

## **PARTY AUTONOMY AND THE EU ONLINE CONSUMER DISPUTE RESOLUTION**

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### ABSTRACT

*The paper analyses the limits of parties' autonomy in the EU ADR/ODR scheme. In the light of constraints which were mentioned by the CJEU in *Alassini and Others*, the paper seeks to explore whether the exclusive online nature and binding effect of the out-of-court settlement procedure could violate fundamental principles of effective legal protection even if the parties agreed to recourse their dispute to an online out-of-court settlement process. The paper ends with the suggestion that the future of the EU ODR should focus on voluntary online mediation.*

*Key words: Party autonomy, the EU, ADR/ODR, the principle of effective judicial protection, online mediation*

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## 1. INTRODUCTION

Online Dispute Resolution<sup>1</sup> in the European Union<sup>2</sup> has been developing since late 1990s. In 1998 the Commission issued the Recommendation 98/257/EC in which it stressed that expressing views and acquainting with the facts “does not necessarily necessitate oral hearings of the parties.”<sup>3</sup> In 2000 Directive on electronic commerce required from the Member States “to amend any legislation which is liable to hamper the use of schemes for the out-of-court settlement of disputes through electronic channels.”<sup>4</sup> By introducing Directive on e-commerce, the EU recognized the growth of ADR/ODR and gave indications to the Member States to support their use for resolution of consumer disputes.<sup>5</sup> In 2001 the Commission issued the Recommendation 2001/310/EC

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<sup>1</sup> Hereinafter as the ODR. The ODR can be defined as dispute resolution method complemented with Information Communications Technology (ICT). When it comes to level of ICT integration, Cortés defines it as resolution method conducted *mainly* online. For him, the ODR emerged from the synergy between alternative dispute resolution (hereinafter as the ADR) and ICT. Part of the doctrine considers the ODR as the use of ADR assisted with ICT tools or assisted largely by ICT tools, including even online litigation and other specific dispute resolution forms. Thus, it is a broad concept, which has been developing on continuous basis and may include any procedure that relies mainly on ICT to solve disputes. Automated negotiation, assisted negotiation, mediation, arbitration and small claims court procedures are considered to be the most relevant. See more in Cortés P., *Online Dispute Resolution for Consumers in the European Union*, Taylor and Francis e-Library, 2010, pp. 53 *et seq.*; see also Pappas, B. A., *Online court: Online dispute resolution and the future of small claims*, *UCLA Journal of Law & Technology*, Vol. 12(2), 2008., p. 2. According to Hörnle, ODR is information technology and telecommunication via the Internet applied to traditional ADR and considers the ODR as an offspring of the ADR. See Hörnle, J., *Online Dispute Resolution -The Emperor's New Clothes? Benefits and Pitfalls of Online Dispute Resolution and its Application to Commercial Arbitration*, 17th BILETA Annual Conference, 2002, p. 1, available at <http://bileta.ac.uk/content/files/conference%20papers/2002/Online%20Dispute%20Resolution%20-%20The%20Emperor's%20New%20Clothes%20-%20Benefits%20and%20Pitfalls%20of%20Online%20Dispute%20Resolution.pdf>, last accessed 30/5/2016; Mania, K., *Online dispute resolution: the future of justice*, *International Comparative Jurisprudence*, vol. 10 (1), 2015, p. 78, available at [https://www.researchgate.net/publication/283958629\\_Online\\_Dispute\\_Resolution\\_The\\_Future\\_of\\_Justice](https://www.researchgate.net/publication/283958629_Online_Dispute_Resolution_The_Future_of_Justice), last accessed 30/5/2016.

<sup>2</sup> Hereinafter as the EU.

<sup>3</sup> Recital 17 of the Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out of-court settlement of consumer disputes, OJ L 115, 17.4.1998., pp. 31-34. Hereinafter as the Recommendation 98/257/EC.

<sup>4</sup> See Recital 51 and Art. 17, *para* 1 of the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ L 178, 17.7.2000., pp. 1-16.

<sup>5</sup> Cortés, *op. cit.* (ref. 1), p. 190.

in which it stated that “continuing development of new forms of commercial practices involving consumers such as electronic commerce, (...), require that particular attention be paid to generating the confidence of consumers, in particular by ensuring easy access to practical, effective and inexpensive means of redress, including access by electronic means”<sup>6</sup> and that “new technology can contribute to the development of electronic dispute settlement systems, providing a mechanism to effectively settle disputes across different jurisdictions without the need for face-to-face contact (...)”<sup>7</sup>. In 2008 Mediation Directive emphasized that it “should not in any way prevent the use of modern communication technologies in the mediation process.”<sup>8</sup>

As a result of these tendencies, in May 2013 the EU adopted two complementary<sup>9</sup> legislative acts: Directive on consumer ADR<sup>10</sup> and Regulation on consumer ODR.<sup>11</sup> The EU ODR scheme is considered to be one of the first concrete outcomes of the EU Digital Market Strategy.<sup>12</sup> Although implementation of the EU ODR should establish simple, fast and affordable out-of-court solution to

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<sup>6</sup> Recital 2 of the Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (Text with EEA relevance) (notified under document number C (2001) 1016), OJ L 109, 19.4.2001., p. 56-61. Hereinafter as the Recommendation 2001.

<sup>7</sup> Recital 6 Recommendation 2001.

<sup>8</sup> Recital 9 of the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ L 136, 24.5.2008, pp. 3-8. Hereinafter as the MedDir.

<sup>9</sup> Bogdan, M., *The New EU Regulation on online resolution for consumer disputes*, Masaryk University Journal of Law and Technology, vol. 9 (1), 2015, p. 156.

<sup>10</sup> 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’), OJ L 165, 18.6.2013, pp. 63–79. Hereinafter as the ADR Directive.

<sup>11</sup> 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’), OJ L 165, 18.6.2013, pp. 1–12. Hereinafter as the ODR Regulation. More on the process of introducing the ODR platform see at [http://ec.europa.eu/consumers/solving\\_consumer\\_disputes/non-judicial\\_redress/adr-odr/index\\_en.htm](http://ec.europa.eu/consumers/solving_consumer_disputes/non-judicial_redress/adr-odr/index_en.htm), last accessed 29/5/2016.

