how they would like to settle the case, then negotiate directly on the platform if the dispute is not resolved in the first stage. If the parties are not successful at negotiating the dispute, they would be moved to the mediation stage where they would have to work with a mediator to resolve the dispute. If the dispute is still not resolved, the parties would eventually take part in a virtual court hearing.¹¹⁰

According to the results of a survey conducted on the improvement of access to justice in cross-border EU litigation via the use of ICT, it was demonstrated that the ESCP needs to embed ICT for a more successful and efficient procedure that would improve access to justice.¹¹¹ The use of ICT would help with a more efficient enforcement of judgments, which includes cross-border judgments.¹¹² This would help reduce uncertainty and build trust in the procedure that enables for getting more efficient redress.¹¹³ The results of the

¹⁰³ See Report by CBA TaskForce 'No Turning Back: CBA TaskForce Report on Justice Issues Arising from Covid-19,' (February 2021) available at https://www.cba.org/CBAMediaLibrary/cba_na/PDFs/Publications%20And%20Resources/2021/CBATaskForce.pdf. Also see speech by Sir Vos G., 'Reliable data and technology – the direction of travel for Civil Justice,' (28 January 2021) available at <https://www.judiciary.uk/announcements/speech-by-the-master-of-the-rolls-reliable-data-and-technology-the-direction-of-travel-for-civil-justice/>. See also Susskind R., 'The Future of Courts,' *The Practice*, Volume 6, Issue 5 (July/August 2020) available at <https://thepractice.law.harvard.edu/article/the-future-of-courts/>

¹⁰⁴ See Schmitz A., *supra* n. 6, p. 2383. See the turbocourt platform (available at <http://info.turbocourt.com/>) for example which provides access to the preparation and the filing of court document online in the US.

¹⁰⁵ *Ibid*, p. 2384.

¹⁰⁶ *Ibid*.

¹⁰⁷ *Ibid*.

¹⁰⁸ *Ibid*, p. 2390.

¹⁰⁹ See the platform on the official website available at <https://cii2.courtinnovations.com/NYNYSC>

¹¹⁰ See Greiling D., 'New York launches ODR for Small Claims in Manhattan (January 29, 2021), available at <https://getmatterhorn.com/new-york-launches-odr-for-small-claims-in-manhattan/>

¹¹¹ Velicogna M. and Ontanu E.A., 'Improving Access to Courts and Access to Justice in Cross-Border Litigation: Lessons from EU Experiences,' *Ciências e Políticas Públicas (Public Sciences & Policies Journal)*, V(1), 67–93, pp. 86-87.

¹¹² *Ibid*, p. 87.

¹¹³ *Ibid*.

survey sit well with the reasoning of the CJEU in *Pönkä v Estonia* 114 where it was suggested that small claims should benefit from a simplified civil procedure.¹¹⁵ As the impact of technology on consumer redress and enforcement is inevitable, using technology as a means of communication for the enforcement of cross-border small claims judgments seems to be key here.¹¹⁶ Therefore, the digitalisation of the ESCP, especially in the context for cross-border EU disputes, would definitely be an interesting development.

4.4. The Impact of Digitalisation on the Recognition and Enforcement of Cross Border ESCP Judgements in the EU

The question that ensues in this article is whether an EU online-based small claims procedure would be a more efficient alternative to the use of ODR. This question namely arises in the comparison between the cross-border enforcement in the EU of online-based ESCP judgments and ODR outcomes. The Regulation establishing the ESCP¹¹⁷ already makes the enforcement of ESCP cross-border judgments much easier in comparison to the cross-border enforcement of ODR outcomes. Article 20 of the Regulation states that an ESCP judgment should be automatically recognised and enforced in all member states without the need to issue a declaration of enforceability. This means that the consumer would not have to file a claim in court to have the judgement recognised cross-border in the EU.