<sup>12</sup> Digital Single Market Strategy has been established on three pillars, one of them being better access for consumers and businesses to online goods and services across Europe. EU-wide online dispute resolution platform is part of it. See 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* (SWD 2015 100 final) (COM 2015 192 final), Brussels, 6.5.2015, pp. 4-5, 17. More information on this dynamic strategy aiming at transforming the EU into a leading digital economy see at <http://ec.europa.eu/priorities/digital-single-market/>, last accessed 29/5/2016.

disputes arising from online sales or service contract, its application is limited by several constraints arising out of ADR/ODR law such as right of access to the judicial system, principle of effective judicial protection, due respect for legal tradition of the Member States concerning existing ADR schemes and limited personal and substantive scope of application. The EU ODR is only a case management tool, not supranational EU - wide dispute resolution entity. In another words, EU traders and consumers are still facing need to agree on and to address their dispute to a national ADR entity. Referring to ODR in General Terms and Conditions (GTC) of a consumer contract (“ODR clause”) still stands for referring to some national ADR. One should bear in mind the fact that EU law in principle prohibits pre-dispute ADR clauses.<sup>13</sup> ODR is ADR assisted by the use of electronic means.<sup>14</sup> Thus, it seems that the same prohibition should apply to pre-dispute OADR clauses. Allowing pre-dispute binding AODR clauses in consumer contracts has been put forward as one of the keys for its growth.<sup>15</sup> Does the integration technology can have an effect of deprivation, and if so, do all ODR mechanism can be depriving to the same extent? In 2010 in case *Alassini and Others*<sup>16</sup> the Court of Justice of the EU<sup>17</sup> stated that national legislation prescribing mandatory settlement procedures in consumer matters complies with the principle of effectiveness in so far as, *inter alia*, “electronic means is not the only means by which the settlement procedure may be accessed and that the procedure does not result in a decision which is binding on the parties.”

But, this paper goes further and puts the CJEU’s judgment in the context of voluntary agreement on ODR. The question arises whether the same “non-online-exclusivity” and “non-binding output” constraints should apply when parties *agree* on clause on online out-of-court settlement as part of GTC. Since the electronic means should not be the only means by which the settlement

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<sup>13</sup> See more *infra*.

<sup>14</sup> Some authors refer to online ADR as to (O) ADR, eADR and internet dispute resolution (IDR). See Mania, *op. cit.*, (ref. 1), p. 78; also Haloush, H. A., The Authenticity of Online Alternative Dispute Resolution Proceedings, *Journal of International Arbitration*, vol. 25 (3), 2008, p. 355.

<sup>15</sup> Cortés. P., What should the ideal ODR system for e-commerce look like? The Hidden World of Consumer ADR: Redress and Behaviour, CSLS Oxford, 28 October 2011, p. 2., available at [https://www.law.ox.ac.uk/sites/files/oxlaw/prof\\_fernando\\_esteban\\_de\\_la\\_rosa.pdf](https://www.law.ox.ac.uk/sites/files/oxlaw/prof_fernando_esteban_de_la_rosa.pdf), last accessed 30/5/2016.

<sup>16</sup> Judgement in *Rosalba Alassini v. Telecom Italia SpA and Filomena Califano v. WindSpa and Lucia Anna Giorgia Iacono v. Telecom Italia SpA and Multiservice Srl v. Telecom Italia SpA*, Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08, EU:C:2010:146, hereinafter referred to as *Alassini and Others*.

<sup>17</sup> Hereinafter as the CJEU.

procedure may be accessed, it raises question of the level of “online” in out-of-court settlement procedures. I.e. could the EU ODR scheme be considered to be the online settlement of disputes irrespective of the mechanism used and as long technology is used or only if the procedure is exclusively conducted online and not mere facilitated via technology?<sup>18</sup> The paper seeks to explore impact of level of technology integration on the principle of effective judicial protection. Bearing in mind the principle of autonomy and possibilities offered by the ODR scheme and EU consumer law, the paper seeks to explore the limits and ambit of the existing EU ADR/ODR scheme by analyzing EU ADR/ODR consumer law, available literature and relevant case law. The aim of this paper is not to provide a reader with the general framework of the ODR in Europe and abroad.<sup>19</sup> Such an overview would exceed the scope of this article and should be left for some further research.

After the introduction, second chapter deals with the scope of party autonomy in EU ADR and ODR law. The paper observes the relation between online exclusiveness and fundamental principle of effective judicial protection as well as the problem of binding effect. In the third chapter paper ends with the suggestion that the future of the EU ODR should focus on online mediation.

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<sup>18</sup> The distinction is made between procedures exclusively conducted online and those only supported by elements of ODR. But there is no clear distinction and most procedures fall in the later, broader category in the sense that ICT plays some role in the modern dispute resolution. Thus ODR is a matter of degree and it is not monolithic concept. It is better to speak of ODR techniques and not ODR as one notion. See Hörnle, *op. cit.* (ref. 1), p. 2.

<sup>19</sup> On the development of the EU ODR see more in Mania, *op. cit.* (ref. 1), pp. 83-84; Chung, Ha-Sung, Online ADR for the E-Commerce? European Union’s ADR Legislation for Cross-border Online Trade, *Journal of Arbitration Studies*, vol. 25 (3), 2015, pp. 138-142; Cortés, P., A new regulatory framework for extra-judicial consumer redress: where we are and how to move forwards?, *Legal Studies*, vol. 35 (1), 2015., pp. 120-122. On the work of United Nations Commission on International Trade Law (Working group III) on the global ODR see more in Del Duca, L.; Rule, C. and Loebel, Z., Facilitating expansion of cross border e-commerce developing a global online dispute resolution system (lessons derived from existing ODR systems – work of the United Nations Commission on International Trade Law), *Penn State Journal of Law and International Affairs*, vol. 59 (1), 2012, pp. 1-24; also Hörnle, J., 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*, pp. 5-9; Cortés, A new regulatory..., p. 122-126.; Brand, R., Party Autonomy and Access to Justice In the UNCITRAL Online Dispute Resolution Project, *Legal Studies Research Paper Series, Working Paper No. 2012-20, August 2012*, pp. 4-10, 21-30.

## **2. SCOPE OF PARTY AUTONOMY IN EU ADR/ODR LAW**

### *2.1. EU ODR LAW*

The ODR scheme aims to provide simple, efficient, fast and low-cost out-of-court solution to disputes arising from online contracts on sale of goods or provision of services.<sup>20</sup> Nevertheless, the ODR Regulation has only created the ODR platform at the EU level. It is as an interactive website offering a single point of entry to consumers and traders seeking to resolve disputes out-of-court which have arisen from online transactions.<sup>21</sup> Parties still have to agree on some national ADR entity to conduct the dispute resolution<sup>22</sup> which does not even have to be conducted via the platform.<sup>23</sup> The idea of the ODR scheme relies upon one key step – will parties or will they not voluntarily agree on an ADR entity to which the complaint should be transmitted by means of the ODR platform and will this entity or not accept to deal with the dispute in question?<sup>24</sup> The parties' freedom of choice has been maintained as fundamental. Those national ADR entities should apply their own procedural rules and the national legal traditions shall be respected.<sup>25</sup> The ODR Regulation should not prevent the functioning of any existing ODR mechanism within the EU nor prevent them to deal with online disputes which have been submitted directly to them.<sup>26</sup>

Nowadays the ODR in the EU is twofold. The EU introduced merely a case management tool and not a dispute resolution body.<sup>27</sup> There are no EU-wide

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<sup>20</sup> Recital 8 ODR Regulation. See also Art. 1 ODR Regulation.

<sup>21</sup> Recital 18 ODR Regulation. *Hörnle* considers five functions of the platform: clearing house function, referral function, transparency function, transfer and enforcement function. See more in *Hörnle, op. cit.* (ref. 19), pp. 18-20.

<sup>22</sup> Art 6, *para* 1, *subpara* b. of the Commission Implementing Regulation (EU) 2015/1051 of 1 July 2015 on the modalities for the exercise of the functions of the online dispute resolution platform, on the modalities of the electronic complaint form and on the modalities of the cooperation between contact points provided for in Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes, OJ L 171, 2.7.2015, pp. 1–4.

<sup>23</sup> Recital 18 ODR Regulation. See *Chung, op. cit.* (ref. 19), p. 153. *Bogdan, op. cit.* (ref. 9), p. 160.

<sup>24</sup> *Hörnle, op. cit.* (ref. 21), p. 19.

<sup>25</sup> Recital 22 ODR Regulation; recital 15 ADR Directive.

<sup>26</sup> Recital 24 ODR Regulation.

<sup>27</sup> See *Rühl, G., Alternative and Online Dispute Resolution for Cross-border Consumer Contracts: A Critical Evaluation of the European Legislature's Recent Efforts to Boost Competitiveness and Growth in the Internal Market*, vol. 38, 2015, p. 448.

harmonized rules on ODR methods or techniques. These are still left to the Member States' legal systems or even to completely privatized ODR bodies. Notwithstanding the fact that the ODR platform is not the same as ODR techniques and that the EU ODR scheme is without prejudice to national ODR traditions, the issue of their interaction arise if and when parties agree to involve the use of ODR platform to solve their dispute by means of ADR. In that case party autonomy and its limits should be considered in the light of both ODR Regulation and ADR Directive.

Considering the scope of parties' freedom to submit their dispute to some ADR via the ODR platform, one should stress the provisions of Article 14 ODR Regulation. Article 14 ODR Regulation regulates two situations. First situation deals with EU traders engaging in online service or sales contracts and online marketplaces established in the EU. They should provide an electronic link to the ODR platform on their websites.<sup>28</sup> Second situation deals with EU traders engaging in online sales or services contracts, which are committed or obliged to use one or more ADR entities to resolve consumer disputes. They are bound to provide an electronic link to the ODR platform on their websites and, if the offer is made by e-mail, in that e-mail as well as in applicable GTC.<sup>29</sup> These provisions should be considered as more than just informational. In both situations a trader engages in online sales or services contract, which means that the trader or his intermediary (e.g. an agent) has offered goods or services on a website or by other electronic means and the consumer has ordered such goods or services on that website or by other electronic means.<sup>30</sup> The information on the ODR platform becomes an integral part of negotiation phase, mandatory pre-contractual obligation of a trader,<sup>31</sup> imposed to him by virtue of the ODR Regulation. Once a consumer accepts the offer, the consumer<sup>32</sup> has been granted the option to launch out-of-court procedure which involves

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<sup>28</sup> Art. 14 *para* 1 ODR Regulation.

<sup>29</sup> Art 14 *para* 2 ODR Regulation. See also Art. 13 ADR Directive.

<sup>30</sup> Art. 4 *para* 1, *subpara* e ODR Regulation. E.g. Skype, social media, web store etc. Since traders in both situations could use an e-mail to make an offer, there is no reason why a trader in the first situation could not inform a consumer in her/his e-mail and/or by referring to applicable GTC that there is the possibility to address a dispute to the ODR platform.

<sup>31</sup> Art. 18 prescribes the obligation for the Member States to lay down the rules on penalties for infringement of the ODR Regulation.

<sup>32</sup> The same option exists for 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. Such restraint clearly shows that the Commission's primarily intention has been to create the ODR as consumer tool against a trader and not *vice versa*. That is the reason why the author uses abbreviation C2B (consumer-to-business) dispute, as opposite to B2C (business-to-consumer).

the use of ODR against the trader. The possibility for parties to choose the ADR entity via the platform is somehow restricted by trader's link to a certain ADR entity.<sup>33</sup> From the consumer perspective, it is up to her or him to launch the procedure since the ODR Regulation does not impose obligation to submit complaint to the ODR platform.<sup>34</sup> Such approach casts new light on possibility to introduce OADR clauses into consumer contracts and accompanying GTC. The mandatory inclusion of information about the existence of the ODR and the possibility of using the ODR platform for resolving consumer disputes has broadened the possibility for the parties to agree on further ADR procedure in both cross-border and domestic<sup>35</sup> cases.

## 2.2. EU ADR LAW

### 2.2.1. Sectorial, territorial and procedural coverage

As mentioned *supra*, the ADR Directive is the complementary act to the ODR Regulation<sup>36</sup> and both sources should be considered together.<sup>37</sup> Properly functi-

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<sup>33</sup> According to recital 47 ADR Directive, if the trader is covered by some ADR entity, she/he should inform a consumer of the ADR entity/entities by which they are covered. The same is valid for a trader in his statement according to Art. 9, *para 3, subpara c.*, indent 1 ODR Regulation. The ODR regulation prescribes that that if a trader is obliged to use a specific ADR entity, parties will be invited to agree on *that ADR entity*, but only in the event that the *consumer* is respondent party. If a trader is not obliged to use specific ADR entity, than the parties can choose another. The same should be valid, *a contrario*, if a consumer is not the respondent but the plaintiff.

<sup>34</sup> Even if a party initiates procedure via the ODR platform, an ADR entity which has agreed to deal with a dispute shall not be required to conduct the ADR procedure through the ODR platform. See Art. 10 *para 1, subpara d* ODR Regulation.