Now that EU member states started adopting an online-based procedure, and taking into account the EU Commission's digitisation of the judiciary agenda, the cross-border enforcement of ESCP judgments could become simpler, in theory at least. Following from this, it can be said that a digital form of the ESCP would seem to provide more efficient access to justice for the consumer, as the entire procedure would take place online, including the recognition and enforcement of the cross-border judgment which could be enforced electronically. In addition, it has been argued that public redress is a better option when it comes to consumers for access to remedies for the consumer, than private ODR.¹¹⁸

The adoption of the EU ESCP as an alternative to the use of ODR does however have its limitations though. The ESCP procedure has had a low number of claims since its inception.¹¹⁹ The procedure is not free unlike the

¹¹⁴ App no 64160/11 (ECtHR, 8 November 2016).

¹¹⁵ Daniels C., *supra* n. 17, pp. 263-264.

¹¹⁶ See Micklitz H.W. and Saumier G., *supra* n. 7, p. 36.

¹¹⁷ Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure.

¹¹⁸ Storskrubb E., *supra* n. 9, pp. 13 and 30. Also see, Eidenmuller H. and Engel M., *supra* n. 28, pp. 294-296.

¹¹⁹ Hodges C. and Voet S., *supra* n. 55, p. 359. Also see, Micklitz H.W. and Saumier G., *supra* n. 7, p. 23.

EU ODR procedure. The ESCP therefore leads the consumer to incur extra costs for the proceedings.¹²⁰ The procedure can also be slow and complex which can be aggravated depending on which member state the proceedings are taking place in.¹²¹ There is the burden of translation that falls on the consumer as the Regulation on ESCP does not provide that the proceedings need to be translated when dealing with cross-border disputes.¹²² Also, claims of up to only 5,000 Euros in value can be submitted under the ESCP.

Moreover, the consumer runs an economic risk if he loses the case as the judgment can be enforced against the consumer under the ESCP.¹²³ The consumer does not benefit from the same protections that he would from the EU ODR procedures as the ESCP was established to mainly deal with small B2B claims.¹²⁴ The lack of these protections and the economic risks involved deter the consumer to file for low value claims in court.¹²⁵ So far, there have been no investment or funding initiatives on improving the ESCP by member states¹²⁶, although after the statement made by the European Commission in its Communication, there might be funding for carrying this out. The Communication by the Commission stated that funding for the digitalisation of judicial procedures by member states could be available under the European Regional Development Fund and the European Social Fund Plus.¹²⁷

Even if an online-based ESCP is adopted at EU level to render the cross-border enforcement of judgments as more attractive than the cross-border enforcement of ODR outcomes, these aforementioned issues would still subsist. Also, other challenges could arise that need to be carefully dealt with such as difficulties of the harmonisation of standards on this across the EU, and other issues such as having access to ICT.

5. CONCLUSION

This article has examined whether there is a harmonised approach towards the judicial enforcement of cross-border consumer ODR outcomes in the EU legislation. The paper has shown that there is a clear gap in the EU legislation when it comes to this issue. First, the Directive on consumer ADR and the Regulation on consumer ODR contain no provisions on this matter. Second, although it is possible to have certain types of binding ODR outcomes such as a mediation agreement enforced under the Brussels I Regu-

¹²⁰ Micklitz H.W. and Saumier G., *supra* n. 7, p. 19. Also see, Eidenmuller H. and Engel M., *supra* n. 28, pp. 267-268.

¹²¹ Daniels C., *supra* n. 17, p. 258.

¹²² Luzak J., *supra* n. 39, p. 83.

¹²³ *Ibid*, pp. 85-86.

¹²⁴ Hodges C. and Voet S., *supra* n. 55, p. 360.

¹²⁵ Schmidt-Kessen M.J., Nogueira R. and Gamito M.C., *supra* n. 68, p. 663.

¹²⁶ Micklitz H.W. and Saumier G., *supra* n. 7, p. 35.