<sup>35</sup> *Arg ex* recital 11 ODR Regulation.

<sup>36</sup> Recital 12 ADR Directive. For detailed evaluation of the ADR Directive see Weber, F., Is ADR the Superior Mechanism for Consumer Contractual Disputes? – an Assessment of the Incentivizing Effects of the ADR Directive, *Journal of Consumer Policy*, vol. 38, 2015, pp. 277-282.

<sup>37</sup> In recital 4 of the ADR Directive it is stated that simple, efficient, fast and low-cost access should apply both to online and offline transactions. Thus, the scope of application of the ADR in the EU is broader – it applies both to dispute resolution of online and offline consumer sales or services contracts. In addition to that, ADR Directive is also narrower – it does not apply to procedures initiated by a trader against a consumer, Nevertheless, the ADR Directive does not prevent Member States from adopting or maintaining in force provisions on procedures for the out-of-court resolution of B2C disputes (recital 16 ADR Directive). If national legislation of consumer's habitual residence allows for B2C disputes to be resolved through intervention of ADR entity, such procedure can be executed by means of ODR Regulation as well (recital 16 ADR Directive read in conjunction with Art. 2 *para 2* ODR Regulation).



oning ADR and properly integrated ODR framework for C2B disputes arising from online transactions are necessary in order to boost citizen's confidence in the Internal Market.<sup>38</sup> The ADR Directive requires the Member States to enable online communication of the parties to a dispute.<sup>39</sup> Out-of-court resolution of C2B disputes will be done through ADR entities which are linked to the platform and offer ADR procedures.<sup>40</sup> Such interlink poses question how the ADR, as basis for the ODR,<sup>41</sup> affects parties' autonomy to choose EU ODR scheme and determines functioning of the platform. ADR Directive explicitly exempts public high education<sup>42</sup> and professional health services from ADR Directive.<sup>43</sup> The ADR entity should be registered with the ODR platform in accordance with ADR Directive i.e. should fall within its substantive scope.<sup>44</sup> This leads to conclusion that parties could not choose ADR entity<sup>45</sup> via the ODR platform to solve their dispute arising from e.g. sale of provision of digital content for remuneration by schools, faculties, foreign languages' schools, medical institutions, private physicians etc. Nowadays in the Internal Market there are faculties which provide cross border e-learning. Such a situation has not created a level playing field for public providers of further education or HE. They have not been put on an equal footing with private education institutions which, *arg. a contrario*, are not exempted from application of ADR Directive i.e. national implementing provisions. Public providers will not be able to take part in some ADR procedure relying upon standards of the ADR Directive. Author takes the position that there is no real argument for such solution. A trader is "any legal person irrespective of whether privately or publicly owned, who is acting, (...), for purposes relating to his profession";<sup>46</sup> service contract means "any contract (...) under which the trader (so, the publicly owned as well, a. n.) supplies a service to the consumer (i.e. non-professional natural or

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<sup>38</sup> Recital 11 ADR Directive.

<sup>39</sup> Art. 5, *para 2, subparas a and d.*

<sup>40</sup> Recital 12 ADR Directive.

<sup>41</sup> *Cf. Bogdan, op. cit. (ref. 9), p. 158.*

<sup>42</sup> Hereinafter as the HE.

<sup>43</sup> Art. 2 *paras 2 h and i* ADR Directive.

<sup>44</sup> *Arg. ex Art. 5, para 6* ODR Regulation, read in conjunction with Art. 20, *paras 1 and 2* ADR Directive.

<sup>45</sup> Since the Directive applies horizontally i.e. to all ADR procedures, such constraint covers mediation as well. See recital 19 ADR Directive.

<sup>46</sup> Art. 4, *para 1, subpara b.* ADR Directive.

legal person,<sup>47</sup> a. n.) and the consumer pays or undertakes to pay the price thereof.”<sup>48</sup>

In the light of afore-mentioned, it is not easy to draw a sharp line between public and private providers of HE. In Member States even a publicly owned HE institutions provide to some extent education services, trainings, postgraduate programs for remuneration. These are provided on a cross-border level also by online means.<sup>49</sup> Those institutions provide part of their educational services competing with private schools.<sup>50</sup> In Croatia some public faculties provide English taught undergraduate and graduate programs for remuneration; postgraduate programs (*univ. spec.*; PhDs etc.) are also provided for remuneration, part-time students also have to pay tuition fee. Such a tuition fee does not cover books, IT gadgets etc. Essentially, it covers administrative costs, lecturer’s fees, fees for accommodation of guest lecturers etc. Provision of mentioned services is dependent on consideration paid and the State does not finance it by public funds as it does with full-time undergraduate and graduate student

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<sup>47</sup> Art. 4., *para* 1, *subpara* a. ADR Directive.

<sup>48</sup> Art. 4. *para* 1, *subpara* d. ADR Directive. According to the case-law of the CJEU, the assessment of whether certain activities, in particular activities which are publicly funded or provided by public entities, constitute a ‘service’ has to be carried out on a case by case basis in the light of all their characteristics, in particular the way they are provided, organised and financed in the Member State concerned. The essential characteristic of remuneration lies in the fact that it constitutes consideration for the services in question and has recognised that the characteristic of remuneration is absent in the case of activities performed, for no consideration, by the State or on behalf of the State in the context of its duties in the social, cultural, educational and judicial fields, such as courses provided under the national education system, or the management of social security schemes which do not engage in economic activity. The payment of a fee by recipients, for example, a tuition or enrolment fee paid by students in order to make a certain contribution to the operating expenses of a system, does not in itself constitute remuneration because the service is still essentially financed by public funds. See judgements in *Belgian State v Humbel*, 263/86, EU:C:1988:451, *paras* 17, 18 and 19; *Stephan Max Wirth and Landeshauptstadt Hannover*, C-109/92, EU:C:1993:916, operative part, *para* 1. These activities are, therefore, not covered by the definition of service in Article 50 of the Treaty and do not therefore fall within the scope of this Directive.

<sup>49</sup> See e.g. Learn@WU platform provided by the Vienna University of Economics and Business, <https://learn.wu.ac.at/>, last accessed 29/5/2016.

<sup>50</sup> E.g. public faculties in Croatia compete with private schools to get most prestigious international accreditations such are EPAS or AACSB. Such accreditations students take into account when choosing their study programme; potential partners in international projects also take into account does the faculty in consortium-to-be have some well-known accreditation etc. Such policy clearly advocates certain level of market-based principles in running public schools. On the liberalisation of the market for services see more in Horak, H.; Bodiroga – Vukobrat, N.; Dumančić, K., *Sloboda pružanja usluga na unutarnjem tržištu Europske unije/Free Provision of Services in the Internal Market of the European Union*, Školska knjiga, Zagreb, 2015., pp. 25-31.

program in Croatian. Thus, the EU legislator should have enabled voluntary participation of public providers and their customers in out-of-court settlement procedures based on principles of ADR Directive, in particular, given the fact that those services can be done on a cross border level via the e-learning. That way it would put them on the equal footing with private providers.<sup>51</sup>

When it comes to territorial scope of the ADR Directive, it introduces the possibility that a trader established in one Member State is covered by an ADR entity which is established in another Member State e.g. consumer's.<sup>52</sup> Such an approach broadens the possibility for the parties to choose the appropriate ADR. This could encourage the consumers to shop cross border.<sup>53</sup> Nevertheless, considering the fact that in some Member States there is none ADR entities linked to the platform,<sup>54</sup> although the Regulation became fully operable on 15 February 2016, consumers in those states will not be able to propose local ADR entities to solve the dispute due to the fact that they are still not linked to the platform. ADR entity can be any entity which acts on a durable basis, offers a dispute resolution in C2B contract via an ADR procedure. If Member States so decide, the ADR Directive may also cover entities which impose binding solutions on the parties.<sup>55</sup> The ADR Directive is open to all types of ADRs – facilitation, procedures where ADR entity proposes or imposes solutions, negotiations etc.<sup>56</sup> It seems that any type of ADR procedure can be

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<sup>51</sup> To mention just a few. Slovenian DOBA Business School is one of the provider and developer of online learning in Europe with the UNIQUE international quality certification for online learning; Oxford's Department for Continuing Education offers online courses for remuneration; King's College offers paid online study programme in commercial law; German Goethe Institute provides online language courses for fee etc.

<sup>52</sup> Recital 26 ADR Directive.

<sup>53</sup> It is interesting to note that legal basis for adoption of both ADR Directive and ODR Regulation is not Art. 81 of the Treaty on the functioning of the EU (Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, pp. 1-390, hereinafter as the TFEU) on judicial cooperation in civil matters. It is Art. 114 TFEU on approximation of laws for proper functioning of the Internal Market. Considering the fact that Art. 81 TFEU applies only to cross-border cases, referring to Art. 114 TFEU enabled broadening the scope of application of both instruments to national cases. See recital 7 ADR Directive. Also Bogdan, *op. cit.* (ref. 9), p. 158.. Rühl, *op. cit.* (ref. 27), pp. 433-442; Ulbaite, N.; Juškys, A., *Alternative Dispute Resolution for consumer disputes in the European Union: Current Issues and Future Opportunities, Issues of Business and Law*, vol. 4, 2012, p. 26.

<sup>54</sup> Dispute resolution bodies are currently not available on the ODR platform website for some sectors and in the following countries: Croatia, Luxembourg, Poland, Romania, Spain. See <https://webgate.ec.europa.eu/odr/main/index.cfm?event=main.home.show&lng=EN>, last accessed 26 May 2016.

<sup>55</sup> Recital 20 ADR Directive.

<sup>56</sup> Recital 21 ADR Directive; Art. 2, *para* 1 ADR Directive. Hörnle, *op. cit.* (ref. 19), p. 15.

invoked via the ODR platform<sup>57</sup> and the parties are free to choose which ADR method and which degree of integration of online tools suits them best.

### **2.2.2. The problem of online exclusiveness and effective judicial protection**

According to the ODR Regulation, for the sake of effectiveness, dispute resolution should not require “the physical presence of the parties or their representatives before the ADR entities, unless the procedural rules provide for that possibility and the parties agree.”<sup>58</sup> The ADR Directive supports this by the same token.<sup>59</sup> From the wording of this rule one can conclude that effective dispute resolution implies not only electronic submission of documents but e.g. online, virtual hearings<sup>60</sup> before the ADR entity. Further on, wording “and” indicates that lack of mutual consent of both parties to a dispute to be physically present before the ADR will prevent an economically weaker party to be heard before an ADR entity. In another words, physical standing before an ADR must be agreed with the trader.

Such a rule should be considered in the light of the CJEU case law and fundamental principle of effective judicial protection. In *Alassini and Others* the CJEU opened a question to which extent it is permissible to use electronic means and still be in line with the requirement of effective judicial protection. In brief, under Italian law an attempt to achieve an out-of-court settlement was a mandatory condition for the admissibility before the courts of actions in certain disputes between providers and consumers under Universal Service Directive.<sup>61</sup> The mandatory out-of-court resolution could have been done even by means of electronic communication.<sup>62</sup> The referring court took the view that the mandatory settlement procedure could impede end-users from exercising their rights, in particular because the settlement must be carried out by electronic means.<sup>63</sup> In that context the referring court asked the CJEU whether EU rules on effective judicial protection and fair trial must be interpreted as meaning that disputes in the area of electronic communications among end-

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<sup>57</sup> See also Art. 9 *para* 5, *subpara* e. ODR Regulation. ADR/ODR procedures can take various forms e.g. arbitration, mediation, conciliation, ombudsmen, complaints boards etc.

<sup>58</sup> Recital 22 ODR Regulation; Art. 10, *para* 1, *subpara* b. ODR Regulation.

<sup>59</sup> Recital 42 ADR Directive.

<sup>60</sup> E.g. virtual courtrooms, videoconferences.

<sup>61</sup> Directive 2002/22/EC of the European Parliament and the Council of 7 March 2002 on Universal Service and users' rights relating to electronic communications networks and services (OJ L, 24.4.2002, 108, p. 51-77). Hereinafter as the USD.

<sup>62</sup> *Alassini and Others*, *para* 17.

<sup>63</sup> *Ibid.*, *para* 20.

users and operators (C2B) concerning non-compliance with USD rules must not be made subject or conditional to a prior mandatory (online, n. a.) settlement procedure.<sup>64</sup> The CJEU emphasized that the exercise of rights conferred by the USD might be rendered in practice impossible or excessively difficult for certain individuals, in particular, for those without access to the Internet if the settlement procedure could be accessed only by electronic means.<sup>65</sup> The CJEU did not find prior implementation of an out-of-court settlement contrary to the principle of effective judicial protection, provided that, *inter alia*,

“(..) that procedure does not result in binding decision (...) and only if electronic means is not the only means by which the settlement procedure may be accessed (...)”.<sup>66</sup>

Although above-cited judgment was adopted in the context of *national legislation* prescribing mandatory out-of-court settlement,<sup>67</sup> the CJEU’s standpoint is worth considering in the context of voluntary OADR clauses.