¹²⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *supra* n. 101.

lation, this paper has discussed how this is only a partial harmonisation due to the absence of express reference to ADR and ODR in the Regulation, and the absence of an efficient remedy outlet for the consumer. Non-adjudicatory ODR outcomes for example are not judicially enforceable on their own without becoming an agreement. So if the trader does not engage with the procedure already because it lacks legal enforceability, it would be difficult to come to an agreement that could be enforceable under the Brussels I recast Regulation. Therefore, it can be safely said that the EU legislation does not currently provide a harmonised approach on the enforcement of cross-border consumer ODR outcomes.

The gap in the law can be explained through the importance of ensuring that the consumer has adequate access to justice. Ensuring access to justice in the EU sense means having access to public courts. Rendering the ODR outcome as binding could lead the consumer from being barred from having access to resolve his dispute before state courts. It can however be contended that, as long as the ODR outcome is only unilaterally enforceable against the trader and the legal framework gives the consumer the possibility to withdraw from the process at any time, having a harmonised rule for the judicial enforcement of ODR outcomes would not eliminate the consumer's right of filing his claim in national courts.¹²⁸ Of course, the problem with assessing whether the consumer knows what he is getting himself into despite choosing to go ahead with the enforcement of the ODR outcome.

It has been explored whether the Directive on Mediation and the ESCP can be applied and used to deal with the gap discussed in this paper. Concerning the Directive on Mediation, despite the clarification that it offers on the legal status of mediation agreements, it still has the limitation of having to apply the Brussels I recast Regulation in cases where the laws of all member States involved recognise consumer mediation agreements. As already mentioned in this paper, the application of the Brussels I recast Reregulation does not solve much in terms of giving the consumer an efficient access to a remedy. Concerning the ESCP, it was analysed in this paper that the best option to enable the consumer to have an efficient access to a remedy through an online medium is to have an online-based ESCP.¹²⁹

Virtual or tele-video hearings and electronic-based communications have become the norm for some EU member states after Covid-19. It has been discussed that this contributes to the simplification of the recognition and enforcement of cross-border ESCP court decisions in the EU, as the decision is given electronically and would be directly enforceable in the trader's jurisdiction. The impact of digitalisation on judicial cooperation in the EU could develop this even further. Despite these advantages and facilitations through the use of technology, the ESCP still has its drawbacks. The main limitation

¹²⁸ See Hanriot M., *supra* n. 35, p. 7. Also see, Storskrubb E., *supra* n. 9, pp. 10 and 29. Also see, Luzak J., *supra* n. 39, pp. 91 and 100-101.

¹²⁹ See Hodges C. and Voet S., *supra* n. 55, pp. 361-364.

perhaps is the cost that the consumer would incur which includes the eventual economic risks of losing the case. Access to justice remains essential and this has been restated by the EU Commission in its statement on the digitalisation of the judiciary, so it would be important to deal with these limitations.

In sum, this paper tried to bring an analytical contribution on how to render a more efficient enforcement of the results of online-based procedures in the context of consumer disputes within the EU. The paper has shown the need for having effective harmonisation of the issue in the EU legal framework so that the ODR procedure would be able to achieve the objectives it was set up to fulfil to provide efficient access to a remedy for the consumer online.¹³⁰ The paper has also demonstrated the importance of having a digital form of the ESCP, which can be used as an alternative to ODR with regards to cross-border disputes. Since both the ODR procedure and the ESCP deal with small claims, it might be a solution to combine both procedures in one, and carry out necessary reforms to deal with the current limitations of the ESCP. This could be a potential solution to deal with the current limitations affecting the consumer's access to a remedy in cross-border cases. A digital ESCP could be a more simple alternative to ODR in the EU, especially if there is direct judicial cooperation that operates on the same electronic medium of communication. The question that ensues is however whether such changes would form part of the digitalisation agenda.

¹³⁰ See Cortes P. and Lodder A.R., *supra* n. 60, p. 34 on the need an efficient small claims system in the EU.