The problem of access to the settlement procedure and binding nature of its outcome might arise if a consumer agreed (or was “forced” to agree by trader’s *take-it-or-leave-it* offer) to accept trader’s GTC which recourse to an OADR. Notwithstanding the fact that the EU ODR scheme applies only to disputes arising from online contracts, which imply certain level of consumers’ prior informational literacy and thus might justify online dispute settlement, one should bear in mind that conclusion of an online contract and voluntary online resolution of a dispute cannot be considered in the same light. Online acceptance of an offer made by click to select an item is rather simple and can be done by anyone. But solving a dispute by means of online submission of relevant documents via some platform and active participation at virtual hearings requires higher level of informational literacy and skillfulness. The ODR should be accessible in the sense that it addresses cultural and language barriers, as well as to become media neutral in order to encourage its widest use.<sup>68</sup> Thus, even in those situations the position of an online consumer deserves to be scrutinized in the light of access to justice and procedural fairness.<sup>69</sup>

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<sup>64</sup> *Ibid.*, para 21.

<sup>65</sup> *Ibid.*, para 58.

<sup>66</sup> *Ibid.*, para 68.

<sup>67</sup> The ADR Directive is without prejudice to national legislation making participation in such procedures mandatory, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system. See Art. 1 ADR Directive.

<sup>68</sup> Cortés, *op. cit.* (ref. 1), p. 202.

<sup>69</sup> On the use of technical aid and fundamental procedural fairness concerning the creation of a viable online court see Pappas, *op. cit.* (ref. 1), pp. 11-12, 19.

Hereby the issue of “prior implementation of an out-of-court settlement” is considered in the light of pre-dispute ADR clause which would lead to online settlement. Such settlement would be “mandatory” for a consumer as a result of binding contractual provision on dispute settlement. The CJEU approves online settlement in so far this does not exclude access to the out-of-court dispute resolution by other means. If an ADR entity does implement technology into its procedure, it can be done only to some extent. Electronic means should not be exclusive tool to access the ADR entity. Parties should have possibility to access the ADR by other means e.g. to submit their complaints online but to attend oral hearings,<sup>70</sup> to be able to defend their positions *in vivo*, to be able to express their point of view, facts and arguments and come face to face with the counterparty,<sup>71</sup> as well as comment on counterparty’s opinion. From this standpoint conclusion can be made that EU case law stands on the position that electronic means can only partly be integrated into out-of-court settlement procedures.

In the light of above considerations, the EU ODR can be considered as out-of-court settlement only *facilitated* by the technology<sup>72</sup> and not conducted exclusively online.<sup>73</sup> Otherwise the access to a settlement procedure could be burdensome and could call into question the right to effective protection. Such interpretation opens further debate: should we consider the EU ODR scheme as the ODR in broad or strict sense?<sup>74</sup> Reading ODR rules in conjunction with above-cited judgment leads to former meaning. Fundamental quality requirements applicable to the EU ADR and some other sources of EU law also speak for such interpretation.

ADR Directive puts forward several principles of ADR procedure.<sup>75</sup> Principle of effectiveness requires that the ADR procedure is available and easily

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<sup>70</sup> On the other part, the Recommendation 98/257 in Recital 17 prescribes that participation in the procedure does not necessarily necessitate oral hearings of the parties.

<sup>71</sup> Distance of the parties and the online procedure are sometimes seen as a disadvantage of ODR in contrast to face-to-face procedure. Braun, F. E, Online dispute resolution - an answer to consumer complaints about e-commerce transactions in both a national and a European context, *Journal of Economics and Management*, vol. 9, 2012, p. 93.

<sup>72</sup> Opposite definition was given by the Commission in its Factsheet paper released on 9 January 2016. Thereby the Commission defined the ODR as „an ADR procedure conducted *entirely* online“. Available on [http://ec.europa.eu/consumers/solving\\_consumer\\_disputes/docs/adr-odr.factsheet\\_web.pdf](http://ec.europa.eu/consumers/solving_consumer_disputes/docs/adr-odr.factsheet_web.pdf), last accessed 26/5/2016.

<sup>73</sup> In the Recommendation 2001 the Commission clearly pointed out that electronic measure should facilitate effectiveness of out-of-court consensual dispute resolution. See recital 12 Recommendation 2001.

<sup>74</sup> See ref. 1 above.

<sup>75</sup> Principle of expertise, independence and impartiality (Art. 6 ADR Directive); principle of transparency (Art. 7 ADR Directive); principle of effectiveness (Art. 8 ADR Directive); principle of fairness (Art. 9 ADR Directive); principle of liberty (Art. 10 ADR Directive); principle of legality (Art. 11 ADR Directive).

accessible online and offline to both parties irrespective of where they are.<sup>76</sup> Principle of fairness requires that in ADR procedures the parties have the possibility of expressing their point of view and access documents and arguments.<sup>77</sup> Moreover, a notification of the outcome of the ADR procedure should be available in writing or on a durable medium.<sup>78</sup> According to the principle of liberty, Member States shall ensure that a C2B ADR agreement 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 seeking court redress.<sup>79</sup> In addition to that, the solution imposed by the ADR entity may be binding on the parties only if they were informed of its binding nature in advance and specifically accepted this.<sup>80</sup>

The principle of parties' autonomy should speak in favor of including ADR clauses into contract and to agree on use of electronic means to conduct proceedings.<sup>81</sup> Nevertheless, one should bear in mind that EU law is careful in relation to pre-dispute consumer ADR clauses.<sup>82</sup> This issue has been raised in several cases before the CJEU which declared pre-dispute arbitration clauses in consumer contracts as unfair.<sup>83</sup> In Recommendation 98/257/EC principle of

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<sup>76</sup> Art. 8 *para 1 subpara a* ADR Directive.

<sup>77</sup> Art. 9, *para 1, subpara a*. ADR Directive. *Cf.* adversarial principle as stated in the Art. III Recommendation 98/257/EC.

<sup>78</sup> Art. 9, *para 1, subpara c*. ADR Directive. *Cf.* principle of legality in Art. V Recommendation 98/257/EC.

<sup>79</sup> Art. 10, *para 1* ADR Directive.

<sup>80</sup> Art. 10., *para 2* ADR Directive. „Non-deprivation“effect of imposed solution is also required by the principle of legality, but concerning substantive protection. See Art. 11 ADR directive; *cf.* principle of liberty, Art. VI. Recommendation 98/257/EC.

<sup>81</sup> In the context of arbitration Wahab, M., The Global Information Society and Online Dispute Resolution: A New Dawn for Dispute Resolution, *Journal of International Arbitration*, vol. 21 (2), 2004, p. 160.

<sup>82</sup> See Cortés, *op. cit.* (ref. 1), p. 108. While the U.S.A allows mandatory arbitration agreements between consumers and businesses at the contract formation stage, the EU permits arbitration agreements concluded after the dispute arises. If entered before the dispute arose, such a clause/agreement could be declared null and void. See Stylianou, P., Online dispute resolution: the case for a treaty between the United States and the European Union in resolving cross-border e-commerce disputes, *Syracuse Journal of International Law and Commerce*, vol. 36, 2008, pp. 135,138-139; Edwards, L; Wilson, C., Redress and Alternative Dispute Resolution in EU Cross-Border E-Commerce Transactions, *International Review of Law Computers & Technology*, vol. 21(3), 2007, p. 323.; Brand, *op. cit.* (ref. 19), pp. 19-20.

<sup>83</sup> See judgements in *Elisa María Mostaza Claro v Centro Móvil Milenium SL*, C-168/05, EU:C:2006:675; *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira*, C-40/08, EU:C:2009:615. See more in Trstenjak, V., Procedural Aspects of European Consumer Protection Law and the Case Law of the CJEU, *European Review of Private Law*, Issue 2, 2013, pp. 461-472.

liberty prescribes that the consumer's recourse to out-of-court procedure may not be the result of a commitment prior to the materialization of a dispute, where such commitment has the effect of depriving the consumer of his right to seek court redress.<sup>84</sup> Both rights to an effective remedy and to a fair trial can be traced in European Convention of Human Rights<sup>85</sup> and Charter of Fundamental Rights of the EU.<sup>86</sup> The EU is reluctant to pre-dispute consumer prorogation clauses. In the EU the autonomy of the parties to a consumer contract to determine courts having jurisdiction is limited.<sup>87</sup> Namely, parties to a consumer contract can depart from general provisions on jurisdiction over consumer contracts only by an agreement, *inter alia*, which is entered into after the dispute has arisen.<sup>88</sup> Although such approach applies to departing from court jurisdiction and choice of another court,<sup>89</sup> it indicates some sort of reluctance of the EU legislator to allow pre-dispute agreements which alter ordinary jurisdiction.

Possibility to treat ADR clauses as "unfair term of a consumer contract" and possible implications of such qualification on validity of an online contract are also worth considering. Consumer contracts are in principle pre-formulated standard contracts to which General Terms and Conditions apply (GTC). Such GTC may contain an ADR clause under which any dispute arising from the contract shall be referred to some (O) ADR entity. If provisions on ADR would have as their object or effect excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to (online, a. n.) arbitration not covered by legal provisions, might be regarded as unfair.<sup>90</sup> The consequence of this qualification might lead to an OADR clause be declared void,<sup>91</sup> but the online

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<sup>84</sup> Art VI Recommendation 98/257/EC.

<sup>85</sup> Art 6 and 13 European Convention on Human Rights, as amended by Protocols Nos. 11 and 14 and supplemented by Protocols Nos. 1,4,6,7,12 and 13, available at [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf), last accessed 22/5/2016. Hereinafter as the ECHR.

<sup>86</sup> Art. 47 Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391-407. Hereinafter as the CFREU.

<sup>87</sup> Recital 14 of the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, p. 1-23. Hereinafter as the Brussels I Regulation.

<sup>88</sup> Art. 17 *para* 1 Brussels I Regulation.

<sup>89</sup> According to Art 1 *para* 2, *subpara* d Brussels I Regulation, the Regulation shall not apply to arbitration.

<sup>90</sup> Art 3, *para* 3 in relation to the Annex, point 1, *subpara* q of the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993., p. 29-34. Hereinafter as the Directive on unfair terms.

<sup>91</sup> Although the Directive on unfair terms does not mention terms „void/voidable“ or „null“, the author takes the position that the imperative expression „as provided for under their na-



contract containing it might stay valid and bind the parties, if it is capable of continuing its existence without the unfair OADR clause.<sup>92</sup>

Although the ADR Directive seems to be open for all types of procedures in terms of level of technology integration, the same does not follow from other sources of law. Given the fact that national ADR traditions are strong and so far no supranational EU-wide OADR method has been put in place, disparities among Member States call for at least some interpretation on the limits of integration of online tools into C2B disputes. The above considerations put forward the following conclusion: “no physical presence” rule should be interpreted more flexible, leading to the EU ODR as broader, technology-facilitated concept. Opposite conclusion would seriously undermine the fundamental principles prescribed by the ADR Directive, the CFREU and judgment brought in *Alassini and Others*.

### 2.2.3. Binding effect

The issue of right to an effective protection is closely related to binding effect of the outcome. The general rule says<sup>93</sup> that an ADR agreement should not be binding on the consumer if it was concluded before the dispute has materialized and if it has the effect of depriving the consumer of his right to seek court redress. Such cumulative wording leads to several conclusions. If it was concluded before the dispute arose, it will bind the consumer if it has not the depriving effect. It will also bind the consumer if it deprives her/him of the court redress, but the consumer accepted it after he/she faced the actual dispute. If it does not deprive consumer to seek court redress, irrespective of when it was concluded, it should be binding on her/him. But this is a general conclusion va-

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tional law, (the unfair term shall, n. a.) not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms“ means absolute nullity/voidance of the contract which arises by the virtue of the law (*ex lege*). In case *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, C-472/10, EU:C:2012:242, operative part, *para 2, subpara 2*, the CJEU clarified that “(...) where the unfair nature of a term in the general business conditions has been acknowledged in such proceedings, national courts are required, of their own motion, and also with regard to the future, to take such action thereon as is provided for by national law in order to ensure that consumers who have concluded a contract with the seller or supplier to which those general business conditions apply will not be bound by that term.” Such an approach speaks for declaring absolute nullity/voidance of the unfair term in question and not merely relatively nullity/voidability (which should be asserted by the party concerned). Also Trstenjak, *op. cit.* (ref. 83), p. 460.

<sup>92</sup> Art. 6 *para 1* of the Directive on unfair terms.

<sup>93</sup> Recital 43 ADR Directive.

lid for all ADR procedures. The parties' autonomy to set up ADR agreement is restricted by stringent rules of Art. 47 CFREU and it seems that any contrary agreement should be void.

The same is valid for agreement settled after the ODR platform transmits the compliant to the respondent in line with ODR Regulation. Namely, general rule on "non-binding" effect of ADR agreement should apply to "agreement between a consumer and a trader to submit complaints to an ADR". Thus, it should apply to both offline and online agreements on ADR within the EU ADR/ODR scheme.

Going back to *Alassini and Others*, possible pre-dispute clause on out-of-court settlement should not lead to exclusiveness of online means but it also should not lead to a binding decision, irrespective of its imposing or proposing nature. The question arises: which procedure could lead to a non-binding decision<sup>94</sup> on the parties and maintain (to some extent) integration of electronic means into dispute resolution? Without seeking to provide a definite and authoritative answer to this question, the author concludes this paper by considering mediation as future of the EU ODR.

### 3. IS ONLINE MEDIATION FUTURE OF THE EU ODR?

Mediation itself is a structured process whereby two or more persons attempt by themselves, on a voluntary basis, to reach an amicable agreement on the settlement of their dispute.<sup>95</sup> A mediator only assists the parties,<sup>96</sup> but it does not impose or propose a binding decision.<sup>97</sup> This is one of the main differences among mediation and arbitration.<sup>98</sup> If the parties initiated the mediation by themselves or accepted the court's invitation to recourse to mediation,<sup>99</sup> it

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<sup>94</sup> According to recital 11 of the Recommendation 98/257 the term „decision“ should be understood as binding decision, mere recommendations or settlement proposal which has to be accepted by the parties. The ADR Directive and ODR Regulation do not define the term „decision“.

<sup>95</sup> Art. 3., *para* 1, *subpara* a. MedDir.

<sup>96</sup> *Ibid.* Van der Heuvel, E., Online dispute resolution as a solution to cross-border e-disputes: an introduction to ODR, 2000., p. 7, available at <http://www.oecd.org/internet/consumer/1878940.pdf>, last accessed 30/5/2016.

<sup>97</sup> Cortés, *op. cit.* (ref. 1), p. 146.

<sup>98</sup> Arbitration is adjudicatory process in which a party cannot unilaterally withdraw from the arbitration. The arbitrator renders a decision – arbitral award, which is final, legally binding and appealable only in limited number of cases (e.g. contrary to the public order). See Van der Heuvel, *op. cit.* (ref. 96), p. 5.

<sup>99</sup> Art. 5., *para* 1 MedDir. Mediation can be also ordered by a court or prescribed by the law of a Member State (mandatory mediation). Such type of mediation reduces the parties' auton-

would be completely voluntary process. The parties are themselves in charge of the process and may organize it as they wish and terminate it at any time.<sup>100</sup> Mediation is also voluntary in the sense that either party may abandon mediation at any stage prior to the signing of a settlement agreement.<sup>101</sup> The enforceability of agreements resulting from mediation depends on the consensual request of both parties.<sup>102</sup> The mediation process takes care of the parties' interests more than of the legal solutions.<sup>103</sup> Such an approach makes it more flexible, tailor-made<sup>104</sup> and highly autonomous process, in which the parties are *domini litis*. Its flexibility makes it particularly appropriate for being conducted online.<sup>105</sup> Due to its voluntarily character, agreements resulting from mediation are more likely to preserve an amicable and sustainable relationship between the parties<sup>106</sup> and to be enforced.<sup>107</sup>

As mentioned *supra*, MedDir introduced the possibility to use modern technology in the mediation procedures.<sup>108</sup> MedDir also refers to the principles of Recommendation 2001,<sup>109</sup> which suggest introducing electronic means in out-of-court consensual dispute resolution. Nothing in these principles speak up for exclusive use of electronic means and the wording speaks more in favor of facilitating role of modern electronic means, without prejudice to any form.

The mediation process as described above meets the criteria which were introduced in *Alassini and Others*. Not only that electronic means are only meant to be *used* in the course of a procedure but the outcome of the procedure is amicable agreement and its enforceability depends on the parties' request. But even if it became enforceable, it would be a consensual agreement only assisted by an online mediator. Including pre-dispute clause on online mediation

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omy to recourse to out-of-court settlement. Thus, it exceeds the scope of this article. See more in Cortés, *op. cit.* (ref. 1), p. 161.

<sup>100</sup> Recital 13 MedDir. MedDir covers both civil (consumer) and commercial matters. However, it should not apply to matters on which the parties are not free to decide themselves under the relevant applicable law, e.g. family and employment law, tax, customs and administrative law or *acta iure imperii*. See recital 10 MedDir; Art. 1, *para* 2 MedDir.

<sup>101</sup> Van der Heuvel, *op. cit.* (ref. 96), p. 7.

<sup>102</sup> Art. 6 MedDir.

<sup>103</sup> Cortés, *op. cit.* (ref. 1), p. 150.

<sup>104</sup> Recital 6 MedDir.

<sup>105</sup> Cortés, *op. cit.* (ref. 1), p. 146.

<sup>106</sup> *Ibid.* Van der Heuvel, *op. cit.* (ref. 96), p. 7.

<sup>107</sup> *Ibid.*

<sup>108</sup> Recital 9 MedDir.

<sup>109</sup> Recital 18 MedDir.

which would be merely facilitated by the use of electronic means in a consumer contract would meet the *Alassini* requirements of “non-e- exclusivity” and “non-binding decision.” It would not deprive an economically weaker party to seek further court redress since the outcome of the mediation depends on her/his will to reach an amicable agreement and to request its enforceability. In another word, the pre-dispute clauses is not valid, if this clause prevents the consumer from seeking court redress, which would be the case with *res iudicata* effect of the arbitration but not with mediation.<sup>110</sup> The level of parties’ autonomy is higher in mediation than in adjudicative procedures. Although the EU ODR mechanism stays opened for any type of existing ADR mechanism, it seems that in most cases only online mediation will comply with afore-mentioned standards, since parties are “masters” of the dispute and the mediator acts as a mere facilitator. Bearing in mind the above-described quality requirements of EUADR/ODR law and the need to reconcile them, the author concludes that the future of the EU ODR should be focused on development and encouragement of voluntary mediation facilitated by the use of electronic means.

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